STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ISSAC MOBLEY,

APPELLANT

APPELLATE CASE NO. 2022-000450

INITIAL BRIEF OF APPELLANT

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The trial judge erred in denying appellant's directed verdict motion on the burglary charge because the state's evidence did not establish sufficient proof that appellant possessed the requisite intent to commit a crime in the case.

STATEMENT OF THE CASE

Appellant Michael Issac Mobley was convicted of second degree burglary (violent) pursuant to a bench trial held during the April, 2022 term of the York County General Sessions Court before Judge William A. McKinnon. Appellant was sentenced to imprisonment for a period of six years. Assistant Solicitors Chris Epting and Peri Imler prosecuted the case on behalf of the state, and Attorney Geoffrey M. Dunn appeared on appellant's behalf.

Appellant appealed his conviction and sentence. This brief follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." Clasby, 385 S.C. at 154, 682 S.E.2d at 895; see State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia,* the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

A case should be submitted to the jury when the evidence is circumstantial "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. Bostick, 392 S.C.134, 708 S.E.2d 774 (2011)(quoting State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126(2000)). "Evidence must

constitute positive proof of facts and circumstances which reasonably tends to prove guilt" Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of a guilty is not error." Id. At 139, 708 S.E.2d 776-777. "On appeal of the denial of the a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. 139, 708 S.E.2d at 772. See also State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).

ARGUMENT

The trial judge erred in denying appellant's directed verdict motion on the burglary charge because the state's evidence did not establish sufficient proof that appellant possessed the requisite intent to commit a crime in the case.

Appellant was on trial per an indictment containing the allegation that he entered a building at night without consent and with the intent to commit a crime therein.

Officer Thomas Austin testified that he was dispatched to Workman's Oil Company in York County after midnight on the morning of December 9, 2021, and that he arrived on the scene to find a slightly bent plexiglass window pane protruding out at the bottom level of the company's garage door. Officer Austin stated that he searched the garage minutes later and found appellant lying underneath one of the vehicles inside. Appellant was detained and arrested in connection with the break-in. Tr. 77, l.5-p. 91, l.16.

Appellant testified at trial and explained that he was in effect homeless on the morning in question, and that he entered the building at issue to escape from the cold weather outside after his ex-wife made him leave her home around midnight. Appellant added that this was why the police found him sleeping inside the garage, and that he had not taken anything from inside the garage. Tr. 114, l.16-p.123, l.11.

Building manager Wendy Shaner testified that there was a prior incident on March 20, 2020[1] when appellant broke into the same building, "the same way, through the same window;" and that at that time, appellant took cigarettes, sodas, and chips from inside the building. Tr. 60, l.19-p. 69, l.4. The state sought to introduce the prior burglary from March 20, 2020, into

[1] Appellant pled guilty to second degree burglary and received a two-year sentence for entering the same building Workman Oil on March 20, 2020. Tr. 6, l.17-p. 7, l.3.

evidence in order to prove intent with respect to the instant burglary charge that occurred on December 9, 2021, for which appellant was on trial. Tr. 6, l.17-p. 8, l.2.

At the close of the state's case, defense counsel moved for a directed verdict on the burglary charge because there was insufficient evidence to establish any intent on appellant's behalf to commit a crime upon or after entering this garage. In addition, defense counsel argued that the use of appellant's prior burglary crime to prove intent in this case was insufficient evidence of intent on the instant burglary case due to the dissimilarities between the two events. Tr. 104, l.20-p. 107, l.2.

Second degree burglary under S.C. Code Ann §16-11-312 (B) is committed if a person enters a building without consent and with the intent to commit a crime therein. Here, appellant was in a building without consent at night, but there was no intent to commit a crime therein on appellant's behalf (that being the crime of theft or any other crime) because appellant's intent was not to steal, but rather to escape cold temperatures outside and find a place to sleep for the night. The prior burglary wherein appellant entered into the same building was for a purpose, and that purpose was to steal. However, the prior burglary occurred under a different scenario and did not provide sufficient proof of intent in the instant case because the circumstances in the instance included a different purpose, i.e., the purpose of lodging rather than the purpose of stealing.

