

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2013-000396

THE STATE,

Respondent,

vs.

THOMAS E. GILLILAND,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

Petitioner's directed verdict issue is not preserved for review because Petitioner did not specifically object to the sufficiency of the evidence with respect to the intent to commit a crime element of burglary in the first degree. Regardless of preservation, the Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion for a directed verdict on the charge of burglary in the first degree because Petitioner had the intent to violate an order of protection, which is a crime in South Carolina, when he entered the victim's dwelling at nighttime without her consent.

II.

The Court of Appeals properly concluded that trespass is not a lesser-included offense of burglary in the first degree.

STATEMENT OF THE CASE

Procedural History

In September 2010, a Greenville County Grand Jury indicted Petitioner on one count of violating an order of protection and one count of burglary in the first degree. On February 1, 2011, Petitioner proceeded to trial. On February 2, 2011, the jury found Petitioner guilty of both charges. The Honorable G. Edward Welmaker sentenced Petitioner to fifteen years of imprisonment for the burglary in the first degree conviction and thirty days of imprisonment for the violation of the order of protection conviction.

On February 10, 2011, Petitioner filed a notice of appeal, and the Court of Appeals heard arguments on October 29, 2012. On November 28, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence in a published opinion. State v. Gilliland, __ S.C. __, 741 S.E.2d 521 (Ct. App. 2012). On December 13, 2012, Petitioner filed a petition for rehearing; the Court of Appeals denied the petition on January 25, 2013.

On April 26, 201, Petitioner served a petition for writ of certiorari. This return follows.

Factual History

On March 16, 2010, Petitioner broke into Pamela Morgan's ("Morgan") home through a bathroom window without Morgan's consent. (R. p. 12 lines 15-17; R. p. 30 lines 3-10.) Petitioner allegedly went to Morgan's house in order to reconcile with Morgan and obtain his belongings. (R. p. 97 lines 8-24; R. p 98 lines 10-17.)

At trial, Morgan testified that approximately two years before the March 16, 2010 incident, she met Petitioner at work. (R. p. 25 lines 10-12.) Shortly after the two met, they

began dating. (R. p. 81 lines 3-7.) Eventually, Petitioner moved in with Morgan. (R. p. 23 lines 24-25 - R. p. 24 lines 1-5; R. p. 81 lines 12-16.) However, around January of 2010, an incident occurred that made Morgan realize she could no longer live with Petitioner. (R. p. 24 lines 4-8.)

As a result of the January of 2010 incident, Morgan sought an order of protection against Petitioner. (R. p. 24 lines 7-11.) On February 16, 2010, the Thirteenth Judicial Circuit Family Court issued an order of protection against Petitioner pursuant to the Protection from Domestic Abuse Act. (R. pp. 164-167; S.C. Code Ann. § 20-4-60 (1976)).

The order of protection prohibited Petitioner from doing the following acts: 1) abusing, threatening to abuse, molesting, or engaging in any conduct that would place Morgan in reasonable fear of bodily injury; 2) using, attempting to use, or threatening to use physical force against Morgan that would reasonably be expected to cause bodily injury; 3) communicating or attempting to communicate with Morgan; or 4) entering or attempting to enter Morgan's place of residence, employment, or education. (R. pp. 164-167.)

During the trial, Deputy Rebecca Devore-Snow testified that on February 10, 2010, she served Petitioner with the summons and notice of an emergency hearing for an order of protection. (R. p. 75 lines 23-24.) However, Petitioner testified that he did not attend the hearing. (R. p. 82 lines 4-12.) After the Family Court granted Morgan's request for an order of protection, Deputy Kenneth Posey testified that he served the order of protection upon Petitioner on February 23, 2010. (R. p. 76 lines 24-25- R. p. 77 line 1.) At trial, Petitioner admitted that he received and understood the order of protection. (R. p. 84 lines 19-23; R. p. 113 lines 8-25-R. p. 114 lines 1-4.)

