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

DARRYL WAYNE RIDGEWAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-3523

Opinion filed December 26, 2013.

An appeal from the Circuit Court for Okaloosa County.
Michael A. Flowers, Judge.

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 with a deadly weapon, raising two 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.

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.

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;
> (3) the knife had some value[1];
> (4) the taking was with the intent to permanently or temporarily deprive the clerk of his right to the 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).

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

[1] The clerk testified at trial that the knife had an approximate value of between $160 and $260.

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.

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.

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 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).

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 convicted 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").

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 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 toward 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: 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."[2] 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."[3] 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.

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.

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[2] 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.

[3] http://www.merriam-webster.com/dictionary/obtain.

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 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.