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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER PAUL MAHAFFEY,

APPELLANT

APPELLATE CASE NO 2012-213062

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in denying appellant's motion to sever drug charges from burglary and petit larceny charges?

2.

Whether the trial court erred in refusing to charge the lesser included offense of burglary in the second degree?

STATEMENT OF THE CASE

On February 23, 2012, Christopher Paul Mahaffey was indicted by a Spartanburg County grand jury for first degree burglary, larceny, possession of crack cocaine, and possession of oxycodone. On August 27 – 28, 2012, Mahaffey was tried before the Honorable J. Derham Cole and a jury. R. 1. Jennifer A. J. Jordan represented the State. R. 1. Claire Hall and Clay Allen represented Mahaffey. R. 1. The jury convicted Mahaffey on all four charges. R. 130, ll. 21 – 131, l. 22. Judge Cole sentenced Mahaffey to twenty-five years' imprisonment for the burglary, ten years' imprisonment for larceny, two years' imprisonment for possession of crack cocaine, and two years' imprisonment for possession of oxycodone. R. 135, ll. 12 – 22. Mahaffey timely filed and served a notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in denying appellant's motion to sever drug charges from burglary and petit larceny charges.

Relevant Facts

On the morning of January 14, 2012, Mahaffey was at his father's house for a cookout. R. 92, ll. 5 – 18. A man named "Ronald" arrived at the family cookout. R. 93, ll. 2 – 8. Mahaffey left the cookout at approximately 11:00 AM in his father's sport utility vehicle. R. 93, ll. 5 – 17. Ronald drove. R. 93, ll. 5 – 13.

Andrew Sustare ("Sustare") was the State's first witness. R. 14, ll. 1 – 4. Sustare and a laborer named Richie Blackwell ("Blackwell") were at Sustare's house digging an asparagus patch. R. 16, ll. 2 – 12. When Sustare and Blackwell came around the front of Sustare's house, Sustare noticed an unknown vehicle in his driveway. R. 17, ll. 17 – 18, l. 14. Sustare and Blackwell moved towards the front of the house. R. 19, ll. 6 – 12. Sustare claimed to see Mahaffey exiting his house. R. 19, ll. 13 – 16. Sustare claimed that Mahaffey's back was to him and Mahaffey was shutting the door. R. 19, ll. 13 – 16.

Sustare and Blackwell forcibly detained Mahaffey and questioned him. R. 19, l. 22 – 21, l. 24. While Blackwell held Mahaffey, Sustare took the keys out of the running vehicle. R. 21, l. 19 – 22, l. 2. Sustare claimed that he went into his house to get his pistol. R. 22, ll. 3 – 6. Sustare claimed that his pistol was not on his bedside table where he usually kept it. R. 22, l. 7 – 24, l. 12. At this point Sustare called 911. R. 23, l. 25 – 24, l. 1.

Sustare retrieved a different pistol from his house and went back outside after completing his 911 call. R. 26, ll. 8 – 24. He then held Mahaffey at gunpoint and made him get on his knees. R. 26, l. 25 – 27, l. 7. Sustare asked Mahaffey, "Where is it?" R. 27, ll. 9 – 10. Mahaffey did not answer. R. 27, ll. 11 – 12. Sustare then claimed he asked again "with more enthusiasm." R. 27, ll. 13 – 14. Sustare claimed Mahaffey then responded, "Between the front seats." R. 27, ll. 13 – 18.

Blackwell, who is 6'9" tall and weighs 250 pounds, claimed that while Sustare was in the house, Mahaffey "slipped loose and took off running." R. 43, ll. 10 – 11. Blackwell claimed that he tackled Mahaffey, held him down, and "dragged him back over to the front of the house." R. 43, ll. 14 – 17. Blackwell claimed that a money bag that was tucked into Mahaffey's waist fell to the ground during the fight. R. 43, ll. 14 – 22. Sustare claimed that the money bag belonged to his business. R. 30, ll. 3 – 10.

