STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN LOUIS NATION,

APPELLANT

APPELLATE CASE NO. 2024-000185

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to direct a verdict of acquittal for first-degree burglary where there was no direct or substantial circumstantial evidence that Appellant possessed the intent to commit a crime when he entered the dwelling, since a defendant is entitled to a directed verdict when the evidence merely raises a suspicion of guilt?

STATEMENT OF THE CASE

On August 25, 2023, a Spartanburg County Grand Jury indicted Benjamin Nation, Appellant, for first-degree burglary. R. *(indictment). Appellant was tried before the Honorable R. Keith Kelly and a jury, from January 29 – February 1, 2024. Appellant was represented by Charles Snyder, III. Spenser Smith prosecuted the case. Tr. 1. Appellant was convicted as indicted, and he was sentenced to twenty-five years' imprisonment. Tr. 211, ll. 17-23; Tr. 217, ll. 17-18.

This appeal follows.

STANDARD OF REVIEW

"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, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (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 acquittal is not error." *Id.* at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." *Id.* at 139, 708 S.E.2d at 777; *see also State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. *Hepburn*, 406 S.C. at 429, 753 S.E.2d at 409.

ARGUMENT

The trial court erred in refusing to direct a verdict of acquittal for first-degree burglary where there was no direct or substantial circumstantial evidence that Appellant possessed an intent to commit a crime when he entered the dwelling, since a defendant is entitled to a directed verdict when the evidence merely raises a suspicion of guilt.

Relevant facts

Appellant was a twenty-nine-year-old construction worker who was friends with Greg Wall, a resident in the "Calhoun Lakes" area of Spartanburg County. R. *(sentence sheet); Tr. 83, ll. 12-14; Tr. 45, l. 12. Wall and Randall Etters lived at the Calhoun Lakes home, which was being remodeled. Tr. 112, ll. 2-16; Tr. 85, ll. 20-24; Tr. 51, ll. 3-13. Wall knew Appellant because Appellant did some of the construction work. Wall also knew Appellant through Wall's former roommate. Tr. 86, ll. 13-23; Tr. 52, ll. 2-20.

On December 22, 2022, Wall called the police for trespassing because Appellant, who was doing work on the house, refused to leave when it was time for him to leave, and Wall "was in a hurry to get somewhere." Wall stated he wanted the police to "hurry [Appellant] along a little bit." Tr. 86, l. 24 – 87, l. 21. (According to Wall, Appellant's behavior was often "kind of bizarre.") Tr. 87, ll. 6-8. Law enforcement arrived and gave a "trespass notice." Tr. 86, l. 24 – 87, l. 24; Tr. 80, l. 9 – 81, l. 11; Tr. 84, ll. 2-3. Nevertheless, Wall would testify at trial that he still considered Appellant a friend. Tr. 86, ll. 16-20.

Wall and Etters had large dogs. They left a glass door open for the dogs and to smoke. Tr. 66, ll. 7-23; Tr. 63, ll. 17-18. At approximately 6:41 a.m. on January 23, 2023, Etters was up getting ready for the day when he heard the dogs "acting different" and heard an unknown voice. Etters walked into the hall and saw Appellant inside the house. Tr. 81, ll. 24-25; Tr. 51, l. 3 – 52,

l. 3; Tr. 93, ll. 10-14. Appellant's car was parked in the driveway. Tr. 60, ll. 8-13; Tr. 98, ll. 8-14. Appellant had let himself in through the back gate and the open door. Tr. 56, l. 3 – 59, l. 21; Tr. 66, ll. 7 – 23; Tr. 76, l. 16 – 79, l. 6. Appellant had a water bottle and a couple of cellphones. Tr. 53, l. 25 – 54, l. 3. According to Etters, he asked Appellant why he was there, and told him to leave. Etters testified Appellant was "talking weird, like saying like just crazy off-the-wall stuff . . . He just, like wasn't in his right mind." Etters alleged Appellant was "having conversations with himself." However, Etters stated he never felt like he was in danger. According to Etters, Appellant was not hostile or confrontational, but he just would not leave. Wall woke up and went out to the hall and he also asked Appellant to leave but Appellant did not. The men therefore called 911. Tr. 67, ll. 14-22; Tr. 51, l. 3 – 54, l. 8; Tr. 87, l. 25 – 89, l. 12.

