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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA ,

Petitioner,

v. Case No. 93,499

JEREMIAH BUTLER,

Respondent.
_______________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Jeremiah Butler, was the defendant in the trial court, and the appellant in the First District Court of Appeal. He will be referred to in this brief as respondent or by his proper name. Petitioner, the State of Florida, was the prosecution in the trial court, and the appellee in the district court. Petitioner will be referred to herein as petitioner or the state.

The record on appeal consists of five consecutively numbered volumes of documents and transcripts. The record will be referred to by use of the symbol "V," followed by the appropriate volume and page numbers. Petitioner's Initial Brief will be referred to by use of the symbol "IB," followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as accurate.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY FOUND THAT THE LIL' CHAMP STORE WAS OPEN TO THE PUBLIC WHEN RESPONDENT ENTERED, AND PROPERLY VACATED RESPONDENT'S BURGLARY CONVICTION ON THAT GROUND.

Petitioner has made a three-pronged attack on the decision of the First District Court in this case. First, petitioner claims there was no evidence that the Lil' Champ Store was open to the public when respondent robbed it. In the alternative, petitioner asserts that even if the store was open to the public, respondent did not have consent to go behind the counter and take the proceeds from the cash register (IB-6). Last, petitioner argues, "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" and the codefendant returned to shoot the victim (IB-8).

Respondent respectfully asserts that these arguments are either meritless or are procedurally barred under the Appeals Reform Act. S. 924.051, Fla. Stat. Each of the state's positions will be addressed under a separate heading below.

1. **The Lil' Champ Store Was Open To The Public When Respondent Robbed It**

The best evidence that the store was open to the public at the time respondent and his co-defendant entered is the videotape

of the offenses. State's Exhibit 4 (V2-103), showed the store lights on, the front door open, and the store clerk on duty (V2-149). Both before and after the shooting, customers can be seen walking into and out of the store. Clearly it was open to the public at the time respondent entered.

Furthermore, the clerk, Johnny Williamson, testified that he worked "second shift" (V2-121), which lasted "normally from 3:00 till about 11:30, 12:00 o'clock, depend[ing] on how long it takes to clean the store up" (V2-122). At 10:00 p.m., the time of the robbery, he "was servicing the store, draining the barrel, checking the ice machine to make sure there was plenty of ice for customers. And minutes later a man in a white shirt come by with a gun" (V2-123).

Thus, not only were the lights on and the door open, but the store clerk was busy making sure there was ice for his customers. A reasonable inference derived from this testimony is that Mr. Williamson anticipated more customers that night since it would be wasteful to prepare ice at 10:00 p.m., for customers the next day (especially since most people drink hot coffee in the mornings). Moreover, Mr. Williamson testified that he was approached inside the store by a man with a gun. If the store had in fact been closed, one would have expected Mr. Williamson to testify that someone broke into the store with a gun, or simply that he was startled to see a man inside the establishment since it was closed.

1. (b) Preservation

In his motion for judgment of acquittal, codefendant Laster argued:

> Your Honor, my understanding is that the business was -- that this was a business that was entered and that it was open for business and that in that regard the armed burglary charge should be dismissed against Mr. Laster.

(V4-467).

The prosecutor responded to Mr. Laster's argument, but never made the argument now advanced by the state. That is, the state never argued there was no evidence that the store was not open to the public at the time respondent entered (V4 468-469).

Thereafter, respondent adopted Laster's argument on the armed burglary count (V4 469-470).[1]

Thus, the record is clear that the Lil' Champ Store was open to the public at the time respondent entered, and that respondent argued he could not be properly charged with burglary of an open business. Furthermore, the state did not contest respondent's position in the trial court, and is procedurally barred from doing so now on appeal.

---

[1] Respondent, referring to "the fifth count of his information, which is the armed burglary count," argued, "Your Honor, my argument in behalf of the motion [for judgment of acquittal] would be substantially similar to that of Mr. Soberay in his argument" (V4 469-470).

In closing argument, the state set out its theory of the burglary charge as follows:

> Do not be mislead by the fact that the Lil' Champ Store was open for business and people are free to come in there and go. And certainly law abiding citizens are there to purchase whatever it is they need to purchase, are free to come in that store. But nobody is free to come into a store to perpetrate the acts that these two men perpetrated. Their consent to be in there was revoked the minute they entered that door. So that is in fact a burglary.

(V5-681).

