

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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RECEIVED

MAY 25 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RAYMOND SMILEY,

APPELLANT

APPELLATE CASE NO. 2015-002002

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ANDERS BRIEF OF APPELLANT

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SUSAN B. HACKETT  
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

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in instructing the jury that a person is guilty of armed robbery if the person alleged he was armed while using a representation of a deadly weapon where there was no evidence before the jury that Appellant used a representation of a deadly weapon?

**STATEMENT OF THE CASE**

On December 18, 2014, an Horry County grand jury indicted Appellant for armed robbery (2014-GS-26-5250). R. 234 - 235. The state, represented by George DeBusk, called the case for trial before the Honorable Benjamin H. Culbertson and a jury on September 8-10, 2015. R. 1. Edward Chrisco represented Appellant. R. 1. At the conclusion of the trial, the jury found Appellant guilty of armed robbery. R. 227, ll. 4-14. Judge Culbertson sentenced Appellant to thirty years' imprisonment. R. 231, ll. 21-23; R. 236.

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

## ARGUMENT

The trial judge erred in instructing the jury that a person is guilty of armed robbery if the person alleged he was armed while using a representation of a deadly weapon where there was no evidence before the jury that Appellant used a representation of a deadly weapon.

### **Relevant facts**

During the early morning hours of August 23, 2014, someone robbed the Wilco Hess convenience store in Loris, South Carolina. R. 71, ll. 10-14; R. 72, ll. 10-25. Logan Wade Sawyers was the cashier at the time. R. 72, ll. 10-11. According to Sawyers, a male walked into the store, walked around, got a cup of coffee and placed it on the counter. R. 73, ll. 1-4. When the man told Sawyers to give him all the money, Sawyers thought he was joking. R. 73, ll. 4-5. Sawyers realized the man was not joking when he presented a firearm that was covered with a napkin and threatened to kill him. R. 73, ll. 5-7. The robber did not say he had a gun – he simply “presented it.” R. 88, ll. 23-24. Sawyers saw the “muzzle” of the firearm, not the entire weapon. R. 95, ll. 5-8; see also, R. 96, l. 17 – R. 97, l. 1; R. 102, ll. 19-23. Sawyers had “no doubt” the robber had a gun. R. 102, ll. 5-7.

Sawyers then gave the man the cash from the drawer. R. 73, ll. 23-24. Sawyers did not know how much money it was, but claimed it was over \$100. R. 73, l. 25 - R. 74, l. 3; R. 102, ll. 24-25. Although Sawyers was not familiar with Appellant and did not view a photographic lineup, he claimed Appellant was the person who robbed him. R. 74, ll. 12-23; R. 90, ll. 2-3. The robber then left out the front door. R. 80, ll. 9-10; R. 95, ll. 23-24.

Although two others were in the store – a second employee and a regular customer – only Sawyers testified at the trial. R. 80, ll. 11-15; R. 90, ll. 12-24; R. 114, ll. 8-18.<sup>1</sup> This may be because no one else saw the robber with a gun. R. 114, l. 23 – R. 115, l. 5. According to Sawyers, he told his co-worker to call the police when the robber left. R. 96, ll. 12-14. When she asked why, Sawyers told her they had been robbed. R. 96, ll. 12-18.

Two months after the robbery, the police arrested Appellant. R.108, l. 9 - R. 109, l. 3. According to the Loris Police Chief, Appellant's arrest was the result of information provided by Appellant's ex-wife. R. 106, ll. 1-20. The day after Appellant's arrest, Chief Karen Shepherd and Sergeant Alicia Miller interrogated Appellant at the jail. R. 109, ll. 4-10; R. 146, ll. 5-8. According to Shepherd and Miller, Appellant admitted he was at the Wilco Hess station, that he set a cup of hot chocolate on the counter, and that he took money. R. 111, ll. 15-20; R. 148, ll. 12-20. Appellant was unable to tell them what day this occurred. R. 148, l. 1. Further, Appellant denied using a gun. R. 111, lines 19-20; R. 148, ll. 19-20.

