STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2012-213062

THE STATE,

Respondent,

vs.

CHRISTOPHER PAUL MAHAFFEY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I.

The trial judge did not err in denying Appellant's motion to sever the drug charges from the burglary and larceny charges because the charges were of the same general nature involving connected transactions closely related in kind, place, and character. Regardless, even if the trial judge erred, any error was harmless due to the overwhelming evidence of Appellant's guilt.

II.

The trial judge properly denied Appellant's request to charge burglary in the second degree because there was no evidence Appellant was guilty only of burglary in the second degree.

STATEMENT OF THE CASE

On February 23, 2012, a Spartanburg County Grand Jury indicted Appellant for burglary in the first degree and petit larceny. On June 14, 2012, a Spartanburg County Grand Jury indicted Appellant for possession of cocaine base and possession of oxycodone.

On August 27, 2012, Appellant proceeded to trial before a jury. Claire Hall and Clay Allen represented Appellant, and Assistant Solicitor Jennifer Jordan represented the State. On August 28, 2012, the jury convicted Appellant as charged. The Honorable J. Derham Cole sentenced Appellant to the following terms: 1) twenty-five years of imprisonment for the burglary conviction; 2) ten years of imprisonment for the larceny conviction; 3) two years of imprisonment for the possession of cocaine base conviction; and 4) two years of imprisonment for the possession of oxycodone conviction. The sentences were to run concurrently.

Appellant filed a timely notice of appeal. This appeal follows.

STATEMENT OF FACTS

On January 14, 2012, Appellant entered Andrew Sustare's home, without consent, and stole Sustare's gun, money bag, and Blackberry cell phone. (Tr. p. 63; Tr. pp. 66-67; Tr. p. 70; Tr. pp. 74-75; Tr. pp. 78-79; Tr. p. 81; Tr. pp. 89-90; Tr. p. 96.) On the day of the burglary, Sustare noticed an unfamiliar Ford Expedition in his driveway. (Tr. p. 64; Tr. p. 68.) The vehicle was running. (Tr. p. 68.) When Sustare and his friend Richie Blackwell approached the home, they saw Appellant exiting Sustare's home. (Tr. p. 66; Tr. p. 89.) Thereafter, Blackwell restrained Appellant while Sustare went inside to call the police. (Tr. pp. 68-69; Tr. p. 89.) Sustare attempted to retrieve his gun, a .357, from his bedside table, but the gun was missing. (Tr. pp. 69-70.)

According to Blackwell, Appellant attempted to run away, but Blackwell tackled Appellant. (Tr. p. 90.) Sustare's money bag fell from Appellant's waist during the struggle. (Tr. p. 90.) According to Sustare, he kept the money bag in a drawer by his wife's side of the bed. (Tr. p. 77.)

Although Sustare did not specifically ask Appellant where his gun was located, he asked Appellant, "Where is it[?]" (Tr. pp. 74-75.) Appellant responded, "Between the front seats." (Tr. p. 74.) Thereafter, Sustare walked to the Expedition, opened up the console, and saw his gun. (Tr. p. 75.) Sustare left his gun in the Expedition for the police to process. (Tr. p. 76.)

When the police arrived, they searched Appellant and found the following items: 1) a pocketknife in each pocket; 2) keys; 3) a lighter; 4) money; and 5) a Blackberry cell phone, which belonged to Sustare. (Tr. pp. 96-97.) The police ran the tag number of the Expedition and learned that the vehicle belonged to Appellant's father. (Tr. p. 98.)

According to Officer Bruce Bishop, when he arrived at the scene, he did not see anyone other than Appellant, Sustare, and Blackwell. (Tr. p. 98.)

At trial, Investigator Brandon Howard testified that he photographed the scene of the crime and collected evidence. (Tr. pp. 100-101.) He found Sustare's gun in the center console of the Expedition. (Tr. pp. 102-103.) In addition, Investigator Howard and Deputy Keith Gibbs testified regarding the drugs they found in the Expedition. (Tr. p. 102; Tr. pp. 113-115.) According to Deputy Gibbs, when he looked in the driver side door of the Expedition, he saw what appeared to be drug paraphernalia in the cup holders. (Tr. p. 113.) Deputy Gibbs saw "a pill bottle, and the top they put some aluminum foil and poke holes in the top of it." (Tr. p. 114.) When Deputy Gibbs lifted up a newspaper article, he saw a clear plastic bag that contained a white rock substance, which tested positive for crack cocaine. (Tr. p. 115; Tr. pp. 129-130.) Further, Deputy Gibbs found a Newport cigarette pack that contained green pills, which tested positive for oxycodone. (Tr. p. 102; Tr. pp. 115-116; Tr. p. 130.)

ARGUMENT

I.

The trial judge did not err in denying Appellant's motion to sever the drug charges from the burglary and larceny charges because the charges were of the same general nature involving connected transactions closely related in kind, place, and character. Regardless, even if the trial judge erred, any error was harmless due to the overwhelming evidence of Appellant's guilt.

