IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT LASTER,

Respondent.

CASE NO. 92,864

PETITIONER'S REPLY BRIEF ON THE MERITS

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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. "AB" will designate Respondent's Answer Brief, followed by any appropriate page number.

This brief is typed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent raises a new issue in his answer brief (AB 8-9). If the Court chooses to address that issue, Petitioner adds that the videotape of the crimes shows Williamson in one of the store's aisles when Respondent and Jeremiah Butler enter the store. (Exh. 4). Butler climbs over the counter and takes money from the cash register while Respondent makes Williamson lie on the floor and steals his wallet.

ARGUMENT

ISSUE I

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

Respondent asserts that the record shows the business was open to the pubic at time the burglary took place. (AB 4). Respondent has the burden to bring forward evidence that the store was open to the public and he does not do so. He shows, and Petitioner agrees, that the store was open for some time before Respondent and co-defendant Butler entered the store. There is no doubt that the store was open between 9:00 p.m. and 10:00 p.m. because Gordon testified he usually visits the store during that time. (III, 351). He does not show that the store was open at 10:00 p.m. when the incident occurred. (III, 300). Respondent is correct that a customer entered the store after the robbery. (AB 4). Since Respondent had shot Williamson in the head, Williamson could not get up to lock the door or turn off any lights to signal to potential customers that the store was closed. A customer entering the store after the shooting does not show that the store was open. Since Respondent failed to show that the store was open to the public when the crimes took place, the State need only prove that he entered the store with the intent to commit an offense. The State has met its burden while Respondent has not.

Further, Respondent and Butler entered the store, robbed Williamson and the cash register, and left the store. Moments

later, Respondent returned and shot Williamson in the head. Even if the store was open to the public when the defendants initially entered the store, it was not open for business once the robbery took place. Assuming Respondent had simply left and not returned to shoot Williamson, the store would have closed for the police investigation of the robbery. It would have been open for the police to conduct their investigation but not to serve customers. Once again, Respondent failed to meet his burden to show that the store was open to the public or that he was invited to enter or remain in the store when he made his second entry into the store. Accordingly, Respondent's burglary conviction is appropriate.

Respondent states that section 810.02(1) "plainly provides that premises open to the public are exempted from the operation of the burglary statute" and that it is a "blanket exclusion." (AB 5). The State disagrees. In Miller v. State, 23 Fla. L. Weekly S389 (Fla. July 16, 1998), this Court rejected that assertion. Miller entered a grocery store, shot the clerk, and stole money from the cash register. Miller, 23 Fla. L. Weekly at S389. This Court reversed Miller's burglary conviction because it said that Miller "entered the grocery store when it was open, and on this record we can find no evidence that consent was withdrawn." Id. at S390. This Court continued:

> Here, the argument was geared towards showing that Miller did not have consent to enter the grocery store to commit a crime. Clearly the store was open, so Miller entered the store legally. There was no attempt to show -- even through circumstantial evidence -- that although Miller entered the store legally, consent was withdrawn. **There must be some evidence the jury can rationally rely on to infer that consent was withdrawn**

besides the fact that a crime occurred. (emphasis added). Id. at S390.

If the burglary statute had made the fact that the store was open to the public a complete defense to burglary, this Court would have said so in Miller. All of the language in Miller about withdrawal of consent is surplusage if the store being open to the public is a complete defense. Miller rejects Respondent's assertion that the fact that a business is open to the public exempts it "from the operation of the burglary statute." (AB 5). If a store is open to the public, Miller holds the State must show that any consent to remain in the store has been revoked in order to support a burglary conviction. This Court reversed Miller's burglary conviction because there was no evidence to show consent to be in the store was withdrawn and not because the grocery store was open to the public. If the State had shown "even through circumstantial evidence," Miller, 23 Fla. L. Weekly at S390, that consent had been withdrawn, this Court could have affirmed the burglary conviction. Since no evidence of withdrawal of consent was shown in that case, the conviction was reversed. The conviction in Miller was not reversed, as Respondent would contend it should have been, simply because the store was open to the public.

