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IN THE SUPREME COURT OF FLORIDA

DEAN KENNETH ROCKMORE,

Petitioner,

v. CASE NO. SC12-577

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts as provided by Petitioner, but would supplement them with the following:

Respondent, Dean Rockmore, was charged by third amended information with one count of robbery with a firearm. (R55, Vol I). It was alleged the robbery was committed on March 29, 2009. Id.

The jury trial commenced on April 14, 2010. (T1, Vol I). Stephen Arnold (Mr. Arnold) revealed he was employed as a loss prevention associate for Wal-Mart from June of 2007 until March of 2010. (T63,64, Vol I). Mr. Arnold was working at the DeLand Wal-Mart on March 29, 2009, around 8:00 p.m. when he noticed Petitioner enter the store and head to the men's department. (T65,74, Vol I). Petitioner was wearing pants, a T-shirt, and a green and black Jacksonville Jaguars jacket. (T66, Vol I). Mr. Arnold was about 15 to 20 feet away from Petitioner when Mr. Arnold observed Petitioner place some T-shirts into his jacket and shove some socks down the front of his pants. (T68-69, Vol I). The total value of the property was fourteen or fifteen dollars. (T70, Vol I).

Mr. Arnold continued to watch Petitioner as Petitioner walked around customer service and passed by the last point of sale. (T71, Vol I). Mr. Arnold had apprehended between two to three hundred people prior to the incident with Petitioner. (T72, Vol I). At this point, Mr. Arnold approached Petitioner in the vestibule area

between the glass doors. Id. Mr. Arnold introduced himself and advised Petitioner why he was making contact with Petitioner. (T73, Vol I). Mr. Arnold wanted Petitioner to go with him to the office where Mr. Arnold would obtain Petitioner's information. (T74,75, Vol I). At first Petitioner seemed compliant, but when a group of people entered the store Petitioner fled out the doors. (T74, Vol I). Petitioner turned left, or south, toward a sports store and into the parking lot. (T75,76, Vol I).

Mr. Arnold chased after Petitioner, after handing over his cellular telephone and keys, and told the assistant manager to call the police. (T76-77, Vol I). Mr. Arnold's plan was to stall Petitioner until the police arrived. (T77, Vol I). Mr. Arnold was keeping up with Petitioner at a fast walk and tried to reason with Petitioner, telling Petitioner he just wanted the merchandise back and Petitioner's information. (T77,78, Vol I). When Petitioner began trying to take off his jacket, Mr. Arnold pulled on the jacket and the T-shirts came out. (T77,78, Vol I). Petitioner told Mr. Arnold there was his merchandise and he was not going to come with Mr. Arnold. (T78, Vol I).

Petitioner still had the socks, so Mr. Arnold continued to follow Petitioner. (T78-79, Vol I). Petitioner began heading toward a red Festiva parked behind a Tire Kingdom. (T79, Vol I). Mr. Arnold observed a man in the driver's seat and a woman in the front passenger's seat. Id. When Petitioner went to the driver's side,

the driver motioned for Petitioner to go around. Id. Mr. Arnold was approximately five feet away from Petitioner and told Petitioner he needed to come with Mr. Arnold. (T80, Vol I). Mr. Arnold was going to try to stop Petitioner from entering the car, when Petitioner turned around, stated something like "let it go, let it be, you don't want none", and then lifted up his shirt revealing a gun. (T80, Vol I).

Mr. Arnold recalled that the gun was shiny and silver and, while he could not see the whole gun, he believed it was a revolver. (T82, Vol I). He definitely saw the handle and knew it was a gun. Id. Mr. Arnold backed off immediately, observed Petitioner get into the back seat, and watched the vehicle leave. (T83-84, Vol I). Mr. Arnold retrieved the T-shirts and the Jaguar jacket. (T84, Vol I). On his way back to the store, Mr. Arnold met up with a DeLand police officer. Id. The next morning, Mr. Arnold identified Petitioner in a photographic array. (T85, Vol I). Mr. Arnold immediately recognized Petitioner. Id.

On cross-examination, Petitioner asked Mr. Arnold about his deposition wherein he had stated that Petitioner dropped the socks, rather than the T-shirts. (T123-124, Vol I). Mr. Arnold explained that he simply misstated what he meant to say, i.e., socks rather than T-shirts. (T124, Vol I).

Cleveland Wilson (Mr. Wilson) revealed that he was not that well acquainted with Petitioner, but knew a friend of Petitioner's,

Myra Taylor. (T129, Vol I). Mr. Wilson and Ms. Taylor stopped at a convenience store where Petitioner approached the car and asked for a ride to Wal-Mart. (T130, Vol I). Mr. Wilson dropped Petitioner off at Wal-Mart and left for a few minutes. Id. Upon returning, Mr. Wilson observed Petitioner walking between the bank and a tire store. (T131, Vol I). Mr. Wilson saw another gentleman behind Petitioner, and they were both walking briskly. Id. The two were having a discussion but because of construction work Mr. Wilson could not hear them. Id. When Petitioner approached the driver's door, Mr. Wilson told him to get into the vehicle. (T132, Vol I). Petitioner moved to the passenger's side, turned around, lifted his shirt, and told the guy "You don't want none of this." (T132, Vol I). Mr. Wilson saw something silver, but could not tell what it was. (T133, Vol I). The other gentleman backed away with his hands up. Id. Petitioner got into the car and Mr. Wilson dropped Petitioner off at the same place they had picked him up. (T133-134, Vol I). Mr. Wilson admitted he had one felony conviction and one misdemeanor conviction. (T128, Vol I).

Petitioner was picked up on April 1, 2009, by Officer Jason Florence who read Petitioner his Miranda rights from a card. (T156, Vol I). After Petitioner waived his rights and agreed to talk, he admitted to Officer Florence that he had gone to Wal-Mart, shoplifted some clothing, and then left the store. (T157,158, Vol I). Petitioner advised the officer that, once he was outside,

contact was made with him by a security officer, but that he dropped the clothing and ran. (T158, Vol I). Petitioner denied robbing anybody. Id.

In moving for a judgment of acquittal, Petitioner argued that the property was abandoned before the threat was made and, thus, there was no crime of robbery, referring to Mr. Arnold's having stated at his deposition that the socks had fallen out while Petitioner was fleeing. (T209,213-216, Vol II). The State responded by reminding the court that Mr. Arnold had Petitioner in his sights the whole time, that this was a continuing course of events, and that the robbery was ongoing from the moment Petitioner ran from the store until the gun was displayed. (T212-213, Vol II). The court denied the motion finding that there was conflicting testimony which was a jury issue and, in viewing the evidence in the light most favorable to the State, the jury could find the existence of the elements of the offense beyond a reasonable doubt. (T216, Vol II).

Ms. Taylor testified that she never saw a gun and had never seen Petitioner in possession of a firearm. (T225,226, Vol II). Petitioner told them when he got in the car that he had some stuff, but that it had fallen out while he was running away. (T226, Vol II). She also admitted to having four prior felony convictions and two prior convictions for dishonesty or theft. (T227, Vol II).