After the order of protection was issued, Morgan called Petitioner's son. (R. p. 29 lines 14-25.) However, Petitioner's son handed the phone to Petitioner. (R. p. 30 lines 11-20.) Morgan told Petitioner that one of his family members could come over and obtain Petitioner's belongings. (R. p. 30 lines 1-8.) But Morgan did not give Petitioner permission to come to her house. (R. p. 30 lines 9-10.)

On March 15, 2010, Morgan left work around 11:00 p.m. Hoping to be greeted by her dog, Morgan arrived at her home around 12:10 a.m. (R. p. 32 lines 17-22.) But Morgan found more than just her dog in her home. (R. p. 33 lines 1-11.) Much to Morgan's surprise, Petitioner walked out of Morgan's bedroom and approached her. (R. p. 33 lines 5-12; R. p. 31 lines 19-20.) Completely startled, Morgan asked Petitioner how he got inside her house. (R. p. 33 lines 5-25.) Petitioner responded, "I'm a cat burglar. Doors can be jimmed, windows can be opened." (R. p. 33 lines 11-25- R. p. 34 line 1.)

Morgan testified that she did not make any effort to run or call out for a neighbor because she knew it would not do any good. (R. p. 35 lines 7-14.) Approximately three hours later, Morgan was finally able to call 911. (R. p. 35 lines 15-24.)

At trial, Deputy Ryan Brent Flood testified that he responded to a 911 call relating to a domestic disturbance at Morgan's home at approximately 3:00 a.m. on March 16, 2010. (R. p. 4 lines 9-16.) When he arrived at the scene, he knocked on the back door of Morgan's home and observed Petitioner standing inside the house behind a frightened Morgan. (R. p. 5 lines 16-25 - R. p. 6 lines 1-5; R. p. 7 lines 14-18.) Upon questioning, Petitioner admitted to Deputy Flood that he entered Morgan's home through the bathroom window in hopes of reconciling with Morgan. (R. p. 12 lines 6-18.) Petitioner also admitted to Deputy Flood that there was an order of protection prohibiting Petitioner from contacting Morgan. (R. p. 12 lines 20-22.)

At the close of the State's case, Petitioner moved to dismiss the charge of burglary in the first degree. (R. p. 78 lines 9-12.) However, the trial judge denied Petitioner's motion. (R. p. 78 lines 13-22.)

Thereafter, Petitioner chose to testify in his defense. (R. p. 79 lines 8-23.) According to Petitioner, Morgan contacted Petitioner's son while Petitioner was out on a walk. (R. p. 85 lines 16-18.) When Petitioner returned from his walk, Petitioner's son handed the phone to Petitioner. (R. p. 85 lines 18-19.) During the conversation, Petitioner claimed Morgan told him he could come get his clothes and truck from her house after she got off of work. (R. p. 86 lines 3-10.) Petitioner further testified he walked eight miles to Morgan's house, and he arrived at Morgan's house around 12:15 a.m. on March 16, 2010. (R. p. 86 lines 17-20; R. p. 90 lines 3-5.) Petitioner claimed he knocked on the back door of Morgan's house, and Morgan let him inside her home. (R. p. 88 line 23; R. p. 89 lines 8-9.)

At trial, Petitioner admitted he understood that writing letters to Morgan, entering Morgan's home, and calling Morgan were all violations of the order of protection. (R. p. 83 lines 7-18; R. p. 84 lines 24-25 - R. p. 85 lines 1-7; R. p. 115 lines 1-25.) Nevertheless, he chose to contact Morgan. (R. p. 115 lines 1-14.) Petitioner admitted to violating the order of protection by writing Morgan letters on numerous occasions but claimed he had to write the letters because he loved Morgan so much. (R. p. 83 lines 15-18; R. p. 121 lines 9-25 - R. p. 122 lines 1-10; R. p. 134 lines 22-25 - R. p. 135 lines 1-5.) In one of Petitioner's letters to Morgan, Petitioner wrote, "I understand they think they know how to protect you, but they don't. I must concentrate on what's good for us, and not what's right for the system." (R. p. 119 lines 2-9.)

