

NOTICE OF INTENT TO APPEAL
THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
FROM AIKEN COUNTY
THE HONORABLE DOYET A. EARLY, III
August 10, 2018

Indictment # 2017 GS 02 01121

RECEIVED

AUG 16 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA -- Respondent

VS.

BERTRAM MERLE BROWN -- Appellant

AMENDED NOTICE OF INTENT TO APPEAL

Bertram Brown was found guilty and was convicted of Burglary First Degree, on January 10, 2018 before the Honorable Doyet A. Early, III in Aiken, South Carolina. He appeals his conviction and sentence. A motion for a New Trail was filed on January 19, 2018 and the Order Denying New Trail was issued on July 27, 2018.



Derek M. Bush
Attorney for Defendant

Other Counsel of record is:

Samuel Grimes
Assistant Solicitor
Post Office Box 3368
Aiken, South Carolina 29802

FS

AM
Jail

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

AFFIDAVIT OF INDIGENCY AND
APPLICATION FOR APPOINTED COUNSEL

STATE VS. Bertum Merle Brown

ARREST WARRANT / TICKET & CHARGE: 2016A0220100933 - Burglary 1st deg; 2016A022010095
Poss of firearm during commission; 2016A0220100935 - Poss of firearm or ammunition;
2016A0220100936 - Poss of stolen Pistol

ARE YOU PRESENTLY EMPLOYED? YES NO If yes, Please state the name and address of your employer and the amount of your salary or wages per month and/or week.

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SC Court of Appeals

NAME: _____ ADDRESS: _____

NET WAGES: \$ _____ WEEKLY / BI-WEEKLY / MONTHLY

If No, please state the name and address of your former employer, date of termination and the amount of your salary or wages.

EMPLOYER: travelling carnival

NET WAGES: \$ 200.00 WEEKLY / BI-WEEKLY / MONTHLY

DATE OF TERMINATION: 8/2016

HOUSEHOLD MEMBER(S) EMPLOYER (if applicable): _____

NET WAGES: \$ _____ WEEKLY / BI-WEEKLY / MONTHLY

Have you or household member(s) received within the past twelve months any money from any of the following sources?

- a. Business, Profession or Self-Employment? Yes No
- b. Rent Payments, Interest or Dividends? Yes No
- c. Pensions, Annuities or Life Insurance Payments? Yes No
- d. Gifts or Inheritance? Yes No
- e. Any Other Source (including Unemployment, Retirement, Disability and/or Food Stamps)? Yes No

If the answer to any question above is "Yes", please list the source of the money and the amount received within the last 12 months.

SOURCE: FS AMOUNT: \$194.00

LIST BY NAME, AGE AND RELATIONSHIP TO YOU, ANY PERSONS WHO ARE DEPENDENT UPON YOU FOR SUPPORT. INDICATE BESIDE EACH HOW MUCH YOU CONTRIBUTE TOWARD THEIR SUPPORT.

NAME: _____	AGE: <u>f</u>	RELATIONSHIP: _____	AMOUNT \$ _____
NAME: _____	AGE: <u>f</u>	RELATIONSHIP: _____	AMOUNT \$ _____
NAME: _____	AGE: _____	RELATIONSHIP: _____	AMOUNT \$ _____

DO YOU HAVE CASH, OR DO YOU HAVE ANY MONEY IN A CHECKING OR SAVINGS ACCOUNT
CASH: \$ _____ CHECKING: \$ _____ SAVINGS: \$ _____

DO YOU OWN ANY REAL ESTATE, STOCKS, BONDS, NOTES OR OTHER VALUABLE PROPERTY, EXCLUDING ORDINARY HOUSEHOLD FURNISHINGS AND CLOTHING? YES NO

PLEASE SPECIFY: _____

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7. LIST THE TYPE OF VEHICLE(S) YOU OWN (YEAR, MAKE, MODEL): _____ AUG 16 2010
PAID FOR? YES _____ NO AMOUNT OF PAYMENT(S) \$ _____ SC Court of Appeals
8. DO YOU OR HOUSEHOLD MEMBER PAY RENT OR MORTGAGE? homeless
9. AMOUNT OF DEBTS, LIENS, MORTGAGES, ETC.? _____ AMOUNT \$ _____

I do solemnly swear that the information reported by me for this application for counsel does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I or any person in trust for me have or at the time of my possession had, or am, or was in any way respect, entitled to, in possession, remainder or reversion, and that I have not at any time since charges were made against me or before, directly or indirectly sold, leased, assigned, or otherwise disposed of any property, or made over in trust for myself or otherwise, other than mentioned herein.