Petitioner admitted he stole a pack of T-shirts and socks,

which he placed in his waistband. (T239, Vol II). Mr. Arnold followed him and Petitioner testified that he threw the packet of T-shirts down. (T239,240, Vol II). Petitioner contended that Mr. Arnold threatened to kill Petitioner if Petitioner did not return the merchandise. (T229-230, Vol II). He took his jacket off because he was hot and tired from running. (T240,241, Vol II). Petitioner claimed the socks fell out by themselves before he threw down the T-shirts. (T241, Vol II). Petitioner got inside the car but could not remember if he said anything to Mr. Arnold. (T242, Vol I). Petitioner told Mr. Wilson to just go. Id. Petitioner admitted he had been convicted of at least four felonies and ten crimes of dishonesty. (T244, Vol I).

Petitioner requested a special jury instruction on abandonment, stating that if the jury finds that Petitioner abandoned the property before he used force, the jury cannot find that his use of force in the act of taking constituted a continuous series of acts or events and Petitioner must be found not guilty of robbery. (T173, Vol II). The State objected. (T174, Vol II). The issue was deferred until later. Id.

During a recess, the issue was brought up again, and the State agreed Petitioner could argue in closing about the defense of abandonment, but objected to a special jury instruction arguing that the standard jury instruction adequately covered the law. (T245-246, Vol II). The judge disagreed with the State and advised

the attorneys that Petitioner's proposed instruction had been rewritten by the court. (T247,249, Vol II). The judge had reviewed case law on abandonment and concluded that the issue was the voluntariness of the abandonment. Id. The court found it to be a factual question for the jury to decide whether Petitioner voluntarily abandoned the property and whether it was a complete abandonment. (T248, Vol II). The court's first draft read: "If you find that the defendant took the merchandise without any force and had completely and voluntarily abandoned the property before he used force, you should find him not guilty of robbery with a firearm, deadly weapon, or weapon." (T251, Vol I). The State argued that robbery involves the perception of the victim and asked what if the victim was unaware of the abandonment. (T251, Vol I).

The judge agreed that a well-founded fear in the mind of the victim is an element of robbery and that is why the court believed that abandonment does not address the crime of robbery. (T251-252, Vol II). The court explained that while the defense of abandonment would address the use of force, it did not address all of the elements of robbery. (T252, Vol II). The State suggested that the instruction could include a line about the victim being aware of the abandonment. Id. Petitioner argued that the victim had testified that Petitioner had stated to the victim to take the stuff back. (T252, Vol II). However, the court noted that the victim had testified that one of the items was dropped, but that

would go to the voluntariness of the abandonment. (T253, Vol II). The court agreed to include a line regarding the victim's knowledge of the abandonment, which Petitioner objected to for the record. (T253, Vol II). The judge then read the revised instruction:

> If you find that the defendant took the merchandise without any use of force and had completely and voluntarily abandoned the property before he used any force and the victim was aware of such abandonment, you should find the defendant not guilty of robbery with a firearm, deadly weapon, or weapon.

(T253-254, Vol II). This same instruction was given to the jury by the court. (T308, Vol II; R61, Vol I).

During closing argument, the State contended Petitioner did not voluntarily abandon the property; instead, the property fell out, and Petitioner still had possession of the socks with him when he threatened the victim with the gun. (T270-271, Vol II). During the defense's closing, defense counsel argued that Petitioner told four people he abandoned the property. (T285, Vol II). Later, defense counsel argued that Petitioner abandoned the crime by dropping the property on his own, so that even if there was some sort of threat afterwards, there was no robbery. (T298,299, Vol II).

The jury found Petitioner guilty as charged with a special finding that Petitioner was in actual possession of a firearm. (T326, Vol II;R76, Vol I). Petitioner was adjudicated guilty and sentenced to life in prison. (R111-116, Vol I).

After briefing on jurisdiction wherein the State argued that there was no express and direct conflict on the face of the opinions, this Court accepted jurisdiction. Briefing on the merits followed.

SUMMARY OF THE ARGUMENTS

POINT I (RESTATED): It remains the State's position that there is no express and direct conflict between Rockmore v. State, 37 Fla. L. Weekly D533 (Fla. 5th DCA March 2, 2012), and Peterson v. State, 624 So. 3d 686 (Fla. 2d DCA 2009), as the Rockmore court factually distinguished Peterson and the language in Rockmore finding conflict with Peterson was *dicta* since a special jury instruction was given in Rockmore. Should this Court retain jurisdiction, the Fifth District Court's holdings that Petitioner was not entitled to the abandonment instruction and the modifications made by the trial judge were either proper or constituted invited or harmless error at worst and should be affirmed. Assuming this Court decides to address the dicta in Rockmore, the State would urge this Court disapprove the legally erroneous interpretation and application of the abandonment defense, as reflected by the jury instruction approved by the Peterson court. Logically, simply discarding the stolen property after detection by law enforcement or store personnel in order to facilitate flight should not qualify as an abandonment or renunciation of a robbery since such "abandonment" was hardly voluntary or complete.

Here, Petitioner's so-called abandonment of some of the property and subsequent display of the firearm was part of a "continuous series of acts or events" beginning with his taking of the property, his flight from the store and the loss prevention personnel, the removal of his jacket causing some of the stolen

property to fall out, and ending with the display of a firearm. The Fifth District Court properly concluded that the focus should be on whether there was a "continuous series of acts or events" rather than the disposal of property. Moreover, any so-called abandonment of the stolen property was not complete or voluntary. Accordingly, the Fifth District's decision in this case should be affirmed.

POINT II (RESTATED): Petitioner contends the Fifth District Court of Appeal erred by affirming the trial court's denial of his motion for judgment of acquittal, arguing that he abandoned the property prior to the use of force and, thus, he could not be convicted of robbery. However, when considering the evidence in a light most favorable to the State, the evidence established that the so-called abandonment of the property and subsequent display of the firearm was part of a "a continuous series of acts or events." Moreover, there was a conflict in the evidence whether all of the property had been dispossessed by Petitioner before the use of force and any so-called abandonment of the stolen property was not complete or voluntary. The Fifth District Court of Appeal properly affirmed the trial court's denial of the motion for judgment of acquittal.

ARGUMENTS

POINT I (RESTATED)

NOT ONLY IS THE OPINION IN PETERSON NOT IN EXPRESS AND DIRECT CONFLICT WITH ROCKMORE, BUT THE FIFTH DCA PROPERLY FOUND NO ENTITLEMENT TO THE ABANDONMENT INSTRUCTION; AND ASSUMING THIS COURT WISHES TO ADDRESS THE DICTA IN ROCKMORE, THE FIFTH DCA CORRECTLY FOUND THE INTERPRETATION AND APPLICATION OF THE ABANDONMENT DEFENSE IN PETERSON TO BE LEGALLY ERRONEOUS.