In this case, there is at least circumstantial evidence that Williamson withdrew whatever consent that Respondent had to remain in the store. Respondent entered the store and ordered Williamson to lie down on the floor. (III, 300). At that point, the jury could infer that any consent that Respondent had to

remain in the store was withdrawn. In Robertson v. State, 699 So. 2d 1343 (Fla. 1997), cert. den., 118 S.Ct. 1097 (1998), this Court found that the jury could reasonably infer that the victim withdrew her consent for Robertson to remain in her apartment when he "bound her, blindfolded her, and stuffed her brassiere down her throat." Robertson, 699 So. 2d at 1347. Robertson noted that withdrawal of consent can be shown by circumstantial evidence. Id. See, also, Jimenez v. State, 703 So. 2d 437 (Fla. 1997)(jury could infer that consent was withdrawn when defendant beat and stabbed victim); Raleigh v. State, 705 So. 2d 1324 (Fla. 1997)(ample circumstantial evidence that consent was withdrawn when defendant shot victim several times and beat him viciously). Here, Respondent told Williamson to lie down on the floor, took Williamson's wallet, and left the store. While Williamson might not have told Respondent to leave the store,[1] he was no doubt thinking it. Respondent returned to the store and shot Williamson moments later. Williamson did not consent to Respondent reentering the store and certainly did not consent to be shot. There is ample evidence to show that any consent Respondent had to be in the store was revoked when he ordered Williamson to lie down, took his wallet, left the store, and returned and shot him.

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[1]It is unclear exactly what Williamson said. The transcript says "inaudible." (III, 326). Undersigned counsel (Billmeier) could not discern what Williamson was saying on the videotape.

To hold otherwise leads to an absurd situation where a defendant is convicted of burglary if the victim asks him or her to leave during the commission of the crime but is acquitted of burglary if the victim stands silent as the crimes take place. A better reading of the statute is the one used in Robertson, Jimenez, and Raleigh: if the jury can infer, even from circumstantial evidence, that consent to be on the premises was withdrawn, the defendant is guilty of burglary. Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), the conflict case, applied this simple test and reached an appropriate result. It should be approved.

Respondent does not respond to the State's contention (IB 7-8) that the area behind the counter where Butler stole from the cash register is not open to the public. As argued in the initial brief, even if this Court finds that the store was open to the public and that consent to be in the store itself had not been revoked, it should find that neither Respondent or his co-defendant ever had consent to go behind the counter to commit crimes.

The District Court erred by reversing Respondent's burglary conviction. The portion of the opinion reversing Respondent's conviction should be disapproved, the Third District's opinion in Garvin should be approved, and Respondent's conviction for burglary entered in the trial court should be affirmed.[2]

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[2]The State respectfully suggests that this Court's declaration in Miller that Miller legally entered the store for

ISSUE II

WHETHER RESPONDENT WAS PROPERLY CONVICTED OF TWO COUNTS OF ROBBERY. (Restated)

Respondent asks this Court to review Respondent's convictions for armed robbery and reverse one of the convictions. (AB 8-9). The First District affirmed Respondent's robbery convictions without discussion but reversed one of co-defendant Butler's convictions for the same incident. The First District certified that its reversal of the burglary conviction conflicts with Garvin but did not certify conflict as to any other issue. This Court is not required to review these convictions and should decline to do so.

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the purpose of committing a criminal offense because the store was open for legal transactions because no one withdrew the consent to enter gives an absurd meaning to "open to the public." Stores and other such buildings are open to the public for the purpose of conducting legal transactions. The invitation to the public is for the purpose of those legal transactions, not for the purpose of committing criminal offenses. Here, there can be no doubt that Respondent entered the store for the purpose of committing a criminal offense. However, in those instances where a member of the public enters for legal reasons and while on the premises decides to commit an impromptu illegal act, the better reading would be to treat this as a violation of the terms under which the invitation to enter was tendered and a withdrawal of the consent. Presumably, a store owner could meet this Court's criteria by posting signs that the public was invited only for the purposes of legal activities and that consent was withdrawn to any with criminal intent, such as a "Welcome" mat with a fine print footnote setting out the conditions under which the welcome was extended. However, modern life is barbaric enough without requiring as a matter of law that honest citizens treat other honest citizens as if they were criminals by the posting of insulting signs. It should not be necessary for victims of crimes to recite a boilerplate withdrawal of the invitation to enter or to otherwise prove that consent has been withdrawn.

