IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT LASTER,

Respondent.

CASE NO. 92,864

PETITIONER'S INITIAL BRIEF ON THE MERITS

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FLORIDA BAR NO. 325791

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Robert Laster, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of six volumes. This brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with attempted first degree murder, two counts of armed robbery, shooting a pistol within a building, burglary with assault, and carrying a concealed firearm. (I, 19A-19B).

At trial, John Williamson testified that his job was to work a shift at the Lil Champ convenience store and close the store. (III, 297). He testified he was working a normal shift on April 25, 1996. (III, 300). He testified he works from 3:00PM until 11:30PM or 12:00AM, depending on how long it takes to clean the store. (III, 298). He said he was "servicing the store, draining the barrel, checking the ice machine to make sure there

was plenty of ice for customers" when Respondent entered the store around 10:00PM. (III, 300). Respondent told him to lay down and took Williamson's wallet. (III, 300). Respondent's accomplice, Jeremiah Butler, took money out of the cash register. (III, 300). The robbers left the store for a "brief moment," then Respondent returned and shot Williamson in the head. (III, 302). Williamson did not testify whether or not the store was open when the incident occurred.

During Williamson's testimony, the State introduced photographs from the bait clicker that activated when Respondent's co-defendant took money from the cash register. (III, 307-320). The State played a videotape of the crime for the jury. (III, 326; State's Exh. 4).

Michael Gordon testified he usually goes to the convenience store between 9:00PM and 10:00PM but did not say whether he goes there after 10:00PM. (III, 351). He said he went to the convenience store on the night of the shooting and left around 9:45PM. (III, 353). He identified Respondent in court as the man he saw outside the store the night of the robbery. (III, 354-355). He also picked Respondent out of a photo lineup. (III, 359-60).

The jury found Respondent guilty of attempted first degree murder with a firearm, guilty of two counts of armed robbery with a firearm, guilty of one count of shooting a pistol within a building, guilty of one count of burglary with an assault or

battery, and one count of carrying a concealed firearm. (I, 42-48).

By opinion issued March 24, 1998, the First District Court of Appeal affirmed all of Respondent's convictions and sentences except the burglary conviction. Laster v. State, 23 Fla. L. Weekly D790 (Fla. 1st DCA March 24, 1998). The District Court found that the convenience store was open to the public at the time the offense occurred. The District Court certified that its opinion conflicts with Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996). The opinion is attached as Appendix A.

SUMMARY OF ARGUMENT

Respondent was convicted of burglary when he entered a convenience store and robbed the clerk at gunpoint while his accomplice stole money from the cash register. Respondent left the store but returned moments later and shot the clerk. The District Court erred by finding the store was open to the public and reversing Respondent's conviction for burglary. Whether the premises are open to the public is an affirmative defense to burglary and Respondent was required to show some evidence of the defense. Since Respondent did not meet his burden of establishing that the store itself was open to the public when the shooting and robbery took place, the affirmative defense fails and Respondent was properly convicted of burglary. Further, even if the store itself was open to the public, Respondent did not establish that the area behind the counter from which Respondent's accomplice took the money was open to the public. Since the burden is on Respondent to establish the existence of an affirmative defense and Respondent failed to do so, the District Court's decision reversing Respondent's burglary conviction should be reversed. If this Court finds that both the store and the area behind the counter were open to the public, it should find that any consent Respondent had to be in the store was revoked, approve the conflict case and disapprove the decision in this case.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT ERRED BY FINDING THE CONVENIENCE STORE WAS OPEN TO THE PUBLIC DURING THE BURGLARY AND REVERSING RESPONDENT'S BURGLARY CONVICTION.

The District Court erred by reversing Respondent's conviction for burglary. Respondent had the burden of establishing that the store itself was open to the public when the shooting and robbery took place and failed to do so. Further, even if the store itself was open to the public, Respondent did not establish that the area behind the counter from which his accomplice took the money was open to the public. Since the burden is on Respondent to establish the existence of an affirmative defense and Respondent failed to do so, the portion of the District Court's decision reversing Respondent's burglary conviction should be reversed. If this Court finds that the store and the area behind the counter were open to the public, it should approve Garvin, find that any consent Respondent had to be in the store was revoked, disapprove the portion of the decision in this case reversing Respondent's burglary conviction, and affirm the trial court.

