IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-03-12-2624 IN-03-12-2625
JASMIN ANDERSON	)	IN-03-12-2626 IN-03-12-2829
	)	IN-03-12-2830 IN-03-12-2628
Defendant	)	IN-03-12-2631 IN-03-12-2632
	)	
and	)	ID No. 0312016596
	)	
STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-04-01-0280 IN-04-01-0281
	)	IN-04-01-0282 IN-04-01-1730
DONALD THOMPSON	)	IN-04-01-1731 IN-04-01-0285
	)	IN-04-01-0288 IN-04-01-0289
Defendant	)	
	)	ID No. 0312016592

Submitted: September 10, 2004
Decided: October 29, 2004

MEMORANDUM OPINION

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

Upon Motion of Defendant Thompson's Motion for New Trial - ***DENIED***

James J. Kriner, Esquire, Deputy Attorney General, of Wilmington, Delaware, attorney for the State of Delaware

Eugene J. Maurer, Jr., Esquire, of Wilmington, Delaware, attorney for defendant Anderson

Joseph W. Benson, Esquire, of Wilmington, Delaware, attorney for defendant Thompson

HERLIHY, Judge

On July 29, 2004, a jury convicted defendants Jasmine Anderson and Donald Thompson of various charges. Anderson has moved for judgment of acquittal or for a new trial. This motion is based on what she argues is the inconsistency of the jury's verdicts. She seeks the alternative of a new trial should the acquittal motion be denied. She would want a new trial on those charges for which she was convicted.

Anderson has filed a separate motion for a new trial. This motion is grounded on her contention the prosecutor made an improper remark in his closing about the jury's role and reasonable doubt. Defendant Thompson joins in this second motion.

The Court finds that the verdicts were not inconsistent, that the prosecutor's remark, though problematical, does not warrant a new trial. Therefore, the defendants' motions are DENIED.

I

Factual Background

Both defendants were indicted for attempted robbery first degree, possession of a firearm during the commission of a felony, burglary first degree, possession of a firearm during the commission of a felony, conspiracy in the second degree, carrying a concealed deadly weapon, endangering the welfare of a minor, and resisting arrest.

These charges arose out of an incident which occurred on December 24, 2003. To understand the jury's verdicts it is helpful to review individually the testimony of each witness.

Sheena Mable was home with her ten year old daughter, Tierra Stanford, on Christmas Eve. They live at 931 Clifford Brown Walk in Wilmington. Stanford had been home for about forty-five minutes to an hour. It was dark outside. Stanford was in one room watching TV and Mable was in the kitchen fixing their dinner.[1]

Mable heard a knock at the front door. She went to the door and a male voice on the other side asked for "Kim" and then went away. About 10 or 15 minutes later, there was a second knock. A female voice asked for "Gene". Mable said she kept asking who was there but got no answer. The person went away and got in a car on the passenger side.

There was a third knock a short while later and the voice said "I have something for Gene". In December 2003, Eugene, Gene, Tucker was Mable's boyfriend and lived with her.

Mable testified that she was expecting Gene's uncle and his wife to bring some papers and thought this third knock was related to that. Nevertheless, she was suspicious about it because of the prior knocks. As a result she gave Stanford a cordless phone which Stanford used to call 911 shortly thereafter. Mable was questioned about possible inconsistencies between her trial testimony and statements to the police concerning where her daughter was when she used the telephone.

On this third knock and statement, Mable opened her front door. She saw a male

[1] To understand the jury's verdicts, it is helpful to review the testimony of each witness separately.

and female there. The male had a gun in his hand when she opened the door. She knew neither person; nor could she make a courtroom identification. The male pushed her to the floor and said, “Don’t look.” He then said, “I’m going to ask you one time. Where’s the money?” Next he said, “Tie the bitch up.” Mable held her hands over her face so as not to look. She never saw tape in the male’s hands.