Canine officer James Rhodes ("Rhodes") responded to the scene. R. 118, l. 22 – 72, l. 7. Officer Rhodes was told there was a possible second suspect. R. 72, ll. 11 – 14. Officer Rhodes had his dog search for a track in the front yard and the dog did not find a track. R. 72, l. 10 – 73, l. 24. Officer Rhodes admitted on cross-examination that he did not take the dog into the backyard and did not take the dog into the vehicle. R. 76, ll. 13 – 18.

After the police arrived and arrested Mahaffey, one of the officers took an inventory of the SUV. R. 66, ll. 10 – 19. The officer saw what he said "appeared to be drug paraphernalia." R. 66, ll. 14 – 16. The officer claimed to find a plastic bag "with a white rock substance in it." R. 68, ll. 12 – 19. The substance later tested positive as crack

cocaine. R. 82, l. 24 – 83, l. 1. The officer also found a bag with "green pills." R. 68, l. 25 – 69, l. 2. These pills were identified as oxycodone. R. 83, ll. 2 – 5.

Prior to trial, Mahaffey moved to sever the drug charges from the burglary and petty larceny charges. R. 6, l. 17 – 7, l. 4. Mahaffey argued that presenting the drug charges at the same time as the burglary charges would result in unfair prejudice to Mahaffey. R. 6, l. 17 – 7, l. 4. Mahaffey argued that there was no allegation that the drugs were in Sustare's house or that any drug activity was taking place. R. 9, ll. 4 – 6. Judge Cole denied the motion to sever the charges. R. 9, ll. 18 – 19.

Discussion

The trial judge abused his discretion in refusing to sever the drug charges from the theft charges. "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." State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). "A motion for severance is addressed to the sound discretion of the trial court." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 328 (Ct. App. 2011).

When examining whether charges should be severed, the court must consider whether joinder would result in the "admission of prior bad act evidence that would have otherwise been inadmissible." State v. Beekman, 405 S.C. 225, 746 S. E. 2d 483 (Ct. App. 2013). The drug charges would have been inadmissible under Rule 404(b). SCRE 404(b). In the context of the theft, the drugs were only offered against the defendant's character in

an attempt to portray him as a drug user. They showed neither motive, identity, nor common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Admission of the drug evidence prejudiced Mahaffey. The temporal proximity of the discovery of the drugs is only a superficial connection to the theft charges. The drugs bore no other connection to the theft charges. No evidence was presented that the defendant used the drugs or was intoxicated. It is also possible that the drugs belonged to Ronald. These possibilities were obscured by the prejudicial smokescreen of their admission in connection with the theft evidence. For these reasons, the trial judge's denial of the motion for severance was an abuse of discretion and Mahaffey's convictions should be reversed and remanded for separate trials.

2.

The trial court erred in refusing to charge the lesser included offense of burglary in the second degree.

Mahaffey requested the lesser included offense charge of second degree burglary. R. 96, ll. 10 – 11. Mahaffey argued that a reasonable doubt existed as to whether Mahaffey was armed with a deadly weapon. R. 96, ll. 13 – 18. When the police searched Mahaffey, he had two pocketknives in his pockets. R. 49, ll. 18 – 22. Mahaffey argued that the pocketknives were common and innocuous. R. 100, ll. 17 – 20. Judge Cole found as a matter of law that a pocket knife "obviously is a deadly weapon" and refused to give the second degree burglary charge. R. 101, l. 8 – 102, l. 20.

"The law to be charged must be determined from the evidence presented at trial." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the

evidence" Id. "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." Id.

