STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

PERRY B. BUCHANAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001632

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of larceny when there was evidence presented at trial from which the jury could have concluded the lesser offense was committed, specifically that Petitioner was not armed and did not use any force, violence, or intimidation when he shoplifted merchandise from Wal-Mart?

STATEMENT

A Lexington County Grand Jury indicted Petitioner at the June 2010 term of the Court of General Sessions for armed robbery and possession of a weapon during the commission of a violent crime. App. 349-350. His case was called to trial on April 25, 2011 before the Honorable R. Knox McMahon, and a jury.[1] App. 1. Assistant Solicitors J. Angela Garrick and Colleen E. Dixon represented the state, and Casey Cornwell represented Petitioner. App. 1.

On April 26, 2011, the jury acquitted Petitioner of armed robbery and the weapons offense, but found him guilty of the lesser included offense of common law robbery. App. 204, l. 21 – 205, l. 11. He was sentenced by Judge McMahon to fifteen years imprisonment. App. 217, ll. 13-17.

The South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Buchanan, Opinion No. 2013-UP-319 (Ct. App. Filed July 17, 2013); App. 241-242

On October 24, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 243-252. The state filed a return to this application dated December 17, 2013. App. 253-259. The matter proceeded to an evidentiary hearing on April 17, 2014 before the Honorable William P. Keesley. App. 260. Assistant Attorney General J. Walter Whitmire represented the state, and Aimee Zmroczek represented Petitioner. App. 260. By order dated January 7, 2015, Judge Keesley denied Petitioner relief. App. 333-343. On March 4, 2015, Petitioner filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP. App. 344-345. The court denied the Motion to Reconsider by order filed March 25, 2015. App. 346-348. This petition for writ of certiorari follows.

[1] Before trial, the state served Petitioner with Notice of Intent to Seek a Life Sentence if he was convicted of armed robbery. App. 210, ll. 8-14.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of larceny when there was evidence presented at trial from which the jury could have concluded the lesser offense was committed, specifically that Petitioner was not armed and did not use any force, violence, or intimidation when he shoplifted merchandise from Wal-Mart.

Facts at Trial

On March 12, 2010, Shirley Smith was working as a cashier in the Garden Center at the West Columbia Wal-Mart. Her fellow employee, Curtis Williams, who was stationed at the exit door to check receipts, had momentarily stepped away. Consequently, when Smith saw a customer leaving the store with "a buggy with a large electronic item in it," she excused herself from the register to check the man's receipt.

Smith claimed that when she asked the customer for his receipt he said, "I got it, they got it." After the customer failed to show a receipt, Smith repeatedly told him she needed to see his receipt before he could leave. Instead of producing a receipt, the customer attempted to maneuver around Smith and flee the store with the merchandise. Each time the customer moved Smith stepped in front of his shopping cart to prevent him from leaving.

Smith claimed that at some point during this encounter, the customer reached into his jacket and pulled out a yellow box cutter with the blade exposed. According to Smith, the customer held the box cutter down low and threatened, "Is this worth you getting all cut up over?" She responded by stating, "Well, you still can't leave the store without showing a receipt." Smith said the customer did not like her response, "so he brought it [the box cutter] up . . . a little higher" and said again, "Is this worth you getting cut up over?" It was then that Smith moved out of the way and walked back

to her register. App. 62, l. 12 – 66, l. 11. After notifying management of the theft, Smith immediately resumed checking out other customers. App. 85, ll. 16-23; App. 88, ll. 10-20.

The customer ultimately fled out of the store with the shopping cart. He placed the stolen merchandise in the back of a red Nissan Xterra and then left the parking lot headed in the direction of downtown Columbia. App. 90, l. 19 – 92, l. 14; App. 99, ll. 1-18. The vehicle was stopped by law enforcement about a mile from Wal-Mart and Petitioner, who was the front seat passenger, was subsequently arrested. App. 105, l. 1 – 107, l. 10. Upon his arrest, Petitioner admitted to shoplifting a desktop computer from the store. App. 124, l. 5 – 125, l. 11.

Security cameras at Wal-Mart captured the encounter between Petitioner and Smith. Officers obtained this footage from the store's loss prevention personnel. App. 99, l. 19 – 100, l. 6. The recorded footage was admitted into evidence and published to the jury during the trial. App. 69, l. 16 – 70, l. 20. It showed the encounter from numerous different angles since several cameras were in use at the time.