While acknowledging this Court's decision to accept jurisdiction in this case, it remains the position of the State that there is no express and direct conflict on the face of the decision under review. In Rockmore v. State, 37 Fla. L. Weekly D533 (Fla. 5th DCA March 2, 2012), the Fifth District Court held:

> Appellant argues in the alternative that he was entitled to a special instruction consistent with his version of the facts and urges that his proffered instruction was a correct statement of the law under Baker and Simmons and should not have been modified by the trial court. Appellant's argument and proposed jury charge presents the question of whether the "abandonment" of stolen goods by a thief who is being pursued is a sufficient break in the "continuous series of events" such that a robbery conviction cannot be sustained. Consistent with the *dicta* in Baker, Appellant contends that Baker and Simmons apply anytime an escaping thief discards or drops the ill-gotten-gains before employing force or threatened force to evade capture by someone in pursuit. We think Baker and Simmons can be distinguished.
>
> Simmons can be distinguished because the defendant there had been apprehended and escorted by employees back inside the store. 551 So. 2d at 608. This was an intervening event that interrupted the defendant's

> volitional course, thereby negating the continuity requirement of the statute. Baker is also distinguishable. There, the property was discarded in the shopping mall before the ensuing flight began. 540 So. 2d at 848. Arguably, the "taking" ended **before** the next act of flight began. Thus, the series of acts was not continuous because the defendant ceased the crime of theft before he began the flight. The *dicta* in Baker - that a fleeing thief must be in continuous possession of the stolen item(s) until the point of violence to constitute robbery - was unnecessary to the holding and in contravention of the plain language of the statute. Under this construction, if a fleeing thief drops the merchandise to retrieve a gun and shoot the pursuer, it is not robbery. We specifically reject the Baker *dicta* because it is repugnant with the plain and unambiguous language of the statute and legislative history outlining the reason for the statutory amendment.

Id. at D534-535. (emphasis in original). In closing, the Fifth District Court stated:

> We acknowledge conflict with Peterson v. State, 24 So. 3d 686, 690 (Fla. 2d DCA 2009). **Although Peterson is in the Baker/Simmons category of cases and can be distinguished for the same reasons, we disagree with its conclusion regarding the necessity and propriety of the special instruction regarding "abandonment."**

Id. at D535 (Emphasis added). As the instant case and Peterson are factually distinguishable on the face of the opinions, the Fifth District Court's opinion in Rockmore v. State, 37 Fla. L. Weekly D533 (Fla. 5th DCA March 2, 2012), does not expressly and directly conflict with Peterson.

Moreover, in Peterson, the Second District Court reversed the robbery conviction, *inter alia*, because the defendant was denied a

special jury instruction on abandonment. Id. at 690. However, the jury in Petitioner's case received a special jury instruction on abandonment. Rockmore, 37 Fla. L. Weekly at D534. Accordingly, unlike the Peterson case, a special jury instruction on abandonment was given in this case, just not the legally erroneous special instruction Petitioner requested. Thus, the language in Rockmore finding conflict with Peterson regarding the necessity of the abandonment instruction is pure dicta and is "without force as precedent." State ex rel. Biscayne Kennel Club v. Board of Bus. Regulation of Dept. of Bus. Regulation of State, 276 So. 2d 823, 826 (Fla. 1973). Moreover, even assuming this Court agreed with the Peterson opinion that similarly situated defendants are entitled to an abandonment instruction, such a ruling by this Court would not change the result in this case and Petitioner would be entitled to no relief. Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (declining to exercise conflict jurisdiction because conflicting language was obiter dicta).

Notwithstanding the foregoing, this Court should affirm the findings which are not dicta, i.e., that Petitioner was not entitled to a special jury instruction on abandonment and that the modifications made by the trial judge were either proper or constituted invited or harmless error at worst.

Section 812.13(1), Florida Statutes, sets forth the elements of the crime of robbery. Robbery is defined as "the taking of money or other property which may be the subject of larceny from the

person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (2009). An act is considered "'in the course of the taking' if it occurs 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." § 812.13(3)(b), Fla. Stat. (2009). Thus, a taking of property that otherwise would be considered a theft constitutes robbery when in the course of the taking either force, violence, assault, or putting in fear is used. It has long been recognized that it is the element of threat or force that distinguishes the offense of robbery from the offense of theft. Royal v. State, 490 So. 2d 44, 46 (Fla. 1986), receded from on other grounds, Taylor v. State, 608 So. 2d 804 (Fla. 1992); Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922). Under section 812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events. Mahn v. State, 714 So. 2d 391, 396-397 (Fla. 1998).

Section 812.13, Florida Statutes, incorporates the modern view that a robbery can be proven by evidence of force used to elude the victim or to retain the victim's property once it has been taken.[1]

[1]While not determinative of legislative intent, it was explained in the legislative staff analysis of the proposed amendment in 1987, that the purpose of the amendment was "to expand robbery to include force occurring in an attempt to take money or

See Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 8.11(e) (1986). The rationale for this view is that the force used in the flight after the taking of property is no different from that used to effect the taking. See, e.g., Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995)(robbery conviction proper even if taking and subsequent murder not motivated by desire to steal property but to escape apprehension).[2] As explained in the Comments to the Model Penal Code, "the thief's willingness to use force against those who would restrain him in flight suggests that he would have employed force to effect the theft had the need arisen." Model Penal Code § 222.1, Comment at 104 (1980). The Rockmore court pointed out that, "[t]he statute defines 'in the course of committing the robbery' to expressly include the 'flight' after a robbery or attempted robbery." Rockmore, 37 Fla. L. Weekly at D535. Thus, where a weapon is alleged to have been used, the standard jury instruction advises a jury it must decide if "in the course of committing the robbery" the defendant carried a weapon. Fla. Std. Jury Instr. (Crim.) 15.1. The jury is also informed that "[a]n act

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property, **or in flight after the attempt or taking.**" See Fla. H.R. Comm. on robbery, HB 758 (1987) Staff Analysis 1 (final June 26, 1987)(on file with Comm.)(emphasis added). Rockmore, 37 Fla. L. Weekly at D536 n.3.

[2]This Court has held that the specific intent to commit robbery is the intent to deprive an owner of property either permanently or temporarily. Daniels v. State, 587 So. 2d 460, 462 (Fla. 1991). The specific intent of robbery was not modified in 1987; instead, the timing of the use of force or violence was simply expanded.

is 'in the course of committing the robbery' if it occurs in an attempt to commit robbery **or in flight** after the attempt or commission." Id. (Emphasis added).