With her hands over her face, she heard duct tape being pulled off a roll. She believes, but could not be sure, the female taped her up. She saw what she testified were the female’s “shoe boots” through her fingers. She saw the female’s shoes next to the male intruder’s. The male asked, “Where’s the baby. I want money. The baby won’t get hurt.”[2]

When the male asked about the money and the baby, Mable said she felt something, like a gun, next to the right side of her head. She testified the male held it. The female, who stood between her and the door, never responded to anything Mable said or asked, including when she said they could take anything, and that there was nothing risking a life for. Mable thought she heard “them” go upstairs, but when the male came back down, the female kept saying, “Come on, let’s go”. The male kept asking, “Why?” Mable said she heard the male go up and down the stairs in the house three times.

The two intruders left. Mable said she never saw a gun in the female’s possession. Mable testified no money or belongings were taken.

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[2] The quotes in the Court’s opinion are from the trial notes as there is not yet a transcript. The Court endeavors to quote as exactly as possible.

Mable's ten year old daughter, Tierra Stanford, testified. She had been at her father's house earlier and he had driven her over to Mable's home. She started watching TV while her mother cooked. Her mother gave her the phone before answering the door. She testified that two people, one male and another a female, came in. Her mother was pushed to the floor. The female put duct tape on Mable's head while Mable was still holding her hands over her face. The male removed the duct tape from a little bag. She saw the male holding a gun. Her mother was crying.

That male kept asking Mable where the money was. Stanford said the male, went up and down the stairs two times. On one of those trips, the female held a gun to Mable's head. When he was upstairs, she heard him opening things in her mother's bedroom. While somewhat hidden, Stanford called 911. The tape of that short call was played for the jury. Stanford asked the female if she could turn off the stove and was allowed to do so.

Stanford identified a long barreled gun as the one she said the male had. The gun which she said the female held on mother did not look like that.

The next witness to testify was Cpl. Michael Carnavale of the Wilmington Police Department. He was riding in a marked car with Patrolman Bruce Lee. Both were in police uniform. They were two blocks away from Mable's residence when notified of Stanford's 911 call. It took them, he said, about ten seconds to get there.

When they got nearer, they got out of their car. Lee went to the rear of Mable's

residence and he went to the front. There were three steps leading up to the front door and a railing on either side. The female and male came out as he got to the door. He told them to stop and put his hands on the railing. Both ignored his command and broke through his arms.

The male was holding a black and white gym bag as he came out which he threw in the direction of 9th Street. The male ran toward 10th Street as did the female. Carnavale chased the male. The female ran in the same direction but turned the corner and Carnavale lost sight of her.

While attempting to secure the male, the male kept flailing his arms. He kept pushing and trying to get away. A third officer arrived and helped arrest the male.

The male is Donald Thompson.

Later, Carnavale retrieved the bag from next to the stairs leading up to Mable's front door. When opened later, the police found a .45 caliber Smith and Weston revolver and a black mask (neither intruder wore a mask, however). The police also retrieved a roll of duct tape next to the spot where the bag had been thrown and retrieved. Inside the house, the police also recovered the duct tape used to cover Mable's face and hands.

When Carnavale was out front, Lee, who had climbed over a fence to get to the rear of Mable's house, heard Carnavale call him. He returned to 10th Street and saw a young female in dark clothing running toward him. They ran into each other. He took her into custody and went to where Carnavale was. Carnavale was still struggling with Thompson. While Lee attempted to handcuff the female, she elbowed him in the chest.

The female was Jasmine Anderson.

There was some additional testimony but the basic evidence is that reviewed above. The State rested. Thompson and Anderson moved for a judgment of acquittal on the weapons charges. The Court denied their motions. There were no other motions.

In the first part of her case, Anderson presented several witnesses about her good character. Geraldine Anderson, defendant Anderson's biological mother was the next to testify. Defendant Anderson had a child who was around four months old at this time. Sometime after 6 p.m., Thompson called for the defendant. Ms. Anderson answered. She testified he and her daughter had been friends since elementary school.

Geraldine Anderson heard her daughter say, "It's Christmas Eve. You want to go where? You want me to pick up some money?" The two women discussed it being Christmas Eve and that it was the baby's first Christmas. Jasmine Anderson left anyway. She owned a beige 1993 Mazda.

