IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2390
DCA CASE NO. 3D08-188

LEONARDO MARRERO,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

and

FORREST L. ANDREWS, JR.
Assistant Attorney General
Florida Bar No. 17782
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

LUNAR C. ALVEY
Florida Bar No. 0173473
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF CONTENTS....................i

TABLE OF CITATIONS....................iii

INTRODUCTION....................1

STATEMENT OF THE CASE AND THE FACTS....................2

SUMMARY OF THE ARGUMENT....................12

ARGUMENT....................14

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRESENTED WITNESS TESTIMONY DESCRIBING THE CASINO DOORS IN DETAIL AND A VIDEOTAPE SHOWING THE DAMAGE, AND ITS WAS SELF-EVIDENT THAT THE DAMAGE WAS MUCH MORE THAN $1,000. 14

A. The Third District Court of Appeal Correctly Determined that Based on Common Experience, the Jury Could Reasonably Conclude That the Cost of Repairs or Replacement of the Casino Doors Easily Exceeded $1,000. 15

B. Petitioner Failed to Properly Preserve His Argument That the Life Experience Exception Contained in F.S. 812.012(10)(b) is Inapplicable to Criminal Mischief Cases. 22

C. Even if Petitioner's Argument That the Life Experience Exception Contained in F.S. 812.012(10)(b) is Inapplicable to Criminal Mischief Cases is Preserved, it Fails on the Merits. 25

D. Application of F.S. 812.012(10)(b) to Criminal Mischief Cases is Not Inappropriate Despite the Fact That There is No Comparable Provision in F.S. 806.13. 28

CONCLUSION....................38

CERTIFICATE OF SERVICE....................39

CERTIFICATE OF COMPLIANCE..39

TABLE OF CITATIONS

FLORIDA CASES

A.D. v. State, 866 So. 2d 752 (Fla. 2d DCA 2004) 15, 25-27, 37

Carnley v. State, 89 So. 808 (Fla. 1921).. 36-37

Castor v. State, 365 So. 2d 701 (Fla. 1978) 22, 25

Clark v. State, 746 So. 2d 1237 (Fla. 1st DCA 1999) 15, 26

Coolen v. State, 696 So. 2d 738 (Fla. 1997)..22

Cox v. State, 819 So. 2d 705 (Fla. 2002)...22

Duest v. Dugger, 555 So. 2d 849 (Fla. 1990) 22

Evans v. State, 452 So. 2d 1040 (Fla. 2d DCA 1984) 32

Jackson v. State, 413 So. 2d 112 (Fla. 2d DCA 1982) 16-17, 31

J.O. v. State, 552 So. 2d 1167 (Fla. 3d DCA 1989) 32

Jones v. State, 408 So. 2d 690 (Fla. 2d DCA 1982)... 32-33

L.B. v. State, 700 So. 2d 370 (Fla. 1997) 29

Marrero v. State, 22 So. 3d 822 (Fla. 3d DCA 2009)............................... 11, 15, 28

McAllister v. State, 874 So. 2d 1266 (Fla. 5th DCA 2004) 23

Miller v. State, 667 So. 2d 325 (Fla. 1st DCA 1995) 27-28

Negron v. State, 306 So. 2d 104 (Fla. 1974) 36

Pagan v. State, 830. 2d 792 (Fla. 2002)..14

Pope v. State, 441 So. 2d 1073 (Fla. 1983) 22

Randolph v. State, 608 So. 2d 573 (Fla. 5th DCA 1992) 32

Reed v. State, 603 So. 2d 69 (Fla. 4th DCA 1992)..24

San Martin v. State, 705 So. 2d 1337 (Fla. 1997) 24

Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982).. 23-24

Sori v. State, 477 So. 2d 49 (Fla. 2d DCA 1985) 32

S.P. v. State, 884 So. 2d 136 (Fla. 2d DCA 2004) 15, 27, 37

State v. Brake, 796 So. 2d 522 (Fla. 2001)... 29, 31

State v. Fuchs, 769 So. 2d 1006 (Fla. 2000)..29

State v. Hagan, 387 So. 2d 943 (Fla. 1980)...29

State v. Mitro, 700 So. 2d 643 (Fla. 1997) 29

Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) 22, 25

Sutton v. State, 834 So. 2d 332 (Fla. 5th DCA 2003) 14

T.B.S. v. State, 935 So. 2d 98 (Fla. 2d DCA 2006).............................. 15, 25-26, 36

Timmons v. State, 448 So. 2d 1048, 1049 (Fla. 1984)..25

OTHER STATE CASES

District of Columbia v. Shannon, 696 A. 2d 1359 (D.C. 1997).............................21

Hayes v. State, 228 S.E.2d 585 (Ga. App. 1976)..19

People v. Garcia, 29 A.D. 3d 255 (N.Y. A.D. 1st Dept. 2006) 19-21

People v. Hoppe, 184 A.D. 2d 582 (N.Y. A.D. 2d Dept. 1992) 19

People v. Tassone, 241 N.E. 2d 419 (Ill. 1968) 17-18

State v. Davis, 569 So. 2d 131 (1st Cir. La. App. 1990) 18-19, 24

State v. Sydnor, 2010 WL 366670 (Tenn. Crim. App. 2010) 19

FEDERAL CASES

Bell v. United States, 349 U.S. 81 (1955)...35

Johnson v. Louisiana, 406 U.S. 380 (1972)..34

Williams v. Florida, 399 U.S. 78 (1970) 34

United States v. Ingraham, 832 F. 2d 229 (1st Cir. 1987).....................................35

United States v. Saccoccia, 58 F. 3d 754 (1st Cir. 1995) 35

FLORIDA STATUTES

Fla. R. Crim. P. Rule 3.390(d), Florida Statutes (2008) 2414

Fla. Std. Jury Instr. (Crim.) 3.9 (2008) 34

F.S. 806.13, Florida Statutes (2008) 28

F.S. 812.012(10), Florida Statutes (2008) 30

F.S. 812.012(10)(b), Florida Statutes (2008)...30

F.S. 924.051(1)(b), Florida Statutes (2008).. 22, 25

INTRODUCTION

The Petitioner, Leonardo Marrero, was the Appellant below, and the Respondent, the State of Florida, was the Appellee below. In this brief, Leonardo Marrero will be referred to as "Petitioner", and the State of Florida will be referred to as "Respondent."

The symbol "R." refers to the record on appeal in the Third District Court of Appeal, the symbol "T." refers to the trial transcript, and the symbol "SR." refers to the supplemental record on appeal containing the trial court's restitution order filed on or about October 28, 2009.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by amended information with criminal mischief over $1,000, culpable negligence, and reckless driving with damage to property or person. (R. 6-10).

The following evidence was introduced at Petitioner's trial:

On October 5, 2006, Rosa Garcia and her husband, Jorge Fuentes, went to the Miccosukee Casino/Resort to have dinner. (T. 146, 180-183). As they were leaving the building via the north entrance, Ms. Garcia saw Petitioner drive a large white car drive through the two glass doors which caused the glass to crack like a spider's web. (T. 147-148, 151, 153). She did not observe Petitioner attempt to stop the car. (T. 153).

Ms. Garcia felt the impact of the car driving through the doors which seemed like a bomb. (T. 147-148). The "shock of air" was so intense that it forced her to close her eyes. (T. 149, 167-168). Mr. Fuentes also felt a "great noise and wind that pushed [him] backwards." (T. 182). Glass flew onto both Ms. Garcia and Mr. Fuentes. (T. 149).

The casino exit was about fifteen feet away from Mr. Fuentes and Petitioner's car was fully inside the casino, approximately three to five feet away from him. (T. 183).

Ms. Garcia tried to get up but noticed that she was no longer wearing her shoes and she had pain in her left ankle. (T. 149-150). Mr. Fuentes helped her up and sat her on a sofa. (T. 151).

Ms. Garcia was familiar with the casino as she had gone there three to four times a year since it opened. (T. 151). She described the doors as wide, tall, and made of glass. (T. 152).

Ms. Garcia was taken to Kendall Regional Hospital for medical treatment. (T. 157, 159). Photos of her injuries were admitted into evidence. (T. 164-165).

Walter Rosas was the Facilities Director for Miccosukee Casino. (T. 191). Among his duties was to maintain all of the entrances and exits of the casino. (T. 191). He testified that on October 5, 2006, a truck entered through the door on the northeast side of the casino. (T. 191-192).

Mr. Rosas described the doors as:

> constructed of a special aluminum. They're about 16 or 17 feet high in height roughly. It's divided in four segments. It's got an automatic handicap door that's as you enter on the right hand side. The glass, as I stated before, is impact resistant. They're special in that they have sun resistance shading.

(T. 197).

The glass was hurricane proof and could withstand 200 or 210 mile an hour winds. (T. 197). The doors were installed approximately eight years earlier. (T.

197). After the truck crashed through the door, none of the parts of the door were functional. (T. 197).

Mr. Rosas further testified that while he did not recall the exact square footage of the doors, there were four large commercial size doors and one had an opening for handicapped patrons that was almost forty-two (42) inches wide. (T. 198). There were also "six glasses that support the structure, that support the concrete structure above." (T. 198). The special aluminum door frames also had to be replaced. (T. 198).

There was no damage to the doors prior to the truck crashing through it on October 5, 2006. (T. 192). The doors needed to be repaired because they were completely torn off. (T. 192). To repair the doors, Mr. Rosas had to remove all the debris and hire an outside company to install a temporary door "so that the air conditioning would not leave the hotel." (T. 193).

The trial court sustained the defense objection to the State admitting an invoice associated with these temporary repair costs. (T. 195-196).

The State then presented Juan Rosell, surveillance supervisor for Miccosukee. (T. 200). Through Mr. Rosell, the State introduced a surveillance videotape of Petitioner's truck crashing through the doors. (T. 209, 215). The video was played for the jury. (T. 215-219).

Finally, Officer Sabata Bryant of the Miccosukee Police Department, testified that when she arrived at the casino she observed Petitioner's Ford F-150 in the walkway inside of the casino. (T. 223-225). "The whole entrance was pushed [into] the gaming area [and] [t]here was debris and glass every where." (T. 226).

Officer Bryant approached Petitioner, who was angry and stated, "they got what they deserved. This is what they get. I have been here all week and I got rob[bed] by Miccosukee." (T. 228).

The State then rested its case and the defense moved for judgment of acquittal on all three counts. (T. 237). With respect to the criminal mischief charge (count I), the defense argued that the State failed to establish a prima facie case that Petitioner had the specific intent to damage the property, that the property was the property of Miccosukee Resort and that the damage was $1,000 or more. (T. 238). The State argued that the jury could use its commonsense and experience to find that the damage to the doors, as described during the testimony, was $1,000 or more. (T. 240).

The trial court reserved ruling on the motion regarding count one and denied the motion as to counts two and three. (T. 242-243). The defense rested and moved for its second judgment of acquittal. (T. 244, 246). The trial court stated,

> I will be honest with you. I am concerned about the lack of evidence of value. The case L.C. versus State, 579 Southern 2d

> 783 states that in the absence of any proof of value, adjudication of delinquency, it's a juvenile case, was to be reduced to criminal mischief as a second degree misdemeanor, and I am not sure that there was any proof of value here. So I am going to reserve on that.