Florida recognizes the common-law defense of abandonment, also referred to as withdrawal or renunciation. Smith v. State, 424 So. 2d 726, 732 (Fla. 1982); Laythe v. State, 330 So. 2d 113, 114 (Fla. 3d DCA 1976). The law distinguishes between a "voluntary abandonment" and an "involuntary abandonment." According to Professor LaFave, "The cases are in agreement that what is usually referred to as involuntary abandonment is no defense." 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 6.3(b), at 53-54 (1986). "An involuntary abandonment occurs when the defendant fails because of unanticipated difficulties in carrying out the criminal plan at the precise time and place intended and then decides not to pursue the victim under these less advantageous circumstances, [or] ... when the defendant withdraws because of a belief that the intended victim has become aware of his plans, or because he thinks that his scheme has been discovered or would be thwarted by police observed in the area of the intended crime." Id. (footnotes omitted). In order to constitute a defense, the abandonment must be complete and voluntary. See id. at 56; see also Carroll v. State, 680 So. 2d 1065, 1066 (Fla. 3d DCA 1996) (noting that the law distinguishes between a voluntary abandonment and an involuntary abandonment, and an involuntary abandonment is not a

defense); cf. § 777.04(5) Fla. Stat. (2009)("It is a defense to a charge of criminal attempt, criminal solicitation, or criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant:(a) Abandoned his or her attempt to commit the offense or otherwise prevented its commission"). A renunciation "is not voluntary if 'motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose'" and "is not complete if 'motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.'" 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 6.3(b), at 56 (1986).

Here, Petitioner requested a special jury instruction on abandonment which stated that if the jury finds Petitioner abandoned the property before he used force, the jury cannot find that his use of force in the act of taking constituted a continuous series of acts or events and Petitioner must be found not guilty of robbery. The State objected. The issue was deferred until later. During a recess, the issue was brought up again and the State agreed Petitioner could argue in closing about the defense of abandonment, but objected to a special jury instruction, arguing that the standard jury instruction adequately covered the law. The

judge disagreed with the State and advised the attorneys that Petitioner's proposed instruction had been rewritten by the court. The judge had reviewed case law on abandonment and concluded that the issue was the voluntariness of the abandonment. The court found it to be a factual question for the jury to decide whether Petitioner voluntarily abandoned the property and whether it was a complete abandonment. The court's first draft read: "If you find that the defendant took the merchandise without any force and had completely and voluntarily abandoned the property before he used force, you should find him not guilty of robbery with a firearm, deadly weapon, or weapon." (T251, Vol I). The State argued that robbery involves the perception of the victim and asked what if the victim was unaware of the abandonment.

The judge agreed that a well-founded fear in the mind of the victim is an element of robbery and that is why the court believed that abandonment does not apply to the crime of robbery. The court explained that while the defense of abandonment would address the use of force, it did not address all of the elements of robbery. The State suggested that the instruction could include a line about the victim being aware of the abandonment. Petitioner argued that the victim had testified that Petitioner had stated to the victim to take the stuff back. However, the court noted that the victim had testified that one of the items was dropped, but that would go to the voluntariness of the abandonment. The court agreed to include a line regarding the victim's knowledge of the abandonment,

which Petitioner objected to for the record. The judge then read the revised instruction:

> If you find that the defendant took the merchandise without any use of force and had completely and voluntarily abandoned the property before he used any force and the victim was aware of such abandonment, you should find the defendant not guilty of robbery with a firearm, deadly weapon, or weapon.

(T253-254, Vol II). This same instruction was given to the jury by the court. Accordingly, unlike Peterson, who requested but did not receive a special jury instruction on abandonment, Petitioner can only complain that the special instruction he requested was modified by the trial court.

At trial, Petitioner testified the socks fell out by themselves before he threw down the T-shirts and Petitioner's own witness testified that Petitioner told her that the property dropped out while he was running away from the store's loss prevention agent. These facts reveal that, unlike the appellant in Peterson, 24 So. 3d at 688, who claimed to have dispossessed himself of all of the stolen property into his shopping basket before using force to flee, Petitioner never voluntarily dispossessed himself of all of the stolen property. Clearly, dumping or losing stolen property while being pursued by a store's loss prevention officer should not and does not constitute a complete and voluntary renunciation of a criminal purpose and, thus, Petitioner was not entitled to an abandonment defense

instruction. Carroll v. State, 680 So. 2d at 1066 ("In the present case the evidence showed involuntary abandonment, not voluntary abandonment. After an encounter with a uniformed police officer in the K-Mart store, defendant waited until the officer walked away and then commenced to unload from his duffle bag two power drills, still in the original boxes, which he had taken from store inventory kept in an "employees only" storage closet. The requested jury instruction was properly refused"); see also Andrade v. State, 564 So. 2d 238, 239 (Fla. 3d DCA 1990)("[T]he defendant's requested jury instruction on the defense of abandonment was properly denied because there was no evidence adduced at trial to support such a defense and the proposed instruction was otherwise incomplete and misleading.").

Based on the facts of this case, Petitioner was not entitled to an abandonment defense instruction since he never voluntarily dispossessed himself of all of the property. Moreover, by requesting and receiving a special jury instruction on a defense he was not entitled to, he either invited any error or it was harmless beyond a reasonable doubt. See Etheridge v. State, 415 So. 2d 864, 865 (Fla. 2d DCA 1982)("The trial court's instruction on abandonment erroneously gave the jury the opportunity to consider Etheridge's abandonment as a legitimate defense to conspiracy. The jury refused to acquit even with this erroneous instruction. Accordingly, we affirm the convictions and sentences of both appellants."); see also Bass v. State, 58 Fla. 1, 50 So. 2d 531,

533 (Fla. 1909)(denying claim for relief based upon court's modification of requested special instruction because requested instruction was clearly erroneous). As such, the Fifth District Court properly held that Petitioner was not entitled to a special instruction based on the facts in this case and, since he received an instruction, any modification that constituted error was invited or harmless.

Should this Court wish to address the issue raised in Rockmore's dicta regarding the abandonment defense in the context of a robbery charge, it is the State's position that this Court should adopt the interpretation set forth in the Rockmore opinion. As the Fifth District Court's opinion reveals, characterizing the abandonment of property as the abandonment defense in the context of a robbery is a misnomer.[3] This misnamed defense was first presented in State v. Baker, 540 So. 2d 847 (Fla. 3d DCA 1989), and Simmons v. State, 551 So. 2d 607 (Fla. 5th DCA 1989), which were issued two years after the robbery statute was modified in 1987. In Baker, the district court affirmed the dismissal of a robbery charge where the evidence revealed that the property was taken without the use of force, the property was abandoned after the appellant realized security guards were watching him, and force was used to flee. Id. at 848. Nine months later, the Fifth District

[3]As the Rockmore court noted, the abandonment of property refers to the relinquishment of an owner's right to property, and a thief cannot abandon property he or she does not own. Id. at D536 n.2.

Court, relying upon Baker, disapproved the denial of a motion to dismiss a robbery charge where the evidence revealed that the property was taken without force, the defendant was escorted back into the store by store employees where, once inside, she threw the property to the floor, and then struggled with employees as they attempted to escort her to the store's security office. Simmons v. State, 551 So. 2d at 608. The district courts in Baker and Simmons concluded that because the use of force was not a part of a continuous series of acts or events involved with the taking of the property, the evidence could not sustain a robbery conviction. In other words, an abandonment of the stolen property broke the chain of events precluding a robbery conviction. The Rockmore court easily distinguished Baker and Simmons, since, here, the merchandise dropped from Petitioner's person when his jacket was grabbed by the loss prevention officer, whereas in Baker and Simmons, the appellants put the property back or threw it down, respectively, upon being noticed or caught by authorities.

