STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County

Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BERTRAM MERLE BROWN,

APPELLANT

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO. 2018-001429

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal on the charge of burglary in the first degree where the indictment alleged the aggravating circumstance that Appellant was armed with a deadly weapon where the undisputed evidence presented was that the pistol was not loaded and the homeowner knew the pistol was not loaded?

STATEMENT OF THE CASE

On July 10, 2017, an Aiken County grand jury indicted Appellant for burglary in the first degree. R. 223. The state, represented by Sam Grimes and Bradley McMillian, called the case to trial before the Honorable Doyet A. Early, III, on January 9-10, 2018. R. 1. Derek M. Bush and Barry L. Thompson, II, represented Appellant. R. 1. Ultimately, the jury found Appellant guilty as charged. R. 198, ll. 5-8. Judge Early sentenced Appellant to twenty years in the state department of corrections. R. 207, ll. 7-9; R. 225. At the conclusion of the trial, Appellant moved for a new trial. R. 200, ll. 7-8. On January 19, 2018, Appellant filed a memorandum in support of his motion for a new trial. R. 213. On July 27, 2018, Judge Early denied the motion. R. 215.

On July 31, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the charge of burglary in the first degree where the indictment alleged the aggravating circumstance that Appellant was armed with a deadly weapon where the undisputed evidence presented was that the pistol was not loaded and the homeowner knew the pistol was not loaded.

Relevant facts

On September 22, 2016, Appellant signed in as the thirty-first person to eat lunch at the Salvation Army soup kitchen. R. 142, l. 6 – R. 144, l. 7; R. 209. Rose Mitchell, the shelter director at the Salvation Army, explained that "people start lining up about 11:30" for the soup kitchen. R. 141, ll. 1-6; R. 141, ll. 11-14. The lunch service started at noon and ended at 1 p.m. R. 141, ll. 13-15. Individuals must sign in as they entered for lunch. R. 141, ll. 15-16. The kitchen could serve only twenty-eight people at a time; therefore, as the thirty-first person, Appellant was not part of the first group of people to eat. R. 144, ll. 8-19. Mitchell estimated that Appellant entered the kitchen to eat at "about 12:30." R. 144, ll. 20-22.

Mitchell recalled that on September 22, 2016, Appellant "had just left the soup kitchen" when she saw the police talking to Appellant "across the street." R. 145, ll. 17-25. She repeatedly indicated Appellant "just left" the soup kitchen when he was encountered by the police as he was "less than a block away." R. 145, ll. 22-25.

Aiken Public Safety Officer Karl Odenthal responded to a call for a "burglary or robbery or something" by going to a location he "knew" was where the suspect was going to be and where he would most likely intercept the person. R. 80, ll. 22-23; R. 81, l. 20 – R. 80, l. 3; R. 82, l. 24 – R. 83, l. 7. Odenthal saw Appellant in this location when he arrived. R. 88, ll. 6-7. He believed Appellant matched the description of "the guy's leaving north on a bike." R. 88, ll. 8-

16. Odenthal immediately handcuffed Appellant. R. 89, ll. 1-5. When Odenthal asked Appellant where he had been, he truthfully responded he had been at the Salvation Army. R. 94, l. 24 – R. 95, l. 5.

Odenthall claimed Appellant had a cup in his hand. R. 89, ll. 6-8. He also found a gun in the tree line near where Appellant had been standing prior to Odenthall's approach. R. 91, ll. 18-25. Finally, Odenthall discovered a college ring in Appellant's pocket. R. 114, l. 24 – R. 115, l. 2.

"[J]ust after lunchtime," Adam Waller was packing to go to the beach for the weekend. R. 45, ll. 17-20; R. 63, ll. 2-5. He left his home to return a cake plate to the manager of the SPCA Thrift Store "just around the corner" from his house. R. 45, ll. 22-25. Waller was gone "[a]pproximately 10 minutes." R. 46, ll. 16-18. When he returned, he noticed a bike to the right of his entrance gate in front of his house. R. 47, ll. 6-12. As Waller entered his house, he saw "[a] man … kneeled down where [he] had left [his] pistol to clean it." R. 48, ll. 4-7. When the man stood up, he had Waller's gun case and gun in his hand. R. 50, ll. 17-18. The pistol was not in the case at the time. R. 50, ll. 19-22. Waller "backed out of the front door and back down the couple, three steps." R. 51, ll. 1-3.

When the man walked out of the house, he had a cup full of change in one hand from Waller's bedroom and the pistol and gun case in the other. R. 51, ll. 15-18; R. 55, ll. 10-12. Waller's class ring was in the cup as well as the change. R. 51, ll. 22-23. Although the man's hands were occupied, he still managed to hop on his bike and leave. R. 51, ll. 8-9. Waller explained that the man never pointed the gun at him. R. 52, ll. 7-11. In fact, Waller was certain the pistol was unloaded. R. 62, ll. 11-12. When the man left, Waller called for help. R. 64, ll. 14-16.

After the state rested its case, Appellant moved for a directed verdict. According to the indictment, the state alleged he was armed or became armed with a handgun during the burglary. R. 128, ll. 12-19; R. 223. Appellant argued the evidence presented did not show the perpetrator was "armed" because "the weapon was not cocked, was not loaded" and "[t]he homeowner was well aware of all this." R. 129, ll. 1-5. He explained "[t]he burglar is holding both a gun and a medium-size plastic, hard-sided case in a single hand. Based on the facts in evidence, it is not reasonable for anyone to assume that that handgun can be used as a weapon in this case. He's aware that it's not loaded. You can't use it or fire it other than possibly throwing it at somebody." R. 129, ll. 6-11. Thus, he argued "it would be unreasonable … to consider the handgun as a deadly weapon in this matter." R. 129, ll. 19-21.

The judge agreed the handgun was "not armed and was not in a position to be fired." R. 130, ll. 5-7. However, in analyzing the question, the judge moved beyond what was alleged in the indictment to include other portions of the burglary statute. R. 131, ll. 14-17. The judge relied upon the statutory aggravating circumstances that a person "uses or threatens the use of a dangerous instrument" or "displays what is or appears to be a ... pistol … or other firearm." S.C. Code Ann. § 16-11-311(A)(1)(c) & (d); R. 131, ll. 3-13. When confronted with the argument that the handgun was not a deadly weapon because it was not loaded, the judge remarked that the statute did not require it to be a deadly weapon because the statute only required display of what appeared to be a pistol. R. 131, l. 19 – R. 132, l. 3; R. 133, ll. 1-3. According to the judge "armed" and "displays" as used in the statute were "the same thing." R. 133, l. 8.

Ultimately, the judge found "the indictment sufficiently covers that giving the defendant notice that he took the gun while he was in there and that's what he became armed with." R.

133, ll. 17-20. Thus, the judge denied Appellant's motion for a directed verdict. R. 133, ll. 20-21.

After Appellant rested his case, he renewed his earlier motion for a directed verdict, which the trial judge summarily denied. R. 150, ll. 4-8. During the closing argument, the prosecutor told the jurors that it was "very important" for them to understand that it did not matter whether the gun was loaded. R. 165, ll. 23-25. According to the prosecutor, "[t]here [c]ould have been not a bullet within 10 miles of this pistol and the person holding it while they're doing this burglary is still guilty of burglary in the first degree." R. 166, ll. 6-8. He told the jurors that the gun was "very much a deadly weapon" and that was "what ma[de] the defendant guilty of burglary in the first degree." R. 166, ll. 19-22. Thereafter, the prosecutor informed the jurors that the fact that the firearm was not loaded did "not mean that the defendant was not armed with [a] pistol, that he didn't display a pistol, which is all that is required for this charge." R. 167, ll. 6-10.

When the judge instructed the jurors on the offense of burglary, he first informed them that the state was required to prove "that while entering the building or while in the building or when fleeing the building the defendant was armed with a deadly weapon." R. 191, ll. 16-19. Thereafter, he stated flatly: "And a pistol is considered a deadly weapon, or can be considered a deadly weapon." R. 191, ll. 19-20.[1] Additionally, although this portion was not stated in the indictment, he told the jurors that they could find Appellant guilty of burglary in the first degree if they found that "when entering the building or while in the building, or while fleeing, the defendant displayed what was or appeared to be a pistol." R. 191, l. 25 – R. 191, l. 2. When

[1] Appellant objected to this sentence at the conclusion of the jury instructions. App. 194, ll. 4-10. Appellant explained that he was objecting to preserve his earlier objection related to the "concept of whether someone is armed with a deadly weapon or not." App. 194, ll. 4-10. The judge indicated that he stood by his charge. R. 194, l. 11.

elaborating on this point, he stated, "So they have to prove beyond a reasonable doubt that while entering or while in there that he displayed a knife, pistol, revolver, in this case it was a pistol." R. 192, ll. 2-5.

