IN THE SUPREME COURT OF FLORIDA

STEVE LAMONT JOHNSON,

Appellant,

v. Case No. 96,234

STATE OF FLORIDA,

Appellee.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Steve Lamont Johnson, was the defendant in the trial court and the appellant in the District Court of Appeal, First District. Respondent, State of Florida, was the prosecuting authority in the trial court and the appellee in the District Court. The parties will be referred to herein as they appear before this Court.

The record on appeal consists of four volumes which will be referred to with the volume number in roman numerals and the appropriate page number in parentheses.

STATEMENT OF TYPE STYLE

Pursuant to the Florida Supreme Court's Administrative Order of July 13, 1997, this brief has been printed in Courier New (12 point), not proportionally spaced.

STATEMENT OF THE CASE

Petitioner was charged by Information with causing bodily injury during a felony, to wit: burglary. (I-17-18). On appeal to the First District Court of Appeal, petitioner contended that since the convenience store was open to the public at the time of the robbers' entry, the evidence failed to establish that a burglary occurred.

The District Court in Johnson v. State, 737 So.2d 555 (Fla. 1st DCA 1999), rejected this contention based upon their finding that the area "behind the cash-register counter" was not an area open to the public.

Petitioner's timely motion for rehearing was denied on July 30, 1999.

Petitioner filed a timely Notice to Invoke, followed by a jurisdictional brief.

By this Court's order of November 5, 1999, jurisdiction was accepted.

STATEMENT OF FACTS

Petitioner and a co-defendant, Tard Jackson, entered Harlow Food Store while the store was open for business. (II-11-12, 24-25, 41-42). Their purpose was to commit a robbery. (II-24-25, 44, 135).

Mr. Goswami, owner of the store, testified that when he realized a robbery was about to occur, he told the robbers:

> I will give you the money, you come with me, I will give you the money.

(II-26). As Mr. Goswami proceeded towards the store's counter, his wife stated, "you don't need to go over there." (II-27). Mr. Goswami then heard gunfire and immediately began to struggle with Mr. Jackson. (II-27-28). He had not yet reached the register. (II-35). When appellant began striking Mr. Goswami, Mrs. Goswami was able to get her gun with which she threatened appellant and shot Mr. Jackson. (II-28-31, 51).

Mrs. Goswami indicated appellant was already at the counter when she had advised him not to go behind the counter. (II-58-59). At that time, he turned around firing shots towards her. (II-59). Appellant then turned back and started hitting Mr. Goswami. (II-59). This continued until Mrs. Goswami retrieved her gun and threatened him to stop. (II-60-61).

Tard Jackson testified that Mr. Goswami was coming towards the cash register to get the money when the struggle between them ensued. (II-124, 170-172).

In arguing for a conviction for causing bodily injury during a felony, to wit: burglary, the State asserted:

> For some reason there is an argument about whether this is a burglary or not. First of all, burglary comes under causing bodily injury, but why is it not a burglary? I mean, are we saying now that this business was opened for robbers to come in and rob them? Doesn't that sound ridiculous? I agree it's not like the burglary where everybody thinks of somebody breaking into a house while they're asleep or while they're not there. **I mean, I agree that the business was opened but it wasn't opened for come on in robbers and rob me, it was open for legitimate people to buy something that they needed with hard earned money**. The business owner is not required okay, hold on, is this a real burglary, is this real, are those guns real? Is that mask that you're trying to use to conceal, is that real?

(III-287-288).

> The third crime is causing bodily injury during the commission of a felony. What does that mean? He was -- he perpetrated or attempted to perpetrate a burglary and he committed, aided or abetted an act that caused bodily injury to Mr. Goswami. ...
>
> Burglary, just for purposes of understanding what it means he entered or remained in a structure owned by or in the possession of the Goswamis, he didn't have the permission or consent of anyone authorized by the Goswamis, either them or anybody authorized to enter, and at the time of the entering, at the time of going in he was intending to commit a crime.
>
> **Robbery. So then the business was opened, it wasn't opened for the purpose of allowing people to come in and commit robbery.**

(III-301-302).

In defining burglary to the jury, the trial court instructed them that:

> A person may be guilty of this offense if he originally entered the premises at a time when they were open to the public, but remained there after he knew that the premises were closed to the public, if he had the intent to commit the crime described in the charge.

(IV-339).

SUMMARY OF ARGUMENT

An essential element of the crime for which petitioner was convicted was the commission of a burglary. The District Court erroneously concluded that a burglary was committed although the evidence was undisputed that the convenience store was open to the public at the time petitioner entered intending to rob the store.

ISSUE PRESENTED

Point I

THE DISTRICT COURT ERRED IN FINDING THAT A BURGLARY WAS COMMITTED WHERE PETITIONER ENTERED A STORE OPEN TO THE PUBLIC WITH THE INTENT TO COMMIT A ROBBERY.

In Count III of the Information, the State charged that petitioner did:

> attempt to perpetrate a felony enumerated in Section 782.04(3), Florida Statutes, to-wit: Burglary, and did commit, aid or abet an act, that caused bodily injury to another, to-wit: Kiran Goswami, contrary to the provisions of Section 782.05(1)[sic], Florida Statutes.

(I-17-18). The evidence at trial established that an attempted robbery occurred while Mr. Goswami's store was open to the public. (II-24-25, 42, 135). On appeal to the District Court, petitioner argued that the State had not established that a burglary occurred since the store was open to the public at the time of entry by the robbers.[1] Thus, petitioner asserted the State had not established the offense of causing bodily injury during the commission of a felony.

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[1] Petitioner argued in his motion for judgment of acquittal that the State had not presented sufficient evidence to establish a burglary. (III-254-255). The District Court erroneously concluded that the sufficiency of the evidence to establish burglary had not been preserved for appeal. Johnson v. State, supra. The court considered the claim, however, under a fundamental error theory. See, Griffin v. State, 705 So.2d 572 (Fla. 4th DCA 1998); Brown v. State, 652 So.2d 877 (Fla. 5th DCA 1995); K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA 1991); Troedel v. State, 462 So.2d 392 (Fla. 1984).

The District Court affirmed the conviction for causing bodily injury during the commission of a burglary finding that the cash-register counter area was not an area open to the public. Johnson v. State at 556-557. In so ruling, the District Court erred.

In Miller v. State, 733 So.2d 955 (Fla. 1999), this Court held that being "open to the public" is a complete defense to burglary. The Court cited with approval Collett v.State, 676 So.2d 1046, 1047 (Fla. 1st DCA 1996), where the First District held:

> 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 committ a crime, the person would have committed a burglary a result directly in conflict with the express language of section 810.02(1).[2]

This Court held that "[t]he only relevant question is whether the premises were open to the public at the time the defendant entered or remained wth the intent to commit an offense therein." Miller v. State, supra, at 957. This Court further stated:

> Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue.

(Emphasis supplied).

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[2] Section 810.02(1) provides: "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.

In the present case, the premises petitioner was alleged to have burglarized -- the convenience store -- was open to the public at the time petitioner entered with the intent to commit robbery. Both the State[3] and the District Court[4] acknowledged this. Under Miller, the complete defense was thus established. Whether consent to enter a portion of the store may have been withdrawn by the "other store owner's command," Johnson v. State at 556, is legally irrelevant.

In State v. Butler, 735 So.2d 481 (Fla. 1999), this Court affirmed the lower court's ruling that

> the trial judge should have granted his motoin for judgment of acquittal on the burglary charge because the only evidence at trial concerning the convenience store at the time of his entry was that it was open to the public, and that one entering the premises under such circumstances cannot be convicted of burglary.

Butler v. State, 711 So.2d 1183 (Fla. 1st DCA 1998). Further, this Court specifically held:

> 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.

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[3] As noted infra at 4, the State conceded that the business was open to the public.

[4] The District Court noted: "[A]ppellant and his codefendant ... entered a convenience store that was open for business." Johnson v. State, supra at 556.

State v. Butler, supra. See also, State v. Laster, 735 So.2d 481 (Fla. 1999). The decision of the lower court conflicts with State v. Butler, supra, and State v. Laster, supra.

As in Butler and Laster, the convenience store petitioner was alleged to have burglarized was open to the public at the time of his entry. Under this Court's decision in Miller, Butler, and Laster, since petitioner thus showed that the premises were open to the public, a complete defense to the charge of burglary was established. To quote Miller: "[P]remises are either open to the public or they are not." The fact that the convenience store was open establishes a complete defense to the burglary charge.

