

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0879

STATE OF LOUISIANA

VERSUS

CHRISTOPHER J. AUDIBERT

Judgment Rendered: November 9, 2011

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 493037

Honorable Allison H. Penzato, Judge Presiding

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Christopher J. Audibert

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WPR
KW
FH

WHIPPLE, J.

The defendant, Christopher J. Audibert, was charged by bill of information with one count of theft of a firearm, a violation of LSA-R.S. 14:67.15. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to imprisonment at hard labor for five years without benefit of probation, parole or suspension of sentence. The defendant was also ordered to pay a fine of \$1,000.00.

The defendant now appeals, urging in a single assignment of error that the trial court erred in denying his request that the jury instructions include the responsive verdicts of unauthorized use of a movable and attempted unauthorized use of a movable. Finding no merit in the assigned error, we affirm the defendant's conviction and sentence.

FACTS

The facts of the offense are essentially undisputed. On June 20, 2010, Lindsay Guillory and her husband, Gregory, returned to their home and noticed that three guns were missing. The defendant, who had been living with the Guillorys at the time, initially denied taking the guns. However, he later admitted that he took the guns and used them to pay off a drug debt. The Guillorys contacted the St. Tammany Parish Sheriff's Office regarding the matter. The defendant later confessed to Corporal Eric Pearson. Testimony at the defendant's trial established that the guns were never returned.

ASSIGNMENT OF ERROR

In his assignment of error, the defendant contends the trial court erred when it failed to include the offenses of unauthorized use of a movable and attempted unauthorized use of a movable as responsive verdicts. Specifically, the defendant asserts that firearms are movables and the jury should have determined if the circumstances surrounding the taking included intent to permanently deprive.

Louisiana Code of Criminal Procedure article 803 requires a trial court to advise the jury of the law applicable to all offenses charged, as well as any other offenses for which the accused could be found guilty under LSA-C.Cr.P. arts. 814 or 815. Because article 814 does not provide any statutory responsive verdicts for theft of a firearm, the provisions of article 815 apply. Article 815 states that in those cases not provided for by article 814, the responsive verdicts are guilty, not guilty, or “[g]uilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor....”

In this case, the defendant was charged with theft of a firearm. The trial court’s instructions to the jury included responsive verdicts of guilty of theft of a firearm, guilty of attempted theft of a firearm, and not guilty. The defendant requested that the court include the offenses of unauthorized use of a movable as responsive offenses and attempted unauthorized use of a movable in its instructions. The trial court denied the request.

As articulated by the Louisiana Supreme Court in State v. Simmons, 422 So. 2d 138, 142 (La. 1982), the test for determining if a crime is a lesser and included offense of the offense charged is “whether the definition of the greater offense necessarily includes all the elements of the lesser. Stated in another way for practical application, this merely means that, if any reasonable state of facts can be imagined wherein the greater offense is committed without perpetration of the lesser offense, a verdict for the lesser cannot be responsive.” (Italics deleted; citation omitted.)

Theft of a firearm, the offense charged herein, is the misappropriation or taking of a firearm which belongs to another, either without the consent of the other to the misappropriation or taking or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of the firearm is essential. See LSA-R.S. 14:67.15(A). Unauthorized use of a movable

is defined in LSA-R.S. 14:68(A) as “the intentional taking or use of a movable which belongs to another, either without the other’s consent, or by means of fraudulent conduct, practices, or representations, but without any intention to deprive the other of the movable permanently....” Louisiana Revised Statutes 14:68(B) also provides for varying penalties based upon the value of the movable subject to unauthorized use. Thus, it is also necessary for the state to establish, as an element of the offense, the value of the property. See State v. Hudgins, 400 So. 2d 889, 893 n.3 (La. 1981). No such value element is required in theft of a firearm.

Considering the foregoing, we find no error by the trial court in denying the defendant’s request to include unauthorized use of a movable and attempted unauthorized use of a movable as responsive verdicts. We further note that the record reflects that there was no evidence offered tending to establish the actual value of the firearms in this case. Therefore, so far as the record shows, there was no reason why the trial judge should have included the responsive offenses of unauthorized use of a movable and attempted unauthorized use of a movable in this case.

Moreover, even if the failure to include the requested responsive verdicts could be considered error, we do not find that the error warrants reversal of the defendant’s conviction. In State v. Simmons, 2001-0293 (La. 5/14/02), 817 So. 2d 16, 21, the defendant was charged with unauthorized entry of an inhabited dwelling, but found guilty of attempted unauthorized entry of an inhabited dwelling. At trial, the defendant requested the trial court instruct the jury that criminal trespass was a responsive verdict. The trial court refused. The Supreme Court, upon finding error in the trial court’s refusal to include the instruction on criminal trespass (which the Court found to be a responsive verdict to a charge of unauthorized entry of an inhabited dwelling), applied a harmless error analysis, but

noted that the error was not harmless because there was a reasonable possibility that the error affected the outcome of the trial. State v. Simmons, 817 So. 2d at 21. The Court noted, “[g]iven the fact that the jury, after requesting further instruction, returned a verdict of the only lesser included offense offered, it is entirely possible that the jury would have returned a verdict for the lesser misdemeanor offense of criminal trespass if that charge had been given.” State v. Simmons, 817 So. 2d at 21.

In the instant case, the jury had the option of choosing a lesser included attempt verdict; however, unlike in Simmons, the jury did not do so. Instead, the jury found the defendant guilty of the charged offense. In that regard, we find that the failure of the trial court to include as responsive offenses unauthorized use of a movable and attempted unauthorized use of a movable when instructing the jury was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921; Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the defendant’s conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.