Section 810.02(1), Florida Statutes (1995), provides,

> (1) "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.

The language following "unless" sets forth an affirmative defense. Robertson v. State, 699 So. 2d 1343, 1346 (Fla. 1997),

cert. den., 118 S. Ct. 1097 (1998); State v. Hicks, 421 So. 2d 510 (Fla. 1982); Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996). The defendant has the burden of going forward with evidence that the affirmative defense exists. Robertson, 699 So. 2d at 1346; Wright v. State, 442 So. 2d 1058, 1060 (1st DCA 1983), rev. den., 450 So. 2d 489 (Fla. 1984); Coleman v. State, 592 So. 2d 300 (Fla. 2d DCA 1991). Once the defendant presents competent evidence of the existence of the defense, the burden of proof remains with the State, and the State must then prove the nonexistence of the defense beyond a reasonable doubt. Robertson; Collett; Wright, 442 So. 2d at 1060.

Here, Respondent presented no evidence that the store was open to the public when the shooting took place and failed to met his burden to establish the affirmative defense. Michael Gordon testified he usually goes to the store between 9:00PM and 10:00PM but did not say whether he goes there after 10:00PM. (III, 351). John Williamson testified the incident happened near 10:00PM. (III, 300). He said he was "servicing the store, draining the barrel, checking the ice machine to make sure there was plenty of ice for customers" when the robbery occurred. (III, 300). He did not testify whether or not the store was open at that point. He testified he works from 3:00PM until 11:30PM or 12:00AM, depending on how long it takes to clean the store (III, 298) but did not say what time the store closes. "Servicing the store" and "draining the barrel" implies that the store was closed and that he was preparing to leave for the night. Respondent had the

burden of presenting some evidence that the store was open to the public in order to use the affirmative defense. All Respondent had to do was ask Gordon or Williamson whether or not the store was open. He did not do so. In contrast to the lack of evidence in this case, in Collett, there was specific testimony that the vending machines were in an area open to the public. Collett, 676 So. 2d at 1047. Since Respondent failed to present evidence to support the affirmative defense, the State must only prove that Respondent entered or remained in the premises with the intent to commit an offense, § 810.02(1), Fla. Stat. (1995), and was not required to prove the store was closed. The State submits that it met that burden. Since the District Court erred by finding the store was open, the portion of its decision reversing the burglary conviction should be reversed, and Respondent's conviction for burglary entered in the trial court should be affirmed.

Even if this Court agrees with the District Court that the store was open to the public, it should find the area behind the counter where Butler took the money was not open to the public. When Respondent and Butler entered the store, Respondent made Williamson, who was not behind the counter with the cash register, lie on the floor. While Respondent held Williamson at gunpoint, Butler went behind the counter and took money from the cash register. The area behind the counter was not part of the store that was open to the public. In Dakes v. State, 545 So. 2d 939, 940 (Fla. 3d DCA 1989), the court held that although the

retail store was open to the public when Dakes stole merchandise, the storeroom from which he stole the merchandise was not part of the premises open to the public. In Downer v. State, 375 So. 2d 840 (Fla. 1979), this Court held that a hospital, although open to the public, can restrict the public's access to certain areas. Such restrictions are commonplace. The courthouse is open to the public during regular hours but the offices of individual judges are not. A convenience store can likewise restrict the public's access to its cash register. The burden is on Respondent to bring forth evidence that the area behind the counter was open to the public. He did not do so. Even if the store was open to the public, the area behind the counter was not, and Respondent was properly convicted of burglary. The portion of the District Court's opinion reversing the burglary conviction should be reversed.