(T. 246-247).

The judge read the following instruction to the jury regarding the criminal mischief charge:

> To prove the crime of criminal mischief, the State must prove the following three elements beyond a reasonable doubt. One, Leonardo Marrero damaged a building.
>
> Two, the property damaged belonged to the Miccosukee Resort and Convention Center.
>
> And, three, the damage was done willfully and maliciously.
>
> …
>
> The punishment provided by law for the crime of criminal mischief is greater depending on the value of the property damage. Therefore, if you find the defendant guilty of criminal mischief, you must determine by your verdict whether:
>
> A, the damage to the property was a thousand dollars or greater.
>
> B, the damage to the property was greater than two hundred dollars but less than one thousand dollars.
>
> And, three, the damage to the property was two hundred dollars or less.

(R. 41; T. 275-276).

The verdict form for the criminal mischief count contained boxes corresponding to the value of the property damage if the jury found Petitioner guilty. (R. 55; T. 283-284).

While deliberating, the jury sent a note stating, "[c]an we enter a verdict for count 1 without rendering an opinion on the value of the property?" and "was there testimony about the amount of damage to the property?" (R. 38; T. 290). After entertaining suggestions from both sides, the trial court responded as follows without objection from the defense:

> If you find the defendant guilty of criminal mischief, you must make a determination of the value of the property damaged. Your verdict with regard to the value must be for the highest amount which was proven beyond a reasonable doubt. If the exact value of the property damage cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, then you must find the value is less than two hundred dollars.

(T. 290-293).

With regards to the portion of the question that asked whether there was testimony regarding the amount of damage, the defense suggested that the jury rely upon their own recollection. (T. 293). The judge called the jury back into the courtroom and read the jury the answer that had been agreed upon by the parties. (T. 293-294).

The jury found Petitioner guilty of criminal mischief with the value of the property being one thousand dollars or more. Petitioner was also found guilty of counts two and three. (R. 55-57; T. 295-296). The trial court then denied Petitioner's motion for judgment of acquittal on the criminal mischief count. (T. 300).

The defense filed a post-trial motion for judgment of acquittal renewing its argument that there was insufficient evidence that the value of property damage exceeded $1,000. (R. 59-61). The State responded in writing that "the record clearly contains compelling evidence of extensive damages to distinctive materials and components from which the fact-finder, using common sense alongside individual and collective life experience, could draw the very conclusion it drew." (R. 77).

The trial court agreed with the State and denied the motion for judgment of acquittal ruling that "reasonable persons could not doubt that, based on the evidence presented to the jury which was sufficient and self evident, coupled with their common knowledge and life experience, the very nature of the doors is indicative of a incontrovertible minimum value of $1,000." (R. 93-94, 139-140).

The court then sentenced Petitioner to thirty six months in state prison followed by five years of probation with restitution to be determined at a later hearing on the criminal mischief count. (R. 95-103, 107-110).

A restitution hearing was subsequently held where the trial court ordered restitution payable to the Miccosukee Casino in the amount of $47,500 for the cost of repairing and replacing the permanent doors, and $8,500 for the cost of installing temporary doors. (R. 231; SR. 2).

Petitioner appealed his conviction and sentence to the Third District Court of Appeal and raised the following ground (verbatim):

> THE TRIAL COURT ERRED IN FAILING TO ACQUIT THE DEFENDANT OF FELONY CRIMINAL MISCHIEF, WHERE THE STATE PRESENTED NO EVIDENCE AT ALL OF THE COST OF DAMAGE.[1]

(R. TAB A).

On November 25, 2009, the Third District Court of Appeal affirmed Petitioner's conviction as follows:

> This is an appeal of a conviction for criminal mischief. The question is whether the evidence was legally sufficient to

[1] In his appeal, Petitioner also raised an issue regarding the restitution awarded to both Ms. Garcia and the Miccosukee Tribe. This issue is not the subject of the instant appeal.

establish that the damage was $1000 or greater. See § 806.13(1)(b)3., Fla. Stat. (2006). We affirm.

After gambling losses, defendant-appellant Marrero drove his Ford F150 pickup truck into an entrance at the Miccosukee Casino. The entrance consisted of four impact-resistant glass doors, sixteen or seventeen feet tall, each framed in special aluminum materials. One of these was a door with an automated entry system for the handicapped. The doors had been operational prior to the crash, but were destroyed, and had to be replaced. In addition, a patron of the casino was injured.

The State charged the defendant with criminal mischief. The offense is a third-degree felony if the damage is $1000 or greater. For this crime, the amount of damage is measured by the cost of repair or cost of replacement. If there is no competent evidence of value, then the conviction must be for the lowest level of offense, a misdemeanor of the second degree. See id. § 806.13(1)(b)1.

In this case the State did not present any evidence of the cost of repair or replacement of the four doors. The defense moved for a judgment of acquittal on that count, which was denied. The defendant was convicted as charged, and has appealed.

As a general rule, it will be necessary for the State to present evidence of the cost of repair or replacement in a criminal mischief case, if the State wishes to convict the defendant of mischief exceeding either the $200 or $1000 threshold. See id. § 806.13(1)(b)2., 3.

It has been said that "a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met. . . .'" T.B.S. v. State, 935 So. 2d 98, 99 (Fla. 2d DCA 2006) (quoting A.D. v. State, 866 So. 2d 752, 753 (Fla. 2d DCA 2004)); S.P. v. State, 884 So. 2d 136, 138 (Fla. 2d DCA 2004); Clark v. State, 746 So. 2d 1237, 1241 (Fla. 1st DCA 1999).

> In this case the jury had a videotape of the collision which destroyed four extremely tall impact-resistant doors, including one door with a special mechanism for handicapped entry. We agree with the trial court that based on common experience, the jury could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate. We therefore affirm the conviction and the restitution order.

