IN THE SUPREME COURT OF FLORIDA

ERIC M. YOUNG,

Petitioner,

v. CASE NO. SC11-2151

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## STATEMENT OF FACTS

The State submits the following additions to the Defendant's Statement of Facts:

The victim in this case owned a drywall business. (T. 35). On the date of the burglary, he was in a house in a residential neighborhood, where he had been working for the past week or two. (T. 36). The job was "pretty much done," and the victim was in the house to finish cutting up drywall sections so they could be hauled away. (T. 36). Once that was done, he would not have to go back. (T. 36).

The owner was not living in the house at the time. (T. 37). The building was an old house purchased by a contractor, who gutted out the inside and wanted the victim to rehang, retexture, and respray the drywall so it looked like a brand new house. (T. 37).

The victim, while finishing up his work, was approached by the Defendant inside the house; the Defendant pointed a revolver at the victim, told the victim to lie on the ground, then went through the victim's pockets and took his truck keys and other items. (T. 38-39). The victim heard the Defendant leave in his truck. (T. 39, 44).

## SUMMARY OF ARGUMENT

**ISSUE I**: The lower court properly concluded that a house in the process of being renovated is a "dwelling" as that term is defined in the burglary statute. That the house is temporarily uninhabitable does not change its character and design, and imposing an additional requirement of current habitability is contrary to the plain language and intent of the statute.

**ISSUE II**: This Court need not review the Defendant's carjacking conviction, where the validity of that conviction was neither addressed in the lower court's opinion nor advanced as a basis for this Court's review. If this Court does decide to address this issue, the Defendant's conviction should be affirmed. The record reflects that force was used during the course of the taking of the victim's truck.

## ARGUMENT

### ISSUE I

**THE DISTRICT COURT PROPERLY CONCLUDED THAT A HOUSE IN THE PROCESS OF BEING REMODELED IS A "DWELLING" AS THAT TERM HAS BEEN DEFINED BY THE LEGISLATURE.**

The Defendant asks this Court to reverse the district court's conclusion that the house the Defendant burglarized was a "dwelling," as that term is used in the burglary statute. This position is contrary to the plain language of the statute and the intent of the Legislature, and the district court's opinion should be affirmed.

Preservation

First, the State notes that the Defendant's claim was not properly preserved in the trial court. A claim of insufficient evidence is subject to the general rule requiring a contemporaneous objection to preserve an issue for appellate review. F.B. v. State, 852 So. 2d 226, 229-30 (Fla. 2003). Accordingly, a defendant must preserve such a claim through timely and specific challenge in the trial court. Id. at 230. This preservation requirement should not be lightly dismissed, as preservation serves an important societal interest "based on practical necessity and basic fairness in the operation of the

judicial system" that allows a trial judge to correct any error at an early stage of the proceedings. City of Orlando v. Birmingham, 539 So. 2d 1133, 1134-35 (Fla. 1989).

A motion for judgment of acquittal "must fully set forth the grounds on which it is based." Fla. R. Crim. P. 3.380(b). Such a motion must be specific – a "boilerplate objection or motion is inadequate." F.B., 852 So. 2d at 230 n.2. The motion in the instant case was classic boilerplate as to this count (T. 96-99), and the Defendant essentially concedes that he did not preserve the argument he makes now, contending that his conviction is fundamentally erroneous.

An exception to the contemporaneous objection rule is made under two circumstances: (1) in a death case; and (2) where the evidence is insufficient to show that a crime was committed at all. Id. at 230. Neither exception is applicable here, where the Defendant was not sentenced to death and where evidence at trial clearly established that a crime took place, as the victim testified that he was accosted at gunpoint inside the house and his vehicle and possessions taken from him.[1]

[1]In F.B., the defendant clearly committed a theft; the only issue on appeal was the value of the items stolen, and this unpreserved issue was not fundamental. 852 So. 2d at 227-28, 231. Similarly, in the instant case the Defendant clearly committed a burglary; the only issue is the status of the

Statutory Language

Even if a fundamental error argument would be appropriate here, such an argument would be without merit. As this Court has recognized, the power to define crimes rests with the Legislature, not the courts. See Marrero v. State, 71 So. 3d 881, 887 (Fla. 2011); Perkins v. State, 682 So. 2d 1083, 1085 (Fla. 1996); Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994). The crime of burglary, as defined by Florida statute, is quite different from the common law burglary offense, and the clear and unambiguous language of the burglary statute is controlling and cannot be modified by judicial decision. Baker, 636 So. 2d at 1343-44.

