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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002598-MR

MAURICE MILLER

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES, SENIOR
JUDGE.

THOMPSON, JUDGE: Maurice Miller appeals the judgment of conviction in the Christian Circuit Court for first-degree burglary and second-degree unlawful transaction with a minor. Concluding that the trial court's error was harmless, we affirm.

On December 1, 2005, Miller, Crill Facen, and a juvenile drove to a rural area in Christian County, Kentucky, and approached the residence of Thomas and Marilyn Stewart. Two members of the group exited the vehicle and kicked in the door. While the burglary was in progress, H. D. Malone was returning home and observed a red car with its flashers activated. He approached the vehicle and asked its driver if he needed help. The driver responded that the car could get him where he needed to go.

After reaching his residence, Malone again observed the red car and developed suspicion of illegal activity. Malone then went to check the residence of his neighbors, the Stewarts, where he observed the red car parked in front of their residence. Within five minutes of parking his vehicle, he observed three individuals exit the residence with one of the men carrying a long brown or black item.

As the red car drove down the road, Malone blew his horn and blocked the road. The red car swerved off the roadway into a ditch. After getting out of the ditch, the car fled the area at which time Malone called police. After being dispatched to the area, police located the red car and arrested the three suspects traveling in the vehicle. Several items were found inside the car including a New Haven Connecticut .20-gauge shotgun, a Winchester .22-caliber rifle, and a box of .22-caliber shells. These items were later identified as items taken from the Stewarts' residence.

On January 20, 2006, Miller was indicted for first-degree burglary and second-degree unlawful transaction with a minor. Following a jury trial wherein the three suspects gave incriminating testimony against each other, Miller was found guilty of the charges and sentenced to fifteen-years' imprisonment. This appeal followed.

Miller's sole assignment of error is that the trial court erroneously failed to provide the jury with the definition of a deadly weapon in its instructions. Specifically, Miller contends that the jury was only required to find that Crill and/or the juvenile were armed with a deadly weapon while inside or leaving the Stewarts' residence. However, Miller contends that the jury was not instructed regarding the definition of a deadly weapon provided in KRS 500.080(4).

Thus, Miller contends that the jury may have found him guilty of second or third-degree burglary instead of first-degree burglary had the jury found that a deadly weapon was not used during the commission of the crime. The major distinction between first-degree burglary and second or third-degree burglary, under the facts of this case, is the use of a deadly weapon during the commission of the crime. Therefore, Miller contends that his conviction for first-degree burglary should be reversed. We disagree.

The trial court in a criminal case is required to give the jury instructions on the whole of a case including an instruction applicable to every element of the case put in issue by the evidence. *Thomas v. Commonwealth*, 170 S.W.3d 343, 348-349 (Ky. 2005). "A defendant has the right to have every issue

of fact raised by the evidence and material to the defense submitted to the jury on proper instructions.” *Id.* at 349. Specifically, in *Thacker v. Commonwealth*, 194 S.W.3d 287 (Ky. 2006), our Supreme Court held that a jury must be instructed on the legal definition of a deadly weapon when it is an element of a charged offense. *Id.* at 289-291.

KRS 511.020(1)(a) provides that “[a] person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime [i]s armed with . . . a deadly weapon.” Therefore, because the presence of a deadly weapon during the commission of the crime was a matter to be determined by the jury, the trial court was required to provide the legal definition for a deadly weapon provided in KRS 500.080(4).

Notwithstanding the insufficient instructions, an inadequate jury instruction that omits an essential element of a criminal offense is subject to harmless-error analysis. *Wright v. Commonwealth*, 239 S.W.3d 63, 68 (Ky. 2007). An appellate court will not set aside a conviction “[a]s long as it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty’ an actual jury finding on that element is not mandated and an appellate court can find the error harmless.” *Id.*, citing *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999).

KRS 500.080(4)(b) provides that a “[d]eadly weapon” means “[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.” After reviewing the entire record, it is clear beyond a reasonable doubt that a rational jury would have found Miller guilty of first-degree burglary. During the commission of the burglary, a shotgun and a rifle were stolen along with a box of ammunition for the rifle. Under these facts, the jury would have certainly found that a deadly weapon was used during the commission of the burglary. Accordingly, the trial court’s failure to issue an instruction defining a deadly weapon was harmless.

ALL CONCUR.

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