IN THE SUPREME COURT OF THE STATE OF FLORIDA

2013 FEB -7 AM 9:
BY

DEAN KENNETH ROCKMORE,)
)
Appellant,)
)
vs.) CASE NO. SC 12-577
) L.T. Case No. 5D10-1898
STATE OF FLORIDA,)
)
Appellee.)
)

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Seventh Judicial Circuit, in and for Volusia County. On appeal to the Fifth District Court of Appeal, petitioner was the appellant and respondent was the appellee. In this brief, the parties will be referred to as they appear before this Court, except that respondent may also be referred to as "the state," and petitioner may sometimes be referred to by his name. The following symbols will be used to designate references to the record on appeal:

"R" - Court records, transcript of sentencing, and pleadings, Volume 1, pp. 1-126.

"T" - Transcript of the trial, Vol's. 1 and 2, pp. 1-331.

STATEMENT OF THE CASE AND FACTS

This case is before the Court pursuant to the Fifth District Court having acknowledged conflict with Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009), disagreeing with its conclusion. Rockmore v. State, 37 Fla. L. Weekly D 533 (Attached as Appendix A).

Petitioner was charged, by third amended Information, with the offense of robbery with a firearm. (R 55) The Information further alleges that he was previously convicted of theft in nine cases. (R 55) This case proceeded to trial on April 14, 2010, before the Honorable Margaret Hudson, Circuit Judge. (T 1-331)

Stephen Arnold was a loss prevention associate at the DeLand Wal-mart in

March of 2009. (T 64-65) He recalled when Petitioner entered the store, his attention was drawn to him because he appeared nervous. (T 66) He then followed the petitioner to the men's department, where he saw him place T-shirts in his jacket and socks inside his pants. (T 68) Mr. Arnold then saw petitioner pass the registers, so he approached him. (T 71) He identified himself to Mr. Rockmore, explained why he was stopping him, and stated that he had to talk to him for a few moments. (T 73) The petitioner took off on foot. (T 74) Mr. Arnold gave chase, without losing sight of him. (T 76) As they entered the nearby Hibbett Sports parking lot, Mr. Arnold told him to return but he refused. (T 77) At that point, the petitioner's jacket came unzipped and Mr. Arnold tugged at it, causing the shirts to fall out. (T 77-78) Mr. Rockmore told him, "there's your merchandise ... I'm not going to come with you." (T 78) Mr. Arnold was not done with him because he believed Appellant still had the socks and he needed to obtain his information. (T 78-79) The petitioner headed to a car parked behind Tire Kingdom. (T 79) Mr. Arnold followed and again tried to convince him to return to the Wal-mart, and that's when he said Appellant lifted his shirt to display a gun and responded, "you don't want none." (T 80) He saw a handle and the cylinder of a revolver. (T 94)

The merchant backed off, as Petitioner got in the back seat of the car and left. (T 83) the socks were not recovered, although the shirts and the petitioner's

jacket were. (T 83-84) The next day, police had Mr. Arnold view a photo line-up, and he selected Mr. Rockmore's photo. (T 85, 195)

Cleveland Wilson was in the company of Dean Rockmore on March 29, 2009. (T 127) Although he testified for the State, he said no one had offered him a deal in exchange for his testimony. (T 129) He was with Myra Taylor that evening. (T 129) Mr. Rockmore asked them for a ride to Wal-mart, and offered to pay for the ride. (T 130) They dropped him off at the store and continued to the Hot Spot. (T 130) They later returned to the Wal-mart. (T 130) He saw the petitioner coming between a bank and a tire store, with another gentleman briskly walking behind him. (T 131) They came up to the car, and he saw petitioner lift his shirt and tell the guy, "You don't want none of this." (T 132) Mr. Wilson saw something silver, but could not say what it was. (T 133) He drove Petitioner back to the convenience store where he had picked him up. (T 133) Mr. Wilson was not charged with anything relative to the offense in this case. (T 147)

Attorney James Disinger, who represented Mr. Wilson, confirmed that he had faced an unrelated charge, but was not offered anything to induce his testimony in the case at bar. (T 149)

Officer Florence arrested Petitioner on a warrant for armed robbery on April 1, 2009. (T 154) He questioned Mr. Rockmore after reading Miranda rights and

warnings to him. (T 156-157) The witness indicated that the petitioner admitted to shoplifting, but said that he dropped the clothing outside and denied robbing anyone. (T 158-159)