During the jury charge conference, Petitioner asked the court to charge the jury on trespass as a lesser-included offense of burglary in the first degree. (R. p. 138 lines 16-20; R. p. 139 lines 7-16.) After the court conducted its own research, the court denied Petitioner's motion to charge the jury on trespass. (R. p. 139 lines 20-21; R. p. 140 lines 23-24.)

ARGUMENT

I.

Petitioner's directed verdict issue is not preserved for review because Petitioner did not specifically object to the sufficiency of the evidence with respect to the intent to commit a crime element of burglary in the first degree. Regardless of preservation, the Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion for a directed verdict on the charge of burglary in the first degree because Petitioner had the intent to violate an order of protection, which is a crime in South Carolina, when he entered the victim's dwelling at nighttime without her consent.

Petitioner's directed verdict argument fails for two fundamental reasons:

First, Petitioner never argued to the trial judge that the State failed to prove the intent element of burglary in the first degree. Petitioner only made a general directed verdict motion. Thus, the issue is not preserved for appellate review.

Second, a violation of an order of protection is a crime in South Carolina, and Petitioner admitted he intentionally violated the order of protection when he entered Morgan's dwelling in attempt to contact Morgan. Thus, the State presented direct evidence that Petitioner had the intent to commit a crime when he entered Morgan's dwelling.

Standard of Review

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). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). Critically, the appellate court may only reverse the trial judge's denial of a directed

verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

A. Preservation

First, Petitioner's directed verdict argument fails because Petitioner never argued to the trial judge that the State failed to present evidence of the intent element of burglary in the first degree. Petitioner never argued that a violation of an order of protection could not be the predicate offense. Petitioner only made a general directed verdict motion. Thus, the issue is not preserved for appellate review.

"Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970).

Also, an issue must be raised in a sufficiently specific manner so that the trial judge knows exactly what error he or she is being asked to rule upon. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into

focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.”).

In the case at hand, Petitioner failed to preserve the directed verdict issue because Petitioner only made a general directed verdict motion. After the State presented its case, Petitioner moved for a directed verdict because “the State [did] not [prove] the elements of the crime.” (R. p. 78 lines 9-12.) But Petitioner never raised the issue of whether a violation of an order of protection could serve as the predicate crime for burglary in the first degree. (R. p. 78 lines 9-12; R. p. 137 lines 20-22.) In fact, Petitioner never mentioned the intent element in his motion for a directed verdict. (R. p. 78 lines 9-12; R. p. 137 lines 20-22.) Instead, Petitioner made a general motion to dismiss the burglary charge and failed to state his grounds for a directed verdict with specificity.

Because Petitioner failed to state his grounds for a directed verdict with specificity, the trial judge was never presented with the issue Petitioner argues on appeal. Thus, the trial judge never had an opportunity to rule upon the issue, and the issue is not preserved for appellate review.

B. Merits

Second, Petitioner’s directed verdict argument fails because Petitioner admitted he entered Morgan’s dwelling with the intent to contact Morgan in violation of an order of protection, which is a crime in South Carolina.

i. South Carolina’s Burglary in the First Degree Statute

In South Carolina, “[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) (1976).

ii. South Carolina’s Order of Protection Statutes

Section 16-25-20 (D) of the South Carolina Code provides the following: “A person who violates . . . an order of protection . . . is guilty of a *misdemeanor* and, upon conviction, must be imprisoned not more than thirty days and fined not more than five hundred dollars.” S.C. Code Ann. § 16-25-20 (D) (emphasis added).

