

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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FEB 19 2014

SC Court of Appeals

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN HENRY SMITH,

APPELLANT

APPELLATE CASE NO. 2013-000876

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge err in refusing to direct a verdict of acquittal for armed robbery when the State failed to introduce evidence of deadly weapon or the physical representation of a deadly weapon?

STATEMENT OF THE CASE

In February of 2012, the Horry County Grand Jury indicted Smith for armed robbery, indictment #2013-GS-26-469.¹ On April 17, 2013, Smith proceeded to jury trial before the Honorable Larry B. Hyman. Attorney Jonathan Eric Fox represented Smith at trial. Attorneys George H. DeBusk Jr. and Heather T. Von Herrmann prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Hyman sentenced Smith to twenty five (25) years. A timely notice of intent to appeal was filed on April 25, 2013. This appeal follows.

¹ The trial transcript notes indictment #2013-GS-26-876. This appears to be a typographical error.

ARGUMENT

The judge erred in refusing to direct a verdict of acquittal for armed robbery when the State failed to introduce evidence of a deadly weapon or the physical representation of a deadly weapon.

On December 12, 2011, a little after 2:00 AM, the Walgreen's pharmacy in Conway was robbed. The clerk on duty at the time of the robbery, Hilton Fryar, testified:

I had Mr. Smith over there come in. When he came in he went straight to the ziplock bags [sic] were on the aisle, he brought back a box to the register, he asked what the price was of it, I told him what it was and then after that he proceeded to tell me to give him the money out of the register and to be quiet and not make any noise because he said he had a gun.

(Tr. p. 63, lines 12-19). The clerk testified that one of Smith's hands was in his pocket. (Tr. p. 63, lines 20-21). The clerk admitted that he never saw a weapon. (Tr. p. 77, lines 16-20). The State, over objection, introduced a video, marked State's exhibit #2, of the robbery filmed by the store's surveillance camera. (Tr. p. 70, lines 17-19). The clerk never testified that Smith made any gestures with his hand to indicate that he had a gun or the physical representation of a gun.

Smith was stopped by the police shortly after the robbery and, through a show-up identification procedure, the clerk identified Smith as the person who robbed the Walgreen's. (Tr. pp. 66-67). The police found no weapons on Smith at the time of his arrest. (Tr. p. 95, line 20 – p. 96, lines 1-13). No weapon was ever recovered in relation to the Walgreen's robbery.

At the close of the State's case Smith moved for a directed verdict of acquittal based on State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), arguing that words alone are not sufficient to meet the armed element of armed robbery. (Tr. p. 116, line 14 – p. 117, 118, lines 1-23). The State argued, "A hand in a pocket, coupled with the statement. 'I have a

gun,' is sufficient.” (Tr. p. 119, lines 3-4). The judge agreed stating, “I think it goes beyond Muldrow, Mr. Fox, and I would respectfully deny your motion.” (Tr. p. 119, lines 14-15). Smith renewed his motion for a directed verdict when the jury returned with the verdict and the motion was again denied. (Tr. p. 162, line 9 – p. 163, lines 1-4). The judge erred in refusing to direct a verdict of acquittal for armed robbery when there was no evidence that Smith used a weapon or a physical representation of a weapon in accomplishing the robbery.

The armed robbery statute, S.C.Code Ann. § 16–1–330(A) provides:

(A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, **or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon**, is guilty of a felony.... (emphasis added).

In the present case the clerk did not see a weapon but testified that Smith stated that he had a gun. The clerk, however, did not testify that Smith said he had a gun while using a representation of a deadly weapon. The mere fact that Smith’s hand was in his pocket, without more, does not constitute the representation of a weapon needed for armed robbery. The State failed to prove that Smith stated that he had a gun while using a representation of a deadly weapon, an element of armed robbery. The accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct.App.1995). Smith was entitled to a directed verdict for armed robbery.

In State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), the Court found that words unaccompanied by any corroborating action are not sufficient to establish the armed element for armed robbery. In Muldrow the defendant handed the store clerk a note that said, "Give me all your cash or I'll shoot you." The Court reversed Muldrow's conviction for armed robbery and remanded for sentencing on the lesser included charge of strong armed robbery. As in Muldrow, the present conviction for armed robbery should be reversed and the case remanded for sentencing on the lesser included charge of strong armed robbery because Smith's statement that he had a gun, unaccompanied by any corroborating action, is not sufficient for armed robbery. A hand in a pocket, without more, is insufficient. The case should not have been submitted to the jury as an armed robbery. The fact that the jury was instructed on the lesser included charge of strong armed robbery does not cure the error of law in refusing to direct a verdict of acquittal for armed robbery when there was no evidence that Smith used a weapon or a physical representation of a weapon in accomplishing the robbery.

In State v. Dodd, 354 S.C. 13, 579 S.E.2d 331 (Ct.App. 2003), the South Carolina Court of Appeals found that the defendant's confession to having a gun was corroborated by his threat to kill the clerk if she did not comply with his demands. The Court in Dodd wrote:

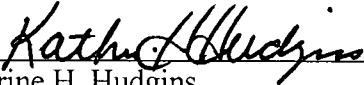
Although his threat, unaccompanied by any representation of a deadly weapon, would not *independently* be sufficient to establish the element of a deadly weapon, the threat *is* sufficient to corroborate Dodd's confession to being armed. See Muldrow, 348 S.C. 264 at 268, 559 S.E.2d at 849 (holding that the State did not sufficiently prove the defendant was armed when the only evidence against him was that he handed a clerk a note that read: "Give me all your cash or I'll shoot you," and there was no confession to having a gun).

Dodd, 354 S.C. at 18, 579 S.E.2d at 334. The present case is distinguished from Dodd because Smith never admitted having a gun. The judge erred in refusing to direct a verdict of acquittal for armed robbery.

CONCLUSION

Based on the above argument, the armed robbery conviction should be reversed and the case remanded for sentencing on the lesser included offense of strong armed robbery.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of February, 2014.

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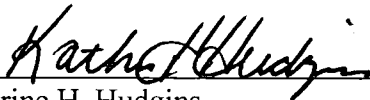
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheet;
- (2) Trial transcript pages 1-3; 29-43; 55-170;
- (3) State's Exhibit #2, video – to be transported.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 19th, 2014


Kathrine H. Hudgins
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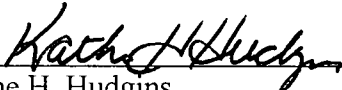
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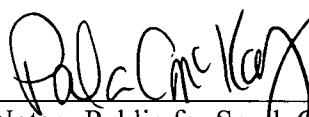
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also upon Mr. John Henry Smith, #211679 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472, this 19th day of February, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of February, 2014.



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