During Smith's testimony, the state played the footage for the jury and Smith walked the jury through her version of what occurred. During Smith's account, she repeatedly stated that Petitioner "swung" the blade at her. App. 81, ll. 5-21.

During his closing argument, trial counsel argued that the "testimony of Ms. Shirley Ann Smith and the video does not match." While playing the security footage for the jury, counsel argued, "We're coming up on the part of the video where Ms. Shirley Ann Smith said my client [Petitioner] pulled a knife, that he put his hand in his pocket and pulled something out and then he wielded a knife. Only problem is, look at this video: Mr. Buchanan's [Petitioner's] hands don't leave his pockets . . ." App. 159, ll. 10-24. Counsel continued, "She [Smith] said he pulled his hand out of his pocket and had a knife, which we just saw that his hand [was] in his pocket the whole

time. He didn't pull his hand out where you could see it. And when he did pull his hand out, there was nothing in his hand." App. 161, l. 23 – 162, l. 5.

After playing additional footage for the jury, trial counsel argued, "He [Petitioner] puts his hand in his pocket, hand's still in his pocket, hand's still in his pocket, hand's still in his pocket. The right hand's still in the pocket, left hand on the grocery cart. Now he pulls his hand out. What's he doing? Gesturing, telling her [Smith] to back up, as you heard her say, 'keep away from my cart.' What's he doing? He's not swinging a blade. If anything, he's trying to get around her. That's not the body language of a person with a weapon who is using it . . . aggressively. That is the body language of a person that's trying to get around somebody." App. 162, ll. 12-23.

Moreover, counsel stated, "And in her [Smith's] statement she claims that Mr. Buchanan [Petitioner] swung a blade at her, not once, he swung around with the blade and then she said he made it clear and she knew it was beyond her when he swung around again. We don't see that. It never happens in the video. You've seen it. At no point does he swing at anybody. The only time he even makes a swinging motion is when he's turned around, turned his shopping cart around to run away from her." App. 165, ll. 16-24.

Lastly, counsel told the jury that, while the footage showed an object in Petitioner's hand when he first entered the Garden Center and before he encountered Smith, this object was a cellular telephone and not a box cutter or knife. Counsel argued, "But it does appear he [Petitioner] had something in his hand . . . This is a frame of Mr. Perry [Petitioner] leaving Walmart right before . . . you see the encounter between him and Ms. Shirley Ann Smith, seconds before. Mr. Perry [Petitioner] walks into the garden center wielding a very, very dangerous cellular device in his hand. You can see it clearly as I can . . . [W]e clearly see that it's a cell phone . . ." App. 163, l. 24 – 164, l. 13.

A cellular telephone was found on Petitioner's person when he was arrested. The local detention center seized the telephone when Petitioner's was booked and stored it as part of his property. The telephone was admitted into evidence as Defendant's Exhibit No. 1 during trial. App. 150, l. 22 – 152, l. 4.

The solicitor admitted during her closing argument that the jury had to determine "the believability and the credibility" of Smith. App. 174, ll. 305. She argued, "Certainly Mr. Buchanan [Petitioner] is guilty of taking that computer from Walmart without paying for it. So he's guilty of a crime. But you all have to decide what crime he is guilty of. Is he guilty of armed robbery or is he guilty of something lesser?" App. 173, ll. 6-11.

The jury ultimately acquitted Petitioner of armed robbery and possession of a weapon during the commission of a violent crime. However, it found him guilty of the lesser included offense of common law robbery. App. 204, l. 21 – 205, l. 11. For whatever reason, trial counsel never requested a jury instruction on the lesser included offense of larceny despite the fact that there was evidence presented that supported the charge. The trial court ultimately sentenced Petitioner to fifteen years imprisonment. App. 217, ll. 13-17.

PCR Hearing

At the evidentiary hearing, Petitioner testified that he always admitted to stealing a computer from Wal-Mart. However, he vehemently maintained that he was not armed and that he was not aggressive in any way when he fled the store. Petitioner said the surveillance tape supported this fact. App. 268, ll. 7-22; App. 272, ll. 12-14. Moreover, he testified that he wanted the jury to be charged with the lesser included offense of larceny because "basically, that's all I did." App. 275, ll. 5-18. However, counsel never requested the charge.

