

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-524

LOWER CASE NO.: 3D99-2201

THE STATE OF FLORIDA,

Petitioner,

-vs-

CURLEY BRAGGS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

In this brief, the parties are referred to as they stood in the lower court, by proper name, or as "appellant" and "appellee" where appropriate. The symbols "R." and "T." refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

Curley Braggs was charged by indictment with burglary with an assault (count I), first degree felony murder (count II), and armed robbery (count III).

Ms. Ruby Stevenson, the deceased, was stabbed to death in her home on April 19, 1995. The central issue at trial was the identity of the perpetrator. The state's case against Mr. Braggs consisted solely of circumstantial evidence.

Omni Stevenson, who was fifteen at the time of the incident, lived with her grandmother, Ruby (T. 960). Next door, lived Omni's aunt and uncle, Cassandra and Israel Andrews (T. 961). On April 19, 1995, Omni arrived home between 4:00 and 4:30 P.M. (T. 964). Inside the house she noticed that it was unusually dark. When she walked into her grandmother's bedroom, she saw that it had been ransacked (T. 965). Her grandmother's calendar, where Ruby recorded her finances, was on the bed (T. 966). Omni testified that the calendar was normally tacked to the wall next to an armoire. She discovered the deceased on the floor of the bathroom (T. 969). The calendar reflected that Ruby had loaned \$100 to Mr. Braggs on March 27, 1995 and did not show that the loan had been repaid (T. 1014).

Omni ran next door and told her aunt, Cassandra Andrews (Ruby's daughter), that Ruby was dead (T. 1000). Cassandra, who was a probation officer, worked at night and was home during the day. After calling the police, Cassandra entered

Ruby's house and found her mother on the floor of the bathroom (T. 1002-3). Seeing that her mother was dead, Cassandra covered her with a white towel from the linen closet (T. 1004).

On the floor of the deceased's bedroom, Cassandra found her mother's jewelry box, which had been emptied (T. 1010). Annette Stevenson testified that the last time she saw the contents of Ruby's jewelry box was two days before the homicide (T. 1445). Also, Omni's bicycle was missing (T. 1202). Cassandra identified a photograph of Ruby's house showing a bucket, a mop and a rug. She explained that her mother had probably been cleaning the house earlier that day.

Officer Rivera arrived within a few minutes and had everyone remain in the livingroom (T. 1005). He inspected the house and found no signs of forced entry (T. 1059-60).

Cassandra said that the night before the incident she felt something was wrong (T. 1032). When she knelt next to her mother's body she had an intuition that Mr. Braggs had committed the homicide (T. 1033). Later, Cassandra told her sister, Jeanette, that Mr. Braggs had killed their mother (T. 1034). Cassandra also informed her husband and the police about her hunch (T. 1035-36).

The theory of defense was that Cassandra's family did not like Mr. Braggs' side of the family and that her assumption that he was the perpetrator focused the

investigation on him from the start, when there were other likely suspects. Cassandra's father, before he married Ruby, was married to a woman named Charlena, with whom he had a daughter, Cornell (T. 1036). Cornell later gave birth to Curley Braggs. The Stevenson side of the family derived from Cassandra's father's marriage to Ruby. Subsequently, a division arose between the Braggs and the Stevenson sides of the family, which Cassandra described as "a general feeling of resentment" (T. 1038-39). Cassandra admitted on cross-examination that she never wanted to meet Mr. Braggs and was unhappy that he referred to Ruby as "grandma" (T. 1040-43).

Charles Maez, who lived about ten blocks from the deceased, testified that on the day of the incident he was working in his garage when he saw the defendant pass by on a bicycle (T. 1298-1300). Mr. Maez described the bicycle as a maroon colored girl's bike; however, in deposition he stated it was a boy's bike (T. 1302; 1313). The witness greeted the defendant; he said that the defendant looked nervous and sweaty (T. 1303). The defendant left the bicycle by the fence of Mr. Maez's property (T. 1305). He walked over to a weeded area, took a paper bag (which made a jingling sound) out of his pants and placed it near the fence (T. 1307). He then walked around the property and rode off on the bicycle (T. 1309). In a sworn statement given to the police after the murder, Mr. Maez stated that he could not tell what the defendant had

in his hands and did not mention a bag (T. 1314-17).