Defense counsel requested a special jury instruction on the theory of abandonment. (T 173) The request was granted, however the court added the words: "and the victim was aware" (of the abandonment). (T 253) The petitioner objected to the court's addition. (T 253) He also objected to the court's use of the word "voluntary." (T 250-251)

At the close of the state's case, the petitioner moved for a judgment of acquittal. (T 208-211) He argued that the items taken were abandoned, as evidenced by his words to the merchant, and so no robbery had been proved. (T 208-216) The motion was denied, because the trial court felt the conflicts in the testimony were part of the factual determination to be made by the jury. (T 216-217)

Myra Taylor indicated she has known Mr. Rockmore for a long time, and saw him get in the car on the evening of March 29, 2009. (T 223-225) She did not see a gun. (T 225) He told her he had stolen shirts and socks from Wal-mart, but they fell when he was running. (T 226)

The petitioner testified that he had stolen the shirts and socks, and ran out of

the store. (T 229) He stated that the "security guy" threatened to kill him if he didn't return the merchandise. (T 229-230) The socks dropped as he ran, and he dropped the shirts as well, asking Mr. Arnold to give him a break. (T 230) He denied having carried or displayed a gun. (T 233) He denied robbing or threatening anyone with a gun. (T 235)

In closing, defense counsel argued that the petitioner was guilty of petit theft and resisting a merchant. (T 297)

On the issue of abandonment, the trial court instructed the jury as follows: "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, then you should find the defendant not guilty of robbery with a firearm." (T 308) Petitioner had previously objected to the use of the word 'voluntary' and the phrase 'and the victim was aware of such abandonment,' and been overruled.(T 250-251, 253) The jury was instructed on the lesser-included offenses of petit theft and resisting a merchant, however the jury was not instructed that Appellant could be found guilty of both offenses. (T 311-313, 304-321)No objection was made on this ground. (T 168-191; 305-325) Both abandonment and guilt of the lesser-included offenses of petit theft and resisting a merchant were argued as defenses. (T 297, 208-211)

The jury returned a verdict of guilt as to robbery with a firearm, and made a special finding that Petitioner was in actual possession of the firearm. (T 326; R76-77) Following the verdict, the prosecutor announced that he would be seeking to have the petitioner sentenced as a prison releasee reoffender. (T 329) Thereafter, the State filed a notice of intent to rely on business records, consisting of Florida Department of Corrections records pertaining to the petitioner. (R 78)

Sentencing took place on May 21, 2010. (R 1-36) Petitioner had no objection to the introduction of the certified documents, which were under seal, from the Department of Corrections. (R 5) Deputy Furse took Petitioner's fingerprints on October 6, 2009, and he identified Mr. Rockmore in court as the person whose prints he took. (R 7-8) Mary Seney, a fingerprint technician, compared the October 6, 2009 print card with the certified prints from a July 2004 case. (R 12) In her opinion, both sets of fingerprints belong to Mr. Rockmore. (R 14) The trial court found the petitioner to qualify as a prison releasee reoffender, and sentenced him as such, to life in prison without possibility of parole. (R 33-34, 113-118)

A Notice of Appeal was timely filed. (R 122) The Office of the Public Defender was appointed to represent Petitioner for purposes of appeal. (R 125)

On appeal to the Fifth District Court of Appeal, petitioner raised two issues:

that the trial court erred in denying his motion for judgment of acquittal on the charge of robbery where the use of force was too remote from the taking to support that conviction, and that the trial court erred in giving an improper jury instruction on the defense of abandonment over petitioner's objection, and for these arguments he relied on Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009) and Longval v. State, 914 So.2d 1098 (Fla. 4th DCA 2005).

The Fifth District affirmed, while acknowledging conflict with the conclusion of the Second District in Peterson that a special instruction on the defense of abandonment is necessary in cases such as this one. Rockmore, at 535.

SUMMARY OF ARGUMENT

The trial court erred in denying Petitioner's motion for judgment of acquittal on the charge of robbery, where the use of threat of force was too remote from the taking to support the conviction. Further, the court erred because the taking was completed without any use of force and the property was abandoned before any force was employed.