Wall stated Appellant had worked on the house half a dozen times. Wall confirmed Appellant "seemed his normal self, which is kind of out of it." Wall testified that he believed in Appellant's "mind, he was there to work[.]" Wall stated he had not invited Appellant over that morning, but Appellant had come over earlier in the week. Wall testified it was not unusual for Appellant to come by, but he would call first. Tr. 90, l. 19 – 92, l. 9; Tr. 95, ll. 23-25; Tr. 97, ll. 19-22.

Law enforcement arrived, arrested Appellant and had his car towed. Tr. 101, ll. 21-23; Tr. 109, ll. 20-22. Because the entry into the home occurred at approximately 6:40 a.m., it was dark outside. Tr. 81, ll. 22-24. Also, Appellant had a prior conviction for second-degree burglary and for third-degree burglary. Tr. 107, l. 21 – 108, l. 22. Therefore, Appellant was indicted for first-degree burglary. R. *(indictment).

At the conclusion of the State's case, Appellant moved for a directed verdict of acquittal.

Appellant argued the State had not proven the material element of intent to commit a crime inside the house. He noted Wall's testimony that Appellant appeared to believe he was there to do work. Tr. 114, l. 4 – 115, l. 7; Tr. 119, l. 14 – 121, l. 8. The State argued the jury could infer intent to commit a crime from trespassing: "[W]e argue that he broke into the house with the intent to commit a trespass." Appellant responded that using trespass as an element of burglary was "circular" reasoning. The solicitor further argued the jury could infer intent from Appellant's failure to leave, and it could infer that Appellant intended to commit larceny because he was in a dwelling at "nighttime." Tr. 115, l. 9 – 119, l. 12; Tr. 119, l. 21 – 120, l. 5. Appellant responded that this was mere speculation. Tr. 120, ll. 11-18. The court denied the motion and ruled it was up to the jury to determine intent from the circumstances. Tr. 121, ll. 9-18.

Appellant testified in his defense. Appellant admitted he was a little "weird." Tr. 135, l. 16. He also stated he might have Tourette's Syndrome or "Personification or something." Tr. 145, ll. 11-23. "I'm a weird guy, do you know what I mean?" Tr. 157, l. 17. Appellant stated that although he had been trespassed in December, he believed he was welcome back. Tr. 137, ll. 9-15. According to Appellant, he went over to Wall's house to find out if Wall had work for him that day. Appellant explained that 6:45 a.m. is a normal time to begin the workday. Appellant testified he had gone into the house unannounced and knocked on Wall's bedroom door before. Tr. 132, ll. 1-19.

Appellant testified he had last been in contact with Wall four days earlier, by text. Tr. 144, ll. 10-21. According to Appellant, the morning of the incident, he did not call Wall because his phone battery had died. "Greg's is a safe place. I felt like Greg would give me a charger." Tr. 143, l. 21 – 144, l. 9. Appellant stated that he did not leave when he was asked to because he

knew the police had been called and he did not want to run from the police. Tr. 138, l. 20 – 139, l. 15. Appellant admitted he had previously been charged with burglary for trespassing at his parents' house. Tr. 166, l. 1 – 167, l. 3.

At the conclusion of the defense's case, Appellant renewed his directed verdict motion, and the court denied the motion. Tr. 172, ll. 11-23. In closing argument, the solicitor argued that the jury could infer that Appellant intended to commit crimes such as larceny, breach of peace, harassment, or trespassing. Tr. 177, l. 6 – 179, l. 10. As seen, Appellant was convicted as indicted and received a twenty-five-year sentence.

Discussion

Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). An accused "is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing *State v. McHoney,* 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Brown,* 103 S.C. 437, 88 S.E. 21 (1916); *State v. Gore,* 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995)). *Accord State v. Heath*, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006) (same).

Denial of a directed verdict motion is only proper where viewing the evidence in the light most favorable to the State, the evidence could induce a reasonable juror to find the defendant guilty. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016). "[W]hen there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing *State v. Cherry*, 361 S.C. 588,

593, 606 S.E.2d 475, 478 (2004)). *Accord State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (same). The trial court should grant the motion for a directed verdict "where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127.

"It is the trial court's duty to submit the case to the jury where 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. Childs*, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989). "This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016).

S.C. Code Ann. § 16-11-311(A) provides in relevant 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 . . .
>
> (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
>
> (3) the entering or remaining occurs in the nighttime.

(emphasis added).