I understand that the appointment of counsel creates a claim against the assets and estate of the person who is provided counsel or the parents or legal guardians of a juvenile in the amount equal to the costs of representation less the amount paid to appointed counsel, the public defender office and/or the Commission on Indigent Defense. I understand such claim shall be filed in the Office of the Clerk of Court where I, my child, or ward are assigned counsel, but that the filing of a claim shall not constitute a lien against my real or personal property unless, in the discretion of the Court, part or all of such a claim is reduced to judgment by appropriate Order of the Court, after serving me with at least thirty (30) days notice that judgment will be entered.

I understand that pursuant to §17-3-30(b), I am required to pay a non-refundable \$40.00 application fee to the Public Defender's Office for public defender services or other appointed counsel.

I am financially unable to employ counsel and request that counsel be assigned to represent me. I understand that I am entitled to at least 30 days notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

X Bertram Brown
Applicant

Sworn to before me this 26 day of September, 2016.

[Signature] Notary Public for South Carolina. My commission expires: 8-31-26

RACE: B SEX: M AGE: 53 IN JAIL _____ OUT ON BOND
SSN: 250-41-7869 DATE OF ARREST: 9-22-16
DATE OF BIRTH: 4-29-63 BOND AMOUNT: 0
ADDRESS: 604 Park Avenue SE (salvation army) BONDSMAN: _____
CITY & STATE: Aiken, SC 29801 CO-DEFENDANTS: _____
TELEPHONE: 803-641-4149

The applicant's request for counsel is hereby
 GRANTED
_____ DENIED

[Signature]
Judge: Clerk or Deputy Clerk
DATE: 9-26-16

ARREST WARRANT

2016A0220100933

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

16-60313 THE STATE against

Bertram Merle Brown

Address: Aiken, SC 29801

Sex: M Race: B Height: 6 Weight: 140

DL State: SC DL #:

DOB: Agency ORI #: SC0020100

Prosecuting Agency: Aiken Public Safety

Prosecuting Officer: Ed Galo

Offense: BURGLARY/burglary (post 6/20/85) 1st degree

Offense Code: 79

Code/Ordinance Sec: 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on 9-23-16 @ 1313

Signature of Constable/Law Enforcement Officer Cpl. Gode #6380

RETURN WARRANT TO:

Aiken Municipal Court 251 Laurens St., N.W. Aiken, SC 29801

ORIGINAL

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

Personally appeared before me the affiant Ed Galo who

being duly sworn deposes and says that defendant Bertram Merle Brown

did within this county and state on 09/22/2016 violate the criminal laws of the

State of South Carolina (or ordinance of County/ Municipality of City of Aiken)

in the following particulars:

DESCRIPTION OF OFFENSE: BURGLARY/burglary (post 6/20/85) 1st degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Upon information and belief, the defendant, Bertram Brown, did on 9/22/2016, commit the offense of Burglary 1st Degree in the following: The defendant did unlawfully enter the residence at 504 Colleton Ave. with the intent to commit a crime. The defendant did possess a Springfield Armory XD 9mm (XD151560) while inside of the residence. This incident occurred at 504 Colleton Ave., which is within the city limits of Aiken, SC and being in violation of the Code of Laws as amended.

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Signature of Affiant

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

Affiant's Address 251 LAURENS ST

AIKEN, SC 29801-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 09/22/2016 defendant Bertram Merle Brown

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ Municipality of City of Aiken) as set forth below

DESCRIPTION OF OFFENSE: BURGLARY/burglary (post 6/20/85) 1st degree

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 09/22/2016

(L.S.)