The trial court erred in giving an improper jury instruction relating to a contested issue. The instruction given was confusing on several levels. The standard instruction made no mention of the defense of abandonment, and the Petitioner is entitled to a correct instruction on his theory of defense. The second addition the trial court made to the requested instruction was not suggested by the defense and was objected to. Further, the court failed to instruct the jury that they could find Appellant guilty of both petit theft and resisting a merchant, although he was entitled to this instruction. The error is not harmless where there exists a reasonable possibility that it contributed to the conviction.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF ROBBERY, WHERE THE USE OF FORCE WAS TOO REMOTE FROM THE TAKING TO SUPPORT THE CONVICTION.

Standard of Review

The standard of review for a denial of a motion for judgment of acquittal is that the trial court must not grant such a motion unless there is no legally sufficient evidence on which the trier of fact may base a verdict of guilt. Brewer v. State, 413 So.2d 1217 (Fla. 5th DCA 1982). An appellate court reviews the record de novo. State v. Hawkins, 790 So.2d 492 (Fla. 5th DCA 2001).

Argument

Here, the Petitioner was seen taking and concealing T-shirts and socks under his clothing in the store. (T 68) He left without paying, and was chased across two parking lots by a merchant before unzipping his jacket and dropping the shirts when the merchant tugged at his jacket. (T 71-78) At that point, Mr. Rockmore told the merchant, "there's your merchandise . . .I'm not going to come with you." (T 78) These constitute the facts of this case concerning abandonment. It was only after this, when the merchant continued to follow him, that the

merchant said Petitioner displayed a gun and told him, "you don't want none of this." (T 78-80, 94, 131-133) No other witness said there was a gun, although the petitioner's ride heard him say "you don't want none of this." (T 132-133) Additionally, he admitted that he had taken the items but consistently stated to contemporaneous witnesses and at trial that he had abandoned the property and threatened no one. (T 158-159, 226, 229-235)Where the taking is completed without any use of force and the property abandoned before any force is employed, there is insufficient evidence to support a robbery conviction. Kimbrough v. State, 788 So.2d 421 (Fla. 1st DCA 2001); Simmons v. State, 551 So.2d 607 (Fla. 5th DCA 1989); Peterson v. State, 24 So.3d 686 (Fla. 2d DCA 2009). A taking of property constitutes a robbery if "in the course of the taking" there is a use of force, violence, assault or putting in fear. § 812.13(1), Fla. Stat.; Peterson v. State, 24 So.3d 686, 688 (Fla. 2d DCA 2009). An act of force is in the course of the taking if the taking and the act of force, violence, assault or putting in fear constitute a continuous series of acts or events. Id., at 688. Where, as here, the property is abandoned prior to the alleged act of force, violence, or putting in fear then the act of force and the act of taking are not part of a continuous series of events. As such, this conviction should be reversed and this cause remanded for the entry of a judgment of guilt on the lesser included offense of petit theft. *See*

Kimbrough v. State, 788 So.2d 421 (Fla. 1st DCA 2001); Simmons v. State, 551 So.2d 607 (Fla. 5th DCA 1989).

ARGUMENT

THE TRIAL COURT ERRED IN GIVING AN IMPROPER JURY INSTRUCTION RELATING TO A CONTESTED ISSUE.

Standard of Review

Where a "misleading and confusing jury instruction that did not pertain to evidence presented at trial" is given on the defendant's theory of defense, the error that results is not harmless where there exists a reasonable possibility that it contributed to the conviction. Butler v. State, 493 So.2d 451, 453 (Fla. 1986). An "incomplete and inaccurate instruction on the law is fundamental error where the error relates to the elements of the criminal offense." Hubbard v. State, 751 So.2d 771 (Fla. 5th DCA 2000).

Argument

The Petitioner was tried on a charge of robbery, to which there is the defense of abandonment, and where there is a break in events such that acts are not part of a continuous chain of events, the defendant in such a case is entitled to have the jury properly instructed on the issue of abandonment and that he could be found guilty of both petit theft and resisting a merchant. Peterson v. State, 24 So.3d 686 (Fla. 2d DCA 2009); Longval v. State, 914 So.2d 1098 (Fla. 4th DCA 2005); Stuckey v. State, 972 So.2d 918 (Fla. 5th DCA 2008).

In the case at bar, the petitioner requested a special instruction on the theory of abandonment. (T 173) The request was granted in part, however the trial court

modified the instruction over counsel's objection, to add the words: "and the victim was aware" (of the abandonment). (T 253) The petitioner objected to the court's changes and additions to the instruction. (T 250-251, 253) Thereafter, the trial court instructed the jury as follows: "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*, then you should find the defendant not guilty of robbery with a firearm." (T 308) (Emphasis added).