Miller correctly interprets Florida's burglary statute and establishes a bright-line rule. Section 810.02(1) plainly provides that premises open to the public are exempted from the operation of the burglary statute. This exclusion stands separate from license or invitation, which may be withdrawn. It is a blanket exclusion; discernible from the plain language of the statute. The language admits no ambiguity from which a different conclusion may be drawn. The plain language does not create absurd results.

In finding that the cash register counter area was not open to the public, the District Court relied upon Dakes v. State, 545 So.2d 939 (Fla. 3d DCA 1989), as well as the standard jury instructions for burglary.[5] Johnson v. State, at 557. Assuming

[5] The instruction provides:
A person may be guilty of this offense [if he or

arguendo that Dakes survives Miller, the present case can be readily distinguished and thus reliance upon Dakes was misplaced.

In Dakes, the defendant stole merchandise from a storeroom located within a retail store. Although the retail store was open at the time, the storeroom itself was set apart by a door upon which was posted two signs: "authorized personnel only" and "associates only." The Third District rejected the argument that the case came within the exemption applicable to premises open to the public by noting:

> [A]lthough the store itself was open to the public, the closed storeroom to which access was clearly restricted was not part of the premises open to the public, within the scope of section 810.02. See Downer v. State, 375 So.2d 840 (Fla. 1979).

Dakes v. State, at 940. The court further indicated that entry into the storeroom constituted burglary of an unoccupied structure.

The storeroom in Dakes could be the proper subject of a burglary, unlike the cash register counter area here. Burglary requires the entry or remaining in of a "dwelling, a structure, or a conveyance." Section 810.02(1). Section 810.011(1) defines "structure" as:

> 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].

The committee relied upon Dakes for its belief that the bracketed language was necessary in certain factual situations.

> A building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.

The storeroom in Dakes could meet the definition of a "structure" since, being enclosed by walls and covered with a roof, it could constitute a "building." Compare Small v. State, 710 So.2d 591 (Fla. 4th DCA), rev. denied, 725 So.2d 1110 (Fla. 1998)(carport with single wall not sufficiently enclosed to constitute building) with Smith v. State, 632 So.2d 136 (Fla. 4th DCA 1994)(entry into separate businesses operating within enclosed mall and wholly contained under mall's single roof constituted separate burglaries since each store constitutes a "structure"). By contrast, the cash register counter area cannot be classified as a building or a structure.[6]

In the present case, the structure allegedly burglarized was the convenience store. That structure was concededly open to the public at the time of the entry. Under Miller, Laster and Butler, since the premises were open to the public, a complete defense to burglary was established.

Admittedly, like virtually every retail store, the cash register counter area was not an area intended for access by the public. This fact does not mean, however, that the "premises" were not open to the public. Unlike the storeroom in Dakes, the cash

[6] To constitute burglary, there must be entry into a "not open to the public" structure. A non-public area cannot be burglarized unless that area also constitutes a "structure." Under our statute, areas are not burglarized; structures are.

register counter area can not be considered a separate structure which could be burglarized apart from the store itself. Since the store was open to the public at the time of the entry, a burglary could not be committed. Simply put, the premises were open to the public. Thus, a burglary could not be committed.

That portion of the standard jury instruction which purports to apply Dakes is erroneous and cannot be reconciled with Miller, Butler and Laster. The instruction provides:

> A person may be guilty of this offense [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.]

[Emphasis supplied]. The cash register area of every convenience store is one which everyone should know is not open to the public. However, to hold that every convenience store robbery is also a burglary would be inconsistent with the clear legislative intent that "premises... open to the public" are exempt from the burglary statute. Such a holding would also be directly in conflict with Miller, Butler and Laster. The standard instruction ,contrary to the statute and this Court's pronouncements, improperly broadens the reach of the burglary of the statute and should be amended accordingly.

As noted previously, the bright-line rule of Miller is consistent with the clear language of the burglary statute. In the present case, application of Miller's bright-line rule requires that the District Court's decision herein be reversed. Since the

convenience store[the structure petitioner allegedly burglarized] was open to the public at the time of petitioner's entry, a burglary was not committed. Accordingly, petitioner's conviction for bodily injury in the course of a felony must be reversed.

CONCLUSION

For the reasons stated, the District Court's opinion should be reversed with directions that petitioner's conviction for causing bodily injury during commission of a felony be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to L. MICHAEL BILLMEIER, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to appellant, STEVE LAMONT JOHNSON, on this day, December 1, 1999.

Respectfully submitted,

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