Defendant Jasmine Anderson testified next. She is twenty-three and lived in New Castle in December, 2003. She views Thompson as her "brother". The call her mother overheard was around 8 p.m. Thompson had called her several times earlier in the day.

Anderson testified that Thompson said he needed her to drive him to a friend's house. He wanted to get some money and to buy Christmas presents for his family. She said that Thompson had a broken arm and could not drive his own car as it had a manual transmission. She expected to be away from home for no more than an hour. She drove,

she testified, to Thompson's house on South Clayton Street in Wilmington to pick him up. He had a gym bag with him that looked like the one recovered by the police (admitted into evidence).

After picking up Thompson, she followed his directions to the "friend's" house. They ended up at the Clifford Brown Walk. They went to one of the residences there but she did not know the occupant. Anderson testified that she did not know Thompson had a gun. He knocked on the door and a female voice asked who was there to which he replied, "I have something for Gene".

When a female opened the door, Thompson, Anderson said, took a gun out and pointed it at the female's (Mable) head. It was Thompson, she said, who put the duct tape on Mable, which he had removed from the gym bag.

Thompson asked Anderson to watch Mable, which she did. She said she stood by the front door while he went upstairs. She recalls he went only once. She denies ever having a gun in her hand. When he came back downstairs she testified she said, "Let's go," and the two defendants left. While still inside she testified she had a vague recollection of Stanford.

Anderson claimed she was too scared and shocked by what Thompson was doing to run from Mable's residence. When she went outside and the police were there, she became more scared, she said, and ran. During cross-examination she also testified she ran because of racism (Carnavale is caucasian). She is African-American.

Defendant Thompson also testified. His testimony differed in several key respects from that of Anderson's. He acknowledged calling her several times during the day. He said he told Anderson that he had bought drugs from Tucker but that they were bad. Tucker had promised to get him "good" drugs instead but Tucker was evading him. He denied telling her he was going there to get money. He told her that he was going to Tucker's residence and knew he had a girlfriend and wanted Anderson there in case there was trouble with Tucker.

Anderson had testified that Thompson asked her to pick him up. He said, however, that he asked her to meet him and that they both drove there. He identified a picture taken by the police (State's Exhibit 16) as one of his car (dark in color), which was parked on 12th Street near Clifford Brown Walk. It is not the beige 1993 Mazda Anderson's mother said Anderson used to pick up Thompson. He said that even with his broken arm, he could drive his manual transmission car. Thompson testified, when he got to Mable's residence, he gave the gym bag to Anderson. He used it to transport the gun since it was pretty big. He took a gun out and put it in his pants. He wanted his hands free, he said, in case Tucker opened the door. Thompson also said he had told Anderson he had a gun.[3]

Thompson believed Tucker had been brushing him off and he was angry about it. He believed that Tucker was at Mable's residence but was surprised when Mable answered

[3] There was testimony that he had a "replica" gun. He took it, he said, to intimidate Tucker.

the door. He felt the female answering the door was hostile, so he had pulled the gun from his pants. When she opened the door, Mable dropped down screaming, begging him not hurt the child or her and saying there was no money. He said he pushed past Mable but denied pushing her down. Thompson saw Stanford in the couch and she looked scared; he described her as "eyes wide".

Thompson testified Anderson put on the duct tape while he was elsewhere in the house. He denied that he told Anderson to put the duct tape on Mable. He did not direct her to do it or not do it. He said he told Anderson to make sure Mable did not go anywhere. Thompson identified as his the gym bag the police recovered outside. He knew the mask was in it but claimed he was not going to use it that night. He also said the duct tape had been in the bag.

After Thompson testified, the evidentiary phase finished. The prosecutor's last rebuttal remark to the jury was:

> I leave you with this, ladies and gentleman, you go back as the 12 people that are most important to the system, to the Justice System. The State asks that you go back not seeking to find reasonable doubt, but to seek the truth, and do apply the facts as you find them to the evidence – to the law, and the State is confident that when you do that, you will return a verdict of guilty on the charges of which the defendants have been indicted.
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> Thank you.