The solicitor argued the intent element was satisfied by the existence of a trespass. There is precedent that intent can be inferred from trespass to satisfy the elements of the now-repealed

offense of housebreaking. In *State v. Clark*, 85 S.C. 273, 67 S.E. 300, 302 (1910), the Supreme Court held that mere breaking and entering will not support a housebreaking. However, in *State v. Christensen*, 194 S.C. 131, 9 S.E.2d 555 (1940), the Court held intent for housebreaking could be inferred from the trespass of a landlord's agent into a tenant's dwelling to secure personal property in lieu of rent. *Christensen* is not controlling in this case, however. The offense of housebreaking has since been repealed and the offense of burglary substantially amended and codified. Moreover, *Christensen* has been criticized for the same reasons as those advanced by defense counsel during his motion. *See McAninch, Fairey and Coggiola*, The Criminal Law of South Carolina (5th Ed. 2007), 359 – 360 (*Christensen's* conclusion that intent to trespass will suffice for the crime of housebreaking "would seem to eviscerate" the intent element. This "conclusion would appear to bootstrap any trespass entry of a house of another into burglary.").

In modern times, the Supreme Court was presented with the question of whether trespass could provide the intent for burglary. The Court's decision, however, suggested the case actually presented a different question. In *McMillian v. State*, 383 S.C. 480, 482, 680 S.E.2d 905, 906 (2009), the Court addressed whether plea counsel provided ineffective representation when she advised McMillian that the intent to commit a crime could be inferred from the act of trespassing, such that it would provide a factual basis to support a plea to first-degree burglary. McMillian was charged with burglary because he broke a stranger's door down at 1:00 a.m., entered the house, and was restrained by the homeowner's son. McMillian claimed he believed someone was chasing him trying to kill him. McMillian claimed he was trying to get help. The Court held that "the fact that counsel advised McMillian that a jury could disbelieve his version of events and could find that he entered the dwelling without consent and with the intent to commit a crime was not erroneous advice and counsel was not deficient in her representation."

Id., 383 S.C. at 488, 680 S.E.2d at 909 (emphasis removed). "Certainly, a jury would have been free to disbelieve McMillian's version of events and find that he had the intent to commit a crime based on his conduct at the time of this offense." *Id.*, 383 S.C. at 487, 680 S.E.2d at 908. Thus, *McMillian's* holding simply reaffirmed that intent may be established by circumstantial evidence—i.e., the jury could infer intent from the particular circumstances, which may include a trespass.

However, the mere existence of a trespass cannot prove the "with intent to commit a crime in the dwelling" element of burglary because such an interpretation would render the element superfluous, which is disallowed. *E.g.*, *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (citation omitted). "The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* (cleaned up). Adopting the solicitor's argument would mean that any time a person went in a house without consent, he would be trespassing and thus guilty of burglary. This would be true for any kind of trespass, not just a trespass after notice. The *McMillian* Court reasoned that there is no difference between the crime of trespass after notice and an ordinary trespass for purposes of analyzing this issue: "There was notice against entry in this case because, as we noted in *Christensen*, the presence of closed doors and locked windows is notice to the world that entry is forbidden." *McMillian v. State*, 383 S.C. at 488, 680 S.E.2d at 909 (cleaned up). Which takes us back to the point that whether the State has proven the element of intent depends on the facts and circumstances of the case. It cannot simply be inferred from a trespass.

Moreover, the solicitor's argument that intent could be inferred from Appellant's failure

to leave is an extension of his trespass argument. Failure to leave is merely an element of trespass. *See* S.C. Code Ann. § 16-11-620. The solicitor cited *State v. Gilliland*, 402 S.C. 389, 741 S.E.2d 521 (Ct. App. 2012), for this argument. In *Gilliland*, the defendant entered his ex-girlfriend's home, in his words, "like a cat burglar," through the bathroom window. He disconnected both of her telephones, and was waiting inside her house when she got home at 12:10 a.m. He had sent the victim letters, including one in which he indicated the family court would not be able to protect her. His entry was in violation of a protection order. *Gilliland* held that "the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling." *Id.* This case was just another example of the fact-intensive nature of a directed verdict inquiry. Appellant's actions inside the house did not indicate the intent to commit any crimes.