Signature of Issuing Judge

Judge Code: 006

Judge's Address 251 Laurens St Nw

Aiken, SC 29801-

Judge's Telephone (803)642-7620 x 0000

Issuing Court County/ Municipality/ Circuit

ORIGINAL

AP MUSGROVE AFFIDAVIT Crime Exista For

BAIL set by
WLB

Judge _____
on 9-23-16
Type and Amount: Denied
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, not. pros., etc.)
Disposition _____
Sentence _____

JURORS

WITNESSES

Name _____
Address _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

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AUG 16 2018
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Aiken VS. STATE

INDICTMENT/CASE#: 2017GS0201121

Bertram Merle Brown

A/W#: 2016A0220100933

AKA:

Date of Offense: 9/22/2016

Race: Black Sex: M Age: 54

S.C. Code §: 16-11-0311

DOB: SS#:

CDR Code #: 0079

Address: Homeless

SENTENCE SHEET 15-16

City, State, Zip: Aiken, SC 29001

CONVICTED OF or PLEADS

DL#: DR: SC00298036

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

TO: Burglary / Burglary (After June 20, 1985) - First degree

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lawd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTORNEYS: Samuel B. Grimes, Samuel B. 77509 SC Bar# Defendant Bertram Merle Brown 10201 SC Bar# Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 20 days/months/years or under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of

probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied

by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic

Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred, Def. Waives Hearing, Ordered PTUP

Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms: Obtain GED

Set by SCDPPPS Attend Voc. Rehab. or Job Corp.

Recipient: May serve W/E beginning

*Fine: Substance Abuse Counseling

§ 14-1-206 (Assessments 107.5%) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2953 (DUI Assessment) \$72 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 61.6 (Public Def/Probation) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114 (BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 100

3% to County (if paid in installments) \$ 3.75

TOTAL \$ 128.75

Clerk of Court/ Deputy Clerk Angel Miles

Court Reporter: Brenda Sigwald

SCCA/217 (07/2016)

Presiding Judge

Judge Code: 2136

Sentence Date: Jan 10, 2018

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WITNESSES

Aiken Department of Public Safety

E Galo

Law Enforcement Case # 16-60313

SBG

ARREST WARRANT NUMBER

2016A0220100933

FILED July 6 2017

Robert J. Bente
C.C.P. & G.S.
(53) Shannon Stiggins
Deputy Clerk

ACTION OF GRAND JURY

TRUE bill

Foreperson of Grand Jury
Date: July 6, 2017

Kelvin A. Oglesby

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017GS0201121

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JULY TERM 2017

THE STATE

vs.

BERTRAM MERLE BROWN

CDR #: 0079

Indictment for

BURGLARY IN THE FIRST DEGREE

§ 16-11-0311

J. STROM THURMOND, SOLICITOR

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SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

INDICTMENT FOR
BURGLARY IN THE FIRST DEGREE

§ 16-11-0311

At a Court of General Sessions, convened on July 10, 2017, the Grand Jurors of Aiken County present upon their oath:

That **BERTRAM MERLE BROWN** did in Aiken County on or about September 22, 2016, wilfully and unlawfully enter the dwelling of Adam Waller located at 504 Colleton Avenue, without consent and with the intent to commit a crime therein and the defendant was armed or became armed with handgun. All in violation of §16-11-311, Code of Laws of South Carolina (1976), as amended.

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AUG 16 2018

SC Court of Appeals

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
STATE OF SOUTH CAROLINA)
)
VS.)
)
BERTRAM BROWN)
DEFENDANT)
_____)

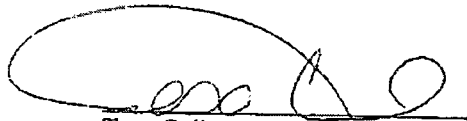
IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR A NEW TRIAL

AFFIDAVIT OF SERVICE

WARRANT #: 2016 A02 201 00933
INDICTMENT #: 2017 GS 02 01121

I, Tesa Culbertson, hereby state that I did serve a certified copy of the attached Motion upon Assistant Solicitor, Samuel Grimes, at 109 Park Avenue, Aiken, South Carolina by hand delivery and a certified copy of the attached Motion upon the Honorable Doyet A. Early, III, by regular mail and electronic mail on January 19, 2018.


Tesa Culbertson
Paralegal for Defendant's Attorney

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, _____, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office, this
_____ day of _____, 2018.

Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
STATE OF SOUTH CAROLINA,
vs.
BERTRAM BROWN,
DEFENDANT.

IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

**ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL**

Indictment: 2017-GS-02-01121
(Burglary 1st Degree)

Date of Trial: January 10, 2018
Presiding Judge: Doyet A. Early, III
Attorneys for State: Samuel Grimes, Bradley McMillian
Attorneys for Defendant: Derek Bush, Barry Thompson

The Defendant was convicted before the Court at a jury trial in Aiken on January 10, 2018. At the conclusion of the trial, counsel for Defendant made a motion for new trial and submitted a memorandum in support of the motion. The Court herein denies Defendant's Motion for New Trial.