Intent is defined as the state of mind required for the commission of a crime. State v. Shands 424 S.C. 106, 817, S.E.2d 524 (2018). Proof of intent rests on inferences from one's conduct. State v. Haney, 257 S.C. 89, 184 S.E.2d 344 (1971). Although the element of intent to commit a crime under the burglary statute must exist at the time the accused enters a dwelling/building, the jury may base its determination of that intent upon evidence of the

accused's actions once inside the place. State v. Gilliand, 402 S.C. 389, 741, S.E.2d 521 (2012), citing to State v. Pinckney, 339 S.C.346, 529 S.E.2d, 526 (2000). In Gilliand, the Court held that the defendant entered the home in question with the intent to commit a crime therein because his entrance was in violation of a prior protection order that concerned the female who resided there whom he was not allowed to contact. In Pinckney, where the defendant entered a home to escape people he believed were after him, the Court of Appeals held that there was no intent to commit a crime upon his entry;[2] but the South Carolina Supreme Court held on further review that the defendant's actions after he entered the house by barricading himself in a bathroom and threatening to "light the place up" satisfied the element of the intent to commit a crime inside that home. Also, compare State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (1999), where the Court found proof of the defendant's intent at the time he entered a home without consent because he grabbed a female once inside and threw her on the bed before fleeing after a child woke, despite the fact that he was later not found guilty of sexual assault. See also McMillan v. State, 383 S.C. 480, 680 S.E.2d 905 (2009), where the Court held that intent to commit the offense of trespassing could be inferred where a defendant entered a home without consent for assistance because he said someone was chasing him and trying to kill him.

In the case at bar, there was insufficient evidence to support the element of intent to commit a crime on appellant's behalf upon and after entering the garage in question. Appellant entered as a homeless man to escape the cold weather and ended up falling asleep. The officer found no items on his person that would have been property of the garage, which meant theft was not an issue in the case. Also, appellant was not engaged in fleeing the scene. Comparatively speaking, none of the burglary scenarios under Gillian, Pinckney, Peterson, or McMillan existed

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[2] State v. Pinckney, Memorandum Op No. 98-UP-495 (Ct. App. Filed November 9, 1998).

here. There was no proof that appellant entered the garage on December 9, 2021, with any intent to commit a crime therein.

In ruling on a directed verdict motion in a criminal case, a trial court must view the evidence in the light most favorable to the state, and analyze the existence or nonexistence of evidence rather than its weight, and then submit the 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 maybe fairly and logically deduced. State v. Phillips, 416 SC 184, 785, S.C.2d 448 (2016). The trial judge should not refuse to grant a directed verdict if the evidence raises a mere suspicion of guilt. State v. Phillips, supra. In the case at bar, the trial judge erred in denying appellant's directed verdict motion on the burglary charge filed against him.

ARGUMENT II

The trial judge erred in admitting appellant's prior burglary conviction into evidence because the prior did not qualify as admissible under the intent or common scheme or plan exceptions outlined in State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923).

Appellant was on trial pursuant to an indictment that charged him with second degree burglary based on the accusation that he entered a building (company garage) without consent via a plexiglass window pane at night with the intent to commit a crime therein. Prior to trial, the solicitor informed the trial judge of evidence that would be presented at trial in the form of a prior burglary crime where appellant previously entered the same building (via a window pane), and took various canteen items (sodas, toilet paper), whereinafter he was apprehended, charged and convicted. The solicitor's position was that appellant intended to operate in the same manner in this burglary case as he did previously in the prior burglary case. Tr. 6, l. 1 – p. 8, l. 2.

A pre-trial hearing was held in the matter in the form of a proffer where police officer Eric Olsen testified in camera that he was in charge of an investigation into a garage break-in at Workman Oil Company that occurred in "March of 2020," and that the entering was accomplished through a garage window pane by appellant, and that he took several items (sodas, toilet paper) from inside at that time (actions videotaped), and that appellant was subsequently apprehended by officers as he walked away from the scene. Tr. 9, l.4-p. 22, l.15.

Officer Thomas Austin testified in camera during the pre-trial hearing and explained that he was dispatched to the same building in this case on December 9, 2021, and found appellant lying underneath a car in the garage building. Officer Austin admitted that nothing was taken by appellant during his stay inside the garage. Tr. 23, l.7-p. 35, l.13.