At the conclusion of the trial, Appellant moved for a new trial, which the judge permitted to be supplemented with briefing. R. 200, ll. 7-13. Appellant argued that "[t]o be armed with a deadly weapon within the meaning of S.C. Code Ann. § 16-11-311 (A)(1)(a), defendant needed only to have physical control over a deadly weapon while entering the house or in the flight from the burglary such that the weapon was readily available for use. State v. McCaskill, 468 S.E.2d 81, 82, 321 S.C. 283, 285 (Ct. App. 1996)." R. 213. Here, the homeowner knew the gun was not readily available to be used because of the configuration of the gun while it was in Appellant's possession. R. 213. Thus, Appellant "was not armed because the firearm did not have the ability to be fired, and there was evidence at trial that the victim knew the firearm wasn't readily available to be used." R. 213.

Subsequently, Judge Early denied the motion by a written order. R. 215. In the order, the judge found that in order for a firearm to not have the ability to be fired, it must be inoperable. R. 215. Although Appellant's argument primarily concerned the meaning of armed, the judge refused to adopt what he termed Appellant's proposed definition of deadly weapon. R. 215. The judge then reverted to his reasoning at trial and relied upon other portions of the statute that were not presented in the indictment by noting that even unloaded guns could be used to frighten, intimidate, and control people – if displayed. R. 215.

Discussion

According to the indictment, the grand jury found probable cause to believe Appellant did "on or about September 22, 2016, willfully and unlawfully enter the dwelling of Adam

Waller located at [redacted] without consent and with intent to commit a crime therein and the defendant was armed or became armed with [a] handgun." R. 223. Thus, the state charged Appellant with burglary in the first degree. Under South Carolina law, "[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either: (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (a) is armed with a deadly weapon." S.C. Code Ann. § 16-11-311(A)(1)(a). The issue presented is whether a person is armed with a deadly weapon if the evidence presented shows the weapon was not loaded.

According to this Court, "[t]he 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." State v. McCaskill, 321 S.C. 283, 285, 468 S.E.2d 81, 82 (Ct. App. 1996). This Court elaborated to explain that for purposes of being armed under the statute, a person "need only have physical control over a deadly weapon ... such that the weapon is readily available for the person to use." Id. Under this reasoning, a firearm would only be a deadly weapon if it were operable, which would require it to be loaded. Otherwise, the firearm would not be "readily available" for use.

The trial judge relied upon State v. Bailey, 273 S.C. 467, 257 S.E.2d 231 (1979), for the proposition that a gun is a deadly weapon regardless of its alleged inoperability. R. 215. However, Bailey specifically applied only to guns used in robberies. State v. Bailey, 273 S.C. 467, 470, 257 S.E.2d 231, 233 (1979). Rather, this Court should hold that possession of an unloaded gun is not sufficient evidence to convict a person under the burglary statute that requires the person be armed with a deadly weapon. See People v. Harris, 72 Cal. Rptr. 423, 427 (Cal. Ct. App. 1968) (explaining burglary in the first degree does not include a burglar who

steals an unloaded firearm and carries it away); People v. Wilson, 684 N.Y.S.2d 718, 720-721 (N.Y. App. Div. 1998) (providing that deadly weapon requires the gun to be loaded); State v. Mustain, 675 P.2d 494, 495-496 (Or. Ct. App. 1984) (explaining that for a weapon to be considered deadly, it must be loaded).

The trial judge further erred by permitting the state to use portions of the burglary statute that were not in the indictment, namely that a person may be guilty of burglary in the first degree if the person displayed a firearm. The indictment specifically notified Appellant he was being charged with burglary first degree because he was alleged to be armed with a deadly weapon. Yet, the judge ruled on the directed verdict motion based upon a different section of the burglary statute. Further, the judge allowed the state to argue to the jury that it could find Appellant guilty of burglary in the first degree based upon the "display" portion of the statute. Finally, and most egregious of all, the judge charged the jury that it could find Appellant guilty of burglary in the first degree based upon the "display" portion of the statute.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in Appellant's favor based upon the state's failure to present evidence that he was armed with a deadly weapon.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bertram Merle Brown 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 Doyet A. Early, III, which was held on January 9-10, 2018, 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 Bertram Merle Brown.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

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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) Entire trial transcript dated January 9-10, 2018;
(2) Defendant's Exhibit #1 (sign-in sheet);
(3) Court's Exhibits #1 & #2 (jury notes);
(4) Memorandum in support of motion for new trial;
(5) Order denying motion for new trial;
(6) True-billed indictment; and
(7) Sentence sheet.

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

August 21, 2019

Susan B. Hackett

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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."

August 21, 2019.

Susan B. Hackett

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Bertram Merle Brown, 234970, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of August, 2019.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of August, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019