

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1314

DCA NO. 3D07-2401

GREGORY THOMAS,

Petitioner,

-VS-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Gregory Thomas, seeks discretionary review of a decision of the Third District Court of Appeal that expressly conflicts with cases of this Court and other district courts of appeal. The symbol “A.” refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Mr. Thomas was charged with first degree felony murder for the death of Gerzon Ferrales during the perpetration of a robbery, (2) robbery by sudden snatching of a purse from Gerzon’s mother, and (3) grand theft auto. (A. 3). In his appeal, Mr. Thomas solely challenged the trial court’s denial of his motion for judgment of acquittal on first degree felony murder on the basis that there was insufficient evidence that the predicate felony of robbery was committed. (A. 3).

The Snatching of a Purse from Gerzon Ferrales’ Mother

Gerzon Ferrales, his wife, his mother and her husband arrived from Tampa to visit in Miami. (A. 2). As they were taking their luggage out of their car, a man (identified as Gregory Thomas) approached them and tried to sell them a CD player. (A. 2). When they declined to purchase the CD player, the man snatched a purse from the mother’s shoulder. (A. 2). The purse contained personal items and \$460 in cash which her son had given her. (A. 2).

The Chase Which Resulted in the Death of Gerzon Ferrales

The man attempted to flee in a car driven by another individual. (A. 2). Gerzon pursued the man and grabbed onto the passenger side door of the vehicle as it took off. (A. 2). As the vehicle sped away, the man forcibly attempted to knock Gerzon from the side of the car. (A. 2). Gerzon continued to resist by holding onto the car. (A. 2). After several minutes, the car arrived at a padlocked gate at the Opa-Locka airport, the car slowed down, then sped through the gate and at least one more fence at the airport. (A. 2). As a result of injuries sustained in the impact, Gerzon died later at the hospital. (A. 2, 3).

Third District's Decision Affirming the Denial of the Motion for Judgment of Acquittal

The defense moved for a judgment of acquittal on the first degree felony murder charge as there was insufficient evidence that the predicate felony of robbery was committed (as there was no force used against the mother and there was no taking from Gerzon). (A. 3). The Third District affirmed the denial of this motion. In its decision, the Third District noted that “prior to 1987, Florida law ‘interpreted section 812.13 as being consistent with the common law . . . [and required that] ‘[t]he violence or intimidation [associated with robbery] must precede or be contemporaneous with the taking of the property.’” *Royal v. State*,

490 So. 2d 44, 46 (Fla. 1986) (citation omitted). (A. 4). The Third District continued finding: “Effective October 1, 1987, the robbery statute was amended by the inclusion of the phrase ‘when in the course of the taking’ in subsection 812.13(1) and the addition of section 812.13(3)(b). *See* Ch. 87-315, § 1, Laws of Fla.; §§ 812.13(1)(3)(b), Florida Statutes (1987). [footnote omitted].” (A. 4). Section 812.13(3)(b) defines in the course of the taking: “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 and the act of taking constitute a continuous series of acts or events.” (A. 5).

The Third District explained: “By amending the statute, the legislature essentially expanded the definition of robbery to include acts occurring after the taking, provided that such acts and the taking are part of a ‘continuous series of acts or events.’” (A. 5). The Third District then concluded:

Following the 1987 amendment, the “force, violence, assault, or putting in fear” no longer has to be exerted against the person from whom the property was taken, so long as it was exerted in the course of the taking. *See Santilli v. State*, 570 So. 2d 400, 402 (Fla. 5th DCA 1990) (“[T]he continuity of [the shoplifter’s] progression from the store to his forceful act against the [pursuing] officer with his car outside the store justified submission of the robbery offense to the jury.”); *Rumph v. State*, 544 So. 2d 1150, 1151-1152 (Fla. 5th DCA 1989) (“[A shoplifter’s] use of force to shove [a store employee] out of his way and into the door as he fled with [stolen property] constitutes the use of force in flight after the taking and provides the

evidence to sustain [the shoplifter's] conviction for robbery.”) (A. 5-6) (emphasis added).

Applying this conclusion to the facts, the Third District held: “In order to prove robbery in the case before us, the State was required to demonstrate that there was a ‘taking of money or other property . . . from the person or custody of another’ and that ‘in the course of the taking, there [was] the use of force, violence, assault, or putting in fear.’ *See* § 812.13, Fla. Stat. (2004).” It then found:

These statutory requirements were satisfied because 1) there was a taking of money from the person of the Victim’s mother; 2) there was a use of force, violence, assault, or putting in fear by both Thomas and the driver against the Victim; 3) the exertion of the force was subsequent to the taking, while the victim was attempting to retrieve the stolen money; [footnote omitted] and 4) the taking and the use of force while fleeing the crime scene comprised a continuous series of acts, rendering the use of force ‘in the course of the taking” *See id.*; *Santilli*, 570 So. 2d at 401-402. We further clarify that there need not be any legal relationship (i.e., mother-son or employer-employee) between the person from whom the property is taken and the person against whom the force, violence, assault, or putting in fear is exerted, provided that the taking and the use of force comprise a continuous series of acts or events. *See Santilli*, 570 So. 2d at 400; *Rumph*, 544 So. 2d at 1150. (A. 6).

The Third District then related that “Thomas’ reliance upon *Gaiter v. State*, 824 So. 2d 956 (Fla. 3d DCA 2002) is misplaced.” (A. 7). The court explained:

Gaiter is entirely distinguishable from the case before us as it involved a landlord who confronted a would-be thief attempting to steal, from the landlord’s premises, a bicycle belonging to the landlord’s tenant. Unlike the instant case, no evidence was presented

in *Gaiter* to demonstrate that anything was taken from the person of another or that the landlord had custody of the bicycle when it was taken. Thomas places particular reliance on the statement in *Gaiter* that “one of the essential elements of robbery is that the person who is placed in fear or assaulted must either own or have custody of the property being taken.” *Id.* at 957. When read in context, it is evidence that this statement is dicta, and we are neither bound nor persuaded by it.” (A. 7).

Based on its findings, the Third District found substantial competent evidence to support the conviction of felony murder and the finding of the elements of the predicate felony of robbery by the jury. (A. 7).

SUMMARY OF ARGUMENT

The two essential elements of robbery are (1) a taking of property from the person or custody of another and (2) the use of force, violence, assault, or putting in fear in the course of the taking. *See* § 812.13, Fla. Stat. (2004). In its decision below, the Third District departed from long-standing Florida law by finding that the force element “no longer has to be exerted against the person from whom the property was taken, so long as it was exerted in the course of the taking.” (A. 5). Contrary to the Third District’s decision below, long-standing Florida law, in conformity with the common law of robbery, still requires that the taking and the force element of robbery must be committed against the same victim. The Third District’s decision is in conflict with this long-standing Florida law.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL’S DECISION EXPRESSLY CONFLICTS WITH *Robinson v. State*, 692 So. 2d 883 (Fla. 1997); *Royal v. State*, 490 So. 2d 44 (Fla. 1986); *Bell v. State*, 394 So. 2d 979 (Fla. 1981); *Williams v. Mayo*, 172 So. 86 (1937); *Brown v. State*, 848 So. 2d 361 (Fla. 4th DCA 2003); *Anderson v. State*, 639 So. 2d 192 (Fla. 4th DCA 1994); *Rose v. State*, 507 So. 2d 630 (Fla. 5th DCA 1987); *Atwell v. State*, 886 So. 2d 421 (Fla. 2d DCA 2004); *Hopps v. State*, 594 So. 2d 848 (Fla. 2d DCA 1992); and *Lundy v. State*, 614 So. 2d 674 (Fla. 2d DCA 1993), ON THE ISSUE THAT THE FORCE AND TAKING ELEMENTS OF ROBBERY, CONSISTENT WITH COMMON LAW, MUST BE COMMITTED AGAINST THE SAME VICTIM.

The two essential elements of robbery are (1) a taking of property (“taking element”) from the person or custody of another and (2) the use of force, violence, assault, or putting in fear (“force element”) in the course of the taking. *See* § 812.13, Fla. Stat. (2004). In its decision below, the Third District departs from long-standing Florida law by finding that the force element “no longer has to be exerted against the person from whom the property was taken, so long as it was exerted in the course of the taking.” (A. 5). Contrary to the Third District’s decision below, long-standing Florida law, in conformity with the common law of robbery, still requires that the taking element and the force element must be committed against the same victim.

This Court interprets the robbery statute, Section 812.13, Florida Statutes, as being consistent with the common law definition of robbery, absent contrary legislative intent. *See Royal v. State*, 490 So. 2d 44 (Fla. 1986) *receded from on other grounds*, *Taylor v. State*, 608 So. 2d 804 (Fla. 1992); *Williams v. Mayo*, 172 So. 86, 87 (Fla. 1937) (“It is quite generally held by the courts, in construing statutes on the subject, that it will not be presumed, in the absence of language to the contrary, that the Legislature intended to change the nature of the crime at common law.”) (citation omitted). The common law “defines robbery as ‘the felonious taking of money or goods of value from the person of another, or in his presence, against his will by violence or putting him in fear.’” *Royal*, 490 So. 2d at 46, *quoting Williams*, 172 So. at 87. *See also Bell v. State*, 394 So. 2d 979 (Fla. 1981) (“The common law elements of the crime of robbery are a taking, the use of actual or constructive force, the absence of consent on the part of the victim, and the intent to deprive the owner of the property.”) (citations omitted).