In Peterson, the appellant was observed by Dollar General Store personnel putting items from the socks and underwear aisle into the waistband of his pants. Id. at 688. The police were called, and the store's door secured. Id. However, before the police arrived, appellant approached the door, left his shopping basket, and forced his way out of the store by pushing the employee aside. Id. He then escaped in a car that pulled up to the front of the store. Id. Peterson contended he had abandoned the property

into his shopping basket before fleeing the store, so that the act of taking and use of force were not a continuous series of acts or events. Id. In reversing the conviction, the Second District Court found, *inter alia*, that the appellant was entitled to a special instruction requested by the defense which read: "If it is established that the property was abandoned prior to the use of force then you must find the Defendant not guilty of robbery." Id. at 689. This is similar to the instruction requested by Petitioner.

Here, the alleged abandonment of the property occurred during Petitioner's flight from the loss prevention officer, even accepting Petitioner's version of events that losing the socks and throwing the T-shirts while being chased by the loss prevention officer constituted an abandonment. However, there was no break in the continuous series of acts or events beginning with the unlawful taking of the items, the flight from the store and from the loss prevention officer, the dropping of the T-shirts, and ending with the display of the gun. Thus, Petitioner was not entitled to a special instruction on abandonment, especially an instruction as approved by Peterson which would allow a defendant to go free simply through serendipity that the property dropped as the defendant was being grabbed or apprehended, followed by the use of force.

The interpretation or application of the so-called abandonment defense found in Baker, Simmons, and Peterson ignores both the plain language of both the robbery statute and the abandonment

defense. As to the robbery statute, it erroneously focuses on the defendant's possession of the stolen property rather than whether there was a "continuous series of acts or events." In Baker, Simmons, Peterson, and herein, the theft of the property was completed at the time of the so-called abandonment, since theft is defined as the taking of property to either temporarily or permanently deprive the owner of his benefit from or use of the property. The question then arises regarding where the line is drawn and does any amount of time have to elapse between the "abandonment" of the property and the use of force or can the two occur simultaneously? For example, a defendant and his friend steal DVD's at a store and, during the use of force out in the parking lot, the stolen items fall out of the defendant's clothing. The defendant in that case argued that he was not guilty of robbery for the simple reason that the force used was only to escape and not to maintain possession of the property. Stuckey v. State, 972 So. 2d 918, 920 (Fla. 5th DCA 2007). Would that entitle Stuckey to an abandonment instruction under Baker, Simmons, and Peterson since his intent in the use of force, according to the defendant, was only to escape and not to maintain possession of the property?

Most glaringly, the Peterson instruction ignores the law regarding the abandonment defense, which requires that any abandonment be voluntary, meaning not done to avoid detection or capture, and complete, meaning the commission of the crime is not simply delayed until a more fortuitous time. In Baker, Simmons, and

Peterson, the appellants' dispossession of the property was not voluntary in that it occurred after the appellants were discovered by either store personnel or security and to facilitate flight rather than manifesting a complete and voluntary renunciation of his or her criminal purpose. As such, there was no lawful abandonment as that defense requires. See Carroll v. State, 680 So. 2d at 1066; see also Andrade v. State, 564 So. 2d 238, 239 (Fla. 3d DCA 1990).

The abandonment defense logically requires voluntariness. If a potential robber does voluntarily renounce or abandon his or her intent to commit the crime of robbery through dispossession of the stolen property, the "abandonment" must be because of the independent determination to abandon the intent to commit the crime, rather than discovery by store personnel or security. Moreover, a true abandonment or renunciation would not be immediately followed by an attempt to flee along with the willingness to use force or threats to facilitate the escape. The willingness to flee and employ force or threats in order to make the escape demonstrates there has been no abandonment or renunciation of his or her criminal purpose.

Accordingly, the interpretation and application of the abandonment defense in Baker and Simmons, and as manifested in the jury instruction in Peterson, are legally erroneous, as correctly pointed out in dicta by the Fifth District Court. The focus should be on whether there was a continuous series of acts or events,

rather than the robber's self-serving action in divesting himself or herself of possession of the property in order to facilitate an escape or flight after discovery by store personnel or security.

Based on the foregoing, as the Peterson and Rockmore opinions are factually distinguishable and the language in Rockmore finding conflict with Peterson regarding the necessity of the abandonment instruction is pure dicta, there is no direct and express conflict on the face of the opinions. Moreover, the Fifth District Court's decision in this case that Petitioner was not entitled to a special jury instruction on abandonment and the modifications made by the trial judge were either proper or constituted invited or harmless error at worst, should be affirmed. Additionally, if this Court chooses to address the dicta regarding the legally erroneous interpretation and application of the abandonment defense in Peterson, this Court should adopt the interpretation that, as applied to the crime of robbery, the proper focus should be on whether the defendant's actions were all part of a continuous series of acts or events and not whether the property was abandoned, discarded, or dropped.

POINT II (RESTATED)

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL.

Petitioner also contends the Fifth District Court of Appeal improperly affirmed the trial court's denial of his motion for judgment of acquittal. It is well established that in reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. See Pagan, 830 So. 2d at 803. There is sufficient evidence to sustain a conviction 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. See Banks v. State, 732 So. 2d 1065 (Fla. 1999). Or, in other words, the general rule established in Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974), is that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." See also Gudinas v. State, 693 So. 2d 953 (Fla. 1997); Barwick v. State, 660 So. 2d 685 (Fla. 1995); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Taylor v. State, 583 So. 2d 323 (Fla. 1991).

In moving for a judgment of acquittal, Petitioner argued that the property was abandoned before the threat was made and, thus,

there was no crime of robbery, referring to Mr. Arnold's having stated at his deposition that the socks had fallen out while Petitioner was fleeing. The State responded by reminding the court that Mr. Arnold had Petitioner in his sights the whole time, that this was a continuing course of events, and that the robbery was ongoing from the moment Petitioner ran from the store until the gun was displayed. The court denied the motion finding that there was conflicting testimony which was a jury issue and, in viewing the evidence in the light most favorable to the State, the jury could find the existence of the elements of the offense beyond a reasonable doubt. Petitioner contends the Fifth District Court erred by affirming the trial court's denial of his motion for judgment of acquittal.

