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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 92,864

ROBERT LASTER, :

Appellee. :

_____/

ANSWER BRIEF OF RESPONDENT

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

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Respondent.	)	

ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Herein, respondent maintains that the district court ruled correctly in reversing the conviction of burglary of a convenience store open for business. Respondent also argues that, consistent with his argument below and the result on rehearing in the case of a codefendant, dual convictions of robbery for thefts of the clerk's wallet and the contents of the store's cash register are improper.

Herein, citations to the record on appeal are by volume and page number, in the format ([Volume number]:[page number]). Citations to the initial brief go by (IB[page number]).

STATEMENT OF THE CASE AND FACTS

Petitioner states that the district court "found that the convenience store was open to the public at the time the offense occurred." (AB3) Consistent with its position as a court of review, the district court actually reversed "because the record reveals that the convenience store was 'at the time open to the public.'" Laster v. State, 23 Fla. L. Weekly D790b (1st DCA Mar. 24, 1998).

On the issue raised by respondent herein, the record shows that the state charged Laster with robbery of money belonging to the convenience store as well as robbery of money from the clerk's wallet. (I:19a) The jury found Laster guilty of each robbery, and the court adjudicated him guilty and imposed a life sentence on each count. (I:42-48, 77-80, 191-93, V:832-33)

The district court reversed Laster's burglary conviction, but affirmed on all other issues, including the claim that the dual robbery convictions are unlawful. Laster, supra. In the appeal of Laster's codefendant, Jeremiah Butler, the district court reversed the burglary conviction and, on rehearing, ordered the trial court to vacate one of the two robbery convictions. Butler v. State, 23 Fla. L. Weekly D1038a (1st DCA April 17, 1998), opinion on rehearing, 23 Fla. L. Weekly D1495a (1st DCA June 17, 1998).

SUMMARY OF THE ARGUMENT

I. The plain meaning of the language in § 810.01(2), Florida Statutes(1995), supports the district court ruling reversing Laster's conviction of burglary. Petitioner's argument to the contrary notwithstanding, the district court correctly observed that the record reveals that the convenience store was open to the public at the time of the robbery. Premises open to the public are expressly excluded from the operation of the burglary statute. This result is consistent with Ray v. State, 522 So. 2d 963, 967 n.6 (Fla. 3d DCA), rev. denied, 531 So. 2d 168 (Fla. 1988), and Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996). The contrary result in Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), ignores the statutory distinction between premises open to the public and those for which entry is gained via license or invitation. Moreover, reversal of the burglary conviction does not allow an offender to escape justice, for he remains responsible for the crimes -- in this case, robbery and attempted murder -- committed within.

II. Dual convictions for robbery of a store cash register and a clerk's wallet are improper. Consistent with the reversal of one of the two convictions on rehearing in Butler v. State, 23 Fla. L. Weekly D1495 (1st DCA June 17, 1998), one of the convictions must be vacated.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REVERSED THE CONVICTION OF BURGLARY, ON EVIDENCE SHOWING ROBBERY OF A CONVENIENCE STORE OPEN TO THE PUBLIC.

In Count V, the state charged burglary, via entry of a Lil' Champ store to commit a robbery. (I:19B) The evidence at trial showed that the robbery occurred while the store was open to the public. Petitioner's argument to the contrary (IB6-7) is insupportable. The videotape admitted into evidence as state exhibit 4 shows customers continually entering and leaving. It does not show the clerk locking the door. Also, the robbers entered the store via an open front door. The videotape also shows a customer entering after the robbery, demonstrating that the customer reasonably believed that the store was open at that time. The district court correctly concluded that the record revealed that the store was open at the time of the offense. The state offers nothing to demonstrate that the court was in error.

Section 810.02(1), Florida Statues (1995) provides:

> Burglary means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, **unless the premises are at the time open to the public** or the defendant is licensed or invited to enter or remain.

(emphasis added).

In construing a statute, a court's duty is to effectuate the intent of the legislature, primarily determined from the

statute's language. State v. Perez, 531 So. 2d 961, 962 (Fla. 1988). Courts are obliged to follow the plain meaning of statutory language unless it leads to an absurd, illogical, or unduly harsh result. Id; Hamilton v. State, 645 So. 2d 555, 560 (Fla. 2d DCA 1994), approved in part, 660 So. 2d 1038 (Fla. 1995). Statutes must be strictly construed, and any ambiguity must be resolved in favor of the accused. §775.021(1), Fla. Stat. (1995)

Section 810.02(1) plainly provides that premises open to the public are exempted from the operation of the burglary statute. This exclusion stands separate from license or invitation, which may be withdrawn. It is a blanket exclusion, discernible from the plain language of the statute. The language admits no ambiguity from which a different conclusion may be drawn. The plain language does not create absured results.

In reversing the burglary conviction, the district court relied upon Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996), in which it reversed a burglary conviction based on entry into a motel alcove, open to the public, with the intent to molest a vending machine. The Collett court wrote:

> The state's argument is that the appellant did not have consent to enter the alcove because no one had permission to enter the alcove for the purpose of stealing money from the machines. But premises are either open to the public or they are not, and the fact that persons with criminal intent have not been given permission to enter has no effect on

> whether premises are open to the public. Otherwise, every time a person entered a structure that was open to the public with the intent to commit a crime, the person would have committed a burglary--a result directly in conflict with the express language of section 810.02(1).

The district court in this case also quoted from Ray v. State, 522 So. 2d 963, 967 (Fla. 3d DCA), rev. denied, 531 So. 2d 168 (Fla. 1988), in which the Third DCA observed that elevation of every shoplifting offense into burglary would be an "absurd result" precluded by § 810.02(1).