Further, the Protection from Domestic Abuse Act provides the punishment for individuals who violate order of protections. S.C. Code Ann. § 20-4-60 (B) (1). The Act states the following: “Violation of this order is a *criminal offense* punishable by thirty days in jail or a fine of two hundred dollars or may constitute contempt of court punishable by up to one year in jail and/or a fine not to exceed fifteen hundred dollars.” *Id.* (emphasis added).

iii. Legislative Intent

This Court need not look any further than the plain meaning of sections 16-11-311 (A) and 16-25-20 (D) in order to affirm Petitioner’s sentence and conviction.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Further, “[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.

Therefore, the courts are bound to give effect to the express intent of the legislature.”
Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Notably, in State v. Brooks, this Court held that any crime would satisfy the intent to commit a crime element of burglary. State v. Brooks, 277 S.C. 111, 113, 283 S.E.2d 830, 831 (1981). The crime the defendant intended to commit when he or she entered the dwelling did not have to be a felony. Id. In support of its holding, this Court discussed the seriousness of burglary and pointed out that the seriousness of the crime was not mitigated by the fact that the defendant only intended to commit a misdemeanor. Id.

Here, the Legislature was clear: A violation of an order of protection is a “criminal offense.” S.C. Code Ann. § 20-4-60 (B) (1). Violation of an order of protection is a misdemeanor. S.C. Code Ann. § 16-25-20 (D). The plain language of sections 16-11-311 (A), 16-25-20 (D), and 20-4-60(B)(1) is unambiguous. Moreover, there is no evidence that the Legislature intended to exclude certain crimes from qualifying as the predicate offense. In fact, section 16-11-310 of the South Carolina Code, which is the definition section for the three burglary statutes, does not define crime at all. S.C. Code Ann. § 16-11-310.

Viewing the evidence in the light most favorable to the State, the evidence established that Petitioner entered Morgan’s dwelling around 12:10 a.m. without Morgan’s consent. When Petitioner entered the dwelling, he was aware that there was an order prohibiting him from contacting Morgan and entering Morgan’s residence. Petitioner admitted he intentionally violated the order of protection but justified his crime by claiming he only wanted to talk to Morgan in order to reconcile. Contrary to Petitioner’s contentions, the plain language of sections 16-11-311 (A), 16-25-20 (D),

and 20-4-60(B)(1) makes no exception for good intentions.¹ Thus, when Petitioner entered Morgan's home at nighttime, without Morgan's consent, and with the intent to commit the misdemeanor of violating an order of protection, Petitioner committed burglary in the first degree.

iv. Other Jurisdictions

Petitioner argues that his "unlawful entry cannot establish both elements of burglary in the first degree – entry without consent and intent to commit a crime in the dwelling." (Pet. Cert. p. 12.) Petitioner cites to a number of out-of-state cases in support of Petitioner's argument. But Petitioner's argument neglects the fact that he violated two provisions of the order of protection: 1) the no-entry provision and 2) the no-contact provision.

Even ignoring the fact Petitioner violated the no-entry provision of the order of protection,² Petitioner's violation of the no-contact provision alone would have satisfied the intent element of burglary.

¹ Petitioner points out that under section 20-4-60 (B)(2) of the South Carolina Code a person is guilty of trespass if he or she has been convicted of criminal domestic violence and is subject to an order of protection and enters or remains on the grounds of a domestic violence shelter in which the person's household member resides. Petitioner argues that the language in section 20-4-60 (B)(2) is easily transferred to any dwelling "in which the person's household member resides" because the statute treats the shelter as the person's home.

However, if the Legislature wanted to apply that language to any dwelling it would have done so. See State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) ("[T]he canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

Further, in section 16-25-125 (A)(1) defines domestic violence shelter and expressly limits the definition to a "facility whose purpose is to serve as a shelter." S.C. Code Ann. § 16-25-125 (A)(1). Thus, the Legislature has expressly rejected Petitioner's argument.