If this Court finds that the evidence shows the store and area behind the counter was open to the public, it should still affirm the burglary conviction. Any consent Respondent had to enter the store was withdrawn when Respondent robbed the store. Garvin is directly on point. In Garvin, the court affirmed the defendant convictions of various counts of kidnapping, burglary with an assault while armed, and armed robbery when he robbed a McDonald's restaurant during lunch hour. Garvin, 685 So. 2d at 18. The court said,

> It is undisputed that the restaurant was open to the public at the time of the invasion. It was the middle of the lunch hour and members of the public were there eating. **However, pursuant to the burglary statute,**

> **once a consensual entry is made, a consensual "remaining in" begins.** Here, the question for the jury to resolve was whether Garvin remained in the premises with the intent to commit an offense therein after the consent to remain in the restaurant had been withdrawn. Garvin, 685 So. 2d at 18. (emphasis added).

The court continued,

> **We find it sensible that no victim consents to a person's remaining in the premises for the perpetrator's purpose of committing a crime against that victim.** Therefore the jury could have concluded that once the restaurant manager became aware that the assailants were committing a crime, the "remaining in" was no longer consensual. Garvin, 685 So. 2d at 18-19. (emphasis added).

If one assumes that the store was open to the public during the shooting, then the facts here are similar to those in Garvin. Garvin certainly entered McDonald's when it was open to the public. Garvin, 685 So. 2d at 18. Respondent robbed and shot Williamson at a time the District Court found the store was open to the public. However, a store is not open to the public for the purpose of committing crimes. See, e.g., People v. Powell, 586 N.E.2d 589, 598 (Ill. App. Ct. 1st Dist. 1991)("authority to enter a building open to the public extends only to those who enter with a purpose consistent with the reason that building is open"). In State v. Sawko, 624 So. 2d 751 (Fla. 5th DCA 1993), the court held that a "license or invitation to enter only for the purpose of performing services does not necessarily insulate a defendant from a burglary conviction when entry is made for a purpose not authorized." A convenience store is open so customers can purchase common items. It is not open to the public so that criminals can practice their trade in it.

Respondent's invitation to enter the store was so he could buy merchandise, not rob and shoot the employee. Since Respondent did not enter the premises for the purpose it was intended, it is appropriate to analyze, as the Garvin court did, whether or not the consent to be in the store is revoked. In this case, whatever consent Respondent had to be in the store was revoked when he detained Williamson at gunpoint while Butler entered an area closed to the public to steal money. The District Court claims that Garvin conflicts with the following footnote from Ray v. State, 522 So. 2d 963, 967 n. 6 (Fla. 3d DCA 1988), rev. den., 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 at the time 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).

Laster, 23 Fla. L. Weekly at D790. The opinion in Garvin does not conflict with Ray. In Garvin and Ray, the court held that the defendants legally entered the victims' store and home but that they remained there after their consent to be there was revoked. Whether Garvin would have been convicted of burglary had he merely shoplifted while in McDonald's was not before the court in Garvin, was not before the District Court below, and is not before this Court in this case. The District Court's comparison of this case with an inapplicable hypothetical from

another case is inappropriate. Whether consent to be in a store is revoked when a defendant commits a shoplifting offense is a question that should be answered in an appropriate case where that issue is before the court and not in this case where such an opinion would merely be an advisory one.

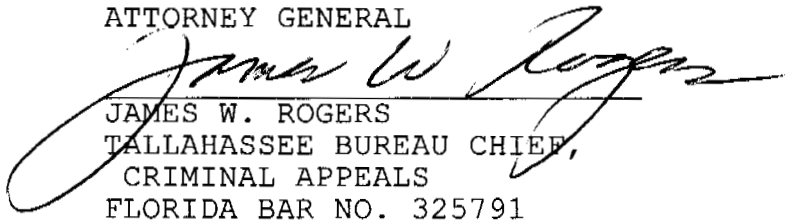
Respondent failed to meet his burden to bring forward evidence the store was open to the public when he committed the robbery. Accordingly, he cannot rely on the affirmative defense that the store was open to the public. Therefore, this Court should reverse the portion District Court's order reversing Respondent's burglary conviction, affirm Respondent's conviction entered in the trial court, and approve the Third District's opinion in Garvin.

CONCLUSION

Based on the foregoing, the State respectfully submits the portion of the decision of the District Court of Appeal reversing Respondent's burglary conviction should be reversed, the opinion in Garvin should be approved, and the conviction entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 8th day of June, 1998.

L. Michael Billmeier
Attorney for the State of Florida

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