After the hearing, defense counsel argued that there were dissimilarities between the prior burglary and the instant burglary charge for which appellant was on trial to the extent that the prior was a down-sized modified "smash and grab," but that the instant offense was not the same, i.e., appellant did not leave quickly, and had no items in his possession for the taking, and was not in possession of a bag to carry out any items from inside. To the contrary, appellant entered the garage because he needed a place to sleep and avoid outside cold weather. Tr. 37, l.9-p.40, l.3, Tr. 45, lines 14-19. The state argued that the prior burglary was admissible to show intent and had not been overly prejudicial. Tr. 35, l.23-p.37, l.4. The trial judge ruled that said burglary prior constituted admissible evidence at trial. Tr. 40, l.24-p. 41, l.15.

At the close of the state's case, defense counsel argued for a directed verdict on the ground that intent had not been proved, and that the prior burglary used by the state to establish intent was inadmissible and prejudicial evidence that was also insufficient evidence of intent. Tr. 104, l.20-p. 107, l.2. The motion was denied. Tr. 108, 10-14. Counsel renewed his directed

verdict motion at the close of appellant's testimony after the defense rested its case. Tr. 130, l.8-p.131, l.16.

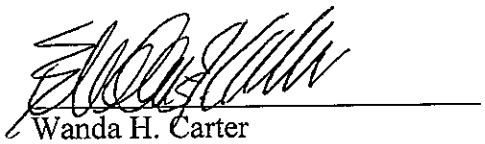
In State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), the Court held that prior crimes or bad acts are not admissible as evidence to prove a defendant committed the specific crime charged unless the evidence tends to establish motive, intent, absence of mistake, identity, or common scheme or plan. See also Rule 404(b), SCRE. Here, there was no proof that the prior burglary showed intent or common scheme or plan due to the dissimilarities between the prior burglary and the instant burglary. The prior burglary crime was dissimilar to the instant burglary charge for which appellant was on trial. Again, regarding the instant burglary case, appellant was not in possession of any items while he was inside the garage so there was no indication that his purpose for being inside the garage was to steal. The prior burglary assigned to appellant involved theft on his behalf. In the present case, appellant's presence in the garage was for the purpose of sleeping and escaping inclement weather only. See State v. Jenkins, 322 S.C. 414, 472 S.E.2d 251 (1996), where the Court reversed the defendant's burglary conviction where his prior "school of burglary" bad act was erroneously offered as Lyle exception evidence in connection to the burglary for which he was on trial. Also, regarding intent, evidence of other crimes that the state attempts to use as logically relevant to prove intent cannot be admitted under Lyle if its probative value outweighs its undue prejudicial effect. State v. Brooks, 341 SC 57, 533 S.E.2d 325 (2000). In Brooks, a prior forgery was used against a defendant who was on trial on a subsequent separate forgery offense to show intent, but the Court reversed and held that the prior was a two-party forgery offense that had no relevance to the case for which the defendant was on trial that involved a third-party forgery offense on a check submitted to a defendant as a loan payment, and that it was error to admit the prior as intent evidence. The Court held further in

Brooks that when prior bad acts are similar to the one for which a defendant is being tried, then the danger of prejudice is enhanced because the effect is the suggestion that the defendant is acting in conformity with a certain criminal propensity.

Here, the burglary prior should not have been submitted as intent evidence regarding the burglary charge for which appellant was on trial because the prejudicial value outweighed the probative value as the prior burglary was dissimilar to the instant burglary charge for which appellant was on trial, and because the prejudice of the prior being a previous burglary conviction heightened the prejudicial effect on the same. The trial judge erred in admitting appellant's prior burglary conviction into evidence due to the high prejudicial effect and because the prior did not qualify as admissible evidence under the intent or common scheme or plan exceptions under State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923).

CONCLUSION

Based on the foregoing arguments, appellant's conviction and sentence should be vacated; or in the alternate, appellant's case should be reversed and remanded for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of November, 2022.

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STATE OF SOUTH CAROLINA

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Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

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MICHAEL ISSAC MOBLEY,

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APPELLATE CASE NO. 2022-000450

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 7th day of November, 2022.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: Leverett, Scott
To: SC - BLITCH WILLIAM
Cc: SC - COLLINS CAROLINE; Carter, Wanda
Subject: Michael I. Mobley - Initial Brief of Appellant - Appellate Case No. 2022-000450
Date: Monday, November 7, 2022 3:06:00 PM
Attachments: Michael I. Mobley - Initial Brief of Appellant - Appelate Case No. 2022-000450.pdf

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Dear Mr. Blitch,

Attached please find a copy of the Initial Brief of Appellant that is being filed with the Court of Appeals today, November 7, 2022.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense