

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	CRIMINAL ACTION NUMBERS
v.)	
)	IN02-06-0824 IN02-06-0825
KAREEM BARKSDALE)	IN02-06-0826
)	
Defendant)	

Submitted: January 2, 2003

Decided: January 10, 2003

MEMORANDUM OPINION

*Upon Motion of Defendant Judgment of Acquittal or
for New Trial - **DENIED***

HERLIHY, Judge

Defendant Kareem Barksdale has moved for a new trial or for judgment for acquittal. On December 18, 2002, he was convicted of burglary in the second degree and attempted theft. The indictment charged that the intended crime for the burglary was theft. The evidence is uncontradicted that there was no completed crime of the theft inside the victim's dwelling. Barksdale's defense was that he went into the dwelling to retrieve his own property. If true, there could be no theft and a key element of burglary would be absent.

He renews his claim that there was insufficient evidence of even attempted theft and that the Court erred in answering a question from the jury about the interrelationship of the burglary charge and the attempted theft charge.

The Court holds that there was sufficient evidence to support the burglary and attempted theft convictions. There was no error in the Court's answer to the jury's question. The defendant's motion for a new trial and for a judgment of acquittal is **DENIED**.

Facts

On June 6, 2002, around 3:30 p.m., the window in the bathroom of Laverne Barnes' house in Claymont was broken out. A neighbor, Maria Rustin, observed a person, later identified as Barksdale, around the broken window. She went to over to the Barnes' residence to check and met Barnes just after she arrived home to discover the burglary.

Barnes and Rustin saw broken glass in the bathroom, blood all over the bathroom floor and in the bedroom of Brian Barnes, Laverne's son. The blood trail went from the bathroom to the bedroom. Laverne Barnes observed blood on her son's mattress and

underneath it. Nothing else in the room was disturbed, nor anything taken. Brian Barnes said he usually kept money in or under his mattress but had taken it with him that day.

As a result of Rustin's description of the burglar's clothing, Brian Barnes gave New Castle County Police Officer Michael Santos Barksdale's name and address. He had known Barksdale for a while and had seen him earlier that day in the clothing Rustin described. Santos went to his house and noted blood on the carpet. Barksdale had one arm wrapped in a red tee-shirt resembling the one Rustin had seen just a short while before. He had another tee-shirt wrapped around the other arm. Both were bloody.

When questioned, Barksdale admitted to breaking into the Barnes' residence and to cutting himself while in the course of doing so. But Barksdale said he went into to get either \$65 or marijuana, which he told Santos, Brian Barnes owed him. Santos testified Barksdale used the word "steal" and he was cross-examined on whether that was the word Barksdale had actually used. Brian Barnes denied he owed Barksdale anything.

At the close of the State's case, Barksdale moved for a judgment of acquittal. That was denied. He did not testify and rested.

Because Barksdale told the police, however, that he had broken into the Barnes' residence to retrieve money or drugs which he claimed was his, the Court noted that an affirmative defense was available to him. That defense is statutory and provides:

a) *In any prosecution for theft or extortion it is an affirmative defense that the property was appropriated by the actor under a*

claim or right, made in good faith, to do substantially what the actor did in the manner in which it was done.¹

If the jury chose to believe Barksdale's statement to Santos and that he had not used the word "steal," the defense was implicated. This meant the jury had to be instructed that 1) there could be no intent to commit theft in the burglary charge and 2) there could be no attempted theft conviction. The jury was instructed on criminal trespass in the first degree should it accept the affirmative defense.

While deliberating, the jury asked four questions. The first asked, "Is defendant's state of mind relevant to breaking into house?" The Court, with no one objecting, answered "Yes" to this question. The jury also asked, "Does the defendant have to prove state of mind?" The Court, again without objection, answered, "No." Next the jury asked, "In the affirmative defense must the defendant meet *all 3* of elements? (emphasis in original)" Without objection, the Court answered "Yes." Finally, the jury asked, "Can defendant be found not guilty of burglary if guilty of attempted theft?" Over the defendant's objection the Court answered this question, "No."

After hearing the questions and answers, the jury deliberated for a while longer and found Barksdale guilty of burglary and attempted theft.

Discussion

¹ 11 *DEL.C.* § 847(a)(emphasis added).

A

Barksdale attacks the verdict as not having sufficient evidence to support it. His claim is that there was insufficient evidence to support the attempted theft charge in that only the mattress area was disturbed and he told Officer Santos that he broke in to retrieve his own money or drugs. Since there could not be a theft, completed or attempted, there could be no burglary. At most, as he suggested to the jury, the evidence supported a criminal trespass conviction.

The standard for reviewing such motion challenging the sufficiency of the evidence is whether any rational trier of fact, examining the evidence in a light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.² Juries are the sole judges of witness credibility.³

There are two discrete issues implicated in this part of Barksdale's motion. One, rejecting his affirmative defense, was there nevertheless sufficient evidence to support a showing of intent to commit theft since only the mattress was disturbed and the other valuables in Brian Barnes' bedroom were left behind. A separate but related question is whether the jury should have accepted his affirmative defense since such items were undisturbed.

² *Fawcett v. State*, 697 A.2d 385, 387 (Del. 1997).

³ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

The jury was instructed about that defense as it related to the burglary charge.⁴ It is an affirmative defense, which means that it must be proven by a preponderance of the evidence, and has three elements. It is because the defense has those three elements that the Court answered “Yes” to the jury’s question whether the defendant had to satisfy all three parts.