When taking the evidence in a light most favorable to the State, the evidence established that the taking of the property, the flight from the store and store personnel, the dropping of some of the stolen property, and, finally, the display of the firearm constituted a "continuous series of acts or events." The victim testified that he pulled on the jacket while Petitioner was attempting to remove the jacket and the package of T-shirts fell out. Petitioner's own witness testified that Petitioner told her that the property dropped out while he was running away from the store's loss prevention agent and not that Petitioner voluntarily divested himself of the property. Moreover, the victim explained that he continued to follow Petitioner because Petitioner still had

some of the stolen property, i.e., the socks. Accordingly, the trial court properly denied the motion for judgment of acquittal. See, e.g., Lemus v. State, 641 So. 2d 177 (Fla. 5th DCA 1994)("Once the issue was presented to the jury, it was a factual issue for the jury to determine whether or not there was a continuous series of acts or events to prove the elements of robbery....The facts, as determined by the jury, are that the act of force by Lemus was continuous with her act of taking the merchandise")(citations omitted).

Furthermore, there was a conflict in the evidence regarding whether Petitioner retained possession of the socks or the T-shirts, and the credibility of witnesses is solely a jury question. See, e.g., Fitzpatrick v. State, 900 So. 2d 495, 508 (Fla. 2005)("The fact that the evidence is contradictory does not warrant a judgment of acquittal because the weight of the evidence and the witnesses' credibility are questions solely for the jury."). In considering the evidence in a light most favorable to the State, there was ample competent, substantial evidence of an armed robbery.

Moreover, even accepting Petitioner's version of events, he never voluntarily and completely abandoned the property. According to the Model Penal Code, "'any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an

opportunity to abandon his effort.'" Model Penal Code § 5.01, Comment at 360 (1985). Here, Petitioner admitted he was being pursued by the store's loss prevention agent when he lost the stolen socks while running away and threw down the stolen package of T-shirts. These acts do not constitute a complete and voluntary abandonment or renunciation of his criminal conduct or purpose but an attempt to facilitate his flight. As such, the abandonment defense did not apply to the circumstances of this case and the Fifth District Court of Appeal properly affirmed the trial court's denial of the motion for judgment of acquittal. See Webber v. State, 718 So. 2d 258 (Fla. 5th DCA 1998)("The circumstance which thwarted Webber's will to complete the transaction was his suspicion that he had been set up and that the police might be involved. Such an involuntary abandonment provides no defense for Webber").

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery via electronic mail to counsel for Petitioner, Kathryn Rollison Radtke, Assistant Public Defender, at radtke.kathryn@pd7.org and young.kathy@pd7.org, this 11th day of April, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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--- So.3d ----, 2012 WL 669065 (Fla.App. 5 Dist.), 37 Fla. L. Weekly D533

Briefs and Other Related Documents
Judges and Attorneys
NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fifth District.
Dean Kenneth **ROCKMORE**, Appellant,
v.
STATE of Florida, Appellee.

No. 5D10-1898.
March 2, 2012.

Background: Defendant was convicted in the Circuit Court, Volusia County, Margaret W. Hudson, J., of robbery with a firearm, and he appealed.

Holdings: The District Court of Appeal, Torpy, J., held that:
(1) whether defendant had discarded all of the stolen merchandise before he allegedly brandished the firearm was issue for jury, and
(2) it was appropriate for trial court to give standard robbery instruction without a supplemental special instruction.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

342 Robbery
342k25 Trial
342k26 k. Questions for Jury. Most Cited Cases

Whether defendant had discarded all of the stolen merchandise before he allegedly brandished the firearm was issue for jury in prosecution of defendant for robbery with a firearm.

[2] KeyCite Citing References for this Headnote

342 Robbery
342k6 k. Force. Most Cited Cases

Under the statutory definition of "in the course of taking," the violent act (or threat) necessary for a robbery conviction may occur subsequent to the taking. West's F.S.A. § 812.13(1, 3).

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k770 Issues and Theories of Case in General

110k770(2) k. Necessity of Instructions. Most Cited Cases

110 Criminal Law KeyCite Citing References for this Headnote
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(4) k. Matters of Defense. Most Cited Cases

To establish entitlement to a special instruction, a defendant must show that: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing.

[4] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(4) k. Matters of Defense. Most Cited Cases

Because standard robbery instruction tracked the language of the statute, including the elements of the crime and the pertinent definition, defendant was not entitled to supplemental special instruction on his "abandonment" defense. West's F.S.A. § 812.13(1, 3).

[5] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(4) k. Matters of Defense. Most Cited Cases

It is not necessary that a special instruction be given when the standard instruction provides the legal framework for the attorneys to argue their theory, even when the proposed special instruction more specifically addresses a defense theory based on facts adduced at trial.

[6] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k830 k. Erroneous Requests. Most Cited Cases

Because robbery defendant's proffered special instruction on "abandonment" was not a correct statement of the law and was confusing at best, it was within the trial court's discretion to deny defendant's request.

[7] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k834 Modification by Court

110k834(3) k. Elements and Incidents of Offenses and Defenses. Most Cited Cases

It was not abuse of discretion for trial court to add the word "voluntary" to qualify "abandonment" in defendant's proffered special instruction on robbery because "abandonment" contemplated a voluntary act, and court's second modification of defendant's special instruction, although erroneous, was invited by the submission of an erroneous special instruction and was nonetheless harmless, given the inconsequential change to the proffered instruction and its redundancy with the standard instruction.

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Pamela Jo Bondi, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

TORPY, J.

***1** Appellant challenges his conviction for robbery with a firearm, asserting that the trial court should have granted his motion for judgment of acquittal because he "abandoned" the stolen merchandise before he threatened a pursuing store employee with a firearm. Appellant also challenges the trial court's modifications to his proffered special jury instruction. We affirm.

The robbery conviction arose from Appellant's theft of clothing from a Wal-Mart store. A store employee confronted Appellant as he attempted to exit the store. Appellant fled with the merchandise, and the store employee pursued him. During the pursuit, the store employee grabbed Appellant's jacket, causing him to drop some or all of the merchandise. The employee continued to pursue Appellant until Appellant reached his get-away car. Before entering the car, Appellant displayed a firearm that had been concealed in his waistband and warned the employee to stop the pursuit. At that point, the employee retreated, and Appellant escaped.

Appellant was apprehended by police and charged with robbery. He admitted stealing the merchandise, but denied that he had committed robbery because he claimed that he had not possessed a firearm. He asserted as an alternative defense to the robbery charge that even if he had displayed a firearm, he had abandoned the merchandise before the display. He argued that this defense entitled him to a judgment of acquittal or, at the very least, a jury instruction that he should be found not guilty if he "abandoned" the stolen property before he threatened force. We conclude that this case was a proper one for the jury to determine whether the threatened violence was used "in the course of taking," as defined in the robbery statute. We also conclude that Appellant was not entitled to his proffered special instruction because it was an incorrect statement of the law, confusing, and was already covered in the standard instruction. One of the court's modifications to the special instruction was not erroneous. The other was invited error and harmless error nevertheless.

