IN THE SUPREME COURT OF FLORIDA

CARLTON FRANCIS,

Appellant,

v. CASE NO. 94,385

STATE OF FLORIDA,

Appellee.

_________________________/

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA
(CRIMINAL DIVISION)

SUPPLEMENTAL BRIEF OF APPELLEE

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that this brief was typed using Courier New 12 or larger.

SUMMARY OF THE ARGUMENT

1. Francis' belated claim that the State failed to prove non-consensual entry, and therefore burglary, fails because consent to enter is an affirmative defense that must be raised by the defendant. Francis raised no such defense at trial; his defense was that he did not enter the victims' home at all, or commit any of the crimes that occurred there. In these circumstances, the State had no burden to prove nonconsensual entry.

2. With or without burglary, the evidence is sufficient to support Francis' convictions for first degree murder, under a theory of premeditated murder or felony murder with robbery as the underlying felony.

3. Because four valid aggravating circumstances exist in this case with or without burglary, Francis' death sentence is valid.

4. This Court should reconsider its recent decision in Delgado v. State. The State must strenuously object to settled law being overturned without consideration by the full Court and without the State having been given the opportunity to brief and argue the issue. Furthermore, it is appropriate for "burglary" to apply where the defendant has committed a crime in another's residence after consent to remain has been withdrawn and the State objects to the burglary statute being judicially rewritten to create an irrefutable presumption of consent to remain on another's premises unless defendant remains "surreptitiously."

ARGUMENT

POINT I

THE STATE BORE NO BURDEN TO DISPROVE CONSENSUAL ENTRY BY FRANCIS INTO THE VICTIMS' HOME BECAUSE CONSENT TO ENTER IS AN AFFIRMATIVE DEFENSE WHICH WAS NOT RAISED BY THE DEFENDANT AT TRIAL

Relying on the lack of evidence of forced entry, Francis argues for the first time in his reply brief that he may have been invited into the victims' home and therefore he cannot be convicted of burglary under this Court's recent decision in Delgadov. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000).

The State would note, first, that under Fla. R. App P. 9.210(d) reply briefs are for responding to and rebutting arguments presented in the answer brief. In civil cases particularly, appellate courts have routinely refused to consider issues raised for the first time in a reply brief, even if properly preserved for appeal. See, e.g., General Mortg. Ass. V. Campolo Realty & Mortg. Corp., 678 So.2d 431 (Fla. 1st DCA 1996); Snyder v. Volkswagon of America, 574 So.2d 1161 (Fla. 4th DCA 1991). Courts have also declined to address arguments made for the first time in reply briefs in criminal cases. See Wood v. State, 717 So.2d 617 (Fla. 1st DCA 1998)(refusing to address constitutional argument made for the first time in defendant's reply brief). But see Saldana v. State, 634 So.2d 201 (Fla. 3d DCA 1994)(addressing, and finding meritless, argument "belatedly" urged by the defendant in his reply

brief). The State would argue here that any issue of consensual entry into the victims' home is procedurally barred for Francis' failure to raise it in his initial brief.

Should this Court disagree, the issue is still barred for failure to preserve it for appeal. Francis never admitted at trial that he entered the victims' home the day of the murder, by invitation or otherwise, and while he did argue that the evidence was insufficient to support his conviction for burglary (because it allegedly failed to establish that he entered the victims' home), he never raised the affirmative defense of consensual entry.

"This Court has construed the consent clause of the burglary statute (beginning with "unless") to be an affirmative defense." Miller v. State, 24 Fla. L. Weekly S155 (Fla. July 16, 1998). "Thus, the *burden is on the defendant to establish there was consent*." Ibid. (Emphasis supplied.) Accord, Delgado at S80. Under this Court's precedents, including the very case on which Francis here relies, *Francis*, not the State, bore the burden to raise the defense *and* to "establish" that he "was an invitee." Delgado. He failed to do so.