Marrero v. State, 22 So. 3d 822, 823 (Fla. 3d DCA 2009).

Thereafter, Petitioner filed a brief on jurisdiction and initial brief on the merits in this Court.

Respondent's brief follows.

SUMMARY OF THE ARGUMENT

The life experience exception is entirely consistent with the function of a jury which is to apply its commonsense to the evidence. Furthermore, Florida courts have recognized that the life experience exception contained in F.S. 812.012(10)(b) is applicable in criminal mischief cases where the value of damages is "so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met."

In the instant case, it is self-evident that damage resulting from the total destruction of two fully functioning 16-17 foot high doors which had an almost 42 inch opening for handicapped patrons made of special aluminum, divided into four segments with an electric door opener for handicapped patrons with six panels of hurricane impact resistant glass that were capable of withstanding 200-210 mile per hour winds exceeded $1,000.

The jury's verdict was not based on inference and speculation. Indeed, the State presented evidence as to the unique nature, makeup, and condition of the doors. Also, the jury viewed a videotape depicting the destruction of the doors.

Based on this evidence, the jury could reasonably conclude that the cost of

repairing or replacing the casino doors exceeded $1,000. Therefore, the Third District Court of Appeal properly affirmed the trial court's ruling denying Petitioner's motion for judgment of acquittal.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRESENTED WITNESS TESTIMONY DESCRIBING THE CASINO DOORS IN DETAIL AND A VIDEOTAPE SHOWING THE DAMAGE, AND IT WAS SELF-EVIDENT THAT THE DAMAGE WAS MUCH MORE THAN $1,000.

In "moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence, but also every reasonable conclusion favorable to the state that the trier of fact might fairly infer from the evidence." See, Sutton v. State, 834 So. 2d 332, 334 (Fla. 5th DCA 2003).

"Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Pagan v. State, 830. 2d 792, 803 (Fla. 2002). Review of a motion for judgment of acquittal is de novo. Id.

a) The Third District Court of Appeal Correctly Determined That Based on Common Experience, the Jury Could Reasonably Conclude That the Cost of Repairs or Replacement of the Casino Doors Easily Exceeded $1,000.

The State agrees with the Third District Court of Appeal's holding that, as a general rule, it will be necessary for the State to present evidence of the cost of repair or replacement in a criminal mischief case, if the State wishes to convict the defendant where the damage exceeds either the $200 or $1000 threshold.

However, when the State presents evidence from which it can be determined that "certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met," direct evidence of cost of repair or replacement is not necessary. Marrero v. State, 22 So. 3d 822, 823 (Fla. 3d DCA 2009); T.B.S. v. State, 935 So. 2d 98, 99 (Fla. 2d DCA 2006); A.D. v. State, 866 So. 2d 752, 753 (Fla. 2d DCA 2004); S.P. v. State, 884 So. 2d 136, 138 (Fla. 2d DCA 2004); Clark v. State, 746 So. 2d 1237, 1241 (Fla. 1st DCA 1999).

This exception does not require the jury to speculate or infer the damage amount; rather it permits the jury to apply its commonsense and life experiences in cases where the amount of damages is clear and self-evident. Indeed, in this case, the jury was permitted to make a reasonable inference based on competent,

substantial evidence that the cost of repair or replacement vastly exceeded $1,000 based on the video and witness testimony describing the damaged doors. Thus, this exception is a tool for analyzing the evidence and not a substitute for evidence.

The first case to interpret F.S. 812.012(10)(b) was Jackson v. State, 413 So. 2d 112 (Fla. 2d DCA 1982). In Jackson, the defendant was charged with grand theft in the first degree for stealing a sailboat valued at more than $20,000. Id. The evidence produced at trial "showed that the boat was a 1980, 37-foot Hunter sailboat that had been seized by the United States Coast Guard on December 15, 1980, while it was carrying 2,000 pounds of marijuana on board." Id. at 112-113. The boat was kept in storage by the United States Custom Service. Id. at 113.

To prove the value of the boat, the State called a supervisor for the Customs Service, Robert Gonzalez. Id. The defendant's objection to Mr. Gonzalez' opinion regarding the value of the boat was sustained as to hearsay. Id. The State did not enter any specific proof of value. Id. at 114.

Nevertheless, the Second District concluded that even "though no direct evidence of value is presented, there is a value which by the very nature of the stolen property itself is indicative of an uncontrovertible minimum value." Id. Therefore, even in the absence of any direct evidence of value, the court believed

that it was self-evident that the sailboat's value exceeded $100 which constituted grand theft in the second degree.[2] Id.

In so holding, the Second District "stress[ed] the fact that this should occur only in those rare instances when the minimum value is undisputable and the jury cannot ascertain a specific value from the evidence or lack of evidence before it." Id. at 112.

A life experience exception has been applied in similar situations in other jurisdictions as well. For instance, in People v. Tassone, 241 N.E. 2d 419, 422 (Ill. 1968), the defendant was charged with the felony theft of "a tractor trailer and one lot of merchandise, of the value of more than $150."[3] No evidence of value was offered. Id.

In affirming the defendant's conviction, the Illinois Supreme Court held:

> It is true that in this case there was no direct proof of value. However, it has been well recognized that judicial notice may be taken of the fact that property has some value, although the courts have been reluctant to take notice of any specific value….

---

[2] The court did not go so far as to find that the value of the sailboat exceeded $20,000 which would constitute grand theft in the first degree. Id.

[3] In Illinois it was necessary to prove the value of property stolen was in excess of $150 to constitute a felony. Id.