On the merits, Respondent's claim that two convictions are improper should be rejected. Respondent and Butler entered the store with separate intents to commit separate robberies. Respondent intended to rob whomever was in the store. His intent was not simply to rob Williamson, the store clerk. He intended to rob any customer who happened to be in the store when he entered. Butler intended to rob the clerk and take the money out of the cash register. Since there were two separate intents to commit two separate crimes, two robbery convictions were proper. In Brown v. State, 430 So. 2d 446 (Fla. 1983), this Court affirmed Brown's two robbery convictions when Brown ordered two employees to empty two separate cash registers. Even though both cash registers were owned by the same person, this Court explained that actual ownership of the property is not dispositive of whether multiple robberies have occurred and said,

> What is dispositive is **whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction.** Brown, 430 So. 2d at 447. (emphasis added).

Hall v. State, 66 So. 2d 863 (Fla. 1953), held that two larceny convictions were appropriate when cattle belonging to two different owners was stolen from two different pastures. Here, there were two intents to commit two separate crimes. Butler intended to rob the clerk and cash register while Respondent robbed the customers. It is clear that each criminal knew that the property they were stealing belonged to different owners - store employees do not routinely hold their personal money in the cash register nor hold the store's money in their wallets. There

were separate intents to commit separate crimes on separate victims. Two convictions were appropriate in this case.

In Lovette v. State, 636 So. 2d 1304, 1305 (Fla. 1994), Lovette and co-defendant Wyatt entered a Domino's pizza store. While Lovette held the store manager at gunpoint and waited for the time-lock on the store safe to open, Wyatt stole another employee's shirt to use as a disguise. Lovette, 636 So. 2d at 1305-1306. This Court held that Lovette was properly convicted of both robbery of the store and robbery of the shirt. Id. at 1307. In Santos v. State, 644 So. 2d 171, 172 (Fla. 4th DCA 1994), the court refused to accept the State's concession of error and affirmed two armed robbery convictions when Santos and a co-defendant obtained money from a shoe store safe and the co-defendant stole two necklaces from an employee. In both of these cases, it is clear that the defendants intended to commit more than one crime. Here, it is clear Respondent intended to commit more than one crime. Respondent should be guilty of both the robbery of the store and the robbery of Williamson.

Simply because there was only one person in the store should not preclude multiple armed robbery convictions. In Nordelo v. State, 603 So. 2d 36, 37 (Fla. 3d DCA 1992), the court reversed one of Nordelo's two armed robbery convictions stemming from an incident when Nordelo took money from a store cash register, beat the clerk, and took the clerk's wallet. The court found that the two takings were "part of one comprehensive transaction to confiscate the sole victim's property." Nordelo, 603 So. 2d at

38. The Nordelo court refused to hold that multiple thefts from a single victim would always be only one robbery, stating:

> We are also reluctant to state an absolute rule of law that becomes immutable. Thus, we stop short of ruling that in all cases, multiple takings from one victim always constitute one transaction. Id. at 39.

Similarly, in Horne v. State, 623 So. 2d 777 (Fla. 1st DCA 1993), the First District found only one robbery occurred under the facts of that case but did not state an absolute rule that only one robbery conviction is possible when there is only one victim. In Horne, the court noted there was no "temporal or geographic break" between the takings. In this case, the fact that two robbers entered the store and each went to different areas indicates intent to commit two robberies. The property taken belonged to different victims. Butler took money from the convenience store cash register while Respondent took money from Williamson. The different areas of the store, separated by the store's counter, is a sufficient geographic break to permit two convictions for robbery.

The First District's opinion on rehearing in Butler v. State, 23 Fla. L. Weekly D1495 (Fla. 1st DCA June 17, 1998), ignores Brown's teaching that what is dispositive in determining whether there are multiple robberies is whether there are successive and distinct forceful takings for each transaction. Rather than creating a strict rule that only one robbery can occur if there is only one victim, this Court should continue to examine whether there are separate intents for separate takings. Under the facts of this case, applying Brown, two convictions are appropriate.

If this Court reaches the merits of this issue, it should affirm the portion of the First District's opinion affirming the convictions.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, 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 convictions entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY 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 23rd day of July, 1998.

L. Michael Billmeier
Attorney for the State of Florida

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