The defense theory of innocence at trial was *not* that Francis had been invited into the victims' home, but, rather, that *he had not been there at all and had neither murdered the victims nor taken anything from them*. This theory was expressed not only by defense counsel in making the motion for judgement of acquittal,

but also in closing argument.[1] At no time, did defense counsel (or Francis himself) argue or contend an affirmative defense of invitation to enter.[2]

Furthermore, while a theory of defense may be established from the state's evidence or concession, see e.g., Miller, supra, and Coleman v. State, 592 So.2d 300, 302 (Fla. 2d DCA 1991), not only was invitation *not* a proffered theory of defense at trial, but there was no evidence offered by either party at trial which would establish invitation. While the lack of evidence of a forced entry may be consistent with invited entry, it is also consistent with various scenarios of nonconsensual entry, including, but not limited to (a) the defendant entered without any invitation via an unlocked front door or (b) the defendant used a key which the victims normally left outside to unlock the front door, or (c) the defendant simply pushed his way into the house after the victims

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[1] By way of specific example, the State would note that in his closing argument, defense counsel, after reading the language of the indictment charging burglary, contended: "There is no evidence that he [Francis] entered that house that day, period. There is nothing to suggest that. There is no evidence that he went in there, and went in there with the intent to commit a theft" (20R 1872).

[2] This Court has held that an affirmative defense "assumes the charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question.... In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" State v. Cohen, 568 So.2d 49, 51-52 (Fla. 1990). Francis certainly never did that; nor did he admit entering the victims' home but claim that he was invited to do so. Nor did he even claim that he did NOT enter the victims' home, but that whoever did was invited in.

opened the door in response to the defendant having rung the doorbell.

Francis is belatedly relying on evidence essentially neutral on the question of invitation to argue for the first time in his reply brief on appeal that the State failed to disprove an affirmative defense he never even tried to raise or prove at trial. Put another way, he now bases his sufficiency-of-the-evidence argument on the very same lack of evidence on the subject of consent which is the result of *his failure to assert or prove his affirmative defense*. But he simply cannot prevail on a claim that the State failed to rebut an affirmative defense he never raised; under settled law, the State had no obligation to disprove a non-existent affirmative defense. See, e.g., Strachn v. State, 661 So.2d 1255, 1256 (Fla. 3d DCA 1995) ("It is true, as urged, that there was no evidence adduced at trial that the defendant did not have Howard Johnson's consent to be on the premises or to enter the subject motel room; this is of no significance, however, as it is settled that the complainant's non-consent to the charged entry is not an essential element of the offense of burglary. To the contrary, consent to the subject entry is an affirmative defense to burglary, and no evidence was ever adduced below that the defendant had Howard Johnson's consent to be on the motel premises or to enter the motel room in question."); Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985) (where defendant fails to come forward with

evidence of voluntary intoxication sufficient to show he is unable to form the necessary intent, no instruction on affirmative defense of voluntary intoxication is required); Williams v. State, 468 So.2d 447, 449 (Fla 1st DCA 1985) (in passing on judgment of acquittal, court must first determine whether defendant produced competent evidence of affirmative defense).

Because Francis never raised the affirmative defense of invited entry or offered any evidence establishing such, the State had no burden to prove non-invited entry beyond a reasonable doubt.[3]

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[3] Because Francis failed to raise or prove this defense prima facie, he loses on this issue even if, had he done so, the burden of proof would have shifted to the state to disprove the defense beyond a reasonable doubt. Where the ultimate burden of proof lies as to an affirmative defense properly raised and proved prima facie is a matter of some appellate inconsistency. ***Compare*** Delgado (burden is on the defendant in burglary case to establish consent); Miller (same); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990)("we see no reason not to treat entrapment like any other affirmative defense in Florida by placing the burden of proving that defense on the defendant"); Molina v. State, 561 So.2d 425 (Fla. 3d DCA 1990)(defendant in criminal case has burden of proving affirmative defense); and Toro v. State, 712 So.2d 423 (4th DCA 1998)(state not required to disprove beyond a reasonable doubt exceptions to bigamy statute which were affirmative defenses to crime of bigamy) ***with*** Wright v. State, 442 So.2d 1058 (Fla. 1st DCA 1983)("Simply because the exception is an affirmative defense, however, does not mean that the ultimate burden of proof of the exception shifts to the defendant."); Coleman v. State, supra (in burglary case, defendant has initial burden of establishing existence of affirmative defense of consent, but thereafter the burden shifts to the state to disprove the defense beyond a reasonable doubt); and Hansman v. State, 679 So.2d 1216 (Fla. 4th DCA 1996)(in burglary case, defendant has initial burden of establishing defense of consent, but then burden shifts to state to disprove the defense beyond a reasonable doubt).