Defense counsel immediately asked for a sidebar where they lodged an objection to the prosecutor's remarks. They were concerned that a curative instruction would be

insufficient but neither did they ask for a mistrial. The Court expressed concern that the challenged remarks may have been "invited" by remarks defense counsel made in their closing.

The Court did give the following curative instruction immediately following the conclusion of the sidebar conference:

> Ladies and gentleman, I think a couple of instructions not in my script are in order, if you will. I'm going to give the complete set of instructions, but it will not take as long as the opening set.
>
> First of all, please keep in mind that it is the State's burden to prove each and every element of each and every crime charged beyond a reasonable doubt. There have been references by counsel to finding the truth. The point is that you have to determine the facts based on your determination of the facts, and decide whether or not the State has met its burden of proof beyond a reasonable doubt, and that's the burden that's involved here. It's not the burden of finding the truth. It's the burden of finding whether the State proved its case beyond a reasonable doubt.
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> There have been remarks by counsel referring to, "Well, I'm going to talk about the facts." The facts are as you find them, not as counsel indicate that they are, or other matters which I'll be covering in additional instructions in a moment. Please keep in mind your role and the State's role here regarding whether the State has met its burden of proving the elements of the offense charged beyond a reasonable doubt.

Later as part of the complete instructions, the Court informed the jury of the burden of proof beyond a reasonable doubt placed on the State and the jury's role to determine if that burden had been met. The Court also instructed the jury that it was to follow the law as given in the Court's instructions.

II

A

Since the defendants' motion for a new trial, if granted, would render moot defendant Anderson's separate motion, the Court will first consider the joint motion. That motion, premised on the prosecutor's remark, raises two issues. One, were his remarks improper? Two, if improper, did the curative instruction remedy any error or is a new trial required?

The Court must first address the claimed impropriety of the prosecutor's remarks.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.[4] Prosecutors are not to mislead the jury about the State's burden of proof.[5] Here, Anderson complains of one possibly improper comment made by the prosecutor during rebuttal.

When the Court reviews charges of prosecutorial misconduct, it must consider whether the remark "prejudicially affect(ed the) substantial rights of the accused."[6] The prosecution, as well as the defense, is permitted some license in presenting a forceful case. The Court finds that the prosecutor's remark, while inappropriate, does not rise to the

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[4] *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

[5] *Hunter v. State*, 815 A.2d 730, 736 (Del. 2002).

[6] *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979).

level of being clearly improper.[7] In future cases, of course, remarks such as this should be avoided.

Even though the prosecutor's remark is not clearly improper; the Court will review the remark under the *Hughes v. State* standards.[8] Improper prosecutorial remarks do not require reversal of a conviction unless the improper remark prejudicially affects the substantial rights of the accused.[9] Under the *Hughes* standards, determination as to whether the substantial rights of the accused are prejudicially affected depends on: "(i) the closeness of the case; (ii) the centrality of the issue affected by the alleged error; and (iii) the steps taken to mitigate the effects of the error."[10] A fourth factor to be considered was added in *Hunter v. State*: whether the prosecutor's error was repetitive and persisted despite the Court's oft-repeated admonitions.[11]

The prosecutorial statement complained of here meets none of the *Hughes/Hunter* tests. First, there was overwhelming evidence of the guilt of both Anderson and Thompson so the case was not close. It was not close at the end of the State's case and, candidly, it was stronger at the end of the defense case.

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[7] *Bruce v. State*, 781 A.2d 544, 555 (Del. 2001).

[8] *Hughes v.State*, 437 A.2d 559 (Del. 1981).

[9] *Id.*, at 571.

[10] *Derose v. State*, 840 A.2d 615, 619 (Del. 2003).

[11] *Hunter v. State*, 815 A.2d at 738.

The second prong of the *Hughes* test is not satisfied, as the alleged error did not affect the central issue in the case. There was no denigration of the burden of proof beyond a reasonable doubt or interference with the defendants' due process guarantees.

