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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MICHAEL ISSAC MOBLEY,

APPELLANT

APPELLATE CASE NO. 2022-000450

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 2025-UP-140

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for hearing in this appeal because although the holding in this case was that the state's prior crime evidence was erroneously admitted for consideration at trial, this Court might have overlooked evidence that would have refuted its ruling that the admission of this prior crime propensity evidence was harmless error; and further that the erroneously admitted evidence did not establish the element of intent, which was used to justify the denial of the directed verdict motion entered at the close of the state's case. In support of this petition, counsel would submit the following information.

1. Appellant was indicted on the offense of second degree burglary (nonviolent) after being arrested for entering Workman's Oil Company in York County on December 9, 2021. Appellant was charged with burglary and tried on April 7, 2022. At trial, building manager Wendy Shamer testified that there was a prior incident on March 20, 2020, where appellant entered the same building. Subsequently, appellant pled guilty to second degree burglary in connection with the March 20, 2020 entry. During the instant trial on the December 9, 2021 entry, the solicitor sought to introduce the prior March 20, 2020 burglary as evidence in the case.

2. On appeal, the issue was whether the admission of the prior burglary conviction into evidence was a Lyle[1] violation. This Court agreed and held as follows:

We hold the trial court erred by admitting Mobley's prior conviction for second-degree burglary under Rule 404(b) of the South Carolina Rules of Evidence because it suggested Mobley had a propensity to commit burglary, was not logically relevant to any material fact at issue, and was insufficient to establish a pattern of conduct that could be probative of Mobley's intent(2) See *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); id. (An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 404(b), SCRE ("Evidence of other crimes...is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show...the existence of a common scheme or plan...or intent."); *see also State v. Robinson*, 438 S.C. 421, 435, 882 S.E.2d 883, 891 (Ct. App. 2023) ("The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, 'i.e., the evidence does something more than prove a person has propensity to commit crimes.'" (quoting *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021)));

Although intent was a material fact at issue here, we hold evidence that Mobley broke into and stole items from the business in 2020 was not logically relevant to his state of mind when he entered the same business almost two years later in December 2021. *See* S.C. Code Ann. § 16-11-312(B)(3)(2015)("A person is guilty of [second-degree] burglary...if the person enters a building without consent and with intent to commit a crime therein, and...[t]he entering or remaining occurs in the nighttime."); *State v. Ostrowski*, 435 S.C. 364, 392-97, 867 S.E.2d 269, 283-86 (Ct. App. 2021)(explaining text messages showing the defendant occasionally dealt drugs from his home, which were sent as far back as six weeks prior to his arrest, "should not have been admitted at trial because [they were] not probative of [his] intent as to the offense with which he was charged in the present case"). In addition, the State offered only one conviction,

[1] State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923).

which was insufficient to establish a pattern of conduct probative of Mobley's intent in December 2021 under the common scheme or plan exception.

3. Nonetheless, after this Court held that the trial judge erred in allowing the inadmissible Lyle prior to be considered as evidence in the case, the subsequent ruling by this Court was that the Lyle error was harmless error per the following analysis:

Nevertheless, we hold the trial court's error in admitting Mobley's prior conviction was harmless because the trial court, sitting as the factfinder in this bench trial, could have inferred Mobley's intent to steal based upon his admission that he trespassed and entered a building that contained items of value. See *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014) ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."); *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006) ("[W]hether an error is harmless depends on the particular circumstances of the case."); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."); *State v. Haney*, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971) ("Absent an admission by the defendant, proof of intent necessarily rests on inference from conduct."); id. at 92, 184 S.E.2d at 345 ("In the absence of inconsistent circumstances, proof of unlawful entry into a building which contains personal property that could be the subject o[f] larceny gives rise to an inference that will sustain a conviction of burglary." (quoting *People v. Rossi*, 250 N.E.2d 528, 530 (Ill. App. Ct. 1969)...[note that] snack items were kept for sale in the front office area and that the service bay where Mobley was found contained auto parts and tools. Thus, even though Mobley had not taken anything of value, he was found inside a building where items of value were kept. Such evidence gives rise to an inference that Mobley intended to commit a crime when he entered the building. See *Haney*, 257 S.C. at 91, 184 S.E.2d at 345 (holding the record contained evidence of intent to commit larceny when trial testimony "fully support[ed] a conclusion that the defendant gained access to the building through an unlocked window and entered the room where movie projectors and other visual aids were kept"). In addition, police found Mobley lying on a concrete floor partially underneath a vehicle when they arrived, which indicated he was hiding from police; Mobley refused to identify himself to police; and he falsely stated to police that he was an employee of the business. This evidence further demonstrated that he intended to commit a crime within the business when he entered. Because Mobley's prior conviction was cumulative to this inference of Mobley's intent to commit a crime when he entered the business and to the other evidence demonstrating that he held such intent, we hold its admission did not prejudice him and was harmless. See *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result.").