The Legislature has, understandably, chosen to punish more severely those individuals who choose to burglarize dwellings rather than other structures. § 810.02(3), (4), Fla. Stat. The Legislature has also chosen to expand dramatically the common law's "dwelling house" element[2], defining the term "dwelling" as follows:

> "Dwelling" means **a building or conveyance of any kind**, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, **which has a roof over it and is designed to**

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structure he burglarized, and this unpreserved issue is not fundamental.

[2]See Baker, 636 So. 2d at 1344.

> **be occupied by people lodging therein at night**, together with the curtilage thereof.

§ 810.011(2), Fla. Stat. (emphasis added).

Under the common law, a burglary of a dwelling took place only where the structure was actually occupied or where the occupant's absence was temporary. Perkins, 682 So. 2d at 1084. Where, for example, a house was unoccupied and for sale, it no longer constituted a dwelling under the common law. See Tukes v. State, 346 So. 2d 1056, 1057 (Fla. 1st DCA 1977).

With the above definition of "dwelling" under the current burglary statute, however, the Legislature has chosen to expand this concept significantly:

> Occupancy is no longer a critical element under this [statutory] definition. Rather, **it is the design of the structure or conveyance which becomes paramount**. If a structure or conveyance initially qualifies under this definition, and its **character** is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual occupancy. It is, therefore, immaterial whether the owner of an unoccupied dwelling has any intent to return to it.

Perkins, 682 So. 2d at 1084 (quoting district court's opinion) (emphasis added).

Here, the record reflects that the Defendant entered an old house that was in the late stages of being refurbished with new drywall, so it would look like a brand new house. (T. 36-37).

Although not currently occupied, it clearly was a building with a roof, "*designed to be occupied* by people lodging therein at night." § 810.011(2), Fla. Stat. While not occupied at the time of the crime, its *character* and *design* remained the same. Accordingly, the structure met the statutory definition of a dwelling.

Caselaw

In support of his argument to the contrary, the Defendant asks this Court to adopt the reasoning of the Second District Court of Appeal in Munoz v. State, 937 So. 2d 686 (Fla. 2d DCA 2006). There, the house was unoccupied at the time of the burglary, in the process of being remodeled from the ground up and essentially "gutted" – "no insulation or sheetrock, unfinished flooring, debris everywhere, stacks of plywood, exposed walls, and wires dangling from the ceiling," with "garbage, buckets, and work supplies on the floor." Id. at 687.

On appeal, the district court concluded that this house was no longer a dwelling; although it had a roof over it and was designed to be occupied by people, the court found that it failed to satisfy the *additional* requirement imposed by this Court in Perkins – a requirement that the building not be

substantially changed to the extent that it becomes unsuitable for lodging by people. Id. at 688-89.

Dissenting from this decision, then-Judge Canady concluded that the majority had misread Perkins. Id. at 690. The Perkins Court did not intend to impose this additional requirement of "suitability for lodging at the time," the dissenting opinion reasoned, but instead intended to address situations where the very character of the house had been changed:

> In context, the reference in Perkins to the requirement that a structure's " ' character ... not [be] substantially changed or modified to the extent that it becomes unsuitable for lodging,'" 682 So. 2d at 1084 (quoting Perkins, 630 So. 2d at 1181) (emphasis added), must be understood as a requirement that the **use for which the structure is designed** not be altered. What is in view is the possibility that a residential structure will be converted to a commercial or other nonresidential use. The change in "character" that the court envisions is a change in the designed purpose of the structure. **Such a change in character does not include circumstances which may temporarily render a structure uninhabitable but which**

> **do not alter the purpose for which the structure is intended to be used.** In the instant case, the character or the designed use of the structure remained unchanged even though the renovation project may have rendered the property temporarily unsuitable for habitation.