Casey Cornwell, Petitioner's trial counsel, testified that his strategy at trial was to convince the jury to convict Petitioner of a lesser included offense. Specifically, Cornwell stated, "**I was going for a lesser-included offense . . . anything I could get that was less than [armed robbery]**, because they [the state] were looking to LWOP [life without parole] him [Petitioner] . . . So, I mean, I was looking for **anything** that would get him out of that [being sentenced to life without parole]." App. 293, ll. 9-18 (emphasis added). Cornwell later clarified that the state served Petitioner before trial with a notice of intent to seek a sentence of life without parole. App. 293, ll. 14-21.

Cornwell testified that the security footage showed Petitioner leaving the store with merchandise after a brief encounter with an employee. He maintained that he sought "to show that [Petitioner] didn't have a weapon, that the object in his hand was a phone and that the video clearly showed that this was a cell phone in his hand and not a weapon of any kind. And it was our strategy to come clean about the fact that, yes, we [Petitioner] took these items, but this was not an armed robbery. This was a . . . taking of some kind, but not an armed robbery. It's more along the lines of strong arm[ed robbery] **or larceny**." App. 294, l. 23 – 295, l. 8.

Cornwell admitted that the facts presented by the state "could probably fit a larceny charge," but claimed he did not request a jury instruction on larceny "because [he] thought a strong arm[ed robbery conviction] was more realistic, and [he] didn't want to . . . shoot for the moon . . . in case [he] missed the whole thing." App. 301, ll. 3-24.

Order of Dismissal

The PCR court found trial counsel was not ineffective for failing to request a jury instruction on the lesser included offense of larceny. Specifically, the court found trial counsel "stated valid strategic reasons for not seeking such an option" and noted that counsel's "focus was on saving his client from serving LWOP, and he was successful." App. 340.

Notably, the PCR court did not find that larceny, if it had been properly requested by counsel, was not a proper jury instruction based on the evidence presented at trial. The court failed to address whether there was any evidence, particularly when viewed in the light most favorable to Petitioner, from which the jury could have inferred that Petitioner was guilty of the lesser included offense of larceny, rather than the greater offenses of common law robbery or armed robbery. Instead, the court focused on the evidence presented that supported Petitioner's conviction for common law robbery. App. 340.

Presumably, because the court relied on its finding that counsel stated a valid strategic reason for failing to request an instruction on larceny in support of its ruling, the court believed larceny was a proper instruction based on the evidence.

Discussion

The PCR court erred by finding trial counsel was not ineffective for failing to request a jury instruction on the lesser included offense of larceny when there was evidence presented at trial from which the jury could have inferred that Petitioner was merely guilty of this lesser offense. Petitioner was prejudiced by counsel's deficient performance because if counsel would have properly requested a jury instruction on the lesser included offense of larceny, it is likely the jury would have found Petitioner guilty of larceny, which only carries a maximum sentence of thirty days imprisonment, as opposed to common law robbery, for which Petitioner received a fifteen year prison sentence. See S.C. Code Ann. § 16-13-30(A).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"Armed robbery occurs when a person commits robbery while armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon." State v. Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (Ct. App. 2007) (citing S.C. Code Ann. § 16-11-330 (2003) and State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App. 2003)). "Included in armed robbery is the lesser included offense of robbery." Moore, 374 S.C. at 476, 649 S.E.2d at 88 (citing State v. Scipio, 283 S.C. 124, 125-126, 322 S.E.2d 15, 16 (1984)).

"The common-law offense of robbery is essentially the commission of larceny with force." Moore, 374 S.C. at 477, 649 S.E.2d at 88 (quoting State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979)) (internal quotation marks omitted). "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." Al-Amin, 353 S.C. at 424, 578 S.E.2d at 42 (citing State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002) and Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002)). "The gravamen of a robbery charge is taking from the person or immediate presence of another **by violence or intimidation**." Moore, 374 S.C. at 477, 649 S.E.2d at 88

(quoting State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-759 (2003)) (internal quotation marks omitted) (emphasis added).

"Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent." Moore, 374 S.C. at 477, 649 S.E.2d at 88 (citing Al-Amin, 353 S.C. at 424, 578 S.E.2d at 42). "**Larceny is a lesser-included offense of the crime of armed robbery**." Moore, 374 S.C. at 477, 649 S.E.2d at 88 (citing Parker, 351 S.C. 570-571, 571 S.E.2d at 290) (emphasis added).

"Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny." Moore, 374 S.C. at 477, 649 S.E.2d at 88 (citing Scipio, 283 S.C. at 126, 322 S.E.2d at 16 and Brown, 274 S.C. at 49, 260 S.E.2d at 720).

