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IN THE SUPREME COURT OF FLORIDA

DARRYL WAYNE RIDGEWAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-1205

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, DARRYL WAYNE RIDGEWAY, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, *Ridgeway v. State*, 128 So. 3d 935 (Fla. 1st DCA 2013), which is attached, but can also be found at 39 Fla. L. Weekly D37.

SUMMARY OF ARGUMENT

Petitioner seeks to invoke this Court's discretionary review by asserting the First District Court of Appeal's decision rendered in the instant case is in express and direct conflict with *Pagan v. State*, 830 So. 2d 792 (Fla. 2002). However, Petitioner does not assert any basis for which the conflict exists. Instead, Petitioner attempts to re-argue his case before this Honorable Court. The First District's opinion in the instant case is consistent with the holding and reasoning set out in *Pagan*, and, in fact, cites to *Pagan* for support. Thus, Petitioner has, quite simply, failed to provide any basis upon which this Honorable Court could invoke its discretionary review based on conflict when no such conflict has been alleged or established.

ARGUMENT

ISSUE I: THIS COURT HAS NO BASIS TO EXERCISE DISCRETIONARY JURISDICTION BECAUSE THE OPINION RENDERED BY THE FIRST DISTRICT IS NOT IN EXPRESS OR DIRECT CONFLICT WITH THE CASE CITED BY PETITIONER. (RESTATED)

1. Standard of Review

The applicable standard of review for claims of direct and express conflict is *de novo* subject to the following criteria.

2. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). *Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves*, 485 So. 2d at 830; *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief." *Stallworth v.*

Moore, 827 So. 2d 974 (Fla. 2002).

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So. 2d at 1359. In *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

3. The decision below is not in "express and direct" conflict with *Pagan v. State*, 830 So. 2d 792 (Fla. 2002).

Petitioner seeks to invoke this Court's discretionary review by asserting the First District Court of Appeal's decision rendered in the instant case is in express and direct conflict with *Pagan v. State*, 830 So. 2d 792 (Fla. 2002). Specifically, Petitioner avers "[b]ecause Petitioner asserts that the Motion for JOA should have been granted he maintains that the First District's decision is contrary and conflicts with *Pagan* [*v. State*, 830 So. 2d 792 (Fla. 2002)]." (PJB. 6). However, Petitioner does not allege how the First District's opinion is in express and direct conflict with *Pagan*, but instead appears to be rearguing before this Court the same claim raised in the Initial Brief at the District Court level.

In his Jurisdictional Brief, Petitioner asserts his Motion for Judgment of Acquittal should have been granted because the State failed to present sufficient evidence to prove the elements of a taking, especially intent. (PJB. 6) (citing *F.B. v. State*, 852 So. 2d 226 (Fla. 2003)). Petitioner argues that it was never his intent to take the knife from the clerk, but the knife was instead given to him. (IB. 6-7). This is the exact same claim raised by Petitioner in his Initial Brief to the First District Court of Appeal. *Ridgeway*, 128 So. 3d at 938.

Petitioner further cites to *Daniels v. State*, 587 so. 2d 460 (Fla. 1991) and *Stevens v. State*, 265 So. 2d 540 (Fla. 2d DCA 1972) to support his argument, but does not allege any conflict between either of those cases. (PJB.. 8). However, this portion of his Jurisdictional Brief is taken directly from the Dissent written by the Honorable Nikki Clark that was part of the First District's opinion. *Ridgeway*, 128 So. 3d at 939. Again, Petitioner does not assert any conflict with these cases for which this Court could base jurisdiction.

As to Petitioner's assertion that *Pagan* is in conflict, he does not assert "how" the cases are in conflict. In *Pagan*, the argument presented to this Court was the sufficiency of the evidence in a death case, where the defendant alleged that the State presented wholly circumstantial evidence that was insufficient to prove premeditation and identity. 830 So. 2d at 803. Unlike the instant case, the argument in *Pagan* was preserved by a motion by defense counsel. See *id*; Cf. *Ridgeway*, 128 So. 3d at 937 ("First,

the appellant did not preserve any issue regarding the taking of the knife because he failed to present the specific legal argument to the trial court below.") (citing *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)). Further, the *Pagan* Court held that the evidence was sufficient to prove both premeditation and the identity of Pagan as one of the perpetrators. *Id.* at 804. The reasoning set out in *Pagan* is consistent with the reasoning employed by the First District; in fact, the First District cited to *Pagan* in its opinion. See *Ridgeway*, 128 So. 3d at 937.

As such, Petitioner has, quite simply, failed to provide any basis upon which this Honorable Court could invoke its discretionary review based on conflict as no such conflict has been alleged or established. This Honorable Court's discretionary jurisdiction under rule 9.030(2)(A)(iv), is limited to decisions "that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Petitioner has failed to set forth a decision from another district court or this Court that is in conflict. Accordingly, this Honorable Court does not have jurisdiction.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on August 4, 2014: DARRYL WAYNE RIDGEWAY, DC#: D24059, at Blackwater River Correctional Facility, 5914 Jeff Ates Road, Milton, FL 32583.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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INDEX TO APPENDIX

A. *Ridgeway v. State*, 128 So. 3d 935 (Fla. 1st DCA 2013).

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H

District Court of Appeal of Florida,
First District.
Darryl Wayne RIDGEWAY, Appellant,
v.
STATE of Florida, Appellee.

No. 1D12-3523.
Dec. 26, 2013.

Background: Defendant was convicted in the Circuit Court, Okaloosa County, Michael A. Flowers, J., of robbery with a deadly weapon after being stabbed in the back by a gas station clerk he attempted to rob. Defendant appealed.

Holdings: The District Court of Appeal, Roberts, J., held that:

- (1) defendant's pulling knife from his own back constituted a taking;
- (2) clerk's stabbing of defendant was not abandonment of the knife;
- (3) defendant committed acts of violence and intimidation; and
- (4) defendant's fleeing with knife was sufficient to establish that he was armed during robbery of knife.

Affirmed.

Clark, J., filed an opinion in which he dissented.

West Headnotes

[1] Criminal Law 110 ⇨753.2(3.1)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in
General

110k753 Direction of Verdict

110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evid-

ence

110k753.2(3.1) k. In general.

Most Cited Cases

A motion for judgment of acquittal should not be granted unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.

[2] Robbery 342 ⇨5

342 Robbery

342k5 k. Taking in general. Most Cited Cases

Robbery 342 ⇨11

342 Robbery

342k11 k. Degrees; armed robbery. Most Cited Cases

Defendant's pulling of knife from his own back after being stabbed by the gas station clerk he attempted to rob constituted a taking as a required element of robbery with a deadly weapon; clerk would not have had to give up possession of the knife but for defendant's act of violence in attacking the clerk, forcing him to brandish the knife for protection. West's F.S.A. § 812.13(1).

[3] Robbery 342 ⇨9

342 Robbery

342k9 k. Taking from person or presence of another. Most Cited Cases

Property need not be in the actual physical possession or immediate presence of the person who was robbed for a taking to occur. West's F.S.A. § 812.13(1).

[4] Robbery 342 ⇨9

342 Robbery

342k9 k. Taking from person or presence of another. Most Cited Cases

Property is taken from the person or custody of another, as a required element of a robbery, if it is sufficiently under the victim's control so that the

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victim could have prevented the taking had he not been subjected to the violence or intimidation by the robber. West's F.S.A. § 812.13(1).

[5] Robbery 342 ↪4

342 Robbery

342k4 k. Property subject of robbery and ownership and possession thereof. Most Cited Cases

Robbery 342 ↪11

342 Robbery

342k11 k. Degrees; armed robbery. Most Cited Cases

Store clerk's stabbing of defendant who attempted to rob him through intimidation and violence was not a relinquishment or abandonment of the knife which became lodged in the defendant's back, such that defendant's pulling of the knife from his back and turning towards the clerk constituted a taking as an element required for robbery with a deadly weapon; knife was clerk's best defensive weapon against defendant and nothing indicated that clerk parted with it voluntarily. West's F.S.A. § 812.13(1), (2)(a).

[6] Robbery 342 ↪11

342 Robbery

342k11 k. Degrees; armed robbery. Most Cited Cases

Defendant's actions of jumping over a counter to attack a gas station clerk, and pulling the knife the clerk stabbed him with out of his back and turning towards the clerk before the clerk fled the gas station were acts of violence, assault, or putting fear in the clerk, required as an element for robbery with a deadly weapon; acts of violence or intimidation could occur prior to, during, or after the actual taking of the knife. West's F.S.A. § 812.13(1), (3)(b).

[7] Robbery 342 ↪3

342 Robbery

342k3 k. Intent. Most Cited Cases

Robbery 342 ↪11

342 Robbery

342k11 k. Degrees; armed robbery. Most Cited Cases

Evidence that defendant did not intend to return knife lodged in his back, after gas station clerk stabbed him during his attempt to rob the clerk, was sufficient to establish that defendant intended to deprive the clerk of knife, as required to support a conviction for robbery with a deadly weapon. West's F.S.A. § 812.13(1), (2)(a).

[8] Robbery 342 ↪3

342 Robbery

342k3 k. Intent. Most Cited Cases

To support a conviction for robbery, the intent to deprive must be shown at the time of the taking. West's F.S.A. § 812.13(1).

[9] Robbery 342 ↪11

342 Robbery

342k11 k. Degrees; armed robbery. Most Cited Cases

Evidence that defendant pulled a knife out of his back and fled with it after being stabbed by the gas station clerk he attempted to rob was sufficient to establish that defendant carried a deadly weapon during the course of his robbery, as required to support conviction for robbery with a deadly weapon. West's F.S.A. § 812.13(1), (2)(a).

*936 Nancy A. Daniels, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee; Scott D. Miller, Assistant Public Defender, Crestview, for Appellant.

Pamela Jo Bondi, Attorney General, and Angela R. Hensel, Assistant Attorney General, Tallahassee, for Appellee.

ROBERTS, J.

The appellant, Darryl Ridgeway, appeals his judgment and sentence for one count of robbery

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with a deadly weapon, raising two *937 issues on appeal, only one of which merits discussion. He argues that the trial court erred in denying his motion for judgment of acquittal. We disagree and find that, in a light most favorable to the State, competent, substantial evidence supported all the elements of the charged offense such that the motion for judgment of acquittal was properly denied.

The appellant entered a gas station in the early morning hours and asked the clerk for cigarettes. The appellant asked the clerk if he was working alone, to which the clerk responded affirmatively. The appellant then demanded all the money in the cash register. After the clerk refused, the appellant took a step back, reached for his pocket, and jumped over the counter. As the appellant jumped over the counter, the clerk pulled out his personal knife. In an attempt to defend himself, the clerk lunged at the appellant twice. On the second lunge, the knife pierced and became lodged in the appellant's back as he jumped back over the counter. The appellant proceeded toward the exit, but stopped halfway between the door and the counter. Upon stopping, the appellant pulled the knife from his back, turned with the knife in his hand, faced the clerk, and took four steps toward the clerk. Feeling defenseless and unsure of the appellant's next move, the clerk ran out the back door and called the police. The appellant exited the store with the knife in his hand, entered his vehicle, and drove away with the knife. The appellant was charged and convicted of one count of robbery with a deadly weapon.

On appeal, the appellant argues that the trial court erred in denying his motion for judgment of acquittal because the State failed to prove that he had the requisite intent to commit robbery of the knife and also failed to prove that there was a taking of the knife.

[1] A motion for judgment of acquittal is reviewed on appeal by the *de novo* standard of review. *Pagan v. State*, 830 So.2d 792, 803 (Fla.2002). The question presented by the motion is

whether, in a light most favorable to the State, the evidence is legally adequate to support the charge. *Jones v. State*, 790 So.2d 1194, 1197 (Fla. 1st DCA 2001). A motion for judgment of acquittal should not be granted "unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Id.* (quoting *Lynch v. State*, 293 So.2d 44, 45 (Fla.1974)). If competent, substantial evidence is presented to support the conviction, an appellate court will generally not reverse the denial of a motion for judgment of acquittal. *Pagan*, 830 So.2d at 803.

[2] First, the appellant did not preserve any issue regarding the taking of the knife because he failed to present the specific legal argument to the trial court below. See *Archer v. State*, 613 So.2d 446, 448 (Fla.1993). The appellant concedes that his general motion for judgment of acquittal could be considered insufficient, but argues that appellate review is not precluded because the error was fundamental. See *F.B. v. State*, 852 So.2d 226, 230 (Fla.2003) (finding an exception to the preservation requirement where the evidence is insufficient to show that a crime was committed at all). We find no support for the appellant's argument for error, let alone fundamental error.

For the crime of robbery, the State must prove the following elements beyond a reasonable doubt:

- (1) The appellant took the knife from the person or custody of the clerk;
- (2) force, violence, assault, or putting in fear was used in the course of the taking;

*938 (3) the knife had some value ^{FN1};

FN1. The clerk testified at trial that the knife had an approximate value of between \$160 and \$260.

- (4) the taking was with the intent to permanently or temporarily deprive the clerk of his right to the

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knife or any benefit from it or appropriate the knife of the clerk to his own use or to the use of any person not entitled to it.

See Fla. Std. Jury Instr. (Crim.) 15.1; § 812.13(1), Fla. Stat. (2011).

To prove the crime of robbery with a deadly weapon, the State must further prove that, in the course of committing the robbery, the appellant carried a deadly weapon. § 812.13(2)(a), Fla. Stat. (2011). An act will 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.” § 812.13(3)(a), Fla. Stat. (2011).

[3][4] As to the taking, the State presented the clerk's testimony and evidence in the form of surveillance video footage with multiple camera angles showing that, after being stabbed, the appellant stopped, took the knife from his back, turned around, took four steps toward the clerk with the knife in his hand, and then left the store with the knife. Although the appellant took the knife out of his back rather than the clerk's hands, property need not be in “the actual physical possession or immediate presence of the person who was robbed” for a taking to occur. *Perry v. State*, 801 So.2d 78, 86–87 (Fla.2001) (citing *Jones v. State*, 652 So.2d 346, 350 (Fla.1995) (citation omitted)). Rather, “property is taken from the person or custody of another if it is sufficiently under the victim's control so that the victim could have prevented the taking had [he] not been subjected to the violence or intimidation by the robber.” *Perry*, 801 So.2d at 87. Here, the clerk could have prevented the taking had he not been intimidated enough to brandish the knife for protection. As such, the taking occurred when the appellant pulled the knife from his back, turned, and took four steps toward the clerk with the knife in his hand.

[5] The appellant argues that no taking occurred because the clerk gave him the knife, or abandoned the knife, when the clerk stabbed him and subsequently fled the store. We disagree with this argument as giving or abandonment implies

that the clerk voluntarily relinquished the knife. See generally *Rockmore v. State*, 114 So.3d 958, 962 n. 2 (Fla. 5th DCA 2012) (“ ‘Abandonment’ of property typically refers to the voluntary relinquishment of an owner's right.”), review granted, 116 So.3d 1262 (Fla.2013). We are hard-pressed to find that the clerk voluntarily relinquished his best defense mechanism against the appellant under the circumstances.

[6] As to the next element that force, violence, assault, or putting in fear was used in the course of the taking, the State presented evidence that the clerk felt the need to defend his life when the appellant jumped over the counter. “In the course of a taking” is defined as an act that “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(3)(b), Fla. Stat. (2011). Here, the appellant placed the clerk in fear prior to taking the knife. Alternatively, the appellant brandished the knife and took four steps toward the clerk subsequent to taking the knife from his back, which resulted in the clerk running from *939 the store. Both instances involve a continuous series of acts between the taking and putting the clerk in fear. See *Messina v. State*, 728 So.2d 818, 819 (Fla. 1st DCA 1999) (stating that robbery is not limited to situations in which the defendant has used force at the precise time the property is taken).

[7][8] The State also presented evidence regarding the appellant's actions on the day of the incident and testimony at trial that indicated he intended to permanently or temporarily deprive the clerk of the knife. The intent to deprive must be shown at the time of the taking. See *Bailey v. State*, 199 So.2d 726, 727 (Fla. 1st DCA 1967). In *Bailey*, the defendant engaged the victim in an altercation, during which the defendant took the victim's gun. *Id.* at 726. The defendant claimed the taking was solely to disarm the victim during the altercation, yet the defendant maintained possession of the gun for some six weeks after the altercation. *Id.* The jury con-

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victed the defendant for the crime of robbery. *Id.* On appeal, the defendant argued there was insufficient evidence to show that he had the intent to permanently deprive the victim of his gun. *Id.* Essentially, this Court determined that the State may show intent by the highlighting the circumstances of the defendant's actions prior to or after the taking. *Id.* at 727. Consequently, this Court affirmed the conviction because the State presented sufficient evidence and "the jury weighed the defendant's exculpatory testimony along with the State's evidence that the defendant retained the property for some time.... [T]he jury obviously arrived at the belief that the intent to steal was present at the time of the taking." *Id.*

Here, the appellant took the knife out of his back, took four steps toward the clerk, and then left with the knife. Furthermore, the appellant testified that he had no intention of returning the knife to the clerk as he feared being stabbed again. *See generally Sims v. State*, 681 So.2d 1112, 1116 (Fla.1996) (finding the intent element of robbery was met when the defendant took the gun "for the purpose of escape or robbery insofar as the defendant did not leave the gun at the scene of the crime").

[9] Finally, the State presented evidence that the appellant carried a deadly weapon during the course of committing the robbery of the knife. "In the course of committing the robbery" is an act that "occurs in an attempt to commit robbery or in flight after the attempt or commission." § 812.13(3)(a), Fla. Stat. (2011). Here, the appellant carried the knife after committing a robbery of said knife. *See Jackson v. State*, 662 So.2d 1369, 1372 (Fla. 1st DCA 1995) ("One may also be convicted of armed robbery with a deadly weapon if he or she steals the weapon in the course of a robbery."), *disapproved of on other grounds by State v. Burris*, 875 So.2d 408 (Fla.2004). *See also State v. Brown*, 496 So.2d 194 (Fla. 3d DCA 1986) (finding sufficient proof of armed robbery where defendant assaulted convenience store clerk and took gold chains from her neck, cash from the register, and a handgun from

the store before fleeing even though defendant did not point the gun at anyone).

If the appellant had stumbled out of the store with the knife still lodged in his back or threw the knife in a trash can as he left the store, our analysis may have been different. Under the facts presented, the question is not whether this Court would arrive at the same result as the jury. Rather, the question before this Court is whether there is competent, substantial evidence to support the verdict. We find the State presented competent, substantial evidence to support each element of the *940 charged crime of robbery with a deadly weapon. Accordingly, the trial court's denial of the appellant's motion for judgment of acquittal was appropriate.

AFFIRMED.

THOMAS, J., concurs; CLARK, J., Dissents with opinion.

CLARK, J., DISSENTING WITH OPINION.

The state charged Appellant with armed robbery for being stabbed. Simply, there was one knife, which Appellant simultaneously came into possession of and armed himself with upon being stabbed. The state's theory is absurd, and the trial court erred by denying Appellant's requested judgment of acquittal on the charge of armed robbery. This Court should exercise care that the issue of the clerk's lawful right to defend himself from a robbery is not confused with the issue of whether Appellant robbed the clerk of his knife. I therefore dissent.

After learning the clerk was working alone, Appellant jumped over the counter toward the clerk and demanded money and cigarettes by threat of violence. The store clerk refused to give Appellant any money or cigarettes. As the empty-handed Appellant was jumping back over the counter, the store clerk buried a Gerber knife into Appellant's back. Appellant walked a few steps, stumbled, and removed the knife from his back. As Appellant removed the knife from his back, he turned back to-

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ward the store clerk, who then hurriedly left the building. Thereafter, so did Appellant.