Brenda Roberson, Mr. Braggs' former girlfriend, said that in April, 1995, the defendant was using crack cocaine on a regular basis (T. 1332-33). The homicide occurred the day before Ms. Roberson appeared in court and she remembered that it was a Wednesday (T. 1333). That day the defendant, who was riding a blue bicycle, asked her for some money and Ms. Roberson did not give him any (T. 1334, 1352). The defendant showed her a pair of diamond gold earrings (T. 1336). Ms. Roberson said that the defendant tried to give them to her and she refused to accept them (T. 1336-37). After the defendant's arrest, Ms. Roberson identified the earrings at the police station (T. 1339). Eddie Williams, Ms. Roberson's brother, testified that on the evening of April 19, 1995, the defendant showed him a pair of earrings (T. 1366-67).

On the morning of April 20, Willie Peterson, who worked as a security guard at a local store, saw Mr. Braggs standing in front of the store (T. 1405). Near Mr. Braggs was a girl's bicycle. The defendant offered to sell him a ring, which appeared to be a wedding band (T. 1406-7). When Peterson declined the ring, the defendant became upset and rode away on the bicycle (T. 1407-8).

The finger-print technician examined several fingerprints that were obtained at the crime scene. A fingerprint lifted from the lid of the toilet did not match either the

victim or Mr. Braggs (T. 1502-3). The technician also examined three other latent fingerprints of value, including one from a box found in the bedroom. A comparison of those prints showed that they did not match either the victim or the defendant (T. 1503-6).

Dr. Michael Hauss, a DNA expert with the Miami Dade Police Department, analyzed several blood samples taken from the bedroom and bathroom areas. The lab tested 17 blood samples from different locations of the crime scene. The blood sample obtained from the hallway floor by the bathroom doorway contained the victim's blood mixed with human genetic material which did not match either the victim or the defendant (T. 1590). Dr. Hauss explained that the second DNA source was a male, but was definitely not Mr. Braggs (T. 1590).

On April 20, when the defendant was arrested, he had a crack pipe and some jewelry in his pockets (T. 1626). At the police station, Mr. Braggs told Detective Thomas Surman that he obtained the jewelry during a burglary in Liberty City, but could not specify an address (T. 1639). The defendant denied that he killed Ruby and said that on April 19 he had spent most of the day with Eddie Williams (T. 1646-48). Detective Surman testified that the only evidence linking the defendant to the homicide was the jewelry in his possession (T. 1652).

The defendant was adjudicated guilty of second degree murder, burglary with

an assault and armed robbery (R. 436-38, 449). The court sentenced the defendant as a habitual violent felony offender as to count I, burglary with an assault, and imposed a sentence of life imprisonment with a ten year minimum mandatory; with respect to count II, second degree murder, the court found an escalating pattern of criminality and imposed an concurrent upward departure sentence of life imprisonment and on count III, armed robbery, the court sentenced the defendant as a habitual violent felony offender to 30 years with a ten year minimum mandatory (R. 528-30, 463-67).

The defendant appealed his conviction and on February 13, 2002, the appellate court affirmed his conviction and sentence.

SUMMARY OF THE ARGUMENT

I. The retroactive application of the Florida legislature's amendment to the burglary statute violates the ex post facto clause of the state and federal constitutions and also violates the doctrine of separation of powers. It is well-established that courts have the authority to interpret the statutory law enacted by the legislature. In *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), this Court interpreted the meaning of the "remaining in" language in the burglary statute and determined that it only criminalized instances where the defendant surreptitiously remained inside a dwelling, structure or conveyance. The legislature's attempt to overturn *Delgado* resulted in a substantially revised version of the burglary statute, rather than a clarification of intent.

II. The evidence was insufficient as a matter of law to sustain any of the convictions. The only evidence connecting the defendant to the crime was his possession of the victim's jewelry. The prosecution failed to establish the relationship of the theft of the jewelry to the homicide. The evidence showed that the last time anyone had seen the contents of the victim's jewelry box was two days prior to the homicide. Moreover, unidentified fingerprints were found at the crime scene and the DNA of an unknown male was mixed with the victim's blood. There was also no evidence of either a burglary, or a robbery. Since the state's case was based entirely on circumstantial evidence and the state was unable to refute all reasonable hypotheses

of innocence, the Third District Court of Appeal erred in its determination that the circumstantial evidence was legally sufficient.

ARGUMENT

I

THE RETROACTIVE APPLICATION OF THE AMENDED BURGLARY STATUTE TO THE APPELLEE VIOLATES BOTH THE EX POST FACTO CLAUSE AND THE SEPARATION OF POWERS DOCTRINE.

In *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989), this Court stated that “it is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.” Since *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), was decided prior to the finalization of the defendant’s conviction, his case must be governed by its interpretation of the burglary statute. The retroactive application of the revised version of the burglary statute to this case would violate Article I, Section X, of the Constitution of the United States, as well as Article I, Section X of the Florida Constitution.

In *Delgado v. State*, 776 So. 2d 233, this Court held that the “remaining in” language in the burglary statute was qualified by the clause which stated that “unless ... the defendant is licensed or invited to enter.” In order to give effect to the entire statute, this Court receded from its prior interpretations and concluded that the “remaining in” language is limited to instances where a defendant surreptitiously

remains in a home, structure or conveyance. *Id.* at 240.

In response to *Delgado*, the Florida legislature amended the burglary statute such that whenever an invitee or licensee commits a crime inside a dwelling, structure or conveyance, consent is automatically deemed to have been withdrawn. § 810.015(2), Fla. Stat. (2001). The amendment further provides for the retroactive application of the statute in order to restore the status quo ante and asserts the legislature's intention to nullify *Delgado*.

The purported clarification of the legislative intent set forth in § 810.105, Fla. Stat. (2001), is not a clarification, but rather a substantive revision to the burglary statute which expanded the definition of burglary such that it criminalized behavior that, under this Court's interpretation in *Delgado*, was not a burglary. Hence, the retroactive application of the new burglary statute violates the ex post facto prohibition.

The legislature's retroactivity language in the amendment to the burglary statute was expressly designed to overrule this Court's holding in *Delgado*, which is why the operative date for retroactive application was February 1, 2000, two days prior to the issuance of the decision. The legislature's effort to overturn this Court's authoritative interpretation of a criminal statute is a violation of the separation of powers doctrine. The principle at issue was laconically stated in *Means v. Northern Cheyenne Tribal*

Court, 154 F. 3d 941, 946 (9th Cir. 1998), as follows:

While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law. In other words, once the Supreme Court has ruled that the law is "X," Congress can come back and say, "no, the law is 'Y,' " but it cannot say that the law was *never* "X" or *always* "Y."

This Court in *State v. Smith*, 547 So. 2d 613, addressed a similar situation in which the Florida legislature attempted to overturn this Court's prior holding in *Carawan v. State*, 515 So. 2d 161 (Fla. 1987). Soon after the *Carawan* decision, the legislature passed an amendment which purported to "override the interpretation [this Court] adopted in *Carawan* and to restore the legislative intent ... pre-*Carawan*." *Smith*, 547 So. 2d at 616. This Court rejected the retroactivity of the legislative enactment intended to abrogate *Carawan* on the basis of both ex post facto and separation of powers prohibitions.

[I]t is a function of the judiciary to declare what the law is. 10 FLA.JUR.2D, CONSTITUTIONAL LAW, § 166. Although legislative amendment of a statute may change the law so that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute. Instead, the nature and effect of the court decisions and the statutory amendment must be examined to determine what law may be applicable after the amendment. *See*, 13 FLA.JUR.2D, COURTS AND JUDGES, § 140.

Secondly, it is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may

be imposed. *See*, 14 FLA.JUR.2D, CRIMINAL LAW, § 18, and cases therein cited; Article 10, § 9, Florida Constitution.

Finally, the amended statute, if given retroactive effect as urged by the state, would result in additional punishment for appellant, thus running afoul of the ex post facto clauses of the state and federal constitutions.

Smith, 547 So. 2d 615 (quoting *Heath v. State*, 532 So. 2d 9, 10 (Fla. 1st DCA 1988)).

The state's contention that this Court receded from its holding in *Delgado* in *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001), is based on an over-interpretation of *Jimenez* which reads too much into the decision. Jimenez's first-degree murder conviction and death sentence were affirmed on appeal *before* this Court decided *Delgado*. Jimenez subsequently filed a motion for postconviction relief seeking to overturn his burglary conviction. This Court found that *Delgado* did not apply because Jimenez's convictions were final prior to the release of the *Delgado* decision. *See Jimenez*, 810 So. 2d at 512-513. In dicta, this Court noted that the legislature had declared that the rationale of *Delgado* was inconsistent with the legislative intent underlying the burglary statute. However, if this Court had intended to abrogate *Delgado* based on the recent amendments to the burglary statute, this Court could have done so by expressly repudiating *Delgado*, rather than applying its holding.

II

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE CONVICTIONS FOR MURDER, BURGLARY AND ARMED ROBBERY WHERE THE ONLY EVIDENCE LINKING THE DEFENDANT TO THE CRIME WAS HIS POSSESSION OF THE VICTIM'S JEWELRY.