The common law approach—which requires that the taking element and the force element must be committed against the same victim—differs from the Model Penal Code approach. This difference in approach was noted by the Third District

in *Gaiter*.¹ “[t]he legislature is free to adopt a different approach [rather than the traditional approach], such as under the Model Penal Code, which defines robbery as a theft with the infliction, or threat of infliction or putting *any* person in fear of immediate serious bodily injury.” *Gaiter*, 824 So. 2d at 957 & n.3 (emphasis in original) (citation omitted).

Contrary to the Third District’s decision below, the 1987 Amendment to the robbery statute only changed the timing of the force element; it did not change the remaining common law elements of robbery. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). In *Robinson*, this court relied on *Royal*’s definition of the elements of robbery. In so doing, it noted:

After *Royal*, the Florida Legislature amended section 812.13, Florida Statutes, to provide that robbery occurs if force or intimidation is used ‘prior to, or contemporaneous with, or subsequent to the taking of the property and if [the force or intimidation] and the act of taking constitute a continues series of acts or events.’ Ch. 87-315, Laws of Fla. This amendment superseded *Royal*, which held that force must be used prior to or while the taking is in progress, but does not affect our reliance on *Royal* in the instant case.

See Robinson v. State, 692 So. 2d 883, 886 & n.9 (Fla. 1997).

¹ As noted in the Statement of the Case and Facts, the Third District below held that the statement in *Gaiter*, “one of the essential elements of robbery is that the person who is placed in fear or assaulted must either own or have custody of the property being taken[]”), is dicta and that it was “neither bound nor persuaded by it.” (A. 7).

Contrary to the Third District's decision below, which adopted the Model Penal Code approach to robbery, numerous decisions from the district courts of appeal follow the traditional common law approach to robbery, which requires that the force be exerted against the same person from whom there is a taking. In *Brown v. State*, 848 So. 2d 361 (Fla. 4th DCA 2003), the victim and her friend were sitting on a park bench, and the victim's purse was next to her on the bench. The friend heard rustling in the bushes and saw the defendant running away. Realizing the victim's purse was taken, the friend ran after the defendant and an altercation ensued. The defense moved for a judgment of acquittal on the robbery charge as the victim of the taking was not the target of any violence, threat, or assault. The trial court granted this judgment of acquittal and reduced the charge to robbery by sudden snatching. The Fourth District affirmed this holding and further held that the robbery by sudden snatching charge could not stand either.

In *Rose v. State*, 507 So. 2d 630 (Fla. 5th DCA 1987), robbers held up a wife and a husband but only attempted to take the property of the husband. The information charged the defendant with the attempted robbery of the wife, not the husband. The defense moved for a judgment of acquittal since there was no taking against the wife. The Fifth District reversed the trial court's denial of the motion for judgment of acquittal emphasizing: "An attempted robbery of [the wife], or

any one person, is a distinctly different factual event and crime from an attempted robbery of [the husband] or any other person.” *Rose*, 507 So. 2d at 631.

In *Hopps v. State*, 594 So. 2d 848 (Fla. 2d DCA 1992), the defendant was charged with two counts of robbery for breaking into a motel room, threatening an elderly couple with a firearm, and then stealing the wife’s purse which contained property belonging to the husband. The Second District held that the robbery charge against the husband cannot stand as there was only a single taking. *See also Atwell v. State*, 886 So. 2d 421 (Fla. 2d DCA 2004) (only three counts of armed robbery could stand as property was not taken from fourth victim); *Anderson v. State*, 639 So. 2d 192 (Fla. 4th DCA 1994) (only one count of robbery could stand as property was not taken from second victim); *Lundy v. State*, 614 So. 2d 674 (Fla. 2d DCA 1993) (same).

CONCLUSION

In light of the foregoing argument that the Third District’s decision below expressly conflicts with decisions of the this Court and other district courts of appeal, Mr. Thomas respectfully requests that this Court exercise its jurisdiction, under Article V, Section 3(b)(3), Florida Constitution, to resolve this conflict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Rolando A. Soler, Attorney for the Respondent, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ____ day of July, 2010.

BY: _____
SHANNON P. MCKENNA
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY: _____
SHANNON P. MCKENNA
Assistant Public Defender

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