The difference between first and second degree burglaries involving a dwelling concern several aggravators listed in the first degree burglary statute. Compare S.C. Code Ann. § 16-11-311(A)(1) to (3) with S.C. Code Ann. § 16-11-312(A). The relevant aggravator was whether Mahaffey was "armed with a deadly weapon." S.C. Code Ann. § 16-11-311(A)(1)(a). In this case, whether Mahaffey was armed with a deadly weapon meant the difference between first and second degree burglary. The ten-year maximum penalty for second degree burglary is less than the fifteen-year minimum penalty for first degree burglary. S.C. Code Ann. § 16-11-311(B); S.C. Code Ann. § 16-11-312(C)(1).

First, there was a jury question as to whether Mahaffey was armed with a gun. Viewing the evidence in the light most favorable to Mahaffey, a reasonable jury could have found that Mahaffey 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 his pistol inside the center console. R. 28, ll. 9 – 12.

Second, whether the pocketknives found on Mahaffey were "deadly weapons" was also a question for the jury. "Deadly weapon" is not defined in the burglary statute. The trial judge did not define "deadly weapon" for the jury. R. 103, l. 22 – 117, l. 2. "A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." State v. Scurry, 322 S.C. 514, 517, 473 S.E.2d 61, 63 (Ct. App. 1996). "The question of whether an instrument used in the commission of a robbery qualifies as a deadly weapon, thereby qualifying the incident as armed robbery, is a factual determination for the jury." Id.

The armed robbery statute specifically lists "dirks" and "razors" as deadly weapons, but does not list knives. S.C. Code Ann. § 16-11-330(A). A "dirk" is a "long straight-bladed dagger." Webster's Ninth New Collegiate Dictionary. Including some bladed weapons but not others means that whether a particular knife is a deadly weapon is a question of fact. Any question of fact that increases the penalty for a crime must be determined by a jury. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The trial judge's decision to only charge first degree burglary removed this fact from the jury's consideration.

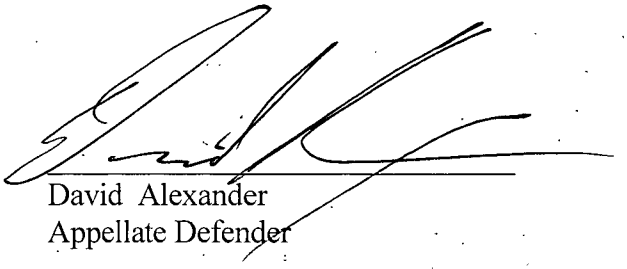
As Mahaffey argued, a pocketknife is a common tool. He was employed as a laborer in a pallet recycling business in which a pocketknife would be a common object to carry. R. 100, ll. 21 – 23. In Florida, a "common pocketknife" is specifically excepted from the definition of "weapon." Fla. Stat. § 790.001(13).

In Blanson v. State, 107 S.W.3d 103, 104 (Tx. Ct. App. 2003), the Texas Court of Appeals addressed whether it was error for a judge to charge the jury that a folding pocketknife was a deadly weapon. Blanson held that it was plain error for the judge to charge the jury that a pocketknife was a deadly weapon. Id. at 105-06. Just as in this case, the pocketknife was unopened. Id. Since Mahaffey was entitled to have the jury determine whether a pocketknife was a "deadly weapon," the trial judge erred in not including second degree burglary in his charge to the jury. His refusal to give the lesser-included offense amounted to a determination that the pocketknives were *per se* deadly weapons. Therefore, this case must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for separate trials.

Respectfully submitted,



David Alexander
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This 3rd day of January, 2014.

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THE STATE,

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V.

CHRISTOPHER PAUL MAHAFFEY,

APPELLANT

APPELLATE CASE NO 2012-212780

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 3rd day of January, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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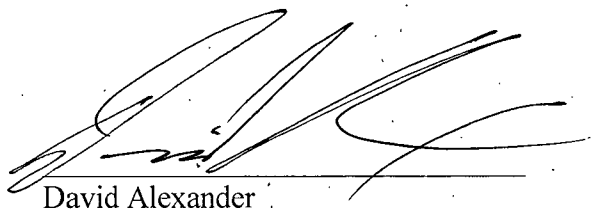
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 3rd, 2014



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