The facts in some cases might require the instruction which the trial court insisted upon, but the facts of the case at bar are that the merchant *was* very much aware of the property being abandoned since he witnessed the petitioner's jacket coming unzipped, the shirts falling out, and heard Mr. Rockmore say, "there's your merchandise ...I'm not going to come with you." The petitioner's words, "there's your merchandise" confirmed the abandonment of the offense of theft which the merchant had just witnessed. Petitioner's actions in dropping the merchandise and the words he spoke to the merchant constitute a break in the series of acts or events. As a result, the court's change to the instruction was confusing, did not apply to the defense, and added an element that was not necessary in this case. The trail court's additions were not suggested by the

defense and the petitioner objected to those additions. Whether the victim is aware of property being abandoned is not an element of either the defense of abandonment or the standard instruction for robbery. *See* Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009); and In RE: Standard Jury Instructions, 982 So. 2d 1160, 1169-1172 (Fla. 2008).

The Fifth District, in the case at bar, opines that everything done by petitioner constituted continuous acts because there was no "significant temporal void." Rockmore v. State, 37 Fla. L. Weekly D533, at 535. The robbery statute, § 812.13, does not speak of any "significant temporal void." Section 812.13, Florida Statutes. The cases which speak to the defense of abandonment simply refer to a break in a series of events, such as abandonment of stolen property – and with it, the intent to steal – prior to any struggle or threat. Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009); Baker v. State, 540 So. 2d 847 (Fla. 3d DCA 1989); and Simmons v. State, 551 So. 2d 607 (Fla. 5th DCA 1989). As in those cases, here the petitioner's act of taking in this case was separated from any act of force by the act of abandonment. Once the merchandise was abandoned, then any subsequent refusal to return to the store with the merchant was not a part of the taking, and does not elevate the crime of petit theft to a robbery.

The Fifth District's opinion in this case concludes that the petitioner's act of

abandonment of the property was probably not voluntary. Peterson, at D535. In fact, the petitioner apparently unzipped his jacket in order to abandon the property as the merchant touched his jacket. (T 77-78) He also told the merchant, "there's your merchandise," indicating evidence of voluntary renunciation of theft. (T 78)

An appropriate instruction would have been: "If it is established that the property was abandoned prior to the use of force then you must find the defendant not guilty of a robbery." Peterson v. State, 24 So.3d 686, 689 (Fla. 2d DCA 2009). That case involved the same defense theory as does this one, that is, it focused on that part of the robbery statute requiring the element of an act of force and the act of taking constitute a continuous series of acts or events. Id., at 688. The discretion of a trial court in the matter of jury instructions is "fairly narrow" because a defendant is entitled to have the jury instructed on his theory of defense if any evidence supports this theory, so long as the theory is valid under Florida law. Id., at 690.

The Fifth District, in its opinion below, concluded that the petitioner was not entitled to the instruction requested, in part, because that court felt the defense was already covered in the standard instruction. Rockmore v. State, 37 Fla. L. Weekly D 533, at 534. The standard jury instruction for robbery, 15.1, contains no mention of the defense of abandonment; indeed, the word 'abandonment' is found

nowhere in the standard instruction. In Re: Standard Jury Instructions, 982 So. 2d 1160, 1169-1172 (Fla. 2008). The petitioner was entitled to have the jury properly instructed on his theory of defense, i.e. abandonment. Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009).

It is recognized that Petitioner objected to the proposed instruction during the charge conference, where it was overruled, but did not renew the objection when the instructions were given. (T 250-251, 253; 305-325) Where the court has ruled on an issue, the law does not require a useless or futile act. Plaza v. State, 699 So.2d 289 (Fla. 3d DCA 1997); Young v. State, 664 So.2d 1144 (Fla. 4th DCA 1995); Howard v. State, 616 So.2d 484 (Fla. 1st DCA 1993); Davis v. State, 832 So.2d 239 (Fla. 5th DCA 2002).