When this Court accepts jurisdiction on the basis of a certified question, this Court has jurisdiction over all issues raised in the case. *See Schreiber v. Rowe*, 2002 WL 432575 (Fla. March 21, 2002); *Fulton County Administrator v. Sullivan*, 753 So. 2d 549, 553 n. 3 (Fla. 1999); *Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994).

The Third District Court of Appeal erroneously determined that the circumstantial evidence against Mr. Braggs was legally sufficient to sustain a conviction for second-degree murder, burglary and armed robbery.

A conviction may be based solely on circumstantial evidence only if the evidence excludes every reasonable hypothesis of innocence. *See State v. Law*, 559 So. 2d 187, 188- 189 (Fla.1989). "When a conviction is based purely on circumstantial evidence such evidence must be conclusive 'and it must be consistent with guilt and inconsistent with innocence, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged.' " *R.S. v. State*, 639 So. 2d 130, 131 (Fla. 2d DCA 1994).

Although the question of whether the evidence fails to exclude all reasonable

hypotheses of innocence is reserved for the jury, *see Dupree v. State*, 705 So.2d 90, 94 (Fla. 4th DCA 1998), "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Barwick v. State*, 660 So. 2d 694, 685 (Fla.1995). In *Law, supra*, the Court explained that "[i]t is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the [factfinder] could infer guilt to the exclusion of all other inferences. . . . If the rule were not applied in this manner, a trial judge would be required to send a case to the [factfinder] even where no evidence contradicting the defendant's theory of innocence was present, only for a verdict of guilty to be reversed on direct appeal." *Law*, 559 So. 2d at 188-89

In the case *sub judice*, there was insufficient evidence linking the defendant to the homicide. The state's case against Mr. Braggs rested primarily on his possession of the victim's jewelry. Mr. Braggs' explanation that he obtained the jewelry the day after the homicide in a burglary in Liberty City was unrefuted. The state, moreover, could not explain why an unknown person's fingerprint was found in the victim's bathroom, nor account for the presence of an unknown male's DNA, which was mixed with the victim's blood. As the defense argued in its motion for a judgment of acquittal, the DNA and fingerprint evidence showing the presence of an unidentified male at the crime scene at the time of the murder established, as a matter of law and

logic, a reasonable hypothesis of innocence (T. 1671). It is fair to infer that the DNA evidence was deposited at the time of the homicide because the unknown male's DNA was mixed with the victim's blood. The Third District states in its opinion that because the unidentified DNA could have come from "saliva, sweat, or other bodily fluid or tissue..." it may have been inadvertently deposited by police officers or members of the fire rescue team. *Braggs v. State*, Slip Op. at 9, Case No. 3D99-2201 (Fla. 3d DCA February 13, 2002). While this scenario is conceivable, it does not negate the equally likely possibility that it was deposited by an unknown assailant. Moreover, it is not the reviewing court's function to posit reasonable hypotheses of guilt when evaluating a circumstantial evidence case, but rather to determine if every reasonable hypothesis of innocence has been excluded by the evidence.

The evidence did not demonstrate when or how the jewelry was stolen. Annette Stevenson had last seen the contents of the jewelry box two days prior to the incident (T. 1445). It is thus impossible to determine whether the jewelry was taken at the time of the murder, some time prior to the murder, or after the murder, but disconnected from the murder. Since the state could not establish either a causal, or a temporal, nexus between the homicide and the theft of the jewelry, a number of equally reasonable interpretations of the evidence remained likely. The following list cites four reasonable alternatives:

- (A) Unknown male killed victim and stole jewelry.
- (B) Unknown male stole jewelry and killed victim after theft.
- (C) Unknown male killed victim, then later defendant stole jewelry.
- (D) Defendant stole jewelry sometime before the homicide and later, in an unrelated incident, an unknown male killed victim.

These four possible scenarios are equally supported by the evidence adduced at trial and none of them are definitively excluded.

Illustrative of the weakness of the state's case is this Court's decision in *Long v. State*, 689 So. 2d 1055 (Fla. 1997). Robert Long, a confessed serial killer who had pled guilty to eight prior homicides, was tried for the murder of an eighteen year old prostitute. The victim's skeletal remains were discovered about a month after her disappearance and it was determined that she had been strangled to death. Ten days after the the body was uncovered, Long was arrested for the abduction of another woman. A search of his car revealed two hair fibers which matched the victim, as well as carpet fibers matching fibers discovered at the crime scene. In a television interview, Long had described his modus operandi. He said that when he saw a woman walking down the street, "it was like A, B, C, D. I pull over, they get in, I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out." 689 So. 2d at 1057. This Court found that the evidence was legally insufficient to sustain

a conviction.

