

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Fletcher v. State

866 So. 2d 113 (Fla. Dist. Ct. App. 2004) · Decided February 11, 2004

OPINION

RAMIREZ, J.

RAMIREZ, J. Omar Fletcher appeals his conviction for burglary of a dwelling and petit theft. We reverse because the jury failed to affirmatively find that the burglary was of a dwelling. Count I of the Information charged that Fletcher did unlawfully enter or remain in a dwelling.

The trial court subsequently instructed the jury as follows: “Omar Fletcher, the defendant in this case, has been accused of the crime of Burglary of an Unoccupied Dwelling and Grand Theft-Third Degree (\$300 to \$5,000).” The trial court also instructed the jury that the State must prove, as one of three elements of the crime of burglary, that Fletcher entered or remained in a structure.

The jury received the definitions of “structure” and “dwelling.” As part of the instruction for Trespass in a Structure as a lesser included offense of burglary, the trial court instructed the jury that it was necessary for Fletcher to have willfully entered or remained in a dwelling.

The jury again received the definition of “structure,” but not that of “dwelling.” The verdict form read as follows: As to Count I of the Information _ Guilty of Burglary _ Guilty of Trespass as a lesser included offense _ Not guilty The jury found Fletcher guilty of burglary.

In order for a third degree felony conviction of burglary to be enhanced *114to a second degree felony of burglary of a dwelling, the jury must make a specific finding that the burglary was of a dwelling, not just a structure. See *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “It is a well established rule of law that the judgment of the trial court must conform to the jury’s verdict.” *Williams v. State*, 511 So.2d 1017, 1019 (Fla.

2d DCA 1987). In *Williams* the defendant’s conviction for burglary of a dwelling was reversed because “[t]he verdict did not specify burglary of a dwelling nor state that Williams was guilty ‘as charged’ in the information.” *Id.* As in *Williams*, the verdict in this case did not specify that Fletcher was guilty of burglary of a dwelling or state that he was guilty as charged.

Thus, Fletcher cannot be convicted of burglary of a dwelling. We therefore reverse Fletcher’s conviction for burglary of a dwelling, and remand for resentencing for burglary of a structure, a third degree felony. Reversed and remanded.