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Court of Appeals  
Division III  
State of Washington

31759-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COURTNEY CORY ARBUCKLE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Insufficient evidence supported the conviction for First Degree Burglary.
2. The trial court erroneously denied defendant's request to instruct the jury pursuant to *State v. Brown* of the requirement of a nexus concerning the .22 cal. firearm stolen during the burglary.
3. Insufficient evidence supported the special verdict finding that defendant was armed with a firearm during the commission of the burglary.
4. Insufficient evidence supported the conviction for Theft of a Firearm.

II.

ISSUES PRESENTED

1. Did the State fail to prove the essential elements of First Degree Burglary?
2. Did the State fail to prove that a participant in the Burglary was armed with a firearm sufficient to support the special verdict returned by the jury?

3. Did the State fail to prove the essential elements of Theft of a Firearm?

### III.

#### STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

### IV.

#### ARGUMENT

- A. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICT FINDING DEFENDANT GUILTY OF FIRST DEGREE BURGLARY.

Defendant contends that insufficient evidence was produced at trial to support the guilty verdict rendered with respect to the First Degree Burglary charge. Defendant argues that insufficient evidence proved that defendant or anyone else was "armed with a deadly weapon." Defendant bases this argument upon the analysis of the evidence produced at trial from his perspective that formed his theory of the case presented to the jury. Defendant argued to the jury that the gun seen in Daniel Spivey's hands in the crime scene video was a fake gun. Defendant argued to the jury that he was referring to Mr. Spivey being armed with a fake gun when he made his statement to Sheriff's Detectives

confessing to his participation in the burglary. Now, defendant is asking this Court to overturn the verdict because the jury did not accept his perspective of the evidence.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in the State's favor and are interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Defendant argues that insufficient evidence supports the verdict because there were no eyewitnesses to the presence of a real firearm at the scene, yet acknowledges that circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Defendant acknowledges that the essential elements of first degree burglary include that a participant in the burglary was armed with a deadly weapon in the commission. Then defendant argues that the evidence he proffered with regard to the issue of whether Mr. Spivey was armed with a real firearm is worthy of greater weight and credibility than evidence to the contrary. The difficulty is that the defendant argued to the jury that it should accept his testimony at trial over his confession to the Deputies who investigated the burglary. The jury was thereby forced to reconcile defendant's differing accounts of what occurred, and then incorporate with the other, independent evidence of the burglary. The jury was not required to accept the version of the incident that defendant proffered at trial over his earlier statements. The jury weighed the credibility of defendant's trial testimony, his confession, and all the other evidence to arrive at its verdict. The body of evidence separate from that offered by defendant corroborated the evidence included in his original confession to the Deputies. The jury had sufficient evidence for it to evaluate and resolve the credibility of the evidence that a firearm was used in the commission of the burglary.

Defendant has not claimed any irregularities in the jury's deliberations. This is the same jury that defendant selected to try his case after *voir dire*. It is hard to accept that the jury the defendant selected to weigh the evidence in his trial was rendered irrational because it returned a verdict contrary to defendant's

theory of the case. Sufficient evidence supported the jury's verdict finding defendant guilty of first degree burglary based upon a participant being armed with a deadly weapon during the commission.

**B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CHARGE OF FIRST DEGREE BURGLARY.**

Defendant contends that the trial court incorrectly instructed the jury regarding the charge of first degree burglary because it failed to follow the holding in *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007). Appellant relies upon *State v. Brown* to argue that "armed" as referenced in the burglary statute requires more than removal of a firearm from the building. Appellant asserts that the State must establish that the defendant or accomplice intended to or was willing to use the weapon to further the crime. An initial reading of *Brown* seems to support defendant's claim; however, a more in-depth examination leads to a contrary conclusion under the circumstances of this case.

In *Brown*, the defendant or accomplice found the gun in a bedroom closet during the burglary and merely moved it from the closet to the bed. The homeowner returned during the burglary and overheard the defendants' discussion about the guns. The homeowner testified at trial that she overheard the defendants talk about wanting the guns, yet heard nothing to indicate that they either moved or knew about the guns. Under such circumstances, the *Brown*

court held that there needed to be evidence of a nexus that linked the defendant, the crime, and the firearm to support a first degree burglary conviction because mere proximity of the weapon and participant, or constructive possession alone is insufficient to prove that defendant was armed. *Id.*, 162 Wn.2d at 431. The *Brown* court concluded that the circumstances under which the weapon was found did not support a conclusion that Brown was “armed” as intended by the Legislature. *Id.*, 16 Wn.2d at 431-432.

Here, unlike in *Brown*, appellant and co-participant Spivey were recorded with a firearm in hand inside the burglary scene. Separately, appellant and Spivey removed a firearm from the burglary scene while leaving other more valuable property behind. This is precisely the distinction that the *Brown* court noted in its decision when it distinguished the existing line of cases that held that a defendant is armed when he enters a building unarmed and acquires a firearm as loot “because in those cases weapons were removed from the homes.” *Brown*, 162 Wn.2d at 434, n.4. The circumstances herein are nearly identical to the line of cases from which the *Brown* court distinguished the facts therein. *See e.g. State v. Hall*, 46 Wn. App. 689, 732 P.2d 524 (1987) or *State v. Faille*, 53 Wn. App, 111, 766 P.2d 478 (1988).

