STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2018-001745

THE STATE, Respondent,

v.

JADEN IMARION GARY, Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial court did not abuse his discretion in sentencing Appellant.

STATEMENT OF THE CASE

Appellant was indicted in September of 2019 for Burglary 1st Degree, possession of a weapon during the commission of a violent crime, and grand larceny. Appellant proceeded to a jury trial August 31- September 1, 2019, in Spartanburg County in front of the Honorable R. Keith Kelly. Joshua Schultz, Esquire, represented the Appellant. The jury found Appellant guilty as charged. He was sentenced to twenty years for the burglary 1st degree, 5 years for the weapons charge and 3 years for the grand larceny to be served concurrently. This appeal follows.

STATEMENT OF FACTS

At the time of trial in 2021, Jason Williams, a retired army veteran, had lived in Spartanburg County for over three years. (Tr. 106). Prior to 2019, an incident occurred in which some neighborhood children found an unlocked window in Williams' home and entered his residence and stole firearms from him. (Tr. 107). The mother of the children who stole the firearms turned them in to the police and the firearms were returned. (Tr. 108). No charges were brought due to the children's ages, however Williams installed a security camera system in his living room, which allowed both entrances to the residence to be seen. (Tr. 108).

While at work on July 22, 2019, Williams received a notification on his phone that there was motion and sound inside his home. (Tr. 110). Williams notified police, who responded to the scene, but the suspects were already gone. (Tr. 110). Williams' security camera recorded three black males entering the home through the kitchen. (Tr. 110). One of the males had a handgun drawn while the others armed themselves with steak knives once inside the residence. (Tr. 110). Multiple long rifles, cases, and ammunition valued at over $2000 were taken. (Tr. 121).

The surveillance video was given to Investigator Brad Newton who was able to identify Jaden Gary (Appellant) as the male holding the handgun in the video. (Tr. 146). The other males were also identified and arrest warrants were obtained. Appellant was brought into the station by his mother. (Tr. 171). At the station, Appellant was taken into custody, Mirandized and interviewed. (Tr. 171). In the interview Appellant said, a girl he knew from snapchat told him about an unoccupied house that had guns in it. (Tr. 171). He admitted to entering the residence and identified himself on the surveillance video as the individual who was armed with the handgun. (Tr. 179).

STANDARD OF REVIEW

Issue 1

"In reviewing jury charges for error, Court of Appeals must consider the circuit court`s jury charge as a whole in light of the evidence and issues presented at trial." State v. Williams, 427 S.C. 526, 533, 829 S.E.2d 702, 721 (2019) (citing State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)) "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). "But an instruction must be erroneous and prejudicial to warrant reversal" State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019).

Issue 2

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). A sentence will not be overturned absent an abuse of discretion; an abuse of discretion occurs "when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "A trial judge has broad discretion in sentencing within statutory limits." Id.

ARGUMENT

I. **The trial judge correctly refused to instruct the jury on the lesser included offense of burglary second degree because the jury could not find Appellant guilty of burglary second degree when the evidence did not support the structure being a building rather than a dwelling.**

Appellant argues the trial judge erred by refusing to instruct the jury on the lesser included offense of burglary second degree when there was evidence upon which a jury could have found Appellant committed only burglary second degree. Appellant argues "had the trial court judge instructed the jury with burglary 2nd degree as trial counsel requested, the jury could have considered Gary's defense that he did not realize someone was currently residing at the incident location at the time of his entry." Appellant's argument lacks merit because Appellant's belief of whether a dwelling was abandoned is irrelevant because the residence is still a dwelling and not a building.

The jury was charged with burglary first degree. Section 16-11-311 of the Code of Laws of South Carolina defines burglary first degree as:

(A) 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 either
    1. When effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime
        a. Is armed with a deadly weapon or explosive; or
        b. Uses or threatens the use of a dangerous instrument; or
        c. Displays what is or appears to be a knife, pistol, revolver, shotgun, machine gun, or other firearm; or
    2. The burglary is committed by a person with a prior record of two or more convictions for burglary or house breaking or a combination of both; or
    3. The entering or remaining occurs at nighttime.

S.C. Code Ann. § 16-11-311 (Supp. 2019). Section 16-11-312 of the Code of Laws of South Carolina provides:

(A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.
(B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
    1. When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
        a. Is armed with a deadly weapon or explosive; or
        b. Causes physical injury to any person who is not a participant in the crime; or
        c. Uses ot threatens use of a dangerous instrument; or
        d. Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
    2. The burglary is committed by a person with a prior record of two or more convictions for burglary or house breaking or a combination of both; or
    3. The entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-312 (Supp. 2019).

A trial judge's determination of what law should be charged is made from the evidence presented. State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (2006). The trial court should refuse to charge the lesser included offense where there has been no evidence tending to show the defendant may have committed solely the lesser offense." Id. In order for the defendant to commit solely the lesser offense, the structure that Appellant entered would have had to be a building and not a dwelling.

In State v. White, White was charged with burglary first degree of a hotel room. State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002). On appeal, White argued that the hotel was a building and not a dwelling so the jury could have found him guilty of the lesser included charges. Id. Our Supreme Court stated "Finally, we find the trial court properly held the motel room in question was being used as a dwelling under S.C. Code Ann. §§ 16-11-10 and 16-11-

310 (dwelling is defined to include any building in which there sleeps a tenant or person who lodges there with a view to the protection of property; for purposes of burglary statute, dwelling also means living quarters of a building used or normally used for sleeping, living, or lodging by a person)." Id. at 39, 307.

Whether or not Appellant believed the house was abandoned is irrelevant. Unlike Ohio's Burglary statute that directly refers to "an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense." Ohio Rev. Code Ann. §2911.12 (2011). The South Carolina statute does not directly refer to whether someone was in the dwelling or likely to be in the dwelling making defendant's belief that a dwelling was abandoned irrelevant. The question is whether the resident, who resided in the dwelling, intended to return. A resident's temporary absence does not convert a dwelling into a building. For example, in State v. Glenn, an arson case, the defendant asserted her mobile home was not a dwelling on the day it burned because she was in the process of moving out. State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988). The court held that since the defendant returned to the mobile home many times after her husband's death to gather more possessions, specifically on the day the mobile home burned, that she had not vacated the mobile home because she had the intention of returning. Id. The court explained that when a dwelling's habitational status is called into question by the occupier's temporary absence, the test is whether the occupant has left with the intention to return. Id.

Burglary is a crime against property and not possession and therefore whether a building is a dwelling house turns on whether the occupant has left with the intention to return and the

temporary absence of occupants will not prevent a residence from becoming the subject of burglary. State v. Davis, 422 S.C. 472, 812 S.E.2d 423 (Ct. App. 2018).

In State v. Evans, this Court considered whether a family's second home was a dwelling even though the homeowners only occasionally went there, had not slept there for three years, and used the home essentially "as a storage building." State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008). This Court held the evidence supported a finding that the house was a dwelling, emphasizing that the house was filled with property, the utilities were on, and the house was "ready to be lived in." Id. This Court explained that "Temporary absence from a 'dwelling' is irrelevant." Id., at 425, 656 S.E.2d at 784.

In this case, there is plenty of evidence that the structure was a dwelling and that Williams intended to return. Williams testified that he currently lived there and had been living there for the last three years. (Tr. 106). Williams refers to one of the rooms as his bedroom during his testimony. (Tr. 108) Similar to Evans, it is clear that Williams' residence is filled with property such as electronics, furniture, clothes, silverware, and the utilities were functioning. (Tr. 105-142). Brad Newton, the investigator working the case also testified at trial that it was clear that someone was currently living in the structure. (Tr. 165). There is plenty of evidence that the structure was a dwelling because Williams' was clearly living there and intended to return after work. Therefore, the evidence did not support a finding that the structure was a building and not a dwelling, and the jury could not have found Appellant guilty of burglary second degree rather than burglary first degree. Appellant's conviction and sentence should be affirmed

II. The Trial Judge did not abuse his discretion in sentencing Appellant.

Appellant argues the trial court abused its discretion in imposing a sentence of five years over the minimum limit because Appellant exercised his right to trial. This argument lacks merit

because it's premised on the fact that the State made a recommendation for 15 years and after trial argued that Appellant should not receive the minimum sentence. The State did not make a 15 year recommendation. It made a plea offer of 15 years that was no longer available once trial began. Further, the sentencing range for burglary first degree is no less than 15 years, but can carry up to a life sentence.

"At sentencing a judge has an obligation to consider information material to punishment." Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14, 15 (1984). "A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

Appellant relies on two cases that are not applicable here. In Davis v. State, our Supreme Court held counsel was ineffective in failing to object when the trial judge indicated the reason he sentenced Davis more harshly than two similarly situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt. Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). When the defense counsel made the point that defendant had no prior drug convictions, the trial judge in Davis stated

> "Yes ma'am, but he didn't plead guilty. Those other two people they pled guilty. They admitted what they had done and to me that's the first step towards rehabilitation is admitting that you did something wrong and you're pleading guilty and when a fellow wants a trial which he's entitled to as a matter of law- and that's fine."

Id. at 332, 802. In State v. Hazel, our Supreme Court held that the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for sentencing under the Youthful Offender Act. State v. Hazel, 317 S.C. 368,

453 S.E.2d 879 (1995). In Hazel, the trial judge made the comment "Well, it's one thing, if he'd pled guilty, I'd have considered that..." Id. at 369, 879. In the present case, Appellant seems to impute to the trial judge's sentencing the comment made by the solicitor and there is no evidence of such. Unlike Davis and Hazel, the trial judge in this case did not make any comments regarding a guilty plea or exercising the right to trial.

Appellant also relies on a quote from State v. Follin[1] stating "We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercises the right to a jury trial." (Initial Brief of Appellant p. 14). In State v. Follin, Follin was convicted of aiding and abetting embezzlement, criminal conspiracy, and obtaining goods and services by false pretenses, in connection with the diversion of funds from a school district through a fake travel scheme. State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002). Most of the other individuals charged in the scheme pled guilty to the charges, however Follin proceeded to trial. Id. On appeal, Follin argued that the trial court erroneously considered her exercise of the right to a jury trial by sentencing her more severely than her co-defendants who pled guilty. Id. This court held that Follin was not in the same position as the others because they were not all charged with identical crimes and they faced different sentences. Id. at 256, 823. In regard to the comments that the trial judge made about the guilty pleas, the court stated

> "It is regrettable that the trial judge in the present case commented on Adam's guilty plea and the consideration given to him for pleading guilty. However, the trial judge repeatedly noted that he was not considering Follin's exercise of her right to a jury trial in rendering her sentence. Further, Follin's charged and potential sentences were vastly different so as to render comparison to any other co-defendant difficult. Thus, unlike *Brouwer*[2], the record before us clearly indicates that the differences

[1] State v. Follin, 352 S.C. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002)
[2] State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001).

> in the charges Follin faced led to the disparity in her sentence, not her decision to proceed with a trial."

Id. at 257, 823-824. Although the trial judge in Follin made comments regarding a guilty plea, it was evident that her decision to proceed to trial did not affect her sentence. Again, in the present case the trial judge did not make any comments about Appellant pleading guilty or exercising his right to go to trial.

Lastly, Appellant relies on State v. Brouwer in which the Court held that despite trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge expressly violated Davis by improperly considering that fact during sentencing especially since the record failed to show another reason for the disparate sentence given between Brouwer and his co-defendant who was charged with the same offense. State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). The present case is distinguished from Brouwer for two reasons. First and again, there were no comments by the trial judge regarding a jury trial or a guilty plea here. In addition is there is no evidence in the record that there was a co-defendant who was charged with the same crime and received a much shorter sentence because he pled guilty.

Further, burglary in the first degree is a felony punishable by life imprisonment with a minimum sentence of no less than fifteen years. S.C. Code Ann § 16-11-311(B) (Supp. 2019). Appellant was approximately 20 years old at the time of sentencing. Considering the young age of Appellant and the maximum sentence that could have been imposed on Appellant, five years over the minimum sentence was well within the sentencing range for his convictions and is evidence that the trial judge did not abuse his discretion in sentencing Appellant. Therefore, Appellant's sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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