> We see no valid reason why notice may not be taken in a case such as this that the property has a value of over $150. Courts do not operate in a vacuum; they are presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true….
>
> To say that it is not common knowledge that a large tractor and trailer are worth more than $150 is to close our eyes to reality. We do not take judicial notice of the exact value of the property but we do take notice that it is worth more than $150.

Id. at 422-423.

State v. Davis, 569 So. 2d 131 (1st Cir. La. App. 1990) presents an even closer factual situation to this case. There, the defendant was charged with stealing a trailer axle valued at $100 or more but less than $500. Id. at 132-133. After being initially instructed and deliberating for approximately an hour, the jury returned to the courtroom for guidance "because the jury felt the item stolen was worth more than $100.00, but it did not feel the state proved its worth was over $100.00." Id. at 133. The trial court responded:

> The State has the obligation of proving every element of the crime to your satisfaction beyond a reasonable doubt. One of the elements of the crime is the value of the thing taken. The State has to prove that value. You are to decide the case based on the evidence which you hear from the witness stand. You should not attempt to supplement that evidence for things which you may know of your own knowledge. ***You can certainly use your common sense***, but the major thing you have to consider in the case is the proof, is the evidence from the witness chair, and if you feel that that evidence does not satisfy one of the elements of the case, then it is your

> prerogative to bring in some other verdict that you want to. But it is not your place to supply for either side the proof in this case.

Id. at 134. (emphasis added).

Despite the defendant's argument to the contrary, the First Circuit Court of Appeal of Louisiana held that the trial court properly recharged the jury during its deliberations that it could use its commonsense to determine that the value of the stolen axle exceeded $100. Id.; see also, Hayes v. State, 228 S.E.2d 585 (Ga. App. 1976) ("A jury is in no event absolutely bound by opinion evidence, and as to everyday objects, such as automobiles, they may draw from their own experience in forming estimates of market value."); State v. Sydnor, 2010 WL 366670, 20 (Tenn. Crim. App. 2010) (agreeing that "the jury is allowed to use their common sense in terms of establishing a value and certainly there is nothing that flies in the face of logic that they found the car having the value of $1,000 when it was less than a year old and purchased brand new."); People v. Hoppe, 184 A.D. 2d 582 (N.Y. A.D. 2d Dept. 1992) (review of photographs introduced at trial insufficient to prove beyond a reasonable doubt that the value of the damage exceeded $1,500 [to constitute criminal mischief in the second degree], but sufficient to demonstrate beyond a reasonable doubt that the value of the damage exceeded $250 [to constitute criminal mischief in the third degree]); People v. Garcia, 29 A.D. 3d

255, 264 (N.Y. A.D. 1st Dept. 2006) (agreeing with the prosecution that although "nothing in the photographs, standing alone, could establish an exact repair value," the photographs "did confirm the magnitude of the repairs required, and did establish that the costs would be far from trivial," and that "common sense dictates that repairs of the magnitude required in this case cannot be made in New York City for under $250.").

The instant case is analogous to Jackson, Tassone, and Davis because it presents a unique set of facts upon which the jury could reasonably conclude that the damage to the casino doors exceeded $1,000. Petitioner drove his pick-up truck through four large commercial sized glass doors that had an almost 42 inch opening for handicap patrons located at the Miccosukee Resort/Casino. (T. 198).

The doors were 16-17 feet high, divided into four segments and had an automatic door opener for handicapped patrons. (T. 197). The doors were also made of special aluminum and had six panels of hurricane impact resistant glass which were capable of withstanding 200 or 210 mile per hour winds. (T. 197-198).

Although the doors were working properly before the crash, they were completely destroyed and were not functional afterwards. (T. 192, 197).

The State also introduced the surveillance tape which allowed the jury to view the damage caused by Petitioner's truck crashing through the doors as it happened. (T. 209, 215-219).

Finally, it is not unreasonable to infer that the jurors, residents of Miami-Dade County, are familiar with the costs associated with hurricane impact glass since south Florida is a hot-bed for hurricane activity during the summer and fall seasons. See, District of Columbia v. Shannon, 696 A. 2d 1359, 1365 (D.C. 1997) (noting that when a matter falls "within the realm of common knowledge and everyday experience, a plaintiff will not need expert testimony to establish a standard and a deviation."); Garcia, 29 A.D. 3d at 264 ("common sense dictates that repairs of the magnitude required in this case cannot be made in New York City for under $250.").

Based on this evidence, as well as common experience, the jury could reasonably conclude that the cost of repair or replacement of the casino doors easily exceeded $1,000.

b) *Petitioner Failed to Properly Preserve His Argument That the Life Experience Exception Contained in F.S. 812.012(10)(b) is Inapplicable to Criminal Mischief Cases.*

Under the invited-error doctrine, a party may not make or invite error at trial and then be heard to complain of that error on appeal. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Cox v. State, 819 So. 2d 705, 715 (Fla. 2002). Further, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Section 924.051(1)(b), Florida Statutes (2008).

Moreover, failure to brief and argue points on appeal constitutes a waiver of those claims. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Coolen v. State, 696 So. 2d 738, 742, fn. 2 (Fla. 1997).

During his motion for judgment of acquittal Petitioner argued that the evidence was insufficient to prove the amount of damages to the casino doors. (T. 238). At no point did Petitioner argue that the "life experience exception" contained in F.S. 812.012(10)(b) was not applicable to criminal mischief cases. (T. 290-293). In addition, Petitioner never argued that "[t]he Jackson court's formulation of this exception is not supported by the plain language of the theft statute's minimum value provision." (Initial Merits Brief, pg. 21).

In his initial brief on direct appeal to the Third District Court of Appeal, Petitioner attempted to distinguish Jackson, 413 So. 2d at 112 from the instant case but did not argue that the life experience exception is inapplicable to criminal mischief cases. (R. TAB A).

Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982) is analogous to this case. In Sapp, the defendant argued that it was within the trial court's discretion whether to instruct the jury on the maximum and minimum penalties for the offense charged. Id. at 363-364. On appeal, however, he argued that it was mandatory for the trial court to do so. Id. at 364.

The Fourth District concluded that "[a] clearer example of invited error would be difficult to envision" because "not only did [the defendant] fail to apprise the trial court of his view (newly taken on appeal) that the rule was mandatory after this change; he in fact affirmatively stated that it was merely directory."

Here, similar to the defendant in Sapp, Petitioner agreed that it was appropriate to read the language of F.S. 812.012(10)(b) in response to the jury's questions. (T. 291-293). Therefore, even if the trial court erred, such error was invited by Petitioner's consent to the re-charge instruction. McAllister v. State, 874 So. 2d 1266, 1268 (Fla. 5th DCA 2004) (trial court did not err in giving the

jury a dictionary where the defendant consented to this action when the jury requested it).

Furthermore, by failing to present his current argument to the trial court for review and ruling, or raising an objection, Appellant is precluded from raising the issue on appeal. Reed v. State, 603 So. 2d 69, 70 (Fla. 4th DCA 1992); Sapp, 411 So. 2d at 364 ("One may not tender a position to the trial court on one ground and successfully offer a different basis for that position on appeal."); San Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997) (defendant's failure to argue that his level of intelligence affected his ability to freely and voluntarily waived his Miranda rights precluded review of this issue on appeal); Davis, 569 So. 2d at 133-134 (noting defendant's failure to lodge a contemporaneous objection to further instructions which the trial court gave to the jury).

This issue is distinct from the sufficiency of the evidence argument made during Petitioner's motion for judgment of acquittal because the life experience exception contained in F.S. 812.012(10)(b) is not evidence; it was used as an instruction to recharge the jury. See, Fla. R. Crim. P. Rule 3.390(d), Florida Statutes (2008) ("No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of

the objection....”); Timmons v. State, 448 So. 2d 1048, 1049 (Fla. 1984) (defendant’s failure to object to misstated instruction at time it was given or at close of jury charge precluded review on appeal); Steinhorst, 412 So. 2d at 338 (stating requirement that a party must make a contemporaneous, specific objection or other timely request for a remedy to the trial court in order to preserve an issue for appellate review); Castor, 365 So. 2d at 703; F.S. 924.051(1)(b), Florida Statutes (2008).

Based on the foregoing, the trial court’s response, if error, was invited by Petitioner who did not object to the response and agreed that it was appropriate. Therefore, since there is no fundamental error, and Petitioner failed to raise this argument in the trial court and the Third District Court of Appeal, this issue is not reviewable in the instant appeal.

c) ***Even if Petitioner’s Argument That the Life Experience Exception Contained in F.S. 812.012(10)(b) is Inapplicable to Criminal Mischief Cases is Preserved, it Fails on the Merits.***

Although the life experience exception is contained in the theft statute, Florida courts have recognized that it is applicable in criminal mischief cases. See e.g., T.B.S., 935 So. 2d at 99 quoting A.D., 866 So. 2d at 753-754 (permissible for trial court to conclude that “certain repairs are so self-evident that the fact-finder

could conclude based on life experience that the statutory damage threshold has been met…"); Clark, 746 So. 2d at 1241 ("We recognize that in theft cases, where the value of an item is so self-evident as to defy contradiction, specific evidence of value need not be introduced."); S.P, 884 So. 2d at 138 ("We recognize that in some circumstances, the fact-finder can infer from life experience and from the self-evident nature of the repairs that a statutory damage threshold has been met.").

The fact that this exception was not applied in T.B.S., A.D., Clark, and S.P., however, does not mean that it cannot be applied in an appropriate criminal mischief case.

In fact, none of these cases rejected such an application; they merely found that the damage to the property at issue was not self-evident. T.B.S., 935 So. 2d at 99 (recognizing that "a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met….," but finding that damage to car windows was not self-evident); A.D., 866 So. 2d at 753-754 (recognizing life experience exception but finding that damage to home which consisted of a broken lock, and replacement of a bathroom vanity and a bathroom sink top was not self-evident); Clark, 746 So. 2d at 1241 (recognizing life experience exception but finding that cost of motor vehicle body repair not self-evident); S.P, 884 So. 2d at

138 (recognizing life experience exception but finding that nature of car repairs not self-evident).

Petitioner relies on A.D. to support his argument that photographs, and seemingly videotapes, are insufficient evidence to prove damage. (Initial Merits Brief, pg. 24-27). In that case, besides the photographs depicting the damage to the victim's home, there was also discrepancies as to amounts paid for the electric bill and evidence that some of the damage may have been caused by someone other than the defendant which contributed to the deficient evidence. 866 So. 2d at 753-754.

In the instant case, however, based upon the videotape viewed by the jury and eye witness testimony, all of the damage to the doors could be attributed to the Petitioner and there was no discrepancy as to amounts that could vary, such as an electric bill. The jury and the trial court could logically infer from the testimony provided by Ms. Garcia, Mr. Fuentes, and Mr. Rosas as well as based upon life experience that the damage to the doors was over $1,000. Moreover, it was self-evident from the video viewed by the jury that the repairs would exceed $1,000 based on the materials described and that the doors had been completely destroyed.

Miller v. State, 667 So. 2d 325 (Fla. 1st DCA 1995) is also distinguishable from the present case. There, after being placed in a patrol car, the defendant

kicked out the right rear window. Id. at 327. Besides the fact that no evidence was presented concerning the value of the window, there was no video or photographs depicting the damage, the trial court failed to instruct the jury as to the amount of damages, and the jury verdict form did not include a reference to the amount of damages. Id. at 329.