² In contrast to the out-of-state cases Petitioner relies upon, no South Carolina case has ever held that trespass cannot serve as the predicate crime for burglary in the first degree. In fact, the only South Carolina case that attempted to address whether trespass could serve as the predicate crime for burglary in the first

Other jurisdictions have examined whether a violation of a no-contact provision of an order of protection may serve as the predicate crime for burglary. See Colorado v. Rhorer, 967 P.2d 147, 148 (Colo. 1998); Colorado v. Widhalm, 991 P.2d 291, 294 (Colo. App. 1999); Minnesota v. Colvin, 645 N.W.2d 449, 454 (Minn. 2002); Washington v. Stinton, 89 P.3d 717, 721 (Wash. Ct. App. 2004); People v. Cajigas, 979 N.E.2d 240 (N.Y. 2012).

In Rhorer, the Supreme Court of Colorado held that a violation of a no-contact restraining order satisfies the intent element of burglary. 967 P.2d at 148. The defendant broke into the basement window of the victim's house in violation of a no-contact provision of a restraining order. Id. Because the restraining order statute stated it was a crime to violate the order, the defendant's violation of the no-contact order served as an appropriate predicate crime for burglary. Id. at 150.

Relying on Rhorer, the Colorado Court of Appeals in Widhalm held that a "violation of a restraining order could serve as a predicate crime for first degree burglary." Widhalm, 991 P.2d at 294. The court reasoned that because the defendant entered the victim's apartment with the intent to contact the victim in violation of the restraining order, the jury could conclude the defendant committed burglary. Id.

degree was a post-conviction relief case. See McMillian v. South Carolina, 383 S.C. 481, 680 S.E.2d 905 (2009).

In McMillian, the petitioner claimed his trial counsel was ineffective because his trial counsel advised him that trespass could serve as the predicate crime of first degree burglary. 383 S.C. at 482, 680 S.E.2d at 906. The Court cited a case, State v. Christensen, 194 S.C. 131, 9 S.E.2d 555 (1940), that was decided when the old statute of housebreaking was in effect. 383 S.C. at 486-87, 680 S.E.2d at 908. Under the old housebreaking statute, "the element of intent to commit a crime of a lesser grade could be satisfied by a trespass." 383 S.C. at 486, 680 S.E.2d at 908. Although the Court did not directly state trespass could serve as the predicate crime for burglary in the first degree, the Court did conclude that petitioner's trial counsel was not ineffective when she advised the petitioner that trespass could serve as the predicate crime for burglary in the first degree. 383 S.C. at 487-88, 680 S.E.2d at 908-909.

In Colvin, the Supreme Court of Minnesota noted that the defendant could have violated the order of protection in a number of ways. 645 N.W.2d at 452. The order of protection prohibited the defendant from: “(1) committing acts of domestic abuse against his ex-wife; (2) having any contact with his ex-wife; (3) entering her residence; (4) entering or calling her workplace.” Id. In violation of the order of protection, the defendant in Colvin entered his ex-wife’s home and started watching television and drinking beer inside the ex-wife’s house. Id. at 450-451. He made no attempt to contact the ex-wife. Id. at 452-453. But the court stated: “[W]e in no way hold that all violations of an [order of protection] are the same as trespass. We simply hold that all the factfinder found in this case was an illegal entry.” Id. at 455. The court noted that if the defendant had tried to contact his ex-wife in violation of the order of protection, then his conduct would not have resembled trespass. Id. at 452.

Further, in Stinton, the Washington Court of Appeals held that a violation of an order of protection satisfied the intent to commit a crime element of burglary. 89 P.3d at 721. The order of protection in Stinton prohibited the defendant from committing harassing contact with his ex-girlfriend. Id. at 718. Also, the order of protection prohibited the defendant from entering his ex-girlfriend’s home. Id. Despite the order, the defendant broke his ex-girlfriend’s door and entered her house. Id. The defendant argued with his ex-girlfriend and refused to leave her house. Id. The court reasoned that the defendant’s harassing contact with his ex-girlfriend was a “separate and distinct” violation of the order of protection from the mere unlawful entry. Id. at 720.

