



Missouri Court of Appeals
Southern District

Division One

STATE OF MISSOURI,)
)
Plaintiff-Respondent,)
)
vs.)
)
LARRY W. WRIGHT,)
)
Defendant-Appellant.)

No. SD30872

Filed: December 9, 2011

APPEAL FROM THE CIRCUIT COURT OF STODDARD COUNTY

Honorable William L. Syler, Jr., Special Judge

AFFIRMED

Larry W. Wright (“Appellant”) was convicted by a jury of the unlawful use of a weapon, a violation of section 571.030.1.¹ The jury was instructed that to be convicted of unlawful use of a weapon the evidence must have shown that Appellant knowingly carried a firearm upon or about his person, that the firearm was concealed from ordinary observation, and that the firearm was readily capable of lethal use.² Appellant claims the trial court abused its discretion in overruling his motion for judgment of acquittal because

¹ All references to statutes are to RSMo Cum. Supp. 2008, unless otherwise specified. The jury acquitted Appellant of forcible rape, armed criminal action and felonious restraint, thus, only the evidence in the light most favorable to support his conviction for the unlawful use of a weapon will be set forth in the opinion.

² The jury instruction was in conformance with MAI-CR 3d 331.20.

there was insufficient evidence that the weapon was concealed and insufficient evidence that the weapon was a functional lethal weapon. We find no error and affirm the judgment.

Appellant first challenges whether the evidence was sufficient beyond a reasonable doubt that the weapon, which was a gun in this case, was concealed. A weapon is considered concealed when the weapon was so carried as not to be discernible by ordinary observation. *State v. Rowe*, 67 S.W.3d 649, 657 (Mo. App. W.D. 2002); *State v. Howard*, 973 S.W.2d 902, 906-07 (Mo. App. S.D. 1998). In this case, there were two instances from which the jury could have found that Appellant was carrying a concealed weapon. The testimony regarding the first instance came in from several witnesses. The first observation came from a witness who observed Appellant walking behind Victim but did not see a gun on Appellant. The second observation was from Victim who testified that she saw Appellant pull something out to show her companion; in her later testimony she testified that it was a weapon. A third witness, Victim's companion, testified that Appellant did not pull out the gun but rather showed a gun in his waistband to the companion and told him to leave. After seeing the gun, the companion left Victim with Appellant. A reasonable inference from the above testimony was that Appellant was concealing the weapon in his waistband and either "pulled it out" or showed it to Victim's companion in order to intimidate Victim and her companion.

Likewise, the evidence from the second instance supports an inference that Appellant was carrying a concealed weapon in violation of section 571.030.1; that instance occurred when Appellant was being arrested. Two police officers, Officer Schatz and Officer Miller, arrived at the home where Victim had first encountered

Appellant. Appellant was outside on the front lawn with a drink and a paper towel in his hands. When the officers arrived Appellant started backing up with his hands in the air and asking “What did I do? What do you want?” The officers secured Appellant and placed him in handcuffs. The testimony indicated that the officers then executed a pat down of Appellant’s person and found a loaded nine millimeter handgun in his waistband. The bullets were also admitted into evidence. The jury could infer that the weapon was concealed in Appellant’s waistband and was discovered only through the pat down. Appellant’s first contention has no merit.

Appellant next argues that the State failed to prove that the firearm was “functional.” Appellant claims that, even if the gun was concealed, the State was required to show that the gun was a “functional lethal weapon.” Appellant relies upon language in *State v. Purlee*, 839 S.W.2d 584 (Mo. banc 1992), to support his contention that the State must prove that a firearm is functional. Appellant’s argument misses the mark on *Purlee* and subsequent cases that have used the *Purlee* language. *Purlee* involved a case in which the defendant was convicted of possession of more than 35 grams of marijuana and the unlawful use of a weapon. *Id.* at 586. Purlee complained on appeal that the State did not produce sufficient evidence to support the conviction for unlawful use of a weapon because the weapon was not concealed from ordinary observation or, alternately, because Purlee was traveling in a continuous journey peaceably through the state. *Id.* at 589.

As to the first issue, the Supreme Court held:

Accordingly, we hold that a weapon being carried in a vehicle is concealed within the meaning of the unlawful use statute whenever the weapon is (1) not readily and practically visible to a person approaching the vehicle under ordinary circumstances and (2) within easy reach of any

of the vehicle's occupants and (3) if the weapon is a firearm, it is operational and loaded, or if not loaded, ammunition is within easy reach of any of the vehicle's occupants. Therefore, the evidence presented to the jury was sufficient to support the conclusion that the revolver was concealed.

Id. at 591. Thus, the first holding of *Purlee* concerns concealing a weapon in a vehicle.

Likewise, the second holding of *Purlee* is inapplicable to the issue raised by Appellant that the gun be functional. Purlee contended that he was “traveling in a continuous journey peaceably through this state.” *Id.* In *Purlee*, the Supreme Court addressed what was the relevant statutory exception raised by Purlee, that is, section 571.030.3. *Id.* at 589-90. The language, “[t]he essential elements of the offense are the knowing concealment and accessibility of a functional lethal weapon,” must be read in context. *Id.* The Supreme Court was discussing the exception to section 571.030.1. *Id.* The exception provides that subdivision (1) of subsection 1 does not apply “when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible.” *Id.* at 589 (quoting section 571.030.3). The court in *Purlee* noted that “once the accused raises the defense that he is within one of the exempted classes designated in the statute, the State has the burden of proving he is not within the exception.” *Id.* at 591. The court concluded that “the travelers’ exemption does not extend to persons traveling through this state during the commission of a felony or for any unlawful purpose.” *Id.* at 592. The exception discussed by *Purlee* has no relevance to Appellant’s claim that the State must prove that the weapon is functional. The only mention of a “functional” weapon is in the exception, “which is commonly known as the ‘non-lethal use exemption.’” *State v. Davis*, 71 S.W. 3d 659, 666 (Mo. App. W.D 2002). A careful reading of cases that cite

Purlee for the proposition that an essential element of the State’s case is proving that the firearm was functional indicates that element applies only when the defense claims an exemption as designated in the statute. Appellant is not contending that he was traveling peaceably through the state or that he was transporting a nonfunctioning gun.

Section 571.030.1 provides only that the person charged with a violation of that section “[c]arries concealed upon or about his or her person a knife, a *firearm*, a blackjack or any other weapon readily capable of lethal use.” (emphasis added). The verdict director provided that the gun had to be readily capable of lethal use, not that it had to be functional. The definition of “readily capable of lethal use” provided in MAI-CR 3d 333.00 is, “[As used in Chapter 571] means readily capable of causing death. If the weapon is a firearm, it is readily capable of lethal use whether loaded or unloaded.”

In this case, Appellant was concealing a loaded firearm. By definition, it was readily capable of lethal use. There was no trial court error in overruling the motion for acquittal. The judgment is affirmed.

Nancy Steffen Rahmeyer, Judge

Burrell, P.J., Lynch, J., concur.

Attorney for Appellant -- Kent Denzel

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Division I