4. To the contrary, there was no evidence establishing appellant's intent to steal or commit any crime while inside the building because the evidence in the record clearly revealed

that appellant's intent was not to commit a crime in the building, but rather to seek shelter from the freezing night temperatures because he was homeless. There was no proof that appellant behaved or intended to behave on December 9, 2021, in the same manner as he acted on March 20, 2020, during which time items from inside the store were taken by him. These actions from these two incidents were totally dissimilar.

5. 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 windowpane 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. R. 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. R. 114, l.16-p.123, l.11.

Building manager Wendy Shaner testified that there was a prior incident on March 20, 2020[2] 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. R. 60, l.19-p. 69, l.4. The state sought to introduce the prior burglary from March 20, 2020, into evidence in order to prove intent with respect to the

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

instant burglary charge that occurred on December 9, 2021, for which appellant was on trial. R. 6, l.17-p. 8, l.2.

6. Defense counsel argued that there were dissimilarities between the prior burglary and the instant burglary charge to the extent that the prior was a downsized 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; and to the contrary, appellant entered the garage because he needed a lace to sleep and avoid outside cold weather. R. 37, l. 9 – p. 40, l. 3; R. 45, lines 14-19.

7. 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;[3] 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.

8. 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

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

asleep. The officer found no items on appellant 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. Therefore, the propensity prior crime evidence that was ruled as erroneously admitted was not harmless error because the same served to prejudice appellant's prior case to establish proof of intent in the instant case. In other words, the dissimilar nature of the prior crime resulted in prejudice as it was improperly used to prove intent in the present case when the circumstances of the two burglaries were different.

9. 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.

10. Here, the burglary prior should not have been submitted as intent evidence regarding the burglary charge for which appellant was on trial based on the improper admission of a propensity prior that did not fall in the category of harmless error 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. Furthermore, if was error to excuse the prior as proof of intent in support of the wrongly labeled harmless designation.

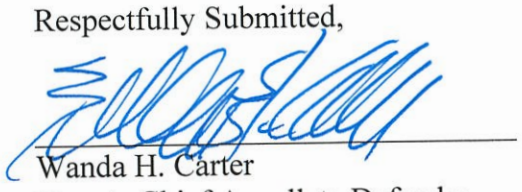
11. This Court erred in holding that "the trial court did not err in denying [appellant's] motion for a directed verdict because when viewed in the light most favorable to the state, the record contained substantial circumstantial evidence [appellant] intended to commit a crime when he entered the business on December 9, 2021."

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 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).

12. Clearly, per the same rationale outlined above to the extent that the Lyle propensity error not harmless error; likewise, this would support appellant's position that a directed verdict should have been granted because there was insufficient proof of the requisite intent to commit a crime on appellant's behalf because sleeping inside the building in the in question in order to escape freezing temperatures on that night was not tantamount to proof of the element of intent in the case.

Based on the arguments above, counsel for appellant would request a rehearing on this Court's holding in the appeal.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 8th day of May, 2025.

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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 Petition for Rehearing in the above-entitled case has been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Michael Issac Mobley at 417 Highland Ave. Sumter, SC 29150, this 8th day of May, 2025.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT