COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Chief Judge Felton, Judges Elder and Petty
Argued at Richmond, Virginia

DIJON ALLEN SMITH

v. Record No. 0197-12-2

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE LARRY G. ELDER
APRIL 2, 2013

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Margaret P. Spencer, Judge

Joan J. Burroughs, Assistant Public Defender, for appellant.

Donald E. Jeffrey, III, Senior Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Dijon Allen Smith (appellant) was convicted in a jury trial for burglary in violation of Code § 18.2-90 and using a firearm in the commission of that offense in violation of Code § 18.2-53.1. On appeal, he contends the burglary was complete before he used or displayed the gun and, thus, that the evidence fails to support his conviction for using a firearm in the commission of burglary. We hold the evidence, viewed in the light most favorable to the Commonwealth, was sufficient to support the challenged conviction.[1] Thus, we affirm.

In considering a challenge to the sufficiency of the evidence on appeal of a criminal conviction, "we view the evidence and all reasonable inferences in the light most favorable to the Commonwealth, the prevailing party in the trial court." Rowland v. Commonwealth, 281 Va. 396, 399, 707 S.E.2d 331, 333 (2011). We will reverse a conviction based on a sufficiency

[1] Appellant also was convicted for robbery and using a firearm in the commission of robbery. Nothing related to those convictions or to the burglary conviction underlying the challenged use-of-a-firearm conviction is at issue in this appeal.

challenge only if the trial court's judgment is plainly wrong or without evidence to support it. E.g., McMorris v. Commonwealth, 276 Va. 500, 504, 666 S.E.2d 348, 350 (2008).

To constitute burglary of a building permanently affixed to realty at nighttime, the evidence must prove the defendant entered, with or without breaking, with the intent to commit a felony therein. Code §§ 18.2-90, -91. Code § 18.2-53.1 makes it "unlawful . . . to use or attempt to use any . . . firearm or display such weapon in a threatening manner while committing or attempting to commit . . . burglary." "A person 'uses' a firearm if he or she employs it." Rowland, 281 Va. at 401, 707 S.E.2d at 334 (citing Black's Law Dictionary 1681 (9th ed. 2009)). "A person 'displays' a firearm if he or she manifests it 'to any of a victim's senses.'" Id. at 401-02, 707 S.E.2d at 334 (quoting Cromite v. Commonwealth, 3 Va. App. 64, 66, 348 S.E.2d 38, 39 (1986)).[2]

Relying on Rowland, 281 Va. 396, 707 S.E.2d 331, appellant contends the trial court erred in finding the evidence sufficient to prove he used a firearm while committing burglary because the burglary was complete before he used or displayed the gun. We conclude Rowland supports rather than defeats the challenged conviction.

Rowland involved the nighttime entry of a restaurant, apparently after business hours but while two employees remained inside. Id. at 398, 707 S.E.2d at 332. The back door was the only door unlocked at the time, and one of the two employees was working near that door, in the kitchen area. Id. While in the kitchen area, that employee "sensed a person behind him and

[2] The statute clearly contemplates that this offense may be proved in two ways, based on *either* "us[ing] or attempt[ing] to use any . . . firearm" *or* "display[ing] such weapon in a threatening manner." Code § 18.2-53.1. Here, the jury instructions covered only the first of these ways, "using a firearm," and the jury returned a verdict of guilty of "using a firearm." Thus, we need not address what is required to prove a defendant "display[ed] [a] weapon in a threatening manner."

turned around to see [Rowland] . . . pointing a gun at him." Id. It was undisputed that neither employee saw Rowland enter the restaurant. Id. The Supreme Court held as follows:

> [T]he evidence shows that the elements of statutory burglary were complete before Rowland used or displayed a firearm. There is no evidence that Rowland used or displayed the firearm when gaining entry to the restaurant. Neither witness observed Rowland's entry. The first time either of the witnesses noticed Rowland was when [the employee in the kitchen] turned around to find Rowland pointing a gun at him. By that time, Rowland had already entered the restaurant with the intent to commit robbery therein. The burglary had been completed. The evidence is insufficient to support a conviction of use or display of a firearm during the commission of the burglary.

Id. at 402, 707 S.E.2d at 334; see also Rushing v. Commonwealth, 284 Va. 270, 274, 279, 726 S.E.2d 333, 335, 339 (2012) (applying Rowland to reverse where the evidence showed the burglars entered through a rear door on the lowest level of the house and did not encounter the victim until they reached the flight of steps to the next level and saw him standing at the top).

Here, in contrast to Rowland, victim Kimberly Bundrick was alerted to the fact that someone was outside her front door because she heard knocking. As she walked toward the door, she saw appellant and his companions, all of whom were masked, push the door open and enter without an invitation. As soon as appellant entered, Bundrick noticed he was holding a firearm "down at his side." Given the absence of testimony from Bundrick that she observed appellant remove the weapon from his waistband or pocket or otherwise "draw" it after entering, her testimony that she noticed he was holding a firearm "down at his side" immediately after he entered supports the inference that he was also holding the firearm in that fashion when he entered seconds earlier.

When Bundrick saw the firearm, she began screaming. Appellant immediately grabbed her, held the gun to her head, and told her to be quiet. It is true these events occurred after appellant had stepped across the threshold of the residence. However, the way appellant used the

gun *after* entering supports the jury's finding, implicit in its verdict, that he used the gun *during* the entry for the same purpose, in order to be ready to subdue Bundrick as necessary. The fact that appellant did not find it necessary to actually point the gun at Bundrick or to display it in some other obvious fashion in order to gain entry does not prevent a finding that he "used" it in the commission of burglary within the meaning of Code § 18.2-53.1.

For these reasons, we hold the evidence was sufficient to support appellant's conviction for using a firearm in the commission of burglary in violation of Code § 18.2-53.1. Thus, we affirm the challenged conviction.

Affirmed.