*State v. Hal* involved the circumstance where firearms were taken in the course of a burglary. This Court reasoned that “no analysis of willingness or present ability to use a firearm as a deadly weapon” was required because the firearm is a

deadly weapon *per se*. *Id.*, 46 Wn. App. at 695. In *State v. Faille*, the court found there was sufficient evidence to support a first degree burglary conviction where the defedant was in possession of unloaded firearms without the intent to use same. The *Brown* court distinguished the facts of these cases from those it had before it, yet did not overturn the reasoning and holdings of these cases. The distinction was between actual and constructive possession of the firearms. Here, as noted, the jury had evidence of two different firearms being involved in the burglary charged herein. There was evidence of a firearm being brought to the burglary by the participants and one being stolen from the scene. There was sufficient evidence available from which the jury could rationally find that the participants in the burglary were “armed with a deadly weapon” such that the trial court was justified in declining to instruct regarding the “nexus” requirement of *State v. Brown*.

Next, appellant contends that the trial court mistakenly instructed the jury of the need for a “nexus” as set out in *Brown* with respect to the firearm special verdict interrogatory. Appellant claims that the trial court imposed a different burden of proof with respect to the special verdict than it did for the general verdict. Appellant characterizes the trial court’s requirement of the finding of a *Brown* “nexus” for the jury to return an affirmative answer to the special interrogatory as being a higher burden of proof. Nevertheless, the concluding instruction for the special interrogatory explains that the jury may only return a “yes” answer if it finds such beyond a reasonable doubt. As instructed, the jury could only answer the special

interrogatory “yes” if it found beyond a reasonable doubt that Mr. Arbuckle was armed with a firearm during the burglary. The distinction between using the “nexus” instruction with respect to the general versus the special verdict was based upon the trial court’s acknowledgement from the evidence that the defendant could be found generally guilty of first degree burglary, yet not be found specifically liable for the enhancement. The trial court’s very specific and technical application of the *Brown* “nexus” requirement meant that the jury could only answer “yes” if it found that Mr. Arbuckle actually possessed the firearm. The trial court neither misstated the law nor confused the jury by its instructions because the condition precedent to the jury considering the special interrogatory was that it had returned a general verdict of guilty of first degree burglary. The trial court’s special verdict instructions forced the jury to be more specific in its findings regarding the special interrogatory.

C. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICT FINDING DEFENDANT GUILTY OF THEFT OF A FIREARM.

Appellant claims that insufficient evidence supported the jury’s finding him guilty of Theft of a Firearm as charged herein.

As noted in the response to appellant’s argument with respect to Count I, "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d at 201. All reasonable inferences from the evidence are drawn in the

State's favor and are interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d at 906-07.

Defendant argues that insufficient evidence supports the verdict because there was no proof of the presence of the .22 firearm at the scene of the burglary. Again, appellant acknowledges that circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d at 638. That the reviewing court defers to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas, supra*. And finally, that the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green, supra; State v. Smith, supra; State v. Myles*, 127 Wn.2d at 816.

Appellant argues that no rational trier of fact could have found that the State proved beyond a reasonable doubt that defendant acted with intent to deprive Mr. Case of the gun. However, defendant never questioned the rationality of the very jury he selected until after the verdicts were rendered. Defendant has not claimed that the jury engaged in any misconduct during its deliberative process. At this point, there is no basis to find that the jury was not rational in its rendering of its verdicts herein. Accepting that the jury that tried this case was a rational trier of fact, the focus then turns to the application of the standard of review when a claim of insufficient evidence for verdict is claimed.

As noted, appellant argues that there was no proof that the .22 caliber gun stolen during the burglary was even at the store at the time. Appellant focuses on Mr. Case's testimony placing the gun in the store three weeks before the burglary as insufficient, yet cross-examination did not dissuade the jury from weighing the evidence and rendering a verdict based upon its perspective of the credibility of the evidence. The only evidence before the jury was that the firearm was kept in the victim's business and was in the area where the surveillance video depicted the defendant and Mr. Spivey. Appellant has not established that insufficient evidence supported the jury's guilty verdict with respect to the Theft of a Firearm charge.

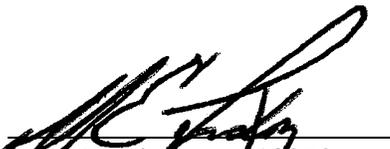
V.

#### CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 28<sup>th</sup> day of March, 2014.

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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     NO.   31759-5-III  
                                  v.                )  
  )  
COURTNEY C. ARBUCKLE,        )  
  )  
                                  Appellant,    )

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I certify under penalty of perjury under the laws of the State of Washington, that on April 1, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

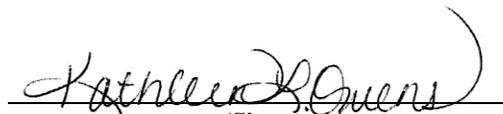
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Spokane, WA  
(Place)

  
(Signature)