The only evidence that Appellant robbed the Wilco Hess station was the testimony of the cashier – Sawyers – and the statement Appellant gave to the police. In fact, Appellant admitted to common law robbery. R. 195, l. 25. However, Appellant disputed the state's claim that he used a gun to commit the robbery. R. 111, ll. 19-20; R. 192, ll. 6-7. The only evidence Appellant used a gun to effectuate the robbery was Sawyers' testimony. Even the surveillance video from the scene did not show the use of a gun. State's Exhibit #1.

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<sup>1</sup> The person identified as a regular customer was deceased at the time of Appellant's trial. R. 81, l. 21 – R. 82, l. 1. Additionally, there were two people sitting in a car outside the store. R. 114, ll. 12-18; R. 124, ll. 4-13; R. 126, ll. 1-22. These individuals were not called to testify.

During the charge conference, the prosecutor requested “the full statutory language on the definition of armed robbery be used.” R. 171, ll. 8-10. Specifically, the prosecutor wanted the judge to include language concerning the use of a representation of a deadly weapon. R. 171, ll. 13-20. The judge explained he was disinclined to charge the jury in that manner because the only evidence before the jury was that Appellant either used a gun or did not. R. 171, l. 21 – R. 172, l. 4; R. 174, ll. 14-20. Nevertheless, the prosecutor continued to argue with the judge’s ruling. R. 172, ll. 9-15; R. 172, l. 22 – R. 173, l. 2. According to the prosecutor, Appellant’s statement that he did not have a gun was evidence that he had “something other than a gun” in his hand. R. 173, ll. 3-10. The prosecutor claimed “the fact he didn’t have a gun doesn’t mean he didn’t have some item that he was passing off as a gun, some - - any objection which a person present during the commission of a robbery reasonably believed to be a gun.” R. 173, ll. 13-17; R. 174, ll. 3-5; R. 174, ll. 11-13; R. 174, ll. 21-25; R. 175, ll. 2-19; R. 176, ll. 3-11. Appellant objected to the requested language, noting the only evidence in the record was from Sawyers, which was that the robber used a gun. R. 175, l. 21 – 176, l. 2. When the judge offered to use some of the language about “representation,” the state continued to request the entirety of the statute. R. 176, l. 16 – R. 177, l. 5. Ultimately, the judge decided to charge the jury only as to whether Appellant was actually armed with a deadly weapon and to omit any language about a representation. R. 178, ll. 9-13; R. 181, ll. 23-24.

During the closing argument, defense counsel told the jury that he “made a big to-do over hot chocolate” being in the cup instead of coffee. R. 193, ll. 17-18. He explained that he did so because the first person made an assumption that there was coffee in the cup and “from that point on, everybody referred to it in the report as coffee.” R. 193, ll. 18-23. Defense counsel then told the jurors to consider Sawyers’ testimony and statements to police and on the video about the

robbery. Sawyers first said the robbery said he had a gun, then said he saw part of the gun. R. 194, ll. 7-10. Defense counsel posited that Sawyers may have been embarrassed about giving the money away and had to build the story to make it believable. R. 194, ll. 11-16. Defense counsel told the jurors to watch the video of the robber leaving and to notice that there was nothing in his hand. R. 195, ll. 1-11. He asked the jury to find Appellant guilty of robbery. R. 195, l. 25.

Following closing argument, the state moved the court to re-consider its ruling on the jury instruction request. The state claimed that defense counsel “argued that the victim only assumed it was a gun during his argument.” R. 196, ll. 11-16. The prosecutor actually claimed that defense counsel’s alleged argument “that he assumed it was a gun clearly [was] arguing that it was not a gun, but some other object.” R. 197, ll. 2-4. Thereafter, the judge agreed to add language to his charge to include the statutory language about “representation” over defense counsel’s objection. R. 197, ll. 8-15; R. 197, ll. 19-23.

The judge charged the jury as follows concerning armed robbery:

Now, the Defendant is charged with armed robbery. In order to convict the Defendant of this crime, the State must prove beyond a reasonable doubt that the Defendant took personal property from the person or presence of another person.

Property is in the presence of a person if it is within the person’s reach, inspection, observation or control so that the person could, if not overcome with violence or prevented by fear, keep possession of the property.

The State must also prove beyond a reasonable doubt that the Defendant carried the property away intending to permanently deprive the owner of the property and to keep the property for the Defendant’s own use. The slightest removal of the property or the complete possession of the property, even for an instant, by the Defendant is sufficient to show a taking and carrying away of the property. The taking and carrying away of the property must have been done with violence or by putting the owner of the property in fear of violence.

Finally, the State must prove beyond a reasonable doubt that the Defendant was armed with a deadly weapon during the robbery or that the Defendant, while alleging either by action or words, that he was armed while using a representation

of a deadly weapon or any objection which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of instruments which may be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a sling shot, metal knuckles, a razor, gasoline, a fire bomb or Molotov cocktail and lighter fluid. A gun may be a deadly weapon even if it is not operating.

R. 205, l. 13 – R. 206, l. 22. Appellant renewed his objection to the charge on “representation” of a weapon. R. 208, l. 24 – R. 209, l. 9.

During deliberations, the jury’s notes and questions demonstrated its struggles with the evidence presented. Initially, the jurors wanted to watch the surveillance video and arrangements were made to allow the viewing. R. 210, l. 10 – R. 212, l. 25. Then, the jury wanted to know why the video and photographs were dated differently than the date of the alleged robbery. R. 213, ll. 10-13. There was no evidence in the record for the jury to consider to explain the difference. R. 213, l. 14 – R. 214, l. 11; R. 216, ll. 14-23. Additionally, the jury wanted to know if Appellant’s statement was reduced to writing and signed by Appellant. R. 214, ll. 13 – 23; R. 217, ll. 2-6. The judge told the jurors that there was “no signed confession” in evidence. R. 214, ll. 13-23; R. 217, l. 7. Then, the jury asked for the police report, which the judge told them was not evidence. R. 217, ll. 10-12. The jury wanted to know if Appellant was left or right-handed, but the judge had to inform them yet again, there was no evidence in the record. R. 215, ll. 15-20; R. 216, l. 24 – R. 217, l. 1. When the jurors were unable to get these questions answered to their satisfaction, they asked for written statement by the other witness who was in the store. R. 217, ll. 17-18. The judge told the jurors that no written statement had been presented into evidence. R. 217, ll. 19-20.

When the jury sent out a question asking the judge to clarify the description of a weapon, the judge explained he would re-charge the jury on the definition of a deadly weapon. R. 218, l. 22 – R. 219, l. 4; R. 219, l. 8; R. 220, ll. 4-5. The state objected and requested the jury be re-charged on the full statutory definition of armed robbery, including the language about “representation.” R. 219, ll. 5-7; R. 219, ll. 11-14; R. 219, l. 22 – R. 220, l. 2. When Appellant objected, the judge indicated he was going to answer the question as asked - only the definition of a deadly weapon. R. 220, ll. 10-13; R. 220, ll. 18-23. After the judge re-charged the jury on the definition of a deadly weapon, a juror asked, “Did he have to just say he had a gun or do we have to prove he had a gun?” R. 221, l. 16 – R. 222, l. 2. Upon hearing this question, the judge immediately re-charged the jury on the full statutory definition of armed robbery, including the “representation” language. R. 222, ll. 18-24. When the jury was excused to deliberate some more, the judge noted he was aware of the objection, but thought the jury’s follow-up question required the additional charge. R. 223, ll. 19-22 Defense counsel noted his objection. R. 223, ll. 23-24. Despite this additional charge, the jury had not reached an unanimous verdict and requested to hear Sawyers’ testimony again. R. 224, ll. 8-9. The judge permitted the jurors to rehear the testimony. R. 225, ll. 4-5. Shortly thereafter, the jury returned its verdict finding Appellant guilty. R. 226, l. 5 – R. 227, l. 12.

### **Discussion**

“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.” State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App. 2003). “The gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation.” State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757,

758-759 (2003). “The common-law offense of robbery is essentially the commission of larceny with force.” State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). According to South Carolina statutory law, “[a] person who commits robbery while armed with a ... 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 armed robbery. S.C. Code Ann. § 16-11-330(A). “Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery.” State v. Moore, 374 S.C. 468, 477, 649 S.E.2d 84, 88 (Ct. App. 2007).

Without question, the statute permits the state to prove armed robbery under two competing theories:

(1) that the robber was armed with a deadly weapon or (2) that the robber alleged that he or she was armed with a deadly weapon, either by action or words, 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.