Defendant contends that he could not have been "armed with a deadly weapon" during the burglary because the "firearm did not have the ability to be fired." As a result, Defendant contends that the Court should have charged the jury on the lesser-included offense burglary second degree. The Court finds that Defendant's contention is not a correct statement of the law as it applies to this case and is not supported by the evidence presented at trial. The Court further finds that a jury charge on a lesser-included burglary charge is not appropriate based upon the evidence presented at trial.

FILED July 27 2018
[Signature]
C.C.P. & C.S.
Katie S. Williams
Deputy Clerk

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2 cert. copies to SOL

Evidence at Trial

The victim testified that he came home to find a burglar in his house holding his pistol. The victim further indicated that he then walked out of the house and the burglar came out holding the pistol in his hand along with a pistol case and a cup full of change from inside the home. After telling the victim to drop his cell phone, the burglar left on his bicycle. An officer testified he located the Defendant a short distance away from the incident location with items taken from the house, including the pistol and pistol case. The Defendant matched the description of the burglar given by the victim. The victim testified the pistol was "unloaded", but later clarified that to him "unloaded" meant that there was no bullet in the chamber, not that there was not a bullet in the gun. The Defendant presented an alibi defense at trial which would not necessarily preclude him from seeking a jury charge for a lesser-included offense based upon the evidence presented at trial. In the present matter, however, the identity of the burglar was the only matter in contention. The credibility of the victim was not challenged on cross-examination and there was no significant challenge by the defense as to the manner in which the burglar used the pistol during the burglary.

Discussion of Defendant's Factual Contention

Defendant's legal contention with regard to the definition of "deadly weapon" relies on the statement of the victim that the pistol appeared to be "unloaded." However, the victim clarified that to him "unloaded" meant that no bullet was in the chamber of the pistol, not that there were not bullets in the pistol. Because the victim used the term "unloaded" in an unconventional manner, the testimony on that subject is included herein:

Adam Waller - Direct Examination by Mr. Grimes (Partial Transcript of Record):

Waller

#2

Q Okay. And I think you talked to law enforcement that afternoon. Did you describe that pistol as unloaded?

A Yes.

Q What does unloaded mean to you?

A It means not having a round in the chamber, basically.

Q Okay. Did you know that pistol to -- could you tell at that time whether there was a round in the chamber?

A I could.

Q You believe you could tell that?

A Yes.

Q And what do you think was loaded -- did you believe there was a round in the chamber?

A I did not, no.

Q Okay. Does that -- does that mean that there were no bullets in the magazine?

A No.

Adam Walter - Cross-examination by Mr. Bush (Partial Transcript of Record):

Q Okay. And you said that you knew the gun was unloaded, right?

A Yes.

Q And you're not sure whether or not it had any ammunition in it, right?

A That's correct.

Q And you told law enforcement that you knew that the

Handwritten signature and initials

gun wasn't cocked, right?

A That's correct.

Q You knew there wasn't a round in the chamber?

A That's correct.

Q So you knew the gun couldn't have been fired,
right?

A At that moment, yes.

Adam Waller – Re-direct examination by Mr. Grimes (Partial Transcript of Record)

Q Do you know of any reason why that firearm couldn't
have been loaded?

A No.

Because the victim was familiar with the pistol, he would have been aware of its capability. Pursuant to the victim's account of the encounter, the victim would not have held the pistol at any point during the burglary and, logically, could not have known how many bullets were in the pistol, if any. There was no evidence or testimony presented that the pistol was incapable of firing a bullet.

The Defendant's contention that the "the victim knew that the gun was not readily available to be used" and that the Defendant was "not armed because the firearm did not have the ability to be fired" are factually unsupported by the evidence presented at trial. There was no evidence that the pistol was inoperable. As discussed below, the Court does not adopt Defendant's proposed definition of "deadly weapon" as the applicable definition in this case. The Court further finds that the evidence presented at trial does not support the Defendant's

Waller
#4

contention that the "firearm wasn't readily available to be used", that the "firearm did not have the ability to be fired," or that the victim "knew" such. Contrary to Defendant's contention, the testimony at trial is not definitive that the pistol was unloaded. The pistol was in the Defendant's hand during the burglary. The victim was not holding the pistol during the burglary. The victim never testified that no bullets were in the pistol and in fact testified that he knew of no reason why the pistol couldn't have been loaded. Even if the Court were to adopt the Defendant's contention with regard to the law, the evidence presented at trial does not support a finding that the "firearm did not have the ability to be fired" or that the victim "knew" the pistol could not be fired. The Court finds that, under the evidence presented in this case and the applicable law, as discussed below, a reasonable jury could not rationally infer that the pistol involved was not a deadly weapon.