Id. at 691 (emphasis added). See also Gonzalez v. State, 724 So. 2d 126, 127 n.1 (Fla. 3d DCA 1998) (houses under construction were dwellings under burglary statute, where houses had roofs and were "designed" to be occupied); State v. Bennett, 565 So. 2d 803, 805 (Fla. 2d DCA 1990) (burglary of mobile home on sales lot constituted burglary of a dwelling where mobile home was "designed" to be used for habitation rather than for another use, such as office space).

The Fifth District Court of Appeal has agreed with this reasoning, addressing the Munoz opinion in a case where the defendant committed a burglary inside a house that was "designed to be occupied by people lodging therein at night," had an intact roof, and had been occupied as a dwelling in the recent past, but was undergoing interior renovations that rendered it temporarily uninhabitable. Michael v. State, 51 So. 3d 574, 575 (Fla. 5th DCA 2010). Recognizing that this house would not

qualify as a dwelling under the Munoz rationale, the court rejected that rationale:

> The issue before us is one of statutory construction. In our view, the statute in plain terms defines a structure that is designed to be occupied by people for lodging at night as a dwelling, even if temporarily rendered unsuitable for that use. The majority in Munoz added an additional element to the plain language of the statute which requires the state to also prove that the structure was habitable as a dwelling on the date of the offense. . . . **We agree with the well-reasoned dissent in Munoz, which concluded that Perkins does not require that this additional element be read into the statute, and explains why the statute should be read in accordance with its unambiguous terms.**

Id. (emphasis added).

The State submits that the dissenting opinion in Munoz more accurately reflects the intent of the language used by this Court in Perkins, avoids rewriting the Legislature's clear and unambiguous definition of the term "dwelling" as used in the burglary statute, and more fully respects the Legislature's intent in expanding this definition beyond the common law.

Florida has long recognized the elevated status of a home as the owner's "castle," and criminals who choose to capitalize on the vulnerability of a home have been deemed by the Legislature to be more dangerous to society. The bright-line definition of "dwelling" in the burglary statute readily protects this interest while giving ample notice to criminals

that they will not be able to rely on the fortuitous circumstance that a home they have entered happens to be undergoing some degree of renovation at the time of the crime. See also People v. Morales, 2012 WL 19456, *11-15 (Colo. Ct. App. Jan. 5, 2012) (collecting cases; concluding that Munoz dissent was more persuasive than majority opinion).

Finally, the Defendant contends that the lower court's construction of the statute ignores the "state of emergency" exception included therein – providing that under certain circumstances the term "dwelling" is expanded to include "such portions or remnants thereof as exist at the original site, regardless of absence of a wall or roof." § 810.011(2), Fla. Stat. According to the Defendant, this exception shows that when there is *not* an emergency the house must be habitable to constitute a dwelling. See Munoz, 937 So. 2d at 689.

Again, the dissenting opinion in Munoz addresses this argument in a logical manner that avoids rewriting the statute:

> The majority is unjustified in relying on the second sentence of the definition of dwelling in section 810.011(2) to transform the meaning of the first sentence of that definitional provision. . . .
>
> While the definition of dwelling was added to the statute in 1982, see ch. 82-87, § 1, Laws of Fla., the second sentence of section 810.011(2) was added effective June 1, 1993, to the definitional provision, see ch. 92-351, § 1, Laws of Fla. **The latter addition**

> **to the statute is designed to ensure that dwellings damaged during a state of emergency do not lose the protection of the penalties for burglary of a dwelling. Under this provision, a house that has lost its roof or has collapsed during a state of emergency would continue to be considered a dwelling.** The provision was necessary because under the definition in the first sentence of section 810.011(2), a structure is a not a dwelling unless it has a roof over it. Furthermore, a collapsed structure might fall outside the definition of dwelling because it would not be considered "a building."
>
> Accordingly, it is by no means necessary to accept the interpretation of dwelling adopted by the majority to make sense of the state of emergency provision. That provision deals with circumstances where a dwelling suffers such extensive structural damage during a state of emergency that it would no longer be covered by the definition of dwelling in the first sentence of section 810.011(2).

Id. at 692 (emphasis added).

This Court should reject the Defendant's strained interpretation of the plain language of the burglary statute and affirm the holding of the Fifth District Court of Appeal.

## ISSUE II

**THE DISTRICT COURT PROPERLY REJECTED WITHOUT DISCUSSION THE DEFENDANT'S CHALLENGE TO HIS CAR-JACKING CONVICTION.**

As his second point, the Defendant contends that the trial court erred in denying his motion for judgment of acquittal on the carjacking count. This claim was raised by the Defendant in the district court but not addressed in the court's opinion. Young v. State, 73 So. 3d 825 (Fla. 5th DCA 2011). Accordingly, the court's ruling on this issue was *not* raised as a basis for jurisdiction in this case. While this Court has jurisdiction to consider this issue, it is certainly not required to do so.

If this Court chooses to address this issue, it should affirm the lower court's decision rejecting this claim, as this decision is fully supported by the record and legally correct.

A motion for judgment of acquittal admits not only the facts in evidence, but every reasonable inference from the evidence favorable to the State. See, e.g., Proko v. State, 566 So. 2d 918, 920 (Fla. 5th DCA 1990). The credibility and probative force of conflicting testimony may not be determined on a motion for judgment of acquittal, and such a motion may only be granted where there is *no* view of the evidence which can sustain a conviction. Lynch v. State, 293 So. 2d 44, 45 (Fla.

1974); Hardwick v. State, 630 So. 2d 1212, 1213 (Fla. 5th DCA 1994). Once competent substantial evidence has been submitted on each element of the offense, the jury is left to decide the credibility of the witnesses. Coday v. State, 946 So. 2d 988, 996 (Fla. 2006). Applying that standard here, the trial court properly denied the Defendant's motion.

The Defendant contends that there was no carjacking because the victim was not in possession of the vehicle when it was taken – the keys were taken from the victim while he was inside the house, and the vehicle was parked outside. This argument should be rejected.

A carjacking takes place when the State establishes the following three elements: "[1] the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, [2] with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, [3] when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.133(1), Fla. Stat. Further, "[a]n act shall be deemed 'in the course of the taking' [under element 3] if it occurs either *prior to*, contemporaneous with, or subsequent to the taking of the property and if it and the

act of taking constitute a *continuous series of acts or events*." § 812.133(3)(b), Fla. Stat. (emphasis added).

The State submits that the instant case is factually similar to Baptiste-Jean v. State, 979 So. 2d 1091 (Fla. 3d DCA 2008). In that case:

> after tying and beating the victim while attempting to discover the location of valuables in his home, Baptiste-Jean and an accomplice pulled his car keys from his pocket, continued to beat him, and left the house taking the stolen items with them. Then, after loading the car which was parked in the driveway, the perpetrator started the vehicle with the keys and drove away.

Id. at 1092.

The defendant's carjacking conviction was affirmed on appeal, because "while the violence involved in taking the keys may have ... occurred 'prior to' stealing the car, it took place within a logically interrelated 'continuous series of acts or events,' and thus 'in the course of the taking' of the vehicle itself." Id. (citations omitted). Just as in the instant case, "the keys were forcibly taken directly from the victim's person and the car was stolen with the victim's knowledge - indeed,

within his hearing." Id. See also Carter v. State, 23 So. 3d 1238, 1242 (Fla. 4th DCA 2009) (affirming carjacking conviction where defendant's beating of victim was intertwined with taking of taxicab), rev. denied, 39 So. 3d 320 (Fla. 2010).

Defendant's reliance on Flores v. State, 853 So. 2d 566 (Fla. 3d DCA 2003), is misplaced. There, the defendant's carjacking conviction was reversed because the theft of the car was obviously an *afterthought* to the *purse* robbery inside the hair salon; the defendant told the victim he wanted cash, and the victim was confined to the bathroom when the car was stolen, not even aware it was taken.

Here, in contrast, the victim saw the truck being driven away by the Defendant (T. 44), and there was no indication the Defendant had any specific interest in a particular item in the victim's possession when he forcibly took the victim's keys and other possessions – in fact, the Defendant left the wallet and credit cards alone as he drove around in the truck for several days, indicating that the truck itself was his main target. (T. 46).

The trial court properly allowed the jury to determine whether the force occurred during the course of the taking, and

the Defendant's conviction and sentence were properly affirmed below.

## CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to James R. Wulchak, counsel for Petitioner, 444 Seabreeze Boulevard Suite 210, Daytona Beach, Florida 32118, by hand delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this 3rd day of July, 2012.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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