Third, the Court took immediate steps to cure whatever inappropriateness was created by the remark. In addition, in the Court's regular instructions, the jury was told to be bound by the law in those instructions. Also, it had been told both before the evidence began and in the final instructions, the burden of proof that is imposed on the State. It was told on those same occasions about reasonable doubt and what to do if reasonable doubt existed. All this was more than sufficient to correct any error in the prosecutor's remark.[12]

As for the final prong added in *Hunter*, the prosecutorial remark was not repetitive. It came at the end of his rebuttal summation and was made just once.

As the Court does not find any of the prongs of the *Hughes/Hunter* standards to be met, the prosecutorial comments do not rise to the level of misconduct requiring the award of a new trial on this claim.

B

The Court now turns to Anderson's separate motion for judgment of acquittal or a new trial . She basis her claim on a contention that the jury's verdicts were inconsistent.

A review of the charges and verdicts is instructive:

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[12] *Bugra v. State*, 818 A.2d 964, 969 (Del. 2003).

Charge	Verdict
Attempted Robbery First Degree	Not guilty
Possession of a Firearm During the Commission of a Felony	Not guilty
Burglary First Degree	Guilty
Possession of a Firearm During the Commission of a Felony	Not Guilty
Conspiracy Second Degree	Guilty
Carrying a Concealed Deadly During the Commission of a Felony	Not guilty
Endangering the Welfare of a Child	Guilty
Resisting Arrest	Guilty

Co-defendant Thompson was charged with the same offenses. He was found guilty of all but endangering the welfare of a child.

Anderson argues that she cannot be convicted of either conspiracy second degree or burglary first degree. Her argument is based on the verdict of not guilty on the charge of attempted robbery first degree. Behind that contention is the fact that the conspiracy charge was one of conspiring to commit burglary in the first degree. The burglary charge alleged the crime she and Thompson intended to commit was robbery in the first degree. Further, she asserts, the verdicts of not guilty on the weapons charges accompanying the attempted robbery and burglary charges are inconsistent. This is so, she contends, because

the charge of burglary first degree has an additional element that one of the defendants be armed with a deadly weapon.

The jury's verdicts are not inconsistent. They are consistent with its role to pick and choose the evidence which it finds credible. Jurors are the sole judges of witness credibility.[13] They also have the power to accept certain portions of a witness' testimony and reject others, or pick and choose between witnesses.[14]

The jurors here were so instructed in this case and their verdicts for these defendants demonstrate it did just that.

The evidence overwhelmingly showed that Thompson was the main culprit here. Examining only the State's evidence showed he burst in the front door, knocked Mable down, had a gun when he came in, asked where the money was, searched the house and had a gym bag next to which, when it was recovered, had the remainder of the duct tape and in it which was located the gun.

Mable could not see a gun once taped up. She did see it in Thompson's hands when she opened the door. She felt something next to her head. That was when, she testified, Thompson was asking where the money was. She really did not know who was holding the gun at this point nor did she ever see one in Anderson's hands.

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

[14] *Mills v. State, 1997 WL 80062* (Del. 1997), at *1.

Mable's daughter, Tierra, however, did see Anderson holding a gun at a time when Thompson went upstairs. She had seen Thompson with it earlier. It is quite conceivable and consistent that the jury believed Tierra, 10 years old, may not have been in the best position to see everything, or that it was not convinced beyond a reasonable doubt about her seeing a gun in Anderson's hands. The 911 tape played for the jury not only showed her courage but showed she was upset.

The evidence, as noted, in the State's case-in-chief was overwhelming that Thompson was the key player and satisfied all the elements of the charges of attempted robbery, burglary in the first degree and the two related charges of possession of a firearm during the commission of the accompanying felony.

The jury's concurrent acquittal of Anderson of the attempted robbery and two weapons charges is not inconsistent, at least to the extent that the guilty verdicts of burglary first degree and conspiracy have to be stricken. First, the evidence overwhelmingly showed her guilty of the charges for which she was convicted. This is the teaching of *Tilden v. State*:[15] examine the sufficiency of the evidence for those charges for which she was convicted.

