IN THE SUPREME COURT OF FLORIDA

STEVE LAMONT JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,234

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (District Court) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Steve Lamont Johnson, the Appellant in the District Court and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four 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 Petitioner's Initial 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 adds the following to Petitioner’s statement of the facts.

Petitioner entered a convenience store while the store was open for business. (II, 24-25). He forced one of the store’s owners, at gunpoint, to the area behind the counter where the cash register was located. (II, 26). The other store owner told

Petitioner that he was not allowed in that area. (II, 25, 58). A gun battle ensued and Petitioner fled. (II, 27-31).

Regarding Count III, causing bodily injury in the commission of a felony, Petitioner made the following motion for a judgment of acquittal:

> As to Count Three, I do not believe the State has put forth sufficient evidence as to the underlying offense of burglary where the State has introduced evidence to the effect there was a robbery that was being committed inside of the store. There is not sufficient evidence there was a robbery, there was not sufficient evidence of burglary to that store. If anything the underlying offense of the attempted armed robbery subsumes the act of a burglary in as much as the alleged victim of the attempted armed robbery is the store itself.
>
> So therefore that offense is subsumed within the attempted armed robbery because in order to rob the business you've got to go inside the business to rob it. For that reason I would say the State has not put forth sufficient evidence as to the allegation of a burglary which is the underlying offense of the causing bodily injury during the commission of a felony. (III, 254-255).

Defense counsel renewed the motion for judgment of acquittal without adding new grounds. (III, 261). The trial court denied both motions. (III, 255, 261).

Petitioner was convicted of attempted armed robbery with a mask and firearm, attempted second degree murder with a firearm, and causing bodily injury in the commission of a felony, specifically burglary. Johnson v. State, 737 So. 2d 555, 556 (Fla. 1st DCA 1999); (I, 109).

On appeal, Petitioner argued that he could not be convicted of the underlying burglary because the convenience store was open to the public when the crime took place. Johnson, 737 So. 2d at

556. The State argued that Petitioner's claim was not preserved. Id. The District Court agreed that the claim was not preserved but addressed the claim as fundamental error and held that the area behind the cash register was not an area open to the public and affirmed Petitioner's conviction. Id. at 556-557. The court explained:

> It is undisputed that in the instant case the store was open to the public when appellant entered. The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area.

Id.

SUMMARY OF ARGUMENT

The District Court correctly held that the area behind the counter in an open convenience store was not an area open to the public and that Petitioner could be convicted of burglary for entering that area with the intent to commit a crime. The District Court interpreted the phrase "open to the public" in the burglary statute to mean an area of the premises open to the public. This is consistent with case law and with the Florida Standard Jury Instructions approved by this Court and permits business owners to designate which portions of their businesses are open to the public and prevents the absurdity of having an entire building be deemed "open to the public" when only one area of building is intended for public use. The result reached by the District Court should be approved. Petitioner's conviction should be affirmed.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT PROPERLY HELD THAT THE AREA BEHIND THE COUNTER WAS NOT OPEN TO THE PUBLIC PURSUANT TO THE BURGLARY STATUTE? (Restated)

In Johnson v. State, 737 So. 2d 555 (Fla. 1st DCA 1998), the District Court properly held that the area behind the counter was not an area open to the public and that Petitioner could be convicted of burglary for entering that area with the intent to commit a crime. The District Court interpreted the phrase "open to the public" in the burglary statute to mean an area of the premises open to the public. This is consistent with case law and with the Florida Standard Jury Instructions approved by this Court. This interpretation of the statute permits business owners to designate which portions of their businesses are open to the public and prevents the absurdity of having an entire building be deemed "open to the public" when only one area of building is intended for public use. This Court's recent decisions in Miller v. State, 733 So. 2d 955 (Fla. 1998), State v. Butler, 735 So. 2d 481 (Fla. 1999), and State v. Laster, 735 So. 2d 481 (Fla. 1999), do not require different results. The result reached by the District Court should be approved. Petitioner's conviction should be affirmed.