We start our analysis with *Royal v. State,* 490 So.2d 44 (Fla.1986), because *Royal* sparked a statutory amendment to the robbery statute. *See Rumph v. State,* 544 So.2d 1150 (Fla. 5th DCA 1989) (intent of amendment to "supersede" *Royal*); *State v. Baker,* 540 So.2d 847 (Fla. 3d DCA 1989) (legislative intent in amending section 812.13 was to "repeal" rule in *Royal*). In *Royal,* when the defendants were confronted by a store detective, they pushed him, fled from the store, and attempted to escape in a vehicle with the detective and other store employees in hot pursuit. 490 So.2d at 45. After an employee attempted to grab the ignition key to prevent the defendants from escaping, one of the defendants punched him. Then, the other defendant pointed a gun at the employees, causing them to retreat. Our high court held that the defendants could not be convicted of robbery because the acts of pushing the detective, punching an employee, and displaying the firearm in a threatening manner did not constitute a taking "**by force,**" because the violence occurred "after the taking." *Id.* at 45-46 (emphasis added).

***2** In response to *Royal,* in 1987 the Legislature amended section 812.13(1), Florida Statutes, to change the definition of robbery from a taking **by force** (or threat) to a taking where force (or threatened force) was used "**in the course of the taking.**" Ch. 87-315, § 1, at 2052, Laws of Fla.

(emphasis added). The amendment added a definition for the phrase "in the course of the taking," to include acts that are either "prior to, contemporaneous with, or subsequent to the taking," provided that the acts and the taking "constitute a continuous series of acts or events." § 812.13(3)(b), Fla. Stat. (1987). The statute retained a definition of "in the course of committing the robbery" for purposes of applying statutory enhancements. § 812.13(3)(a), Fla. Stat. (1987). The revised statute provides in material part as follows:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> ....
>
> (3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.
>
> (b) An act shall be deemed "in the course of the taking" 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.

§ 812.13(1), (3), Fla. Stat. (1987).

The intent of this change was to expand the common law crime of robbery to include, among other circumstances, where the force is used **after** the taking, provided it is used during a "continuous series of acts or events." [FN1] Clearly, in a case like *Royal,* the Legislature intended the use of force or threatened force during flight to fall within the statutory definition of robbery. *Messina v. State,* 728 So.2d 818 (Fla. 1st DCA 1999), is analogous to *Royal.* There, the victim chased the defendant thief through a parking lot and sat on the hood of his car to prevent his escape with her stolen purse. The defendant started and stopped his car abruptly and then made a sharp turn, causing the victim to fall off the car and suffer injuries. *Id.* at 818. Our sister court concluded that the use of force presented a jury question as to whether it was part of a continuous event under the robbery statute. *Id.* at 819–20; *see Thomas v. State,* 36 So.3d 853 (Fla. 3d DCA 2010) (attempt to knock victim off car used to escape was within continuous series of events). In *Royal, Messina*, and *Thomas,* the thieves retained possession of the stolen merchandise throughout the subsequent pursuit, arguably a fact that distinguishes this case.

On the other side of the coin are cases like *Baker,* 540 So.2d 847, and *Simmons v. State,* 551 So.2d 607 (Fla. 5th DCA 1989), wherein the courts held, as a matter of law, that the chain of events was broken by "abandonment" of the stolen property, precluding robbery convictions. In *Baker,* upon seeing store security personnel approaching, the defendant put down the stolen video recorder inside the shopping mall and began to flee. 540 So.2d at 848. During the ensuing chase, he used force to evade capture. In affirming the dismissal of the robbery charge, our sister court concluded that, because the defendant did not use force as part of a " 'continuous series of acts or events' **involved with taking the property,**" the charge was properly dismissed. *Id.* (emphasis added). In *dicta,* however, the *Baker* court stated that "[t]he defendant would have to have been in continuous possession of the property during the escape and the subsequent flight or resisting of arrest in order for the act to fall within the amended statute." *Id.*

***3** Similarly, our Court in *Simmons* addressed a situation where the defendant discarded the merchandise before using force to resist capture. 551 So.2d at 608. There, store employees confronted the defendant outside a department store after observing her remove merchandise without paying for it. They escorted her back inside the store, where she removed the merchandise and threw it to the floor. When the employees instructed her to accompany them to the security office, the defendant forcibly resisted. This Court, citing *Baker,* reversed the robbery conviction because "the property [had been] abandoned before any force was employed." *Id.*

[1] Appellant urges that this case is like *Baker* and *Simmons,* and unlike *Royal* and its progeny, because he dropped the merchandise before he made the alleged threat. Even assuming for the sake of discussion that dropping merchandise when grabbed by a pursuing merchant is the same as "abandonment"—as that term was intended in *Baker* and *Simmons,*[FN2] and assuming that the *Baker dicta* was a correct pronouncement of the law—a factual dispute at trial precluded a judgment of acquittal here. Although Appellant testified that he had discarded all of the stolen merchandise before he allegedly brandished the firearm, the employee testified that he had not.

Our conclusion that a factual issue was presented does not end our labor, however, because Appellant argues in the alternative that he was entitled to a special instruction consistent with his version of the facts and urges that his proffered instruction was a correct statement of the law under *Baker* and *Simmons* and should not have been modified by the trial court. Appellant's argument and proposed jury charge presents the question of whether the "abandonment" of stolen goods by a thief who is being pursued is a sufficient break in the "continuous series of events" such that a robbery conviction cannot be sustained. Consistent with the *dicta* in *Baker*, Appellant contends that *Baker* and *Simmons* apply anytime an escaping thief discards or drops the ill-gotten-gains before employing force or threatened force to evade capture by someone in pursuit. We think *Baker* and *Simmons* can be distinguished.

Simmons can be distinguished because the defendant there had been apprehended and escorted by employees back inside the store. 551 So.2d at 608. This was an intervening event that interrupted the defendant's volitional course, thereby negating the continuity requirement of the statute. *Baker* is also distinguishable. There, the property was discarded in the shopping mall before the ensuing flight began. 540 So.2d at 848. Arguably, the "taking" ended **before** the next act of flight began. Thus, the series of acts was not continuous because the defendant ceased the crime of theft before he began the flight. The *dicta* in *Baker*—that a fleeing thief must be in continuous possession of the stolen item (s) until the point of violence to constitute robbery—was unnecessary to the holding and in contravention of the plain language of the statute. Under this construction, if a fleeing thief drops the merchandise to retrieve a gun and shoot the pursuer, it is not robbery. We specifically reject the *Baker dicta* because it is repugnant with the plain and unambiguous language of the statute and legislative history outlining the reason for the statutory amendment.

***4** [2] Under the statutory definition of "in the course of taking," there is no question that the violent act (or threat) necessary for a robbery conviction may occur subsequent to the taking. The more difficult question is when do the subsequent violent act and the taking "constitute a continuous series of acts or events." A "series of acts or events" is simply a sequence of related acts or events. *See* Oxford Dictionaries, *series,* http:// oxforddictionaries.com/definition/series?q=series (last visited Feb. 6, 2012) (defining "series" as "a number of events, objects, or people of similar or related kind coming one after another"). Section 812.13(3) in no way suggests that these sequential acts or events must be in furtherance of an effort to retain the stolen property, or, as the *Baker* court put it, "involved with taking property." 540 So.2d at 848. Thus, flight upon detection, for example, is an "act" that is sequential to and related to the act of taking. Discarding the stolen goods would also be such an act. The further qualifier that these series of acts be "continuous" means only that the sequential acts are not interrupted.