The Fifth District Court of Appeals has held that "an incomplete and inaccurate instruction on the law is fundamental error where the error relates to the elements of the criminal offense." Hubbard v. State, 751 So.2d 771, 772 (Fla. 5th DCA 2000). The trial court in Hubbard had affirmatively misinstructed on the elements of both the offense reflected in the verdict and the elements of a lesser included offense. Where, as here, a "misleading and confusing jury instruction that did not pertain to any evidence presented at trial" is given on the defendant's theory of defense, the error that results is not harmless where "there exists a

reasonable possibility that it contributed to the conviction." Butler v. State, 493 So.2d 451, 453 (Fla. 1986). Instructional error on the defendant's theory of defense may be fundamental, depending on the facts of the case. Fields v. State, 988 So.2d 1185 (Fla. 5th DCA 2008). Where the effect of the error is to negate the theory of defense, the error is fundamental. Williams v. State, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008). The right to an accurate jury instruction applies equally to instructions on the theory of defense, and the issue is one warranting fundamental-error treatment. Motley v. State, 20 So.2d 798, 800 (Fla. 1945).

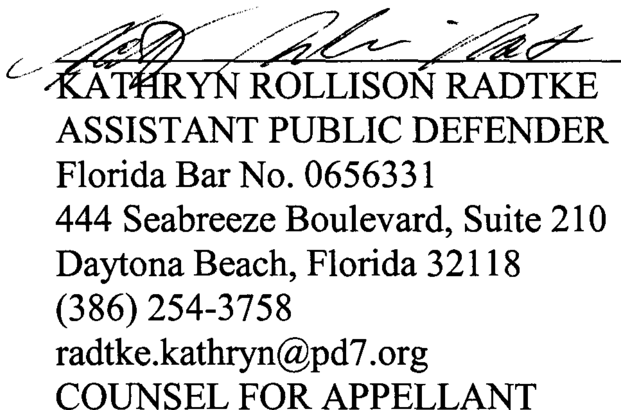
It has been held that when defense counsel agrees to jury instructions during a charge conference, he acquiesces to the instructions and any error is waived. Calloway v. State, 37 So. 3d 891 (Fla. 1st DCA 2010). It must follow, then, that when defense counsel specifically disagrees with the trial court's additions to the instructions, the error is not waived. Because the petitioner's request for a special jury instruction on his theory of defense, to which he was entitled, was not given correctly by the trial court, he is entitled to a new trial on this issue, and asks this Court to overturn the decision of the Fifth District in this case.

CONCLUSION

Based on the foregoing, the Petitioner respectfully asks this Honorable Court to reverse the decision of the Fifth District Court of Appeals, reverse the judgment and sentence and remand for the entry of a judgment of guilt on the lesser included crime of petit theft, or a new trial, or such other remedy as the Court may deem appropriate.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to the Honorable Pamela Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and mailed to: Dean Rockmore #077708 Everglades C. I. 1599 S.W. 187th Avenue Miami, FL 33194-2801 on this 4th day of February, 2013.

KATHRYN ROLLISON RADTKE

ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

DEAN ROCKMORE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-577- SC
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2012

DEAN KENNETH ROCKMORE,

Appellant,

v. Case No. 5D10-1898

STATE OF FLORIDA,

Appellee.
_______________________________/

Opinion filed March 2, 2012

Appeal from the Circuit Court
for Volusia County,
Margaret W. Hudson, Judge.

James S. Purdy, Public Defender, and
Kathryn Rollison Radtke, Assistant Public
Defender, Daytona Beach, for Appellant.

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

TORPY, J.

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).

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."[1] 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

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[1] *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).

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.*

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.*

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*,[2] 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

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[2] 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.

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.

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).[3] The emphasized language plainly connotes that force during flight constitutes robbery, even after a mere "attempt" to take property.

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

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[3] 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))).

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).

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[4] and was

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[4] 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*, 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);

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.

Young v. State, 3 So. 881, 881 (Fla. 1888) (stating that modification that essentially changes the force of an instruction is error unless instruction not pertinent).

LAW OFFICES OF

PUBLIC DEFENDER

SEVENTH JUDICIAL CIRCUIT
FLAGLER, PUTNAM, ST. JOHNS & VOLUSIA COUNTIES

JAMES S. PURDY
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CHIEF ASSISTANT

FILED
2013 FEB -7 AM 9:35
CLERK, SUPREME COURT
BY ____

February 4, 2013

Honorable Thomas D. Hall
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

RE: State v. DEAN ROCKMORE, SC 12-577

Dear Mr. Hall:

Enclosed please find the original and seven copies of the Respondent's Initial Brief to be filed in the above-reference case.

Sincerely,

Kathryn Rollison Radtke
Assistant Public Defender

Enclosures

KRR/lw

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