THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001241

The State, Respondent,

v.

Devin Lavar Outen, Appellant.

APPELLANT'S REPLY TO RESPONDENT'S INITIAL BRIEF

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I. THE TRIAL COURT ERRED IN REFUSING TO GRANT DIRECTED VERDICT BECAUSE THERE WAS NO EVIDENCE TO SUPPORT A FINDING OF SPECIFIC INTENT TO COMIT A CRIME WTHIN.

The State is required to prove every element of a charged offense to obtain a conviction. State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). The trial court must grant a motion for directed verdict of acquittal when the State fails to produce any evidence of the crime charged. State v. Parris, 363 S.C. 477, 481, 611 S.E.2d 501, 502 (2005). At that juncture, the court is concerned only with the existence of evidence, not its weight. Id. at 481, 611 S.E.2d at 502-03. Where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted. See State v. Lee, 294 S.C. 461, 365 S.E.2d 734 (1988).

The statute for first degree burglary provides, in pertinent part, "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A)(3) (2003). The respondent points out that the trial court must submit a case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." State v. Phillips, 416 S.C. 184. 192-193, 758 S.E.2d 448, 452 (2016). Not only was there not substantial evidence in this case that Appellant had a specific intent to commit a crime while within in the dwelling, but there was no evidence at all. The Respondent has failed to present any evidence on the record that the Appellant had any intent to commit a crime while within the dwelling, an essential element of attempted first degree burglary.

The Respondent alleges that plentiful evidence was produced. However, none of the

evidence the Respondent points to is evidence of a specific intent held by the Appellant. Respondent's arguments rely upon evidence the State presented as to whether or not Appellant was the suspect which attempted to break into Ms. Grice's home. Respondent looks to evidence that Ms. Grice shot the intruder, and that Appellant was located with a gunshot wound. This is not evidence, circumstantial nor direct, that Appellant had a specific intent to commit a crime within Ms. Grice's home. Further, Respondent argues the police located the vehicle belonging to Appellant's girlfriend at the scene and officers had seen Appellant driving a similar car previously. Nothing about this testimony provides proof of an intent on behalf of the Appellant to commit a crime within the home. The location of a tool, i.e., a tire iron in the front passenger seat of the vehicle does not provide an of an intent to commit a crime. A tool is not indicative of a perpetrators *mens rea*. Any argument alleging the use of the tool to break into Ms. Grice's home provides some sort of intent falls flat and would be a false suggestion that an inference can be made of intent here. There is nothing that can be inferred regarding intent as it relates to the tire iron. Hypothetically, a credit card can be used to break into a house, but that does not provide any inference of an intent to commit any crime while within. Ms. Grice identifying the Appellant at his bond hearing further provides no evidence of a specific intent to commit a crime while within Ms. Grice's home, an essential element of the crime Appellant was convicted of.

If that state had presented evidence at trial that the Appellant yelled out "I know you have a safe in your house" or "I know you have coins in your house" evidence would have been presented to submit the matter of intent to the jury. No such evidence is on the record. If the Appellant had confessed, he was looking for something to sell, this would be evidence of a specific intent to commit a crime within.

The Respondent alleges that because the break-in took place at 3:45 a.m., Ms. Grice

testified she "knew somebody was breaking in [her home]" and the person was "in a frenzy trying to get that door open" these facts support an inference the Appellant had an intent to commit a crime within. At most, all this proves is the Appellant may have committed breaking and entering. As Respondent admits in their own Brief, and element of first-degree burglary is the act occurring at nighttime. No testimony was presented of any threats from the Appellant. Even if she had lied and said she had threatened her, that could be something used to infer intent. However, that allegation was not made. She never testified he told her he wanted her money. She never sees Appellant inside her house going through her drawers.

If testimony had been presented that she had seen the Appellant in her closet going through her stuff, this would be circumstantial evidence he is trying to steal and show an intent. Again, if Ms. Grice had testified, Appellant yelled out to her he wanted all her money, this would be direct evidence of an intent. Ms. Grice never saw Appellant do anything other than try to break into her house.

Respondent is trying to make this a general intent crime. It is not. The Appellant was convicted of attempted first degree burglary, a specific intent crime. Therefore, every element of the crime must be proved. There has to be evidence of every element. There has to be evidence for the jury to infer there was a specific intent to commit a crime within and this case is completely void of any such evidence. The Respondent is trying to get around the Appellant's lack of intent. The specific intent must be proven on its own. Specific intent cannot be inferred by someone else's belief of what the Appellant may do.

II. APPELLANT'S COUNSEL'S EGREGIOUS STATEMENTS AGAINST APPELLANT'S INTEREST WARRANT A REVERSAL

Respondent argues this matter is not preserved for review as there was no objection made

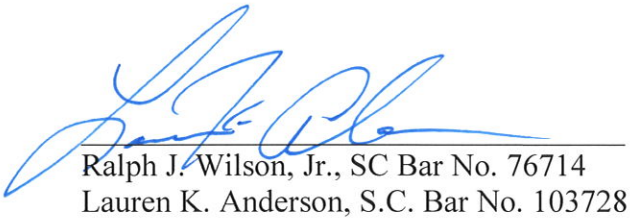
to the trial court pertaining to these statements. The Court should note, Appellant's own attorney made these adverse statements. The statement was made specifically by Appellant's attorney. The figure present before the jury tasked with the duty to protect Appellant's rights at trial. The statement was extremely prejudicial to Appellant and insinuated to the jury a biased sympathy towards the alleged victim in the case. This was not a "benign" statement as the respondent alleges. There was no one to object on Appellant's behalf as it was his own attorney who made the statement. Further, the judicial error is allowing the statement to be considered by the jury. The judge should have instructed the jury, on his own accord, to disregard the attorney's statement. Appellant, as the defendant in the case is afforded due process at ever stage of his trial and was denied such due process when the prejudicial statement was not stricken from the record. Even the slightest insinuation by defense counsel of guilt of his client in the presence of the jury is a denial of Appellant's due process.

CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a ruling of acquittal.

Respectfully submitted,

June 17, 2022



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PROOF OF SERVICE

I certify that I have served the Appellant's Reply to Respondent's Initial Brief upon the below listed by sending a copy of same by electronic mail, on today's date addressed as follows:

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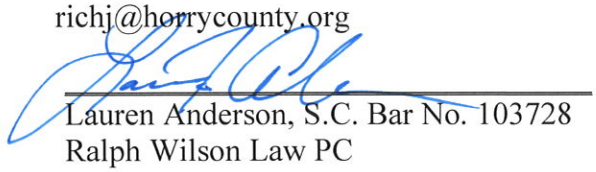

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June 17, 2022

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Re: The State, Respondent v. Devin Lavar Outen, Appellant
Appellate Case No. 2020-001241

Dear Madame Clerk:

Attached and for filing, please find Appellant's Reply to Respondent's Initial Brief and Proof of Service in the above-referenced matter.

Should anything additional be required, please do not hesitate to contact me.

Sincerely,

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