Robbery and attempted murder are more serious offenses than shoplifting or molesting a vending machine, but the gravity of the offense intended is not relevant to a determination whether the premises entered are open to the public. No matter the offense intended, entry into premises open to the public is by definition excluded from burglary.

The district court certified conflict with Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), a case it considered "inexplicably inconsistent" with Ray, supra. Respondent suggests that the Garvin court erred in blending "premises open to the public" with those in which a license or invitation to enter or remain may be implicitly revoked. Although it may be "sensible" that no victim consents to a perpetrator remaining in a business to commit a crime, consent is not at issue when the premises entered are open to the public. Respondent maintains that implied withdrawal of

consent, based solely on commission of a criminal act following entry into an open business, has no place in criminal jurisprudence, and is contrary to the plain language of § 810.02(1). This result does not allow criminals to evade the consequences of their actions, for they remain responsible for the substantive crime committed within, here robbery and attempted murder.

Consequently, respondent prays that this court will hold that entry into an open business to commit an offense therein does not constitute burglary, and that it will approve the district court decision reversing Laster's robbery conviction in Count V.

II. THEFT FROM A STORE CASH REGISTER AND FROM THE CLERK'S WALLET DURING A SINGLE EPISODE CONSTITUTES A SINGLE ROBBERY.

The state charged Laster with robbery of money belonging to Lil' Champ and in the custody of Williamson, the store clerk, as well as robbery of money from Williamson's wallet. (I:19A) The evidence at trial showed that one of the two robbers took money from the cash register while the other took Williamson's wallet. The jury found Laster guilty on both counts, and the trial court adjudicated him guilty and imposed life sentences on each. Laster raised the impropriety of the dual convictions in his direct appeal to the First DCA, but the court affirmed on this issue without comment. In the appeal of Laster's codefendant, the court reversed on rehearing:

> Appellant's motion for rehearing asserts that this court overlooked appellant's contention that he was improperly convicted of two counts of armed robbery, where the undisputed evidence disclosed that property of the convenience store and property of the store's employee was taken from the employee during one continuous episode. We agree that because there was a single victim, this case falls within the holdings of this and other courts that only one robbery occurs, notwithstanding the fact that the property taken belonged to different owners. Morgan v. State, 407 So. 2d 962 (Fla. 4th DCA 1982); Nordello v. State, 603 So. 2d 36 (Fla. 3d DCA 1992); Horne v. State, 623 So. 2d 777 (Fla. 1st DCA 1993); cf., Brown v. State, 430 So. 2d 446 (Fla. 1983). Further, as this court made clear in Austin v. State, 699 So. 2d 314 (Fla. 1st DCA 1997), appellant did not waive his double jeopardy claim arising from the multiple robbery convictions and sentences by his

> failure to raise it before the trial court. Accordingly, on remand the trial court is directed to vacate the judgment and sentence as to one robbery count.

Butler v. State, 23 Fla. L. Weekly D1495 (1st DCA June 17, 1998). Consistent with the decision on rehearing in Butler and in the cases cited therein, and in the interests of justice, one of Laster's two robbery convictions in Counts II and III should be vacated.

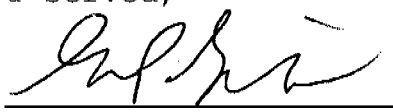
CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the respondent requests that this Honorable Court approve the decision of the district court reversing the conviction of burglary, and that it direct that one of the two convictions of robbery be vacated.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 29th day of June, 1998.

Respectfully submitted
& Served,



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_____/

APPENDIX

23 Fla. L. Weekly D790b

Criminal law--Burglary charge precluded where convenience store was open to public at time of incident-- Conflict certified--Convictions and sentences for armed robbery and shooting of convenience store clerk affirmed

ROBERT LASTER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 96-4580. Opinion filed March 24, 1998. An appeal from Circuit Court for Duval County. Henry Davis, Judge. Counsel: Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert Butterworth, Attorney General, and L. Michael Billmeier, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) The appellant challenges convictions and sentences imposed as a consequence of an armed robbery and shooting of a convenience store clerk. We affirm all the convictions and sentences, except the conviction and sentence for burglary which we reverse because the record reveals that the convenience store was ``at the time open to the public." *See* § 810.02(1), Fla. Stat.; *Collett v. State*, 676 So. 2d 1046 (Fla. 1st DCA 1996). We certify conflict with *Garvin v. State*, 685 So. 2d 17 (Fla. 3d DCA 1996), although we note that the result in *Garvin* is inexplicably inconsistent with the following language from that court's opinion in *Ray v. State*, 522 So. 2d 963, 967 n. 6 (Fla. 3d DCA), *rev. denied*, 531 So. 2d 168 (Fla. 1988):

> Happily, we need not concern ourselves with the potential elevation of a shoplifting offense to a burglary. This is so because Section 810.02, Florida Statutes (1987), precludes a burglary charge where ``the premises are open to the public." That the premises are open to the public is a complete defense to a burglary charge, avoiding the absurd result of *State v. Shult*, 380 N.W.2d 352 (S.D. 1985) (pizza thief guilty of burglary because he entered store with intent to shoplift). *See State v. Graney*, 380 So. 2d 500 (Fla. 2d DCA 1980); *Arabie v. State*, 699 P.2d 890 (Alaska App. 1985).

AFFIRMED IN PART AND REVERSED IN PART. (JOANOS, ALLEN and WEBSTER, JJ., CONCUR.)

* * *