Here, on the other hand, the State produced evidence regarding the nature and condition of the doors from which the jury could make a commonsense determination as to the damage, the trial court instructed the jury regarding its duty to determine the amount of damages, with Petitioner's approval, and the verdict form contained a reference to the amount of damages. (R. 55; T. 283-284). In addition, the value of repairing or replacing a rear window of a car is not so self-evident that it would exceed $1,000 as "four extremely tall impact-resistant doors, including one door with a special mechanism for handicapped entry" is in this case. Marrero, 22 So. 3d at 823.

d) ***Application of F.S. 812.012(10)(b) To Criminal Mischief Cases Is Not Inappropriate Despite the Fact That There Is No Comparable Provision in F.S. 806.13.***

Pursuant to F.S. 806.13, a person commits third degree felony criminal mischief "if he or she willfully and maliciously injures or damages by any means

any real or personal property belonging to another…." The terms "injures" and "damages" are not defined in the statute. Thus, "[i]n the absence of a statutory definition, it is permissible to look to case law or related statutory provisions that define the term." State v. Brake, 796 So. 2d 522, 528 (Fla. 2001); see e.g., State v. Fuchs, 769 So. 2d 1006, 1009 (Fla. 2000) (finding that term "contributing to the delinquency or dependency of a child" could be defined by reference to other chapters of Florida law and case law); State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997) (finding that statute requiring documentation of age for issuance of identification card containing date of birth was not unconstitutionally vague because statute referenced another Florida statute setting forth methods of acceptable proof of age for children being admitted to school and terms "available" and "authenticated" could be given their common dictionary definitions); L.B. v. State, 700 So. 2d 370, 371 (Fla. 1997) (looking to dictionary to ascertain the plain and ordinary meaning of "common pocketknife" in statute defining what constitutes a weapon which may not be possessed on school property); State v. Hagan, 387 So. 2d 943, 945-946 (Fla. 1980) (finding that prohibited netting area encompassed by the Charlotte County waters of Charlotte Harbor could be ascertained with particular exactitude by looking at a different statute which delineated the boundary lines of Charlotte County and that the terms "trawling

operation" and "trawling net" could be defined by industry custom or by resort to a dictionary).

Here, a comparable definition of the value associated with injuring or damaging property is value as defined in the theft statute. F.S. 812.012(10), Florida Statutes (2008). Therefore, it is appropriate to borrow a definition from a different statute to define a similar term. Moreover, Petitioner agreed that this was an appropriate definition when requested for one by the jury. (T. 291-293).

Petitioner's argument that the life experience exception "requires that first, there must be a showing that the "exact value" cannot be "ascertained" and that "there must be some substantive proof of a minimum value" misconstrues the language of this statute. (Initial Merits Brief, pg. 27-28).

F.S. 812.012(10)(b) provides that:

> [i]f the value of property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount; if no such minimum value can be ascertained, the value is an amount less than $100.

The clear language of this statute contemplates the absence of admissible evidence establishing the value of the property. Thus, it does not require the State to prove that an exact value cannot be ascertained under any circumstances as Petitioner argues.

Indeed, in Jackson, the sailboat had an ascertainable value, but such proof constituted inadmissible hearsay at trial. 413 So. 2d at 112-113. Nevertheless, the Second District held that the life experience exception was applicable because of such lack of evidence. Therefore, the life experience exception is equally applicable in the instant case where the casino doors had an ascertainable value, which was established during the restitution hearing (R. 231; SR. 2), but was not introduced during the trial.

Second, a requirement that "there must be some substantive proof of a minimum value" defeats the purpose of the exception. That is, if there were substantive proof of a minimum value, there would be no need to resort to the life experience exception.

Finally, although a comparable provision is not contained in F.S. 806.13, this Court is not precluded from applying it to criminal mischief cases as a tool to determine the value of damage "in rare instances when the minimum value is undisputable and the jury cannot ascertain a specific value from the evidence or lack of evidence before it." Jackson, 413 So. 2d at 112; Brake, 796 So. 2d at 528.

Next, Petitioner's argument that application of this exception to criminal mischief cases would conflict with "well-established law that rough estimates and the mere proof of the nature of an item are insufficient to prove value" is

misplaced. (Initial Merits Brief, pg. 28). There is no conflict because the self-evident nature of the damage as determined on a case-by-case basis, obviates the need for rough estimates. Further, there was more than just evidence of the nature of the damaged doors, there was specific testimony as to the unique components of the doors and the jury was able to view a video depicting their total destruction.

The cases cited by Petitioner in an attempt to sustain his position that the mere nature of the item is insufficient to prove value are distinguishable from the instant case. Significantly, in those cases, the stolen items were not described at trial and there was no evidence of their age or condition. See, Randolph v. State, 608 So. 2d 573, 574 (Fla. 5th DCA 1992) (microwave, color TV, kitchenware, bicycle, blanket, candle holders and towels not specifically described nor was there evidence of their age or condition); J.O. v. State, 552 So. 2d 1167 (Fla. 3d DCA 1989) (victim's statement that video equipment was "practically brand new," without more, was insufficient to prove property stolen had value of more than $300); Sori v. State, 477 So. 2d 49 (Fla. 2d DCA 1985) (no description or proof of age or condition of stolen items); Evans v. State, 452 So. 2d 1040 (Fla. 2d DCA 1984) ("this is not one of those rare cases where the minimum value of an item of property is so obvious as to defy contradiction" where stolen coats consisted of a variety of styles which was not indicative of their value); Jones v. State, 408 So. 2d

690 (Fla. 2d DCA 1982) (although stolen t.v. was introduced into evidence during the trial, there was no evidence of its condition at the time it was stolen).