Finally, in Cajigas, the highest court of New York held that the mens rea element of burglary may be satisfied by showing that the defendant intended to commit an act that would not be illegal absent the order of protection. 979 N.E.2d at 242.

In the case at hand, Petitioner admittedly violated the no-contact provision and the no-entry provision of the order. Petitioner knew contacting Morgan was against the law. But Petitioner did not care.³ Violation of just one of the provisions would have satisfied the intent element of burglary. Regardless of Petitioner's alleged benevolent intent, he committed a crime. The whole point behind the no-contact provision of the order of protection is to prevent victims from having to see or hear from their past abusers. The fact that Petitioner only had good intentions when he violated the no-contact provision of the order is irrelevant. Petitioner still committed a crime.

In summary, Petitioner intended to violate two provisions of the order of protection when he broke into Morgan's home without her consent: 1) the no-contact provision and 2) the no-entry provision. Violation of an order of protection is a crime in South Carolina. Thus, the State presented sufficient evidence that Petitioner intended to commit a crime when he entered Morgan's dwelling.

v. *Policy*

Further, by recognizing that a violation of an order of protection may serve as the predicate crime for burglary in the first degree, this Court is furthering the purpose behind the Protection from Domestic Abuse Act.

According to the Protection from Domestic Abuse Act, the purpose of an order of protection is "to protect the petitioner or the abused person" by "enjoining the respondent from communicating or attempting to communicate with the petitioner . . . and . . .

³During Petitioner's closing, Petitioner's trial counsel admitted to the jury that Petitioner violated the order of protection, and she urged the jury to find Petitioner guilty of violating the order of protection. (R. p. 142 lines 20-25; R. p. 143 lines 1-5; R. p. 144 lines 1-4.)

enjoining the respondent from entering or attempting to enter the petitioner's place of residence S.C. Code Ann. § 20-4-60 (A) (1) & (2).

Individuals protected by such orders should additionally be protected by our burglary laws because burglary is considered an offense against habitation rather than property. See State v Ferebee, 273 S.C. 403, 406, 257 S.E.2d 154, 155 (1979). In Brooks, this Court recognized the dangerousness of burglary and stated the following: “[A]t the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night.” Brooks, 277 S.C. at 112-113, 283 S.E.2d at 831.

In this case, Petitioner knew he was committing a crime when he contacted Morgan and entered Morgan's house. But he simply did not care. Petitioner believed that his unwanted love for Morgan provided him a legal defense. Petitioner's blatant disrespect for the courts in this State was clear from his testimony and letters he wrote to Morgan. Petitioner's actions and attitude is the epitome of why this Court should recognize violations of an order of protection as a crime that can serve as the predicate offense of burglary. The seriousness of the burglary was not mitigated by the fact that Petitioner claimed he only wanted to reconcile with Morgan. See Brooks, 277 S.C. at 113, 283 S.E.2d at 831.

In summary, our burglary statutes should protect individuals from the most unwanted intrusion, an intrusion into an individual's home by a stalker or abuser, who a court has ordered to stay away.

II.

The Court of Appeals properly concluded that trespass is not a lesser-included offense of burglary in the first degree.

Petitioner argues that trespass is a lesser-included offense of burglary in the first degree because the State used a violation of an order of protection as the predicate crime for burglary in the first degree. But Petitioner's argument is based on a flawed premise: Courts do not look at the elements of the predicate offense to determine whether trespass is a lesser-included offense of burglary in the first degree. Instead, courts compare the elements of trespass to the elements of burglary in the first degree to make the lesser-included offense determination. Because trespass requires the element of prior warning and burglary in the first degree does not, trespass is not a lesser-included offense of burglary in the first degree.

i. No error

To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008); State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 301 (2002)

The trial court must charge the jury on a lesser-included offense if a jury could infer from any evidence that the defendant committed the lesser rather than the greater offense. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). The test for determining if one offense is the lesser-included offense of another is the elements test. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002). Under the elements test, the greater offense must include all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000).