Petitioner entered a convenience store while the store was open for business. (II, 24-25). He forced one of the store's owners, at gunpoint, to the area behind the counter where the cash register was located. (II, 26). The other store owner told

Petitioner that he was not allowed in that area. (II, 25, 58). A gun battle ensued and Petitioner fled. (II, 27-31). Petitioner was convicted of attempted armed robbery with a mask and firearm, attempted second degree murder with a firearm, and causing bodily injury in the commission of a felony, specifically burglary. Johnson v. State, 737 So. 2d at 556; (I, 109). On appeal, Petitioner argued that he could not be convicted of the underlying burglary because the convenience store was open to the public when the crime took place. Johnson, 737 So. 2d at 556. The District Court held that the area behind the cash register was not an area open to the public and affirmed Petitioner's conviction. Id. at 556-557. The court explained:

> It is undisputed that in the instant case the store was open to the public when appellant entered. The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area.

Id.

The District Court's holding should be affirmed. The standard of review is de novo. Judicial interpretation of Florida statutes is a purely legal matter and therefore subject to de novo review. See Operation Rescue v. Women's Health Center, Inc., 626 So. 2d 664, 670 (Fla. 1993), aff'd in part, rev'd in part on other grounds, 512 U.S. 753 (1994). The District Court interpreted the burglary statute in this case so the standard of review is de novo.

Section 810.02(1), Florida Statutes (Supp. 1996), defines burglary:

> (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. (emphasis added).

The State submits that the "open to the public" language of this statute applies only to areas of the premises that are actually open to the public and does not apply to areas of the premises that criminals know, or reasonably should know, are not open to the public. Petitioner claims that if a portion of the business is open to the public, the entire business is open to the public and burglary cannot be committed there. (IB 10). This reading of the statute is absurd. This Court's building is open to the public during regular hours but access to many areas, such of the chambers of the justices or the offices of court staff, is restricted. Those areas are not open to the public and it is appropriate that criminals who enter those areas with the intent to commit crimes are convicted of burglary. Under Petitioner's reading of the statute, a burglary conviction is impossible.

The court in Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989), agreed with the position that the State advances here. In Dakes, the defendant entered the unlocked storeroom of a retail establishment that was open to the public. Dakes, 545 So. 2d at 940. The storeroom was clearly marked as "authorized personnel only" and "associates only." Id. The court held that Dakes was properly convicted of burglary because, although the store was

open to the public, the storeroom was not. Id. Similarly, here, Petitioner entered an area behind the counter, an area that he was specifically told that he could not enter, with the intent to commit a crime. This is burglary. This Court should approve the result in Dakes and hold that Petitioner could properly be convicted of burglary in this case.

Such a holding would permit businesses to remain open to the public but still designate certain areas of the business where the public is not permitted. At the same time, it would prevent the elevation of a shoplifting offense to burglary, a concern expressed by two district courts. See Ray v. State, 522 So. 2d 963, 967 n. 6 (Fla. 3d DCA 1988)(elevation of shoplifting to burglary is an "absurd result."); Laster v. State, 24 Fla. L. Weekly D790 (Fla. 1st DCA March 24, 1998), approved, State v. Laster, 735 So. 2d 481 (Fla. 1999)(quoting the same language from Ray.). If a criminal enters an area of the store that is open to the public and commits theft, he or she could be properly convicted of shoplifting. If he or she enters an area that he or she knows or reasonably should know is not open to the public, the criminal can properly be convicted of burglary. Business owners can place criminals on notice by the posting of signs, the placement of barriers (like a counter), or verbal warnings. Therefore, mere shoplifters would not be subject to burglary convictions. In Downer v. State, 375 So. 2d 840, 844-845 (Fla. 1979), this Court acknowledged that a public facility, a hospital, has a right to restrict access to certain areas in

order to fulfil its function of caring for patients. Similarly, this Court should acknowledge the right of business owners to restrict access to certain areas of their businesses. Petitioner distinguishes Dakes by noting that Dakes entered a closed storeroom and such a storeroom could, by itself, be a structure. (IB 10-12). Such a strained reading of the statute would require business owners to build walls around areas that they wish to restrict access. Further, the statute does not use the phrase "unless the structure is at the time open to the public." It uses the phrase "unless the premises are at the time open to the public." While the statute does not define "premises," one definition is "A building or **part of a building**." The American Heritage Dictionary of the English Language (1981). (emphasis added). A better reading of the statute allows a burglary conviction if the criminal enters a "part of a building" that is not open to the public with the intent to commit a crime. The District Court reached the correct result here. That result should be approved.

