

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 26 2014

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

JOHN HENRY SMITH,

APPELLANT

APPELLATE CASE NO. 2013-000876

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

<u>State v. Brown</u> , 103 S.C. 437, 88 S.E. 21 (1916)	6
<u>State v. Dodd</u> , 354 S.C. 13, 579 S.E.2d 331 (Ct.App. 2003).....	7, 8
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	6
<u>State v. Muldrow</u> , 348 S.C. 264, 559 S.E.2d 847 (2002).....	6, 7
<u>v. Gore</u> , 318 S.C. 157, 456 S.E.2d 419 (Ct.App.1995).....	6

Statutes

S.C.Code Ann. § 16-1-330(A).....	6
----------------------------------	---

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 a 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.

(R. p. 27, lines 12-19). The clerk testified that one of Smith's hands was in his pocket. (R. p. 27, lines 20-21). The clerk admitted that he never saw a weapon. (R. p. 41, 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. (R. p. 34, 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. (R. pp. 30-31). The police found no weapons on Smith at the time of his arrest. (R. p.59, line 20 – p. 60, 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. (R. p. 80, line 14 – p. 81, 118, lines 1-23). The State argued, "A hand in a pocket, coupled with the statement. 'I have a gun,' is

sufficient.” (R. p. 83, lines 3-4). The judge agreed stating, “I think it goes beyond Muldrow, Mr. Fox, and I would respectfully deny your motion.” (R. p. 83, lines 14-15). Smith renewed his motion for a directed verdict when the jury returned with the verdict and the motion was again denied. (R. p. 126, line 9 – p. 127, 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:

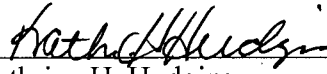
Although his threat, unaccompanied by any representation of a deadly weapon, would not *independently* be sufficient to establish the element of a deadly weapon, the threat *is* sufficient to corroborate Dodd's confession to being armed. See Muldrow, 348 S.C. 264 at 268, 559 S.E.2d at 849 (holding that 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 26th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 26 2014

SC Court of Appeals

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

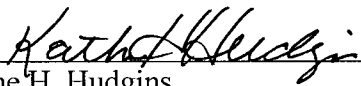
JOHN HENRY SMITH,

APPELLANT

APPELLATE CASE NO. 2013-000876


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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of August, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.