Nor can larceny be inferred to provide intent here. There was no evidence Appellant tried to or intended to take anything. He had a reasonable explanation for his entry. The *McMillian* Court's discussion of *State v. Haney*, 257 S.C. 89, 92, 184 S.E.2d 344, 345 (1971), supports Appellant's position on this. In *McMillian*, 383 S.C. at 487, 680 S.E.2d at 908 the Court observed that it had, in *Haney*, "noted the *unexplained* breaking and entry of a dwelling in the night is itself evidence of intent to commit larceny." (emphasis added). *Haney* involved a conviction for housebreaking based upon the 10:30 p.m. break-in of an elementary school, which activated the school's alarm system. The suspects had entered by opening a window into the principal's office and then opened a door to the library and visual aids storage area. When police arrived, the suspects fled. Based on these facts, the Court concluded, "We cannot say there was no evidence of intent to commit larceny." *State v. Haney*, 257 S.C. at 92, 184 S.E.2d at 345. In *Haney*, the Court quoted approvingly:

> **In the absence of inconsistent circumstances**, proof of unlawful entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. The inference is grounded in human experience which justifies the assumption that the **unlawful entry** was not purposeless, and, **in the absence of other proof, indicates theft as the most likely purpose.**

People v. Rossi, 250 N.E.2d 528, 530 (1969) (emphasis added). "'The fundamental theory, *in the absence of evidence of other intent or explanation for breaking and entering*, is that the usual object or purpose of burglarizing a dwelling house at night is theft.' 13 Am.Jur.2d Burglary, Sec. 52 (1964)." *Haney*, 257 S.C. at 92, 184 S.E.2d at 345 (emphasis added). This "unexplained breaking and entry," "absence of evidence of other intent," "in the absence of other proof," and "in the absence of inconsistent circumstances" qualification once again takes us back to the principle that whether the evidence proves the element of intent depends on the facts of the case. The inquiry on directed verdict is "necessarily fact-intensive." *State v. Bennett*, 415 S.C. at 237 n. 1, 781 S.E.2d at 354 n. 1. On these facts, there was "other proof" and there were "inconsistent circumstances" (i.e., Appellant's friendship with Walls, and the ongoing construction work at the house) such that substantial circumstantial evidence of intent to commit a crime was not proven simply because the entry was of a dwelling house at night (6:41 a.m.).

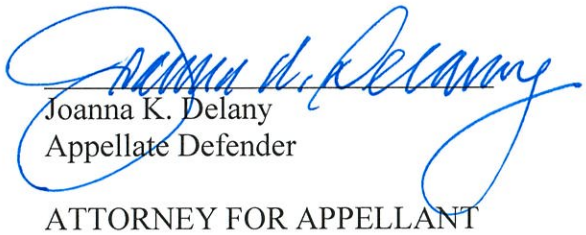
Appellant was unarmed. He openly parked in the driveway next to the homeowner's cars. This was not the middle of the night. The house was being remodeled and Appellant did some of the remodeling. It was 6:41 in the morning, which was a normal time for construction workers to start work. Appellant was friends with one of the homeowners. He did not break in but let himself in through an open door. Appellant was not confrontational or hostile. According to Wall, Appellant had been over earlier in the week. Wall stated it appeared that in Appellant's mind, he was there to do work. Appellant testified he was there to see about work. Appellant

did not flee, and instead waited around for law enforcement. At best, the evidence merely raised a suspicion Appellant had the intent to commit a crime in the house. The court should grant a directed verdict when the evidence merely raises a suspicion the accused is guilty. *Hepburn*, 406 S.C. at 429, 753 S.E.2d at 409. There was no substantial circumstantial evidence of intent to commit a crime inside the dwelling. "[C]ircumstantial evidence that is not substantial is insufficient to go to a jury." *State v. Odems*, 395 S.C. at 592, 720 S.E.2d at 53. Finally, the solicitor's argument that Appellant could have intended to commit a breach of peace or harassment was pure speculation—there was no evidence of those things.

When viewed in the light most favorable to the State, the evidence did not reasonably tend to prove Appellant's guilt. It merely raised a suspicion of guilt. *E.g.*, *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127. The court should have directed a verdict of acquittal.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for entry of a verdict of acquittal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of November, 2024.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN LOUIS NATION,

APPELLANT

APPELLATE CASE NO. 2024-000185

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment;
(2) Transcript of record dated January 29 – February 1, 2024, pp. 1-6; 36; 45-103; 105-121; 131-167; 172; 174-209; 211-212; 217; 219;
(3) State's Exhibit #1;
(4) State's Exhibit #18;
(5) State's Exhibit #19;
(6) State's Exhibit #20;
(7) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

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ATTORNEY FOR APPELLANT

This 8th day of November, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Joanna K. Delany
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ATTORNEY FOR APPELLANT

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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 Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Benjamin L. Nation, #343220, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of November, 2024.

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