This Court implicitly approved Dakes when it issued Standard Jury Instructions in Criminal Cases (97-1), 697 So. 2d 84 (Fla. 1997). In that case, this Court approved the following addition to the burglary instruction:

> A person may be guilty of this offense [if he or she originally entered the premises at a time when they were open to the public, but remained there after he or she knew that the premises were closed to the public]
>
> [or]

> **[if he or she entered into or remained in areas of the premises which he or she knew or should have known were not open to the public],**

Standard Jury Instructions in Criminal Cases, 697 So. 2d at 90. (emphasis added; brackets in original).

The committee comment reads:

> The committee believes that the additional language is necessary in certain factual situations. See Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989). Further, we recommend bracketing the two phrases with a note that only the applicable language be given.

Id. at 90-91.

It is clear that this Court considered Dakes when it approved the addition to the burglary instruction. The instruction clearly contemplates situations, such as here, where a criminal enters an area that he or she knows is not open to the public with the intent to commit a crime. This Court should hold, in this case, that the area behind the counter was not an area open to the public so could properly be convicted of burglary for entering the area with intent to commit a crime.

Petitioner's reliance on Miller v. State, 733 So. 2d 955 (Fla. 1998), is misplaced. In Miller, this Court reversed a burglary conviction because a grocery store was open to the public at the time of the crimes. This Court explained:

> [W]e hold that if a defendant can establish that the premises were open to the public, then this is a complete defense. See Collett v. State, 676 So.2d 1046, 1047 (Fla. 1st DCA 1996)("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)."); Ray [v. State], 522 So. 2d at 967 n. 6 ("That the premises are open to the public is a complete defense to a burglary charge...."). Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue. The only relevant question is whether the premises were open to the public at the time the defendant entered or remained with the intent to commit an offense therein.

Miller, 733 So. 2d at 957.

Miller did not address whether designating one portion of the premises as "open to the public" renders the entire premises open to the public. Miller simply said that if an area of the premises is open to the public, it does not matter whether consent to be in the premises is withdrawn.[1] In Thomas v. State, 742 So. 2d 326, 327 (Fla. 3d DCA 1999), the court found that Miller is "controlling only in cases where the purported burglary occurred in an area 'open to the public.'" The Thomas court's reading of Miller is correct. If a person enters an area that is open to the public with the intent to commit a crime, that person is not guilty of burglary because, as Miller holds, "open to the public... is a complete defense." If the person enters an area

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[1]The State argued in Butler and Laster that the phrase "open to the public" meant simply open to the public for legitimate business purposes and not open to the criminal public for the purpose of committing crimes. This Court's initial opinion in Miller partially accepted that argument and held that there must be some evidence, other than the fact a crime was committed, to show that consent to be in the premises was withdrawn. After briefing in Butler and Laster, this Court withdrew its initial opinion in Miller and issued the opinion discussed herein. However, nothing in Miller suggests that this Court considered whether an area of a store that is open could be designated as "closed" for purposes of the burglary statute.

closed to the public within the intent to commit a crime, that person is guilty of burglary unless invited to enter or remain.[2]

Likewise, Butler and Laster did not address that issue of what portions of the premises are open to the public. Both Butler and Laster were expressly limited to the facts of those cases. In each of those cases, this Court stated:

> In Miller, we held that if a defendant can establish that the premises were open to the public, then this is a complete defense to burglary. **We do not find any merit to the State's argument in this case that the area behind the counter was not open to the public.**

Butler, 735 So. 2d at 482; Laster, 735 So. 2d at 481. (emphasis added).