Section 924.051(1)(b), Florida Statutes, specifically provides:

> (B) "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly appraised the trial court of the relief sought and the grounds therefore.

See also, Cannady v. State, 620 So. 2d 165 (Fla. 1993), where this Court held that the procedural bar rule applied equally to the state and the defense.

Thus, not only is the state procedurally barred from making this argument now, the videotape and the prosecutor's closing argument both prove there is no merit to this claim.

2. Going Behind The Counter Did Not Convert The Consensual Entry Into A Burglary

In its brief, the state argues that "the area behind the counter where Respondent took the money was not open to the public" therefore, respondent is guilty of burglary (IB-9).

Preservation

The state's argument on this point is not preserved for review because, again, the state did not make this argument in the trial court when respondent moved for a judgment of acquittal (V4 465-471). In fact, this is a new theory of prosecution. The prosecutor's closing argument outlined the state's theory of the burglary charge. The prosecutor argued:

> Burglary. The elements of burglary require that the state prove that the defendant entered or remained in a structure owned by, or in the possession of Lil' Champ, John Williamson.
>
> Defendant didn't have the permission or consent of Lil' Champ, or John Williamson, or anyone authorized to act for him, to remain in the structure at the time.
>
> Do not be misled by the fact that the Lil' Champ Store was open for business and people are free to come in there and go. And certainly law abiding citizens are there to purchase whatever it is they need to purchase, are free to come in that store. But nobody is free to come into a store to perpetrate the acts that these two men perpetrated. Their consent to be in there was revoked the minute they entered that door. So that is, in fact, a burglary.
>
> Third element, at the time of entering or remaining in the structure the defendant

> had a fully-formed conscious intent to commit the offense of assault in that structure.
>
> Of course, he had the intent to commit an assault when he entered the structure. He also had the intent to commit the armed robbery, but the armed robbery involved an assault. That's why he gave his gun to his partner, so his partner could assault John Williamson to facilitate the burglary, to facilitate the robbery.

(V5 681-682).

The state is procedurally barred from arguing that the burglary consisted of going behind the counter, as opposed to entering the store, because that argument was not made below (V4 469-471). Cannady v. State, supra; § 924.051(1)(b), Fla. Stat.

The Merits

Furthermore, the authorities cited by the state in support of this argument are quickly distinguishable from the instant case, or were specifically rejected by this Court in Miller v. State, 713 So. 2d 1008 (Fla. 1998).

First, petitioner's reliance on Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989), is misplaced (IB-9). In Dakes, supra, the accused entered a retail store that was open to the public and then proceeded to an unlocked storeroom that had two doors posted with signs reading "authorized personnel only," and "associates only." Once inside the storeroom Dakes took several hundred dollars worth of merchandise and was subsequently charged with burglary.

In upholding Dakes' burglary conviction, the district court held, "although the store itself was open to the public, the closed storeroom <u>to which access was clearly restricted</u> was not part of the premises open to the public within the scope of section 810.02.

In the case at bar, there was no evidence that appellant broke into a separate room that was not open to the public, or that had been posted as a restricted area. Obviously, he was not invited to help himself to the money in the cash register, but that act constituted theft, and not burglary because there was no evidence that his consent to enter the store had been revoked. <u>Miller v. State</u>, <u>supra</u>.

In <u>Miller</u>, <u>supra</u>, the accused did essentially the same thing as respondent did here. That is, Miller and an accomplice entered an open grocery store where they robbed and then shot the two store clerks. Miller was convicted of, inter alia, burglary. The state's theory of that charge was the same as in the case at bar - that consent to enter the open establishment was implicitly revoked when it became apparent that the intruders intended to rob the store.

This Court rejected that argument. The Court reasoned:

> Here, there is no evidence that the grocery store was not open; therefore Miller was 'licensed or invited to enter.' In <u>Robertson v. State</u>, 699 So. 2d 1343 (Fla. 1997), we cited the Third District Court of Appeal's analysis in <u>Ray v. State</u>: 'Once consensual entry is complete, a consensual

> 'remaining in' begins, and any burglary conviction must be bottomed on proof that consent to 'remaining in' has been withdrawn.'
>
> * * *
>
> It is improbable that there would ever be a victim who gave an assailant permission to come in, pull guns on the victim, shoot the victim, and take the victim's money. To allow a conviction of burglary based on the facts in this case would erode the consent section of the statute to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute.

Id.

Furthermore, the state's reliance on Downer v. State, 375 So. 2d 840 (Fla. 1979), is also misplaced. There, trespass charges were filed after Downer entered an area at a hospital that, unlike the instant case, was posted with signs reading, "VISITING HOURS ARE OVER. IMMEDIATE FAMILY CHECK AT DESK," and "NO ADMITTANCE." Downer was also verbally warned that she was in a restricted area, and was asked to leave. Her refusal to depart resulted in a trespass charge being filed against her.

In the case at bar, the establishment was open for business. In Miller v. State, supra, this Court specifically held that to prove burglary of an open business establishment, "There must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred."

There was no such evidence presented below, most likely because the state relied upon the theory that, "Their consent to be in there was revoked the minute they entered that door" (V5-681). The state's theory of prosecution here was precisely the argument rejected by the Miller Court. Accordingly, the state's reliance on Gavin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), must also be rejected on authority of Miller, supra.

Burglary is defined in pertinent part as "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein...." § 810.02, Fla. Stat. Reaching behind the counter of an open business establishment to steal money form a cash register is theft, but that conduct simply does not satisfy the "entering or remaining in a dwelling, a structure, or a conveyance" requirement. See also, Miller v. State, supra. Thus, grabbing the cash out of the cash register did not constitute a burglary under the facts of this case.

In the final analysis, respondent could not burglarize the Lil' Champ Store absent some evidence upon which the jury could rationally infer that his consent to enter the store had been revoked. Miller v. State, supra. Apart from the crimes that were committed inside the store, there was nothing upon which the jury could rationally reach such a conclusion.

3. Consent to Enter Was Never Withdrawn

The state's theory of the burglary at trial was, and remains, that any consent to enter the Lil' Champ Store was impliedly revoked when respondent entered with an intent to commit a crime inside. In support of this argument, the state relies upon Garvin v. State, 685 So. 2d 18 (Fla. 3d DCA 1996).

The rationale upheld in Garvin, supra, was specifically rejected by this Court in Miller, supra. Petitioner correctly notes that the Miller decision requires "some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred." Miller v. State, supra.

To that end, the state has argued:

> Respondent's accomplice entered the store and ordered [the victim] to lie down on the floor. At that point, the jury could infer that any consent that Respondent had to remain in the store was withdrawn.

(IB-14).

Apart from the fact this argument was never made below and is now procedurally barred from being raised, Section 924.051 Florida Statutes, this is the same argument that was rejected in Miller, supra. The state merely changed the criminal act it pointed to as circumstantial evidence that consent to remain had been revoked. Once a store clerk is confronted a gunpoint, it matters little whether they are made to lie down, turn around, raise their hands above their head, or do an Irish jig. Not even

the village idiot would consent to having a loaded firearm held to his face. But, as this Court held in Miller, supra, "There must be some evidence the jury can rationally rely on to infer that consent was withdrawn **besides the fact that a crime occurred.**" Miller v. State, supra.

Notwithstanding this new argument that making the victim lie down constituted circumstantial evidence of revocation of consent to remain in the Lil' Champ Store, the state's argument all along has been: "Their consent to be in there was revoked **the minute they entered that door.** So that is, in fact, a burglary" (V5-681). The state should not be allowed to advance a new theory of the charge at this stage of the proceedings. § 924.051, Fla. Stat.

The Shooting

Last, the state claims, "[The victim] did not consent to [co-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 his accomplice ordered [the victim] to lie down, took his wallet, left the store, and returned and shot him" (IB-15).

John Williamson did not consent to being the victim of any crime. Nevertheless, the state still insists that evidence of

criminal activity, standing alone, is sufficient to show consent to remain in the store was revoked. Cf. Miller v. State, supra.

Stated another way, the victim no more consented to being robbed than he consented to being shot. But the store remained open to the public as evidenced by the videotape showing people entering and leaving the premises. And the victim did nothing different when co-respondent re-entered the store and shot him than he did the first time the intruders appeared. In neither instance was there anything beside the criminal activity that would even tend to suggest that consent to enter or remain had been impliedly revoked.

The state wants to stretch the burglary statute to the point that virtually any crime committed within a structure, dwelling or conveyance constitutes a burglary. As the Court has already held, this is not an appropriate construction of the burglary statute. Miller v. State, supra.

ISSUE II

THE DISTRICT COURT CORRECTLY FOUND THAT ONLY ONE ROBBERY OCCURRED WHERE THE EVIDENCE SHOWED THAT RESPONDENT TOOK PROPERTY FROM ONLY ONE PERSON.

Respondent was found guilty of two counts of robbery, one for robbing store clerk John Williamson, and the other for robbing the Lil' Champ Store (V1-19). The district court correctly reversed one count "because there was a single victim" in the Lil' Champ Store when the robbery occurred. Butler v. State, 711 So. 2d 1183 (Fla. 1st DCA 1998).

"Robbery" means:

> "The taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear."

S. 812.13, Fla. Stat.

It is the use of force, violence, assault, or putting in fear that distinguishes robbery from larceny. Obviously, one cannot assault a cash register or a store, or put either in fear. Therefore, notwithstanding the state's argument at trial, respondent could not properly be found guilty of robbery for robbing the Lil' Champ Store by taking money from the cash register. Horne v. State, 623 So. 2d 777 (Fla. 1st DCA 1993)(only one robbery occurs when the defendant takes property

from the same person, property that belongs to the victim and property that belongs to the victim's employer with little or no temporal or geographical break between the thefts); Anderson v. State, 639 So. 2d 192 (Fla. 4th DCA 1994)(robbery of convenience store clerk of clerk's gold chain and employer's money constitutes single robbery); Nordelo v. State, 603 So. 2d 36 (Fla. 3d DCA 1992)(defendant's taking money from store cash register and from cashier's wallet constituted a single robbery); Morgan v. State, 407 So. 2d 962 (Fla. 4th DCA 1982)(single robbery occurs when money belonging to employee and employer is taken from employee in single transaction). Cf. Brown v. State, 430 So. 2d 446 (Fla. 1983)(property of a single owner taken at gunpoint from two separate employees constitutes two separate robberies).

Here, respondent jumped over the counter and took the proceeds from the Lil' Champ cash register while his accomplice simultaneously relieved the store clerk of his wallet. The victim was alone in the store when this happened. Therefore, only one robbery occurred. Horne v. State, supra; Anderson v. State, supra; Nordelo v. State, supra; Morgan v. State, supra. Cf. Brown v. State, supra.

The State's Argument

Now, for the first time, the state has argued that respondent and his accomplice not only intended to rob John Williamson, but that they also intended to rob "any customer who happened to be in the store when he entered" (IB-18). . . . . .

This argument must fail for a number of reasons. First, appellant was specifically charged with robbing both the Lil Champ Store and John Williamson (V1-19). He was never charged with robbing "any customer who happened to be in the store when he entered," and cannot now be convicted of that uncharged offense. Ray v. State, 403 So. 2d 956 (Fla. 1981). Furthermore, he did not take anything from anyone but John Williamson. Without taking something from someone other than Williamson, there can be no second robbery.

The state never made this argument in the trial court, and cannot make it now for the first time in the Supreme Court. S. 924.051, Fla. Stat. The prosecution argued that respondent robbed John Williamson and then robbed the Lil' Champ Store (V4-555).[2] There was never any mention in the trial court of respondent robbing any other person, or intending to rob any other person. Furthermore, there is no evidentiary support for the contention that respondent entered the store intending to rob

[2] The prosecutor argued, "[Respondent] put John Williamson in fear and took his money. He put John Williamson in fear and took Lil' Champs' money. Two armed robberies (V4-555).

anyone who happened to be inside at the time. Indeed, the facts show that respondent loitered by an outdoor telephone until Michael Gordon left, and no one but Mr. Williamson was in the store (V2-176). Only then did respondent enter the business

In the case at bar, two accomplices entered a convenience store and confronted the clerk. No one else was in the store at the time. Respondent immediately jumped over the counter and emptied the cash register while his accomplice relieved Mr. Williamson of his wallet. This constituted one comprehensive plan to rip-off the clerk and the store in one fell swoop. The entire incident took 33 seconds from start to finish (V4-555), and there was no evidence that Mr. Williamson was moved from one place to another.

The cases cited by the state either involved multiple victims, Santos v. State, 644 So. 2d 171 (Fla. 4th DCA 1994); Lovette v. State, 636 So. 2d 1304 (Fla. 1994), or a second, and independent taking. Green v. State, 496 So. 2d 256 (Fla. 5th DCA 1986). Thus, the cases cited by petitioner are inapplicable to the instant case.

Based on the argument and authorities cited above, respondent urges this Court to affirm the decision of the First District Court.

CONCLUSION

Based on the foregoing arguments, reasoning, and citation to authority, this Court should affirm the decision of the district court in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this date, December 29, 1998.

Respectfully submitted,

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