Contrary to Appellant's assertion, the trial judge properly denied Appellant's request to sever the drug charges from the burglary and larceny charges. The charges arose out of a single chain of circumstances, were proved by the same evidence, were of the same general nature, and no real right of the defendant was prejudiced. Regardless, even if the trial judge erred in refusing to sever the charges, any error was harmless in light of the overwhelming evidence of Appellant's guilt.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

Discussion

A. The trial judge did not err in refusing to sever the charges.

A defendant has "no inalienable right" to be tried separately for each indicted offense when charged with multiple crimes. McCrary v. State, 249 S.C. 14, 38, 152 S.E.2d 235, 247 (1967). A motion for severance or consolidation is addressed to the

sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). The trial judge's ruling on such a motion will not be disturbed on appeal absent an abuse of discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). An abuse of discretion occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 395 (Ct. App. 2006). The exercise of the trial court's discretion must be based upon just and proper consideration of the particular circumstances presented in each case. State v. Castineira, 341 S.C. 619, 624, 535 S.E.2d 449, 452 (Ct. App. 2000).

In Rice, this Court stated the following:

> The appellate court considers **several factors** when deciding whether the trial court's consolidation of charges was proper. Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced.

Rice, 368 S.C. at 614, 629 S.E.2d at 395 (emphasis added) (citing State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)); see also State v. Carter, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) ("Joinder is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof." (citing City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947))); see also Tucker, 324 S.C. at 164, 478 S.E.2d at 265 ("Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the

same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced.").

In the case at hand, the trial court did not abuse its discretion in consolidating all of the charges against Appellant for a single trial.

First, the charges arose out of a single chain of circumstances. On January 14, 2012, Appellant entered Sustare's home, without consent, and stole various items. Before Appellant could escape, he got caught by Sustare and Blackwell. When the police arrived at the scene, the police found drugs in the vehicle Appellant used to perpetrate the burglary. Thus, the possession of the drugs and the burglary/larceny occurred in the same time period and around the same location.

Second, the charges were proved by the same evidence. The State called eight witnesses to testify. Out of those eight witnesses, six of the witnesses would most likely have been necessary in both trials if the charges were severed. The testimony of Sustare and Blackwell would have been necessary in the drug trial because they both had access to the vehicle that contained the drugs, and their testimony would have been necessary in the burglary and larceny trial because they witnessed the crimes. Further, the testimony of Officer Bishop would have been necessary in both trials because he was the first responder. In addition, the testimony of Investigator Howard and Deputy Gibbs would have necessary in both trials because they are the ones that found the drugs and weapon in the Expedition. Moreover, the testimony of Officer James Rhodes would most likely have been necessary in both trials because he was the one that attempted to search for an additional suspect. Although each charge involved some individual evidence, that fact in of itself did not require the trial judge to sever the charges. See State v. Caldwell, 378

S.C. 268, 278, 662 S.E.2d 474, 479-480 (Ct. App. 2008) (noting that the charges were properly consolidated even though each charged required some individualized evidence).

Third, the charges were of the same general nature. "When offenses are interconnected they are considered to be of the same general nature." State v. Grace, 350 S.C. 19, 23, 564 S.E.2d 331, 333 (Ct. App. 2002); see also State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). Thus, our courts have interrupted the same general nature requirement very broadly. Here, the police found the drugs in the vehicle that Appellant used to help perpetrate the burglary. Accordingly, the drug charges and burglary/larceny charges were interconnected.

Finally, no real right of Appellant was prejudiced. The trial judge ensured Appellant did not suffer any prejudice as a result of the consolidated trial by instructing the jury, not once but twice, that there were four separate charges for which the jury was required to reach four separate and distinct verdicts. (See Tr. p. 15; Tr. p. 169); see also State v. Harry, 321 S.C. 273, 279, 468 S.E.2d 76, 80 (Ct. App. 1996) (finding no abuse of discretion in the trial judge's determination the charges should have been jointly tried where "[t]he trial judge went to great lengths to fully instruct the jury that the state had the burden of proving each element of each crime"); see also Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.").

Accordingly, the trial judge properly consolidated the charges.

B. Even if the trial judge erred, any error was harmless.

Regardless, even if the trial judge erred in refusing to sever the charges, any error was harmless in light of the overwhelming evidence of Appellant's guilt.

With respect to the burglary and larceny charges, the State presented overwhelming evidence of Appellant's guilt. Sustare and Blackwell caught Appellant exiting Sustare's home. Sustare did not know Appellant and did not give Appellant consent to enter his home. Further, Blackwell saw Sustare's money bag fall from Appellant's waist. Additionally, Appellant told Sustare where he could find his gun in the Expedition. Moreover, the police found Sustare's Blackberry cell phone in Appellant's pocket.

With respect to the drug charges, the State presented overwhelming evidence of Appellant's guilt. Even Appellant's own witness, Appellant's brother, placed Appellant in the Expedition shortly before the burglary. (Tr. p. 140.) Further, the State presented evidence that Appellant used the Expedition, which had drug paraphernalia in the cup holder, to perpetrate the burglary. Moreover, Appellant's brother testified that Appellant smoked Newport cigarettes, which was the same brand as the cigarette package containing the oxycodone located in the Expedition.