In neither case did this Court say that in all cases, an area behind the counter is always open to the public. In fact, this Court's statements in Laster and Butler implies that there are some cases where portions of an open business can be closed to the public. If the fact that a business is "open to the public" was a complete defense to burglary, then the highlighted language quoted above is redundant. There would be no reason for this Court to have discussed whether the area behind the counter in those cases was open to the public if the mere fact that the

[2]Since there is no conflict between Miller and the opinion below, the State continues to maintain, as it did in its jurisdictional brief, that this Court should not have accepted jurisdiction in this case and that this case should be dismissed.

store was open was a complete defense to burglary. Laster and Butler do not control the outcome here.[3]

Similarly, in Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996), the court rejected the State's argument that entering an alcove (an area open to the public) with the intent to steal from a snack machine was burglary. The court held:

> **Because the state presented no evidence that the motel's alcove was not open to the public**, there was no jury question as to the affirmative defense.

Collett, 676 So. 2d at 1047. (emphasis added).

From the highlighted language, it appears that if, in Collett, the State had presented evidence that showed the motel's alcove was not open to the public, the court would have upheld the burglary conviction. Language from this Court's opinions in Butler and Laster and the First District's opinion in Collett support the State's position that certain areas of an open business can be designated as off-limits to the public. Accordingly, convictions for burglary for entry into such areas with the intent to commit a crime are appropriate.

If this Court does not dismiss this case for lack of conflict, it should hold that a burglary conviction is appropriate in cases where a criminal enters an area of the premises that is not open to the public with the intent to commit a crime. If a person enters an area that is open to the public, no burglary conviction

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[3]Since there is no conflict between this case and Butler and Laster, the State continues to maintain that jurisdiction should not have been granted and this case should be dismissed.

is appropriate. Since Petitioner entered an area of the store that he was told he was not permitted, his conviction for causing bodily harm during the commission of a burglary was properly affirmed by the District Court.

The State will also address Petitioner's claim that the "District Court erroneously concluded that the sufficiency of the evidence to establish burglary had not been preserved for appeal." (IB 7 n. 7). Petitioner presented the following argument in support for a motion for a judgment of acquittal on this count:

> As to Count Three, I do not believe the State has put forth sufficient evidence as to the underlying offense of burglary where the State has introduced evidence to the effect there was a robbery that was being committed inside of the store. There is not sufficient evidence there was a robbery, there was not sufficient evidence of burglary to that store. If anything the underlying offense of the attempted armed robbery subsumes the act of a burglary in as much as the alleged victim of the attempted armed robbery is the store itself.
>
> So therefore that offense is subsumed within the attempted armed robbery because in order to rob the business you've got to go inside the business to rob it. For that reason I would say the State has not put forth sufficient evidence as to the allegation of a burglary which is the underlying offense of the causing bodily injury during the commission of a felony. (III, 254-255).

Nowhere in this argument does Petitioner assert that he could not be convicted of burglary because the business is open to the public. It is well-settled that a motion for a judgment of acquittal "must fully set forth the grounds on which it is based." Fla.R.Crim.P. 3.380(b). Petitioner did not make the argument he makes on appeal to the trial court so his claim is

not preserved. See §§ 924.051(1)(b), 924.051(3), Fla. Stat. (Supp. 1996)(requiring that claims made on appeal be preserved by objection in the trial court and that argument made on appeal be presented to the trial court); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Contrary to Petitioner's assertion, his claim is clearly not preserved and the District Court correctly found it was not.

The District Court erred by addressing the claim as fundamental error. In State v. Barber, 301 So. 2d 7, 10 (Fla. 1974), this Court explained that even a failure by the State to prove a prima facie case must be raised in the trial court:

> [Respondent's] position is that the State failed to prove a Prima facie case, and that this constitutes fundamental error. To accept this contention would be to disregard entirely the holdings in Mancini v. State, State v. Owens, State v. Wright, Supra, all standing for the proposition that sufficiency of the evidence must be raised by appropriate motion in order to be reviewable on direct appeal. Accordingly, we reject this contention. Were we to distinguish in this regard between claims that the evidence failed to establish a Prima facie case, and claims that the evidence was insufficient in some other regards (as, for example, that it was speculative in nature), we would have to emasculate the principle of the above-cited cases; we find no reason to do so. The issues here raised can be reviewed in appropriate post-conviction proceedings under Cr.P.R. 3.850.