For armed robbery, the state must thus show two things: a robbery and that Appellant was armed. Here, the state argues the same evidence (Appellant was stabbed with a knife) fulfills both. "Robbery" means:

The taking of money or other property ... from the person or custody of another, with intent to either permanently or temporarily deprive the person ... of the money or other property, when in the course of taking there is the use of force, violence, assault, or putting in fear.

§ 812.13(1), Fla. Stat.

A robbery is enhanced from a second degree felony to a first degree felony "if, in the course of committing the robbery, the offender carried a firearm or other deadly weapon." § 812.13(2)(a), Fla. Stat. An offender's flight after the commission of the robbery is considered to be "in the course of committing the robbery." § 812.13(3)(a), Fla. Stat.

Because robbery is a specific intent crime, Appellant had to have the specific intent to commit the crime. *Daniels v. State*, 587 So.2d 460, 462 (Fla.1991). The intent to commit a robbery includes the specific intent to steal; that is, to deprive the owner or custodian of property either permanently or temporarily. *Id.* "[I]t is imperative that the intent to steal exist at the time of the taking." *Stevens v. State*, 265 So.2d 540 (Fla. 2d DCA 1972). Accordingly, to prove robbery, the state has to prove that at the time Appellant was stabbed by the store clerk, he intended to permanently or temporarily deprive the clerk of his knife.

The state also had to prove that Appellant was armed "during the commission of" or in flight from the robbery. Note that the state's theory of armed robbery was not that Appellant armed himself with the deadly weapon after unsuccessfully demanding money and cigarettes, intending to use his new-

found weapon to again seek money and cigarettes. But instead, it was that Appellant committed the armed robbery when he obtained possession of the knife (the one in his back) from the clerk: *941 He was now armed, and he stumbled away with the knife. He robbed, while armed, the knife the clerk had just plunged into his back.

Being stabbed cannot equate to "taking" a knife. To "take" means to "get into one's ... possession by voluntary action." ^{FN2} It means "to obtain possession or control without the owner's consent." Black's Law Dictionary 1492 (8th ed.2004). "Obtain" means "to gain or attain usually by planned action or effort." ^{FN3} Thus, "taking" implies a conscious, intentional, voluntary act on the part of the one taking something. "Taking" something from somebody contemplates the taker voluntarily do something to obtain possession of the thing he or she takes.

FN2. [http:// dictionary. reference. com/ browse/ take? s = t](http://dictionary.reference.com/browse/take?s=t). It can also mean, "to get into one's hands, possession, control, etc. by force or artifice"; i.e., "to take a bone from a snarling dog." *Id.*

FN3. [http:// www. merriam- webster. com/ dictionary/ obtain](http://www.merriam-webster.com/dictionary/obtain).

Here, there is no evidence Appellant ever saw the knife before he was stabbed with it; no evidence he knew the knife existed before he was stabbed with it; no evidence he wanted the knife; no evidence he asked for or demanded the knife. Consequently, there is no evidence Appellant took the knife with intent to deprive the store clerk of it, either permanently or temporarily.

To be sure, the knife was "given" to Appellant. The store clerk gave—even if temporarily—the knife to Appellant when he plunged it into his back. However, the passive act of taking delivery of the knife (in his back and through his now-collapsed lung) cannot be construed to constitute an intentional act of taking on Appellant's part. Appellant

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did not take the knife. It was, quite literally, forced upon him. Appellant did not ask for the knife, did not demand the knife, and did not voluntarily accept the knife when it was "given" to him—in fact, he immediately took the knife out from where it had been lodged.

Taken to its logical end, will a person poisoned with Ricin be charged with armed robbery of the Ricin? After all, he now possesses a deadly weapon and "took" it from the poisoner. Being poisoned—or in this case stabbed—is simply not a crime. It is fundamental error to convict a person where there is a complete absence of a prima facie showing of the essential elements of a crime. See *Allen v. State*, 876 So.2d 737, 740–41 (Fla. 1st DCA 2004).

The state had a host of charging options available to prosecute Appellant for his crimes. Instead, the state proceeded on an absurd theory: that Appellant formed the necessary intent to steal the knife when he found it stuck in his back. The trial court should have entered a judgment of acquittal of armed robbery.

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