The elements of burglary in the first degree are as follows: “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).

Further, the elements of trespass are as follows:

Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person **after having been warned not to do so or any person who, having entered into the** dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative.

S.C. Code Ann. § 16-11-620 (emphasis added).

In State v. Cross, the Court of Appeals held that statutory trespass and common law trespass were not lesser-included offenses of burglary in the first degree. State v. Cross, 323 S.C. 41, 44, 448 S.E.2d 569, 570 (Ct. App. 2004). Applying the elements test, the court reasoned that burglary in the first degree does not require a prior warning against entry or a request to leave; however, statutory trespass does require that element. Cross, 323 S.C. at 44, 448 S.E.2d at 570. Also, “[c]ommon law criminal trespass requires either a willful malicious injury or entry after notice” but burglary does not. Id.

In the case at hand, Petitioner’s argument is flawed because the predicate crime to the burglary in the first degree offense is irrelevant when determining whether or not trespass is a lesser-included offense of burglary in the first degree. Contrary to Petitioner’s assertion, courts do not apply the elements test by looking at the individual facts of each case. For example, the court in Cross did not base its determinations concerning the relationship between trespass and burglary on the facts presented at Cross’

trial. Id. Instead, the court compared the elements of the offenses. Id. The fact that the State proved Petitioner violated the order of protection is irrelevant to the application of the elements test. Petitioner tries to revive the test set forth in Grady v. Corbin, 495 U.S. 508, 518 (1990), which looks at the underlying conduct of the offenses. But the Supreme Court overruled the same conduct test in United States v. Dixon, 509 U.S. 688 (1993). See State v. Brandt, 393 S.C. 526, 537, 539, 713 S.E.2d 591, 596, 598 (2011) (recognizing that the United States Supreme Court overruled the same conduct test and reiterating that the same elements test is the only test used in South Carolina); State v. Jolly, Op. No. 5128 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 97) (applying the same elements test to double jeopardy violations).

Thus, the trial judge properly denied Petitioner's request to charge trespass as a lesser-included offense of burglary in the first degree.

ii. No Prejudice

Even if trespass was a lesser-included offense of burglary in the first degree, there is no evidence Petitioner committed trespass to the exclusion of burglary. Thus, Petitioner suffered no prejudice from the trial judge's denial to charge trespass.

In South Carolina, a trial court commits error by refusing to charge a lesser-included offense only if the evidence supports a reasonable inference that the accused committed the lesser *rather than* the greater offense. State v. Fuchess, 267 S.C. 427, 229 S.E.2d 331 (1976); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Morris, 307 S.C. 480, 415 S.E.2d 819, 821 (Ct. App. 1992) (emphasis added). The fact the "jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge." Morris, 307 S.C. at 483, 415 S.E.2d at 821; see also State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596-97 (1994) (finding "where there is

no evidence to support a finding that the defendant was guilty of the lesser offense, there can be no error in the failure to charge the lesser offense.”)

Here, the jury had the option of believing one of two versions of events that took place on March 16, 2010. The first version was that Petitioner broke into Morgan’s home through her bathroom window. The other version was that Morgan invited Petitioner into her home. Based on the jury’s verdict, the jury believed Petitioner broke into Morgan’s home through her bathroom window. However, if the jury believed Petitioner’s story that Morgan invited him into her home, then Petitioner would not have been guilty of burglary or trespass. In other words, Petitioner was guilty of burglary or nothing. Thus, Petitioner suffered no prejudice from the trial court’s refusal to instruct the jury on trespass.

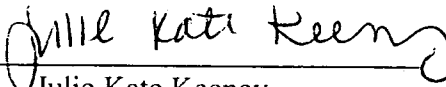
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 28, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2013-000396

THE STATE,

Respondent,

vs.

THOMAS E. GILLILAND,


Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 28th day of May, 2013.



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