Accordingly, even if the State had failed to prove a prima facie case, it would not be fundamental error under Barber. This Court, in Woods v. State, 733 So. 2d 980, 984-985 (Fla. 1999), recently found a claim that the State presented insufficient evidence of premeditation was not preserved:

> Woods initially argues the trial court erred in denying his motion for judgment of acquittal because

> the State's case rested entirely on circumstantial evidence and that insufficient evidence of premeditation existed to submit this case to the jury. He further claims that the only evidence of what transpired on the night of the murder came from Mrs. Langford and she did not see what happened immediately prior to the shooting. The State, on the other hand, contends Woods failed to preserve this issue for review because the grounds raised on appeal are not the specific legal grounds argued to the court below. Rather, during trial, defense counsel merely claimed the State had failed to establish prima facie evidence of guilt without providing any grounds or legal argument in support.
>
> To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. See Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "*fully* set forth the grounds on which it is based." See Fla.R.Crim.Pro. 3.380(b) (emphasis added). Here, Woods submitted a boilerplate motion for acquittal without fully setting forth the specific grounds upon which the motion was based. He did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider.

Here, like Woods, Petitioner did not make the argument to the trial court that he makes on appeal. His claim is not preserved.

Further, Petitioner is not even raising a claim that the State did not present a prima facie case or fail to prove an element. Rather, he claims that the State failed to disprove an affirmative defense. See State v. Hicks, 421 So. 2d 510 (Fla. 1982)(whether consent is withdrawn or business is open to the public is an affirmative defense to burglary); Jones v. State, 24 Fla. L. Weekly D2446 (Fla. 3d DCA October 27, 1999)(“open to public” is an affirmative defense to burglary). The defendant has the burden of going forward with evidence that the

affirmative defense exists. 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. Collett; Wright, 442 So. 2d at 1060. Here, Petitioner never argued the affirmative defense to the trial court. This Court should require that affirmative defenses be argued to the trial court. Affirmative defenses must generally be raised in civil proceedings or else they are waived. See e.g. Fla.R.Civ.P. 1.110, 1.140(b), 1.140(h). Affirmative defenses, like all defenses, are waived if a defendant enters a plea. See Jones, 24 Fla. L. Weekly at D2466 (defendant waived "open to the public" affirmative defense by entering nolo plea). There is no reason to apply a different rule here. If Petitioner had argued that "open to the public" was a complete defense, the State could have presented evidence that showed the store was closed, if such evidence existed. The State acknowledges that there is unlikely any evidence to disprove the defense in this case since the store owner testified that the store was open. However, in other cases, the State might have evidence to show a business was actually closed. For example, the Office of the Attorney General will be closed on January 17, 2000. If a burglary occurs in that office during normal business hours on that day, it might appear from a cold record on appeal (burglary occurred at 10 a.m. on a

Monday) that the office was open to the public. However, if the issue was raised in the trial court, the State could present evidence to show that the office was actually closed for the Martin Luther King holiday. When the issue is not raised in the trial court, the appellate court is often forced to speculate about the factual circumstances of the case. Requiring the issue to be raised in the trial court allows for a complete development of the factual record.

Finally, even if this Court were to hold that "open to the public" is a complete defense to burglary, Petitioner is not without a remedy. Petitioner can file a motion alleging ineffective assistance of counsel for failing to raise the issue pursuant to Florida Rule of Criminal Procedure 3.850 and obtain relief if he prevails. Petitioner presents no reason why such a claim should be treated as fundamental error when a simple remedy for any error already exists.

In summary, the District Court reached the right result by affirming Petitioner's conviction. This Court should hold that a defendant can be convicted of burglary if he or she enters an area of a premises not open to the public with the intent to commit a crime. It should further hold that the District Court erred by addressing this claim as fundamental error and hold that a failure to disprove an affirmative defense must be raised in the trial court to preserve the issue for appeal. The District Court correctly affirmed Petitioner's conviction so the result below should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the result reached by the District Court of Appeal should be approved and the conviction 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 RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to the Attorney for Petitioner, Glenna Joyce Reeves, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3 day of January, 2000.

_____
L. Michael Billmeier
Attorney for the State of Florida

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