In summary, the State presented overwhelming evidence of Appellant's guilt for all of the charges. Thus, even if the trial judge erred in consolidating the charges, any error was harmless.

II.

The trial judge properly denied Appellant's request to charge burglary in the second degree because there was no evidence Appellant was guilty only of burglary in the second degree.

All of the evidence presented at trial proved that Appellant was guilty of burglary in the first degree. There was no evidence presented at trial that Appellant was guilty only of burglary in the second degree. Accordingly, the trial judge properly denied Appellant's request to charge burglary in the second degree.

Discussion

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). The trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). "It is not error to refuse to charge the lesser-included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 388 (Ct. App. 2000) (emphasis in the original).

Further, "[n]o instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). In other words, a trial judge does not err in refusing to charge a lesser-included offense when there is no evidence that the defendant was guilty only of the lesser-included offense. See State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987).

South Carolina's burglary in the first degree statute provides the following:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
>
> (a) is armed with a deadly weapon or explosive; or
>
> (b) causes physical injury to a person who is not a participant in the crime; or
>
> (c) uses or threatens the use of a dangerous instrument; or
>
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm[.]

S.C. Code Ann. § 16-11-311.

Similarly, "[a] person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein." S.C. Code Ann. § 16-11-312. The difference between the two statutes, with respect to burglaries involving dwellings, is the aggravating factors listed in the burglary in the first degree statute. Compare S.C. Code Ann. § 16-11-311 (A)(1)-(3) with S.C. Code Ann. § 16-11-312.

In State v. McCaskill, this Court held:

> [T]o be armed with a deadly weapon within the meaning of S.C. Code Ann. § 16- 11-311 (A)(1)(a), a person or "another participant in the crime" need only have physical control over a deadly weapon "in effecting entry or while in the dwelling or in the immediate flight therefrom" such that the weapon is readily available for the person to use.

State v. McCaskill, 321 S.C. 283, 285, 468 S.E.2d 81, 82 (Ct. App. 1996). In other words, for purposes of the burglary in the first degree statute, a person can become armed with a deadly weapon even if the weapon is one taken during the course of the burglary. See id.

In the case at hand, Sustare testified that after he discovered Appellant exiting his home, he went inside to look for his gun. The gun, which was normally kept by his bedside table, was missing. When he came back outside, he asked Appellant, "Where is

it[?]" (Tr. pp. 74-75.) Appellant responded, "Between the front seats." (Tr. p. 74.) Thereafter, Sustare walked to Appellant's vehicle, opened up the console, and saw his gun. (Tr. p. 75.) Sustare left his gun in Appellant's vehicle for the police to process. (Tr. p. 76.) When the police searched the vehicle, they found Sustare's gun in the console. Thus, based on the evidence and testimony presented during trial, Appellant armed himself with the deadly weapon he found inside Sustare's home when he took it during the burglary and concealed it in his vehicle. Significantly, Appellant's response to Sustare's question demonstrated Appellant's knowledge of the gun.

Appellant argues that "a reasonable jury could have found that [Appellant] never possessed the gun found in the SUV and was not aware of its existence. Sustare, not the police, conducted the 'search' of the SUV and claimed he found the pistol inside the center console." (App. Br. p. 9.) In other words, Appellant's argument is that the jury might have disbelieved the State's evidence regarding the deadly weapon and on the remaining evidence found Appellant guilty of the lesser included offense (i.e. burglary in the second degree). But this Court and our Supreme Court have expressly rejected such an argument. See State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) (the mere contention that the jury might accept the State's evidence in part and might reject it in part does not entitle a defendant to a charge on a lesser-included offense); State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App. 1999) ("The possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery does not entitle the defendant to have the lesser offense submitted to the jury.").

Further, even if the jury believed that there was another suspect involved in the burglary who took the gun and placed it in the vehicle, Appellant would still be guilty of

burglary in the first degree. See S.C. Code Ann. § 16-11-311 ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . when, in effecting entry or while in the dwelling or in immediate flight, **he or another participant in the crime** . . . is armed with a deadly weapon . . . .") (emphasis added).

Moreover, even if this Court found that the gun was insufficient, the State presented uncontroverted evidence that Appellant was armed with two pocketknives. Although the burglary statute does not define "deadly weapon," the State submits that a pocketknife is a deadly weapon. See e.g., State v. Heller, 399 S.C. 157, 160, 731 S.E.2d 312, 314 (Ct. App. 2012) (noting that victim was grievously wounded to the point where medical personnel did not expect her to live, and the pathologist opined that the injuries were consistent with the use of a pocketknife).

In summary, there was no evidence that Appellant was guilty only of burglary in the second degree. Appellant was either guilty of burglary in the first degree or nothing. Thus, the trial court properly denied Appellant's request to charge burglary in the second degree.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 12, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
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Appellate Case No. 2012-213062

THE STATE,

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Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Tr. pp. 14-17; Tr. p. 125

(2) State's Exhibit 11 (Photograph)

(3) Sentencing Sheets

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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November 12, 2013

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THE STATE,

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Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 12th day of November, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
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