Applying this statute to the facts in *Royal* illustrates what was intended. There the series of related acts were the taking, the push, the flight, the struggle at the car, the punch, the threat with the gun, and the escape by vehicle. 490 So.2d at 45. The possession of merchandise during these acts was not an "act," any more than wearing a hat while walking is an act distinct from the act of walking. They were continuous acts because they happened one after the other without any significant temporal void. They were all related to the taking because the taking and the flight were part of the same episode. The escape is as much a part of the crime as is the taking itself. Whether the act of violence was motivated by a desire to retain the goods, avoid capture, or both, is of no moment. *See Kearse v. State,* 662 So.2d 677, 685 (Fla.1995) (robbery conviction proper even if taking and subsequent murder not motivated by desire to steal property but to escape apprehension). The emphasis should be on whether the entire chain of acts is a part of a continuous series of events. That is all the statute requires.

This interpretation is consistent with and bulwarked by other language in the statute and the legislative history for the amendment. The statute defines "in the course of committing the robbery" to expressly include the "flight" after a robbery or attempted robbery. § 812.13(3)(a), Fla. Stat. Although this phrase is tied to the sentencing enhancement aspect of the statute, it nevertheless evinces a legislative recognition that the actions of the thief during the flight are related to, and considered a part of, the underlying crime. Our interpretation is also consistent with a legislative staff analysis of the proposed amendment, which states that the purpose of the amendment is "to expand robbery to include force occurring in an attempt to take money or property, **or in flight after the attempt or taking.**" *See* Fla. H.R. Comm. on Robbery, HB 758 (1987) Staff Analysis 1 (final June 26, 1987) (on file with Comm.) (emphasis added).[FN3] The emphasized language plainly connotes that force during flight constitutes robbery, even after a mere "attempt" to take property.

***5** [3] [4] [5] The State objected to Appellant's proffered special instruction, arguing that it was already covered in the standard instruction. The trial judge gave the instruction with some modification. To establish entitlement to a special instruction, a defendant must show that: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing. *Stephens v. State*, 787 So.2d 747, 756–57 (Fla.2001). Here, the standard instruction was given. Because it tracks the language of the statute, including the elements of the crime and the pertinent definition, it was appropriate to give the instruction without a supplemental special instruction. *State v. White*, 891 So.2d 502, 502–03 (Fla.2004); *State v. Hubbard*, 751 So.2d 552, 558 (Fla.1999); *City of Tampa v. Long*, 638 So.2d 35, 39 (Fla.1994). It is not necessary that a special instruction be given when the standard instruction provides the legal framework for the attorneys to argue their theory, even when the proposed special instruction more specifically addresses a defense theory based on facts adduced at trial. *See San Martin v. State*, 705 So.2d 1337, 1349 (Fla.1997) (not necessary to advise jury of specific non-statutory mitigating circumstances; standard, general instruction sufficient).

[6] [7] More importantly, as we have explained, the proffered special instruction was not a correct statement of the law and was confusing at best. Thus, it was within the trial court's discretion to deny the special instruction altogether. Instead, here, the trial court made two changes to the proffered instruction. The first change, the addition of the word "voluntary" to qualify "abandonment," was not an abuse of discretion because "abandonment" contemplates a voluntary act. The other modification, although erroneous, was invited by the submission of an erroneous special instruction [FN4] and was nonetheless harmless, given the inconsequential change to the proffered instruction and its redundancy with the standard instruction.

We acknowledge conflict with *Peterson v. State*, 24 So.3d 686, 690 (Fla. 2d DCA 2009). Although *Peterson* is in the *Baker/Simmons* category of cases and can be distinguished for the same reasons, we disagree with its conclusion regarding the necessity and propriety of the special instruction regarding "abandonment."

AFFIRMED.

PALMER and EVANDER, JJ., concur.

FN1. *See* Fla. H.R. Comm. on Robbery, HB 758 (1987) Staff Analysis 1 (final June 26, 1987) (on file with Comm.) (stating that bill amends section 812.13 to expand robbery to include force occurring in attempt to take money or property, or in flight after an attempt or taking).

FN2. The use of the word "abandonment" in *Baker* and *Simmons* was inartful at best and led to the confusion here. "Abandonment" of property typically refers to the voluntary

relinquishment of an owner's right. *State v. Kennon*, 652 So.2d 396, 398 (Fla. 2d DCA 1995); *see Meeks ex rel. Estate of Meeks v. Fla. Power & Light Co.*, 816 So.2d 1125, 1129 n. 4 (Fla. 5th DCA 2002) (abandonment is relinquishment of owner's right). A thief cannot abandon property he does not own. The trial court was concerned with the distinction between "voluntary" abandonment and "involuntary" abandonment, a distinction the State argues is legally significant because both the statutory defense of "abandonment," contained in section 777.04(5), Florida Statutes, and the common law defense of "abandonment" only apply to voluntary abandonment. *See Carroll v. State*, 680 So.2d 1065 (Fla. 3d DCA 1996) (only voluntary abandonment is a defense to certain crimes). Adding to the confusion, our Court has characterized *Simmons* as a case where the defendant "voluntarily abandoned" the merchandise. *Santilli v. State*, 570 So.2d 400 (Fla. 5th DCA 1990). We do not take *Baker* or *Simmons* to use the word "abandonment" in the technical sense as either the relinquishment of a **right** in property or as a defense to a crime based on the abandonment of the crime. Rather, we think these opinions intended "abandon" to mean the relinquishment of possession of the property. Based on the facts of those cases, it does appear that the courts contemplated a purposeful act, rather than an accidental or involuntary act. But whatever was meant by the use of the word "abandonment" in those decisions, the proper focus in all of these cases should not be whether the defendant "abandoned," "discarded," or "dropped" the property. The proper focus should be on whether the defendant's actions were all part of a continuous series of acts or events.

FN3. We remain mindful that history such as this is only a factor in determining intent. *See White v. State*, 714 So.2d 440, 443 n. 5 (Fla.1998) (recognizing that staff analyses are not determinative of legislative intent, but are only "one touchstone of the collective legislative will" (quoting *Sun Bank/South Fla., N.A. v. Baker*, 632 So.2d 669, 671 (Fla. 4th DCA 1994))).

FN4. If a proffered instruction misstates the law or is otherwise clearly erroneous, a trial court's modification of it does not constitute reversible error. *See Bass v. State*, 58 Fla. 1, 50 So. 531, 533 (Fla.1909) (denying claim for relief based on court's modification of requested special instruction because requested instruction was clearly erroneous); *Young v. State*, 24 Fla. 147, 3 So. 881, 881 (1888) (stating that modification that essentially changes the force of an instruction is error unless instruction not pertinent).

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