Second, since it was Thompson who burst into Mable's home with the gun, demanded money of her and searched, albeit unsuccessfully, throughout the house, the jury may have believed the evidence insufficient to convict Anderson of that charge. That

[15] 531 A.2d 1302, 1307 (Del. 1986).

verdict is explainable on two grounds. Either the jury misunderstood accomplice liability as to Anderson's involvement in the actual attempt to commit robbery or its verdict resulted from jury lenity Either way, its verdict is sustainable.[16]

Nor does her acquittal of attempted robbery undermine the guilty verdicts for burglary and conspiracy. These defendants' intent to commit a crime inside Mable's residence at night with one armed with a gun was shown beyond a reasonable doubt. That Anderson was found guilty of the burglary but not the accompanying firearms charge again is explained by possible jury misunderstanding of accomplice liability where only one of the defendants possesses a gun, or again lenity. Being a charge where possession is an element of the offense, it is readily understandable that the accomplice who did not have, or whom the jury was unconvinced had, a firearm in her possession would be found not guilty. In short, both firearms offenses, as to Anderson, involved constructive possession. Lenity or misunderstanding about constructive possession readily explains these verdicts.

Again, the evidence was unquestioned in any part of the case that Thompson had a firearm in his possession. The same cannot be said about the evidence against Anderson.

This fact is coupled with the overwhelming evidence against Thompson as to the burglary and the other elements of both firearms charges. It may have been difficult for the jury to grasp accomplice liability as to the firearms charges, and maybe the attempted robbery charge, but it clearly grasped it as to the burglary charge. That charge says in

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[16] *Id.*

part, "(w)here they or another participant in the crime was armed with a gun…."[17] Here the jury knew from the charge that not all participants had to have a gun in their possession in order to satisfy the elements of the crime, as long as one did. That materially differs from the firearms charge where each is charged with having a firearm in his or her possession. There is no constructive possession language in the burglary charge.

Anderson's "dominos" argument that the conspiracy charge must also fail since an element of the burglary charge failed with the acquittal of attempted robbery also lacks merit. Thompson was found guilty of attempted robbery and robbery was the intended crime of the burglary. That she was acquitted and he was not in the face of the evidence as reviewed herein shows the jury found robbery was the crime intended by both. The conspiracy was to commit burglary first degree and all elements of that latter crime were proven beyond a reasonable doubt as to both defendants. The evidence fully supported guilty verdicts for both defendants on both these charges.

And that was only the evidence from the State. The jury clearly had credibility issues with Anderson's version of the events. Thompson's testimony more clearly matched the State's case. Anderson's effort to minimize her role, knowledge of Thompson's intentions and her culpability were contradicted by several things. One was the State's evidence. Two, her choice to leave home on Christmas Eve with her newborn there for the reasons she offered and a third was Thompson's testimony.

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[17] Count III

While the jury could have rejected some or all it, there was one uncontroverted fact undermining her testimony. She testified she Thompson asked for her help to drive him on an errand because he could not drive due to a broken left arm. The errand she described to the jury was innocent and innocuous. She said she picked up Thompson and drove him to Clifford Brown Walk. He said, however, that he met her there and, in fact, drove his own car there. The key point is that the State introduced into evidence during his testimony a picture of his car parked near Clifford Brown Walk.

The jury may not have concluded she ever had a gun in her hands or was a principal in the attempted robbery, but it had more than sufficient evidence not just in the State's case but with all the evidence, to convict her as it did. Arguably in one sense, therefore, its verdicts of not guilty were more a reflection of not fully appreciating accomplice liability or constructive possession as to those charges.

Related to her argument of inconsistency is her contention that the Court erred on not charging, as she requested, on the lesser offense of burglary in the second degree. The basis for this renewed request is her acquittal of the firearms charge accompanying the burglary first degree charge.

This argument fails, too. First, the offense of burglary first degree does not require that she possess the firearm. It only requires one of the participants with her to possess it. Second, the evidence was uncontradicted that one participant, namely Thompson did. Third, he was found guilty of burglary first degree. Fourth, all the evidence about the other elements for the offense of burglary first degree was virtually uncontradicted.

Conclusion

For the reasons stated herein defendant Jasmine Anderson's motion for judgment of acquittal or new trial and defendant Donald Thompson's motion for new trial are DENIED.

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J.