W00A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JEREMIAH BUTLER,

Respondent.

CASE NO. 93,499

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

L. MICHAEL BILLMEIER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0983802

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

CERTIFICATE OF FONT AND TYPE SIZE 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 2

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. 2

ISSUE II

WHETHER THE DISTRICT COURT ERRED BY REVERSING ONE OF RESPONDENT'S CONVICTIONS FOR ARMED ROBBERY. 9

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

CASES — PAGE(S)

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) 3

Canady v. State, 620 So. 2d 165 (Fla. 1993) 4, 5

Caso v. State, 524 So. 2d 422 (Fla. 1988) 3

Cohen v. Mohawk, Inc., 137 So. 2d 222 (Fla. 1962). 3

Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989) 5

Downer v. State, 375 So. 2d 840 (Fla. 1979) 7

Green v. State, 496 So. 2d 256 (Fla. 5th DCA 1986) 9, 10

Miller v. State, 713 So. 2d 1008 (Fla. 1998). 7, 8

FLORIDA STATUTES

§ 810.02(1), Fla. Stat. (1995) 6

§ 921.141, Fla. Stat. (1997) 5

§ 924.051, Fla. Stat. (Supp. 1996) 4

§ 924.051(3), Fla. Stat. (Supp. 1996) 3

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, Jeremiah Butler, 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 five 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. "IB" will designate the State's Initial Brief and "AB" will designate Respondent's Answer Brief, followed by any appropriate page number.

CERTIFICATE OF FONT AND TYPE SIZE

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

STATEMENT OF THE CASE AND FACTS

The State relies on the statement of facts presented in its initial brief.

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.

In its initial brief, the State first argued that Respondent did not meet his burden to come forward with evidence to show that the store he robbed was open to the public at the time of the robbery so he was properly convicted of burglary. (IB 6-9). The State next argued that if this Court found that Respondent met his burden to show the store was open to the public, it should find that the area behind the counter from which Respondent took the money was not open to the public so Respondent's burglary conviction was appropriate because he entered that restricted area with the intent to commit a crime. (IB 9-10). Finally, the State argued that if the Court found both the store and the area behind the counter were open to the public, it should find that any consent Respondent had to enter the store was revoked so the burglary conviction was appropriate. (IB 10-17).

In response to the State's arguments, Respondent contends that the State did not preserve its argument that he failed to meet his burden to bring forward evidence that the store was open to the public (AB 5-6), that the State did not preserve its claim that the area behind the counter was not open to the public (AB 7-8), and that the State did not preserve its claim that any consent Respondent had to be in the store was revoked. (AB 12).

All of Respondent's preservation arguments should be rejected. The trial court denied Respondent's motion for a judgment of acquittal on all counts. (IV, 471). It is well-settled that rulings of the trial court are presumed correct and that an appellate court should affirm the judgment of a trial court if the appellate record supports affirmance. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988)("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979)("Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it."). As this Court stated:

> It should be kept in mind that the judgment of the trial court reached the district court clothed with a presumption in favor of its validity. [citations omitted]. Accordingly, if upon the pleadings and evidence before the trial court, there was **any** theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment.

Cohen v. Mohawk, Inc., 137 So. 2d 222, 225 (Fla. 1962). (emphasis in original).

Since the State is arguing that the trial court should be affirmed, it can advance all arguments in support of affirmance. Respondent's theory is that the prevailing party at trial is required to advance all possible legal arguments to the trial court to support affirmance on appeal. Apparently, he would have the State, after receiving a favorable ruling on the motion for

judgment of acquittal, recite every alternative ground for denying the motion in the event that a defendant chooses to appeal the denial of the motion. Such inefficiency is absurd and should be prohibited by this Court rather than encouraged.

Section 924.051, Florida Statutes (Supp. 1996), provides no support for Respondent's position. Section 924.051(3), Florida Statutes (Supp. 1996), says that an appeal may not be taken and a trial court's judgment cannot be reversed unless prejudicial error is alleged and the claim was preserved in the trial court. This statute requires that the appellant make the arguments that it makes on appeal in support of reversal of the trial court's order in the trial court. This is nothing more than codification of the long standing rule that claims of error be preserved in the trial court. The statute does not require that the appellee make all possible arguments in support of affirmance on appeal to the trial court. Here, as in the District Court, the State is seeking affirmance of the trial court's order. The State, as appellee, is permitted to make all arguments in support of affirmance on appeal and the appellate court should affirm if any of those reasons, or even one not argued, supports affirmance. Section 924.051 codifies the well-established rule that claims of error be preserved in the trial court. It does not change the well-established rule that a trial court's order can be affirmed by any reason supported by the record.

Canady v. State, 620 So. 2d 165 (Fla. 1993), does not support Respondent's position. In Canady, this Court refused to impose

the death penalty based on an aggravating factor that was not argued to the trial jury, that the trial court did not find, and that the State did not argue to the trial court. Canady, 620 So. 2d at 170. In death penalty cases, the trial court is required by statute to determine whether specific aggravating circumstances exist and whether there are sufficient mitigating circumstances to outweigh the aggravating circumstances. § 921.141, Fla. Stat. (1997). No such specific findings are required when a trial judge rules on a motion for a judgment of acquittal. In Canady, this Court refused to make specific factual findings not made by the trial court or argued by the State at trial. In this case, the trial judge denied Respondent's motion without comment and the State is simply asking this Court to affirm that ruling. The State is not asking this Court to make any factual findings. The trial court's ruling should be affirmed if any reason supports the ruling and Canady does not change that rule.