State v. Jones, 342 S.C. 248, 252-253, 536 S.E.2d 396, 398 (Ct. App. 2000). However, under the second theory, the state must prove the robber used a “representation of a deadly weapon” while at the same time, the robber alleged he was armed with a deadly weapon. In State v. Muldrow, 348 S.C. 264, 269, 559 S.E.2d 847, 849-850 (2002), the South Carolina Supreme Court found that words unaccompanied by any corroborating action are not sufficient to establish the armed element for armed robbery. In Muldrow, 348 S.C. at 267, 559 S.E.2d at 849, the defendant handed the store clerk a note that said, “Give me all your cash or I’ll shoot you.” Finding no evidence of a deadly weapon or a physical representation of a deadly weapon, the Court reversed Muldrow’s conviction for armed robbery and remanded for sentencing on the lesser included charge of strong armed robbery. Id. at 269-270, 559 S.E.2d at 850.

In State v. Dodd, 354 S.C. 13, 18, 579 S.E.2d 331, 334 (Ct. App. 2003), this Court 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. This Court explained that "[a]lthough 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. Id. (emphasis in original).

Generally, a deadly weapon is defined as "any article, instrument or substance which is likely to produce death or great bodily harm." State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985). Further, the armed robbery statute does not require the display of a deadly weapon as long as there is a representation of a deadly weapon. See State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 629-630 (Ct. App. 1986). Thus, often, the question of whether an object used in the commission of a robbery is a deadly weapon is a factual determination for the jury. State v. Scurry, 322 S.C. 514, 517, 473 S.E.2d 61, 63 (Ct. App. 1996).

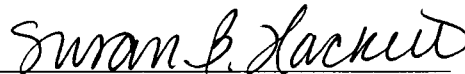
In the instant case, the question is whether any evidence in the record supported the judge's instruction to the jury concerning the second theory under which the state may proceed in armed robbery cases. Put another way - did the state present evidence that Appellant used a physical representation of a weapon while alleging he had a weapon. Sawyer claimed Appellant threatened to kill him; therefore, the only question is whether the state presented evidence that Appellant used a physical representation of a weapon. The answer to that question is no. The only evidence before the jury was that Appellant either used or a gun or he did not use a gun. There was no evidence Appellant used a representation of a gun. Further, defense counsel's closing argument did not open the door for the charge. Contrary to the state's argument, defense counsel did not argue Sawyer assumed Appellant had a gun. Rather, defense counsel argued

Sawyer made up the story about a gun out of whole cloth because he was embarrassed about giving up the money so easily during the robbery. “The evidence presented at trial determines the law to be charged to the jury.” State v. Hernandez, 386 S.C. 655, 690 S.E.2d 582 (Ct. App. 2010)(citing State v. Brown, 362 S.C. 258, 261-262, 607 S.E.2d 93, 95 (Ct. App. 2004)). In light of the state’s failure to present evidence of Appellant’s use of a “representation of a deadly weapon,” the trial judge erred by instructing the jury on that portion of the statute.

**CONCLUSION**

Appellant respectfully requests this Court reverse his conviction and remand for a new trial. In the alternative, Appellant respectfully requests this Court vacate his conviction for armed robbery and remand for sentencing on the lesser-included offense of common law robbery. See Muldrow, 348 S.C. at 269-270, 559 S.E.2d at 850; State v. Brown, 360 S.C. 581, 594, 602 S.E.2d 392, 399 (2004).

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of May, 2016.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
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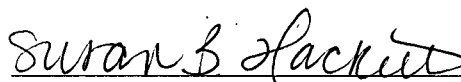
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PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Raymond Smiley states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge Benjamin H. Culbertson, which was held on September 8-10, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Raymond Smiley.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of May, 2016.

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THE STATE,

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

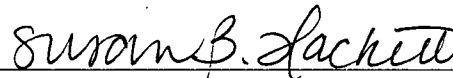
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Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript dated September 8-10, 2015 pages: 1-233;
- (2) State's Exhibit #1 (video);
- (3) True-billed indictments (2014-GS-26-5250); and
- (4) Sentence sheet (2014-GS-26-5250)

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

May 25th, 2016



Susan B. Hackett  
Appellate Defender

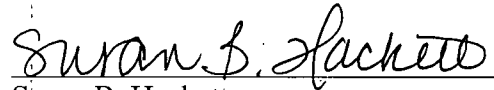
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 25, 2016



Susan B. Hackett  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589