Definition of Deadly Weapon

Defendant has proposed that the pistol in this case is not a "deadly weapon" pursuant to SC. Code § 16-11-311(A). Defendant's contention is that the pistol was not "readily available for use" and therefore could not be a deadly weapon. Defendant cites State v. McCaskill in support of this contention. However, the McCaskill Court was addressing the definition of the term "armed" not the definition of "deadly weapon." State v. McCaskill, 321 S.C. 283 (Ct. App. 1996) *stating* The general rule is that one is "armed" for purposes of first-degree burglary if a ~~firearm is easily accessible and readily available for use by that individual for offensive or~~ defensive purposes. *citing* People v. Adams, 867 P.2d 54 (Colo. Ct. App. 1993); State v. Chiariello, 66 Wash. App. 241, 831 P.2d 1119 (1992). In fact, McCaskill cites as support a Washington case noting, "notwithstanding evidence that the guns were not loaded, that the

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burglar took no ammunition, did not know there was ammunition in the house, and did not intend to load the guns, the guns could still have been used to frighten, intimidate, or control people.” McCaskill, citing State v. Faille, 53 Wash App. 111, 766 P.2d 478 (1988). The Court finds a pistol would be a deadly weapon whether it is loaded with bullets or unloaded. See State v. Bailey, 273 SC 467 (1979) stating “We hold that a gun used in a robbery is a deadly weapon regardless of its alleged inoperability” citing People v. Hill, 47 Ill. App. 3d 976, 6 Ill. Dec. 41, 362 N.E. 2d 470 (1977); State v. Meek, 53 Ohio St. 2d 35, 372 N.E. 2d 341 (1978); State v. Hattori, 19 Wash. App. 74, 573 P.2d 829 (1978). At trial, the Court declined to accept Defendant’s assertion that the pistol in this case could not be a deadly weapon as a matter of law. In fact, the jury charge reflects that a gun may be a deadly weapon even if it is not operating. It is clear that the operability of a firearm is not a legal or factual test to determine if it is a deadly weapon. A firearm is inherently deadly or capable of causing fear of death, so the manner in which it is used or possessed is the factual issue for the jury.

The Defendant presented an alibi defense at trial and there was no contest to the victim’s account of the manner in which the pistol was used during the burglary. Therefore, the uncontested evidence at trial is that the burglar possessed and displayed the pistol during the burglary while the burglar was demanding the victim to drop his phone. Applying the law as discussed above to the uncontested testimony at trial, the pistol involved in this case could not have been anything less than a deadly weapon regardless of its operability.

~~The Defendant’s sole reason the pistol was not a deadly weapon is based upon the contention it was unloaded. A pistol used in the uncontested manner described in this case cannot legally cease being a deadly weapon on the sole basis of it being unloaded. That basis is the only basis on which a burglary second degree charge was requested. Therefore, the Court~~

JME
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finds the burglary second degree charge on that basis would be a legally incorrect jury charge and would wrongly inform the jury about the law regarding a deadly weapon.

Lesser-included Offense

Regarding jury charges on lesser-included offenses: "A judge 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.'" Dempsy v. State, 363 S.C. 365, 371, 610 S.E. 2d 812, 815 (2005). "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." State v. Geiger, 370 SC 600, 607 (Cl. App. 2006) citing State v. Tyndall, 336 S.C. at 22, 518 S.E. 2d at 285. "A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed." Sellers v. State, 362 SC 182, 189 (1996) *questioned on other grounds*, citing State v. Gourdine, 322 S.C. 396, 398, 472 S.E. 2d 241, 242 (1996). "There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense." Id., citing State v. Mathis, 287 S.C. 589, 594, 340 S.E. 2d 538, 541 (1986).