Consequently, proof of the mere nature of these items alone was insufficient to prove their value. Here, however, the jury knew the condition of the doors at the time they were damaged based on Ms. Garcia and Mr. Rosas' testimony and the video.

Petitioner's cases are further distinguishable in that they involve a failure to prove market value. A damage determination is not as esoteric as a market value determination which requires greater expertise and knowledge especially to determine depreciation. The value of damage which is typically the cost of repair or replacement is well within the range of a jury's competency to determine based on its commonsense and life experience.

Interestingly, Petitioner urges this Court to reject application of F.S. 812.012(10)(b) to criminal mischief cases, but concedes that "this provision may be applicable [where there is] theft of or damage to a rare work of art." (Initial Merits Brief, pg. 21-22). There is no difference between the casino doors in this case and a rare work of art. Comparable to a rare work of art, the doors were unique themselves since they were made of a "special aluminum" as well as six panes of hurricane impact glass. Therefore, unlike a "rare work of art" whose

value could only be determined by an expert, the damage determination in this case is obvious, such as damage of a totally destroyed Ferrari 250 GTO, a Stradivarius violin, or a five carat diamond ring, and is not beyond the competency of laymen.

Nevertheless, Petitioner seems to advocate that the jury should ignore its commonsense and life experience merely because this has not been codified in F.S. 806.13. This extreme view ignores the realities of jury work where jurors make far more difficult determinations in every trial based on their commonsense and life experience. Fla. Std. Jury Instr. (Crim.) 3.9 (2008) ("It is up to you to decide what evidence is reliable. ***You should use your common sense*** in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict….") (emphasis added).

Indeed, the essential function of a jury is the "interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Williams v. Florida, 399 U.S. 78, 100 (1970). A central facet of this deliberative process is that individual jurors harmonize their individual recollections and perceptions of the trial proceedings. Johnson v. Louisiana, 406 U.S. 380, 389 (1972) (Douglas, J. dissenting).

Accordingly, application of the life experience exception is consistent with a jury's role in a trial. "Jurors, after all, are not expected to resist commonsense inferences based on the realities of human experience." United States v. Saccoccia, 58 F. 3d 754, 782 (1st Cir. 1995); Bell v. United States, 349 U.S. 81, 83 (1955) (recognizing "the saving grace of common sense."). Furthermore, "[t]he law is not so struthious as to compel a factfinder to ignore that which is perfectly obvious." United States v. Ingraham, 832 F. 2d 229, 240 (1st Cir. 1987).

It is apparent from the jury's question ("can we enter a verdict for count 1 without rendering an opinion on the value of the property?") that the jury immediately applied its commonsense and life experience to the evidence, before the trial court's additional instruction, and concluded that the value of damages easily exceeded $1,000.

Finally, application of this exception did not violate Petitioner's right to due process because the jury's verdict was based on evidence, not inference or speculation as to the amount of damage caused to the doors. Ms. Garcia and Mr. Rosas testified as to the unique nature, makeup, and condition of the doors, that they were working properly, they were approximately eight years old, they consisted of special aluminum, an electric door opener for handicapped patrons, six

panes of hurricane impact glass, and there was a videotape depicting their condition as well as the damage to them. (T. 151-152, 197-198, 215-219).

With this evidence, it was not unreasonable for the jury to exercise its commonsense and conclude that the minimum value of damage exceeded $1,000.

Respondent submits that in cases such as the instant case which involves the complete destruction of large doors attached to a casino consisting of special aluminum, an electric door opener for handicapped patrons, and six panes of hurricane impact glass, unlike cases involving damage to the body of a vehicle or a broken car window, constitutes a rare instance where the damage is so self-evident that a jury can rely on its commonsense and life experience to determine whether or not the minimum threshold value has been met.

Moreover, the risk that a jury would merely speculate as to the amount of the damage is adequately foreclosed by the nature of the item and its condition at the time of the offense, and the trial court's own commonsense. Significantly, the jury's verdict does not have to reflect the exact amount of damage, as in a civil case, just that the damage exceeded the minimum threshold. Therefore, any concern that this standard would lead to speculation by the jury is alleviated by the fact that when the proof indicates a value nearing that minimum as in T.B.S., 935 So. 2d at 99, Negron v. State, 306 So. 2d 104, 107 (Fla. 1974), Carnley v. State, 89

So. 808, 283 (Fla. 1921), A.D, 866 So. 2d at 753-754, and S.P., 884 So. 2d at 137-138, such proof may need to be offered with greater precision.

Indeed, trial and appellate courts have had no difficulty applying the life experience exception to items which truly are self-evident (e.g. sailboat and casino doors) and those that are not (car body damage, broken window). Accordingly, the concern expressed in Petitioner's merits brief has not materialized in the thirty plus years since F.S. 812.012(10)(b) was enacted.

In conclusion, the life experience exception has been recognized as applicable in both theft and criminal mischief cases. The casino doors at issue in this case present a rare instance where the value of the damage was self-evident and the jury could rely on its commonsense and life experience to conclude that the damage exceeded $1,000.

Further, the jury is able to make such a determination based on the testimony regarding the nature and condition of the doors, as well as the video which depicted their total destruction. Therefore, there was sufficient evidence to prove that the damage to the casino doors exceeded $1,000.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the Third District Court of Appeal.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

____
RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

and

____
FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, FL 33131
(305) 377-5441 (phone)
(305) 377-5655 (facsimile)

____
LUNAR C. ALVEY
Florida Bar Number 0173473
Assistant Attorney General
Office of the Attorney
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, FL 33131
(305) 377-5441 (phone)
(305) 377-5655 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 17th day of August, 2010, to Robert Kalter, Esq., Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

____
FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

____
FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General