As to the merits of its claim that Respondent did not meet his burden of establishing the affirmative defense that the store was open to the public, the State relies on the arguments presented in its initial brief.

In response to the State's argument that Respondent should be convicted of burglary because he entered the area behind the cash register to rob the register (IB 9-10), Respondent attempts to distinguish Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989), by claiming that in this case "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." (AB 9). There is no requirement that the burglary of a business open to the public take place in a separate room. Section 810.02(1), Florida Statutes (1995), says that a defendant commits burglary by entering a structure with the intent to commit a crime "unless the premises are at the time open to the public or if the defendant is licensed or invited to enter or remain." The State submits that even if the business is open to the public, a defendant can be convicted of burglary can be convicted if a defendant enters, without invitation, an area of that business not open to the public with the intent to commit an offense. In this case, Respondent entered an area of the store, the area behind the counter, that was clearly off limits to the public. In fact, he had to climb over the counter to reach the cash register. This record supports the State's contention that the area behind the counter was not an area open to the public so even if this Court believes Respondent brought forth evidence that the store was open to the public, it should find Respondent did not bring forth evidence that he was permitted in the area behind the counter where the cash register was located.

Respondent next contends that "reaching behind the counter of an open business establishment to steal money from 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" (AB 11) of the burglary statute. In

Downer v. State, 375 So. 2d 840 (Fla. 1979), this Court held that a defendant could be convicted of trespass for entering certain areas of a hospital even though the hospital building itself was open to the public. The statute at issue in that case also used the language "enters or remains in any structure or conveyance." Downer, 375 So. 2d at 843. In Downer, the defendants entered a hospital during business hours so the building itself was open to the public. They were convicted of trespass because they entered restricted areas. Here, if one accepts Respondent's contention that the store was open to the public, his burglary conviction should be upheld because the area behind the counter was not open to the public. The fact that the portions of the "structure" were open to the public does not preclude a burglary conviction if the crime was committed in an area that was not open to the public.

Finally, Respondent argues that "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 the store with an intent to commit a crime inside" and that this was rejected by Miller v. State, 713 So. 2d 1008 (Fla. 1998). (AB 12). The State argued in its initial brief (IB 15-17) and continues to maintain that it is absurd to suggest that one can legally enter a business for the purpose of committing crimes and contends that it should be unnecessary to show a withdrawal of the consent to enter in order to show burglary. However, this Court said in Miller that there must be evidence other than the

fact a crime was committed from which the jury could infer withdrawal of consent. Miller, 713 So. 2d at 1010-1011. If this Court chooses to require such proof, the State contends that when Respondent's co-defendant making Williamson lie down on the floor, an act not necessary to commit the robbery, is evidence from which the jury could infer withdrawal of consent. The State further contends that the jury could imply withdrawal of any consent to enter the store when, after robbing Williamson, co-defendant Laster returned to the store to shoot Williamson.

For the reasons discussed in this brief and in the initial brief, the State submits this Court reverse the portion of the First District's decision reversing Respondent's burglary conviction and affirm the conviction entered in the trial court.

ISSUE II

WHETHER THE DISTRICT COURT ERRED BY REVERSING ONE OF RESPONDENT'S CONVICTIONS FOR ARMED ROBBERY.

The State's initial brief contains a typographical error. In its issue statement and in the first sentence of its argument, the State's initial brief says that Respondent was convicted of "armed burglary" when it should have said "armed robbery." (IB 18). The State apologizes for the error.

The State argues that since the evidence shows that Respondent intended to commit two robberies, two robbery convictions were appropriate. (IB 18-21). Respondent first counters that this claim is not preserved. For the reasons discussed in Issue I, this claim should be rejected. As the State is arguing for affirmance of the trial court's order, it need not present every possible argument to the trial court. If the appellate court finds any reason that supports the trial court's ruling, it should affirm. Respondent's claim that the State's argument is not preserved should be rejected.

On the merits, Respondent counters that since only one victim (Williamson) was present, only one robbery conviction can stand. (AB 15-16). As argued in its initial brief, the State contends that since the actions of Respondent and his co-defendant show intent to rob separate victims, separate convictions are appropriate. (IB 18-21). In Green v. State, 496 So. 2d 256 (Fla. 5th DCA 1986), the court approved a robbery conviction and a grand theft auto conviction when the victim was robbed of her money in one room and her car keys in another room. The court

rejected Green's claim that the entire incident was a single transaction designed to confiscate all of the victim's property and said that two convictions were appropriate because there was a separate intent for each transaction. Green v. State, 496 So. 2d at 258. Here, the record shows that Respondent intended to rob the store while the co-defendant intended to rob anyone in the store. The two transactions were separate in space, although they occurred almost simultaneously, and show intent to commit two crimes. Two robbery convictions are appropriate. The decision of the First District reversing one of Respondent's robbery convictions should be reversed and the convictions entered in the trial court should be affirmed.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the portion of the decision reported at 711 So. 2d 1183 reversing Respondent's burglary conviction and one of Respondent's robbery convictions should be reversed and the judgment and sentence entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

L. MICHAEL BILLMEIER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0983802

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595

COUNSEL FOR PETITIONER
[AGO# L98-1-8133]

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 Phil Patterson, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of January, 1999.

L. Michael Billmeier
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98108133\BUTLERBR.WPD --- 1/19/99,8:24 am]