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Summary of Funderburk v. State, 125 Nev. Adv. Op. No. 25

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***Funderburk v. State*, 125 Nev. Adv. Op. No. 25
(July 30, 2009)¹**

CRIMINAL LAW – DEADLY WEAPON ENHANCEMENT

Summary

Appeal from a judgment of conviction, upon a jury verdict, of two counts of burglary while in possession of a deadly weapon, two counts of conspiracy to commit robbery, and four counts of robbery with use of a deadly weapon.

Disposition/Outcome

Affirmed the judgment of conviction.

Factual/Procedural Background

On December 20, 2005, Samaja Funderburk and his co-assailant, Tucker Allen, robbed a Burger King wearing hooded sweatshirts and masks over their faces. At least one of the men was carrying a gun which was later determined to be a BB gun. On December 30, 2005, Funderburk and Allen, again dressed in heavy winter clothing and ski masks, entered a McDonald's with a BB gun. Allen pointed the gun at the employees and said, "You know what this is." After Funderburk and Allen emptied the registers and the safe, they left the establishment. The police were waiting outside and took both men into custody.

Funderburk and Allen were subsequently tried. On the final day of trial, the district court instructed the jury on Funderburk's robbery-with-the-use-of-a-deadly-weapon and burglary-while-in-possession-of-a-deadly-weapon charges. Jury Instruction No. 10 addressed the definition of a deadly weapon under the robbery and burglary charges. The jury was instructed that, under NRS 202.265(5)(b), a "firearm" includes "Any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force."

The jury convicted Funderburk of various charges, including two counts of burglary while in possession of a deadly weapon under NRS 205.060(4). Funderburk challenges the deadly weapon element of his burglary-while-in-possession-of-a-deadly-weapon convictions.

Discussion

Funderburk contended that the district court erred by applying one of NRS 193.165(6)'s definitions of "deadly weapon" to his burglary-while-in-possession-of-a-deadly-weapon charges.² Specifically, Funderburk claimed that applying NRS 193.165(6)'s definitions to his

¹ By James Conway

² NEV. REV. STAT. § 193.165(6) states that a "deadly weapon" is "(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used,

burglary charges contradicts the Nevada State Legislature's intent because burglary, unlike other crimes such as robbery or murder, is not referenced in NRS 193.165, and that the burglary statute has its own provision in NRS 205.060(4)³ that allows for an increased sentence when a person possesses a deadly weapon during the commission of a burglary.

The Court disagreed with Funderburk's contention and concluded that the Legislature intended the definition of "deadly weapon" to be broad for purposes of determining whether a defendant committed burglary while in possession of a deadly weapon under NRS 205.060(4). As a result, the Court held that the district court did not err by instructing the jury on a definition set forth in NRS 193.165(6)(c) for Funderburk's burglary-while-in-possession-of-a-deadly-weapon charges.

The Court noted that the Nevada State Legislature amended NRS 205.060 in 1989 to include an increased sentencing range when a person has possession or gains possession of a "deadly weapon" during a burglary. In addition, while the applicability of NRS 193.165(6)'s definitions was not at issue during the 1989 drafting of the armed burglary provision, the Court noted that the "functional test" in *Clem v. State*⁴ had considerable influence on the Legislature's enactment of the 1989 statute. Under the functional test in *Clem*, a court looks to "how an instrument is used and the facts and circumstances of its use."⁵ The Court noted that the functional test in *Clem* was the applicable law in determining whether an instrument was a "deadly weapon" at the time that the Legislature adopted the armed burglary provision. As a result, the Court held that that the Legislature drafted the armed burglary provision with that broad definition of "deadly weapon" in mind.

Conclusion

In addressing an issue of first impression, the Supreme Court of Nevada concluded that, based on the Legislature's intent, the definitions set forth in NRS 193.165(6) are instructive for determining what constitutes a "deadly weapon" for enhancement purposes under NRS 205.060(4). The Court held that the Nevada State Legislature intended the definition of "deadly weapon" to be broad for purposes of NRS 205.060(4). Accordingly, the Court held that the district court did not err by instructing the jury that a BB gun is a deadly weapon as it constitutes a "firearm," as defined in NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c). The Court affirmed the judgment of conviction.

attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350."

³ NEV. REV. STAT. § 205.060(4) states that "A person convicted of burglary who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than \$10,000."

⁴ 104 Nev. 351, 760 P.2d 103 (1988).

⁵ *Id.* at 357, 760 P.2d at 106.