In this case, the State introduced evidence that Long abducted and then released McVey; that a search of Long's car after he was apprehended for the McVey abduction revealed two hairs consistent with that of the victim; that a carpet fiber from the scene of the crime matched the carpet in Long's car; and that Long made vague statements to the effect that he had killed "others." While the hair and fiber evidence in conjunction with the other evidence in this case certainly raises a very strong suspicion that Long killed the victim, we find that it is insufficient to establish beyond a reasonable doubt that he did so. First, no one saw Long with the victim, and no statements were introduced in which Long stated that he killed the victim in this case. Further, as explained below, the critical evidence linking Long to the murder in this case, the two strands of hair and the carpet fiber, is not competent to support the conviction.

689 So. 2d at 1058.

This Court relied on *Cox v. State*, 555 So. 2d 352 (Fla.1989). In *Cox*, the victim was a nineteen year old woman who disappeared one evening after leaving work. Her car and her remains were found a year later. In her car, detectives discovered hair fibers, a blood stain and a boot print, none of which belonged to the victim. The state tied Cox to the homicide on the basis of the aforementioned evidence as well as a bite mark comparison. The Court found that the circumstantial evidence was insufficient to support a conviction.

Long and *Cox* stand for the proposition that a non-conclusive physical tie to the scene of a homicide does not, by itself, constitute proof of murder. A fingerprint, a hair or carpet fiber, et cetera only shows that the suspect *may* have been present at

some point. In the cases of *Cox* and *Long*, the forensic evidence was not specific enough to definitively link them to the victims, despite the fact that the circumstances were highly suspicious. In the present case, assuming that the jewelry found on the defendant belonged to the victim, the defendant's possession of it could not prove a murder.¹ If the defendant had been a stranger, then his possession of the jewelry would have been far more incriminating, since one must infer that he could not have committed the theft without also committing a burglary. However, Mr. Braggs could have acquired the jewelry without the use of force and he could have taken it either before or after the homicide, e.g. he could have visited Ruby the day before and stolen it when she was not looking, he could have gone to Ruby's house on April 19, discovered her body then taken her jewelry.

The convictions for robbery and burglary were unsupported by the evidence and required a number of unsubstantiated assumptions. First, there was no evidence of a burglary. Officer Rivera inspected the house and found no signs of forced entry. Secondly, the state failed to prove armed robbery. Since there was no evidence demonstrating the circumstances which precipitated the murder, for all we know, the deceased was killed during an argument and her death was completely unrelated to the

¹The victim's jewelry, which was not unique, was identified by her daughters Cassandra Andrews and Annette Stevenson at trial (T. 1016, 1439).

theft. For example, the perpetrator could have been someone Ruby knew. She invited him into the house, shortly thereafter they began to quarrel and in a fit of rage the perpetrator stabbed her to death. After the homicide, the subject spotted her jewelry box and decided to steal its contents. This scenario involves a second degree murder and a theft. There was not a shred of evidence presented by the prosecution that ruled out this hypothetical.

The unexplained possession of recently stolen property may sustain a conviction for burglary, where a burglary was required to accomplish the theft. *See Barnlund v. State*, 724 So. 2d 632 (Fla. 5th DCA 19989); *T.S.R. v. State*, 596 So. 2d 766 (Fla. 5th DCA 1992); *Ridley v. State*, 407 So. 2d 1000 (Fla. 5th DCA 1981). In the instant case, however, there was no proof of a burglary, nor was a burglary required to accomplish the theft. The defendant was related to the deceased and had visited her home in the past. There was no indication that anyone gained entry to her home by force or stealth. Additionally, assuming that the defendant stole the jewelry from the deceased's home, he could have committed the theft after gaining entry as an invitee.

In conclusion, the jury's finding that the defendant committed the homicide was predicated on a number pyramiding assumptions the totality of which did not exclude all reasonable hypotheses of innocence. Furthermore, there was strong forensic

evidence showing that an unknown male was in the victim's house at the time of the homicide and had contact with her blood, a fact which to this day remains unexplained.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court rule that the amended burglary statute cannot be applied retroactively and reverse the Third District Court of Appeal's determination that the circumstantial evidence adduced at trial was sufficient to sustain the Respondent's convictions for second degree murder, burglary with an assault and armed robbery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on the Merits has been forwarded to Assistant Attorney General, Paulette Taylor, at the Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Miami, Florida 33131, this 13th day of May, 2002.

BY: _____
MANUEL ALVAREZ
Assistant Public Defender

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY: _____
MANUEL ALVAREZ
Assistant Public Defender