For example: "A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking." Id., citing State v. Grandy, 306 S.C. 224, 226, 411 S.E. 2d 207, 208 (1991). "[W]hen there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute, both charges should be submitted to the jury. **Where, however, the undisputed evidence is that the amount involved exceeds the**

JMOE
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minimum trafficking amount, then only the trafficking charge should be submitted to the jury." Matthews v. State, 300 S.C. at 241, 387 S.E.2d at 260 (*emphasis added*).


The Court finds the undisputed evidence is that the burglar in this case possessed and presented a pistol during the burglary and while demanding the victim to drop his phone. Further, it was uncontested that the burglary location was a dwelling. Therefore, the Court finds that a charge on a lesser burglary is unwarranted.

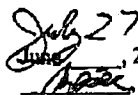
Conclusion

The only factual issue in dispute was the identity of the burglar. There was no evidence presented at the trial that the burglar did not possess and display a pistol in the manner described by the victim. In fact, the Defendant argued the pistol involved was not a deadly weapon. For the reasons stated above, the Court finds that a reasonable jury could not rationally infer, based on the evidence presented at trial and applicable law, that the Defendant committed a lesser burglary. As such, it would have been improper for the Court to provide the jury a charge on a lesser included burglary.

BASED UPON THE FOREGOING, the Defendant's Motion for New Trial is hereby DENIED.

IT IS SO ORDERED.


Doyet A. Early, III
Resident Judge
Second Judicial Circuit


July 27, 2018
South Carolina

AMENDED NOTICE OF INTENT TO APPEAL
State of South Carolina
Vs:
William Merle Brown
2017 GS 02 01121

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AUG 16 2018

SC Court of Appeals

CERTIFICATE OF SERVICE

I, Tesa Culbertson, do hereby certify that I have this day served the original of Appellate's Notice to Appeal upon the South Carolina Court of Appeals, copies to the South Carolina Commission of Appellate Defense and copies of Appellate's Notice of Intent to Appeal to the Clerk of Court of Aiken County, and to Samuel Grimes, Assistant Solicitor, Second Judicial Circuit by placing same in the United States Mail properly addressed and with correct postage affixed thereto:

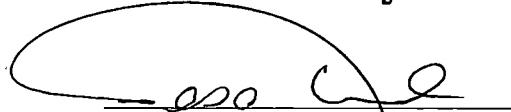
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

South Carolina Commission
Of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

Clerk of Court
Aiken County Judicial Circuit
Post Office Box 583
Aiken, South Carolina 29802

Samuel Grimes
Assistant Solicitor
Post Office Drawer 3368
Aiken, South Carolina 29802

Dated this 10th day of August, 2018



Tesa Culbertson
Secretary to Appellant's Attorney
Post Office Drawer 2247
Aiken, SC 29802
803-642-1732

OFFICE OF THE SECOND JUDICIAL CIRCUIT PUBLIC DEFENDER
410 Barnwell Avenue N.W.
Post Office Box 2247
Aiken, South Carolina 29802

August 10, 2018

South Carolina Commission
On Indigent Defense
Attention: Rhonda Fox
P. O. Box 11589
Columbia, SC 29211

RECEIVED
AUG 16 2018
SC Court of Appeals

RE: AMENDED NOTICE OF INTENT TO APPEAL
Bertram Merle Brown
2017 GS 02 01121


Dear Ms. Fox:

Please find enclosed copies of Notice of Intent to Appeal, Indictment 2017-GS-02-01121, Arrest Warrant, Sentence Sheet, defendant's affidavit of indigency, defendant's motion for new trial dated January 19, 2018 and the Order denying a new trial dated July 27, 2018.

Bertram Brown was found guilty at trial and was convicted of Burglary First Degree and was sentenced on January 10, 2018 before the Honorable Doyet A. Early, III. Ms. Brenda Sigwald served as the Court Reporter. Her address is Post Office Box 206, Jackson, South Carolina 29831.

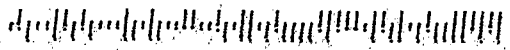
I am available to discuss this case if you so desire.

Sincerely,



Derek M. Bush
Assistant Public Defender

DMB:tpc
Enclosure



7015 1730 0000 6523 8709

10-10-10
Drawer 2247
Ken, SC 29302



RECEIVED

SEP 20 2011
SOUTH CAROLINA
COURT OF APPEALS

South Carolina Court of Appeals
Post Office Box 116029
Columbia, South Carolina 29211