The jury’s verdict shows that it rejected Barksdale’s claim of right defense. It, as noted, is the sole judge of witness credibility. He sought, through cross-examination of Officer Santos to demonstrate that he was exercising that claim of right. The primary method

⁴ The burglary charge against the defendant is that he entered Ms. Barnes’ residence with the intent to commit theft. He is also charged with attempted theft. The defendant has raised an affirmative defense known as claim of right. I will now explain that defense.

The affirmative defense in this case to the charge of theft is that at the time the defendant intended to appropriate the property in question, he acted in accordance with a claim of right to do substantially what he did in a the manner that it was done. In order to establish this defense, the defendant must satisfy you, by a preponderance of the evidence, of the existence of the following elements of this affirmative defense:

- 1) The defendant was acting under a claim of right; and
- 2) The defendant’s claim of right was made honestly and in good faith; and
- 3) The defendant claimed the right to do substantially what he did, in the manner in which he did it.

Under a “claim of right” means that, at the time he intended to come into possession of the property involved, it was his contention that he had a right to the property.

If you are satisfied that all the elements of this affirmative defense have been proven by a preponderance of the evidence, that means the defendant did not intend to commit the crime of theft. Proof by the preponderance of the evidence means that after considering all of the evidence tending to support the existence of this defense, you find that it appears more likely than not that each element of the affirmative defense has been established by the defendant. If you do not so find, you should go on to consider the other evidence in the case and determine whether or not you are satisfied beyond a reasonable doubt as to the defendant’s guilt.

he used was to closely question Officer Santos about whether Barksdale had actually used the word “steal” or had used a neutral or exculpatory word.

But there was more than this debate. There was the break-in itself which significantly undermines a claim that one is retrieving his own property. Brian Barnes denied owing Barksdale anything. The jury had to decide not only what Barksdale did say to Santos but whether the property sought was really Barksdale’s. The evidence supported the conclusion that, through friendship, Barksdale knew where Brian Barnes kept cash and sought to break and steal it when no one was there.

The evidence further showed that he went from the bathroom to Brian Barnes’ bedroom and searched for something under the mattress, unsuccessfully, of course. Before breaking in, he had a destination and, once in, went there. That there might have been money there on occasion was corroborated by Brian Barnes’ statement that he usually kept money under his mattress.

In short, the jury as a rational trier of fact could find that there was evidence beyond a reasonable doubt that Barksdale intended to commit theft once inside. Barksdale agreed to this Court’s answer to one of the jury’s questions that his state of mind was relevant to this breaking in. That is, it was relevant to the burglary charge that he intended to commit theft once inside the Barnes’ residence.

There was sufficient evidence for the jury to find an intent to commit theft and to choose to reject his claim of right defense.

B

It is that defense which he contends prompted the Court to erroneously answer the jury's question about whether he could be found not guilty of burglary if he were found guilty of attempted theft. The Court told the jury it could not reach those verdicts.

Barksdale's claim of error is confusing. In prayer conference, he agreed that if the jury accepted his claim of right defense, he could not be convicted of burglary. He also agreed that if the jury accepted his defense, he could not be convicted of attempted theft. This was basically his argument to the jury, too. There was never a denial that he was the person who broke in. There was an admission in evidence that he was.

The Court instructed the jury as to the defense as it related to both the burglary charge and the attempted theft charge. Barksdale had no objection to that. The Court instructed the jury about the effect on the burglary charge if it accepted the defense.⁵ The defendant had

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- (1) The defendant was acting under a claim of right; and
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If you are satisfied that all the elements of this affirmative defense have been proven by a preponderance of the evidence, that means the defendant did not intend to
(continued...)

no objection to this charge.

In short, the complete set of instructions informed the jury that if it found Barksdale had proven his defense, it could consider criminal trespass in the first degree and could not convict him of attempted theft. Now, however, Barksdale that argues the same instruction when answering the jury's question was somehow erroneous.

He seizes upon another phrase elsewhere in the instructions that tells the jury to separately consider each count and render a verdict as to each count. In retrospect, it would have been better to have not said that when the jury had been told earlier of the relationship of the two counts. However, jury instructions do not have to be perfect.⁶

Whatever confusion existed, if any, about the instruction concerning the interrelationship of the two charges and the "separate verdict" language was cured by the Court's answer to the question. More telling is that the defendant's motion does not explain

⁵(...continued)

commit the crime of theft. Proof by a preponderance of the evidence means that after considering all of the evidence tending to support the existence of this defense, you find that it appears more likely than not that each element of the affirmative defense has been established by the defendant. If you do not so find, you should go on to consider the other evidence in the case and determine whether or not you are satisfied beyond a reasonable doubt as to the defendant's guilt.

If you are satisfied that the defendant has established this defense, that would mean he could not have intended to commit the crime of theft inside the Barnes' residence. If that is the case an element of the burglary charge cannot be met. You can then go on to consider whether the evidence shows beyond a reasonable doubt that he committed the offense of criminal trespass in the first degree. The difference between burglary and criminal trespass is that the offense of criminal trespass does not include an element of intending to commit a crime inside the dwelling.

⁶ *Deputy v. State*, 500 A.2d 581, 596 (Del. 1985).

why the Court's "No" answer was or is erroneous.

Conclusion

For the reasons stated herein, defendant Kareem Barksdale's motion for a new trial or for judgment of acquittal is **DENIED**.

IT IS SO ORDERED.

J.