POINT II

EVEN IF THE EVIDENCE IS INSUFFICIENT TO SUPPORT BURGLARY, ANY ERROR IN INSTRUCTING THE JURY ON FELONY MURDER/BURGLARY IS HARMLESS.

While Francis does not contend that his murder conviction was impacted by any alleged error in instructing the jury as to felony murder in the commission of a burglary, the State would note that even if the evidence is insufficient to support a burglary finding, the jury was also instructed on premeditated murder (5R 688) and felony murder/robbery (5R 689). Because the evidence is sufficient to support Francis' first-degree murder conviction under either of these two theories, any error in instructing the jury as to felony murder/burglary is harmless as a matter of law. Delgado at 24 Fla. L. Weekly S82; Jones v. State, 24 Fla. L. Weekly S535, S538 (Fla. Nov. 12, 1999); Mungin v. State, 689 So.2d 1026 (Fla. 1995); Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

POINT III

FRANCIS' DEATH SENTENCE WAS NOT IMPACTED BY ANY ALLEGED INSUFFICIENCY OF THE EVIDENCE TO SHOW BURGLARY

Nor is there any merit to Francis' contention that any alleged insufficiency of the evidence to establish burglary is significant to the jury's sentencing recommendation. Francis argues it would be significant because "the contemporaneous felonies were found to

be an aggravator in this case, and the jury was instructed that armed burglary constituted a contemporaneous violent felony." Reply Brief at 2.

As a matter of clarification, the trial judge did not instruct the jury as to the aggravator of murder committed during the course of an enumerated felony, even though in the court's view that aggravator was supported by the evidence, but instructed the jury only as to the financial gain aggravator only "so we don't run the risk that [the robbery and burglary are] being considered twice" (22R 2152).

The jury *was* instructed on the aggravator of prior conviction of a capital or violent felony, and the jury was told that murder is a capital felony and that robbery and burglary with an assault or battery are violent felonies (23R 2292-93). At the time of the sentencing, of course, Francis had been convicted not only of burglary, but also of the murder and robbery of two different victims. Thus, the prior violent felony aggravator was indisputably established with or without the burglary, and by convictions for offenses that are more serious than burglary. Moreover, the evidence established the existence of three additional aggravating circumstances charged to the jury, i.e., murder for pecuniary gain, murders were HAC, and the victims were particularly vulnerable due to advanced age. Therefore, with or without burglary, there were four valid aggravators presented to

the jury. In addition, as noted previously, the trial court found four statutory aggravating factors, *none* of which depend *at all* upon burglary: prior *capital* felony conviction (the *murders*), HAC, murder committed during robbery and victims were particularly vulnerable due to advanced age (8R 1316-18).

In Delgado itself, this Court found the death sentence imposed for the murder of Ms. Rodriquez valid even after striking the aggravator that the murder was committed during the course of a burglary, because two aggravators remained: prior violent felony and HAC. Id at S85. In this case, no aggravators fail even if burglary is removed from consideration, and four valid aggravators remain in support of the death sentence. Thus, the death sentences imposed upon Carlton Francis are proportionally warranted even if the Court disagrees with the State's arguments above concerning the sufficiency of the evidence to support burglary.

POINT IV

THIS COURT SHOULD RECONSIDER ITS DELGADO DECISION, AND RETURN TO SETTLED PRE-DELGADO LAW CONCERNING BURGLARY

In Delgado, this Court overruled settled precedent and held for the first time that an invitee whose presence on the premises is known to the host has a "complete defense to the charge of burglary." Id. at S80. This Court limited the applicability of the phrase "remaining in" found in Florida's burglary statute to

those "situations where [after invited entry] the remaining in was done surreptitiously." Id. at S82.

The State has filed a motion for rehearing in Delgado. Because this decision is not final, and because the full Court has not yet considered this issue, the State would take this opportunity to urge this Court to withdraw its decision in Delgado and reinstate settled pre-Delgado law concerning burglary. The State would incorporate by reference all pertinent arguments made by the State in its motion for rehearing. For convenience of opposing counsel, a copy of the State's motion for rehearing in Delgado is attached to this brief as Exhibit "A." In addition, the State would make a few additional points here.

First, the State would note that the issue addressed in Delgado was neither raised in the trial court nor raised or briefed on appeal, and was considered by only five members of this Court and decided by a bare majority. The State would respectfully submit that is it inappropriate for this Court to overturn well settled law under such circumstances, especially when the issue is one having potentially grave impact not only on cases yet to be tried, but also those already tried under seemingly well-settled precedent.

Second, while the State recognizes that even the best-conceived and articulated legislation may on occasion need judicial clarification and interpretation, the State would respectfully

submit that this Court went beyond clarification and interpretation in Delgado, and has in fact simply rewritten the statute to reach a result not contemplated by the legislature and not required by the Constitution. The burglary statute proscribes either entering or remaining in a dwelling with the intent to commit a crime. Consent to both entering and remaining is an affirmative defense under the statute, which, if raised by the defendant, may be rebutted by the State. This Court's Delgado decision in effect gives conclusive effect to a consent to enter and deprives the State of any opportunity to prove that there was no consent to "remain in" for the purpose of committing a crime, notwithstanding the seemingly plain language of the statute to the contrary. Under Delgado, only a surreptitious "remaining in" can constitute a burglary; if the owner of the premises knows of the presence of the defendant, the defendant cannot commit a burglary no matter how vociferously the owner protests the defendant's remaining on the premises. Put another way, under Delgado, the owner's initial consent to enter can never be withdrawn, no matter how quickly she realizes her mistake and withdraws such consent and no matter how strongly the evidence establishes such withdrawal of consent. For reasons argued in the attached Delgado motion for rehearing, the State would contend that this result was never intended by the legislature.

Third, it may well be that Florida's burglary statute, as interpreted prior to Delgado, is broader than that proposed in the Model Penal Code. The State would respectfully suggest, however, that Florida's legislature is not bound by the recommendations (and they are no more than that) of the Model Penal Code, but only by the Constitutions of the United States and the State of Florida. A legislature may wish to consult the Model Penal Code when it is considering criminal legislation, but surely it is not bound by the Model Code's recommendations and may enact criminal laws either broader or more restrictive in scope than contemplated in the Model Code.

Fourth, among the parade of horribles this Court advances as justification for rewriting the burglary statute is the possibility that a lesser crime will be converted to burglary just because it is committed in a dwelling belonging to another. The State respectfully would suggest that it is not inappropriate to increase the severity of a crime depending on where it is committed. After all, burglary statutes traditionally have done just that by increasing penalties for crimes committed in another's house. Furthermore, even if "burglary" as it has been defined may on occasion lead to "absurd" results, as this Court suggests, Delgado at S82, the remedy fashioned by this Court, the State would respectfully submit, goes way beyond what is necessary to exclude merely those "absurd" results. If Delgado stands, it will exclude

perfectly appropriate findings of burglary in many cases, including, for example, cases in which a defendant goes to his victims' home intending to commit a violent crime therein, and then, upon entry, commits the intended violent crime, under "circumstances especially likely to terrorize occupants," Delgado at S81 (quoting the commentary to the Model Penal Code describing the kind of cases which should be burglary). Delgado itself, the State would contend, is precisely such a case, and so is the instant case. The evidence in this case amply demonstrates that Carlton Francis went to the victims' home intending to rob and murder them, and that, after entering their home, he did rob and murder them in a manner "especially likely to terrorize" them. The State would suggest that this is exactly the kind of conduct which "the Legislature intended to criminalize ... as burglary," Delgado at S82, and this is so whether or not the poor victims, totally unaware of Francis' evil intent, initially invited him into their home.

For all of these reasons, as well as those advanced by the State in its motion for rehearing in Delgado, the State would ask this Court to withdraw its opinion in Delgado and to reinstate previous, settled law on the subject.

CONCLUSION

Based upon the foregoing as well as all matters contained in the State's Answer Brief in this case, the State respectfully asks this Court to affirm Francis' conviction and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Peter Grable, 804 N. Olive Avenue, 1st Floor, West Palm Beach, FL 33401, this 24th day of March, 2000.

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