"In determining whether the evidence requires a charge on a lesser-included offense, the . . . Court **must** view the facts in the light most favorable to the defendant." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)) (emphasis added). "The trial court is **required** to charge a jury on a lesser included offense if there is **any evidence** from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (emphasis added). A requested charge "is properly rejected when there is **no evidence** tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995), and State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)) (emphasis added). A "trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence."

State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) and State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)).

Here, there was evidence presented during Petitioner's trial, particularly when viewed in the light most favorable to Petitioner, from which the jury could have inferred that he committed the lesser offense of larceny as opposed to the greater offenses of common law robbery and armed robbery. See Moore, 374 S.C. at 477, 649 S.E.2d at 88 ("Larceny is a lesser-included offense of the crime of armed robbery."). Consequently, if trial counsel had properly requested a charge on this lesser included offense, then the trial court would have been required to charge it. See Gourdine, 322 S.C. at 398, 472 S.E.2d at 241. Moreover, if the trial court had refused to instruct the jury on larceny, it would have been reversible error. See Hill, 315 S.C. at 262, 433 S.E.2d at 849.

The main evidence of larceny presented to the jury was the security footage admitted into evidence as State's Exhibit No. 3.[2] This footage wholly failed to corroborate Shirley Smith's allegations that Petitioner wielded a blade or box cutter when he was fleeing Wal-Mart or that he acted aggressively in any manner. Instead, it showed Petitioner merely attempting to avoid Smith, maneuver around her, and flee the store without any confrontation. Trial counsel emphasized this fact during his closing argument to the jury. Based on this evidence, a reasonable person in Smith's position would not have felt a threat of bodily harm. See Moore, 374 S.C. at 477, 649 S.E.2d at 88 ("When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary person in the victim's position would feel a threat of bodily harm from the perpetrator's acts.").

[2] This footage was also admitted into evidence during Petitioner's evidentiary hearing. It was marked and admitted as Plaintiff's Exhibit No. 4. App. 262, l. 7; App. 300, ll. 11-24. Plaintiff's Exhibit No. 4 is on file with this Court.

The footage also showed Smith acting in a calm manner during the entire event. She never appeared frightened, intimidated, or distressed. In addition to the security footage, Smith testified that after the encounter she immediately returned to her register and resumed checking out other customers, suggesting that she was not distraught in anyway. App. 88, ll. 10-20.

Because there was evidence to support a jury instruction on larceny, trial counsel was ineffective for failing to request this lesser included offense. Moreover, the PCR court erred by finding trial counsel stated a valid strategic reason for failing to request the charge. See App. 340. Counsel repeatedly testified at the evidentiary hearing that his strategy at trial was to convince the jury to convict Petitioner of a lesser included offense whether that be common law robbery or larceny. Specifically, counsel stated, "And it was our strategy to come clean about the fact that, yes, we [Petitioner] took these items, but this was not an armed robbery. This was a . . . taking of some kind, but not an armed robbery. It's more along the lines of strong arm[ed robbery] **or larceny**." App. 294, l. 23 – 295, l. 8 (emphasis added). Further, counsel testified, "I was going for a lesser-included offense . . . **anything I could get that was less than [armed robbery]**. App. 293, ll. 9-18 (emphasis added).

Petitioner was prejudiced by counsel's deficient performance because it is likely the jury would have found Petitioner guilty of larceny if it had been able to consider the offense. The only conclusion that can be reached from the jury's verdict is that it found Smith's testimony that Petitioner presented a box cutter and was acting aggressively as he was attempting to flee the store not credible. Smith's testimony was the only evidence to support an armed robbery or common law robbery conviction. Since the jury found Smith's testimony not credible, it likely would have convicted Petitioner of larceny or "just plain stealing" if given the option, particularly where the

security footage showed Petitioner merely attempting to flee the store without any confrontation. See Moore, 374 S.C. at 477, 649 S.E.2d at 88 ("[L]arceny is just plain stealing.").

The difference between the sentencing range for common law robbery and larceny is further evidence of prejudice. Larceny carries a maximum sentence of thirty days imprisonment where common law robbery carries up to fifteen years imprisonment. See S.C. Code Ann. § 16-13-30.

Respectfully, this Court should hold trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of larceny and that Petitioner was prejudiced by counsel's deficient performance. Ultimately, this Court should reverse Petitioner's conviction and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of February, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

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PERRY B. BUCHANAN,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001632

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of February, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.