

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAYTON FRINKS,

APPELLANT

APPELLATE CASE NO. 2013-001127

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal in Appellant's favor on the charge of burglary in the first-degree where the state failed to introduce any direct or substantial circumstantial evidence that Appellant entered the dwelling without consent?

STATEMENT OF THE CASE

On January 31, 2013, an Horry County grand jury indicted Appellant for burglary in the first degree (2013 – GS – 26 – 00190) and kidnapping (2013 – GS – 26 – 00189). R. 226. The state, represented by Candace Livesay, called the case to trial before the Honorable Edward B. Cottingham and a jury on May 16, 2013. R. 1. The jury found Appellant not guilty of kidnapping, but found him guilty of burglary in the first degree. R. 210, lines 14 – 22. Judge Cottingham sentenced Appellant to fifteen years' imprisonment. R. 223, line 21 – R. 224, line 1; R. 230.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor on the charge of burglary in the first-degree where the state failed to introduce any direct or substantial circumstantial evidence that Appellant entered the dwelling without consent.

Relevant facts

On the evening of November 12, 2012, Elias Michaels and his wife arrived home from dinner. While his wife entered the home to disarm the alarm system, Elias parked their car in the garage. R. 60, lines 5 – 24. When Elias got out of the car, he felt someone tap him on the shoulder. R. 61, line 25 – R. 62, line 1. When Elias turned around, he “was confronted with an individual wearing a hoodie and a semi-Halloween mask,” and pointing a gun.¹ Elias noticed two others, who were also armed, nearby. R. 61, lines 3 – 12. When Elias got close to the door, he pushed the gun away, entered the home, and slammed the door shut. R. 62, lines 2 – 10. Elias’s wife called 911, and Elias armed himself. R. 62, lines 13 – 16.

Elias claimed that while he and his wife dined, a screen covering one of his windows had been removed and a pane of glass broken. R. 64, lines 17 – 22. Eventually, the police matched a fingerprint found on the pane beside the broken pane to Appellant’s fingerprint. R. 94, lines 7-20; R. 95, lines 5-14; R. 129, lines 207; R. 130, line 19 – R. 131, line 4; R. 131, line 23 – R. 132, line 6; R. 134, lines 4-6; R. 134, line 24 – R. 135, line 18; R. 136,

¹ Although the individual wore a mask, Elias claimed that he could identify the individual at the time of trial. He had been concentrating on the individual pointing the gun and believed he could make an identification based on “his jaw angle, and his chin, and his lips.” R. 80, lines 14-20. Elias explained that he identified to his neighbor “who he was” at the bond hearing. R. 81, lines 1-5; R. 81, lines 18-20. Elias then identified Appellant as the perpetrator. R. 83, lines 8-14.

lines 3-13. Additionally, Elias claimed the screen on his screened-in porch had been cut, the door to the porch unlocked and left opened, and the furniture on the porch moved. R. 68, line 2 – R. 69, line 25; R. 71, line 19 – R. 72, line 532, line 17 – R. 73, line 2.² Elias had a pond in the backyard where people in surrounding neighborhoods would often swim and fish. After Elias moved into the home, he repeatedly ran off teenagers who were fishing and swimming there because they did not live in Long Bay Golf Club. R. 75, line 13 R. 76, lines 23.³

At the conclusion of the prosecution's case, Appellant moved for a directed verdict. Appellant relied upon State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) to support his motion. R. 172, lines 19-24. Initially, Judge Cottingham believed the evidence showed Appellant's fingerprint on the inside of the window. However, Judge Cottingham also relied upon the alleged entry into the garage to establish an entry into the household as necessary for burglary. Finally, Judge Cottingham also relied upon testimony that the perpetrators were inside the screened porch was well. R. 173, lines 1-14. Although Appellant made clear that the print was found on the exterior of the home, Judge Cottingham still denied the motion based on the reasons previously stated. R. 173, line 16 – R. 175, line 1. After the jury returned with its verdicts, Appellant moved for a new trial. R. 222, lines 4-7. In denying this motion, Judge Cottingham ruled "there was an entry into the garage, and ... testimony that the screen door was open and that someone had moved furniture around in the screen door, which is a part of the dwelling." Based on those two

² The responding police officer searched for prints on the porch but found none. R. 94, lines 22-23; R. 96, line 19 – R. 97, line 3.

³ When questioned by police, Appellant admitted he lived in a neighborhood within walking distance of Elias's home. He further admitted that he had been swimming in the pond there. R. 145, line 20 – R. 147, line 6; R. 152, lines 17-21; R. 153, lines 2-8.

facts, Judge Cottingham found sufficient evidence of an entry without consent. As to evidence that Appellant was the perpetrator, Judge Cottingham found the fingerprint and Elias's identification testimony to be sufficient. R. 222, line 8 – R. 223, line 4.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant 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); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963). The prosecution must prove the

identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Hugh Mathis, the homeowner, went home at lunch on September 7, 1995. Id. at 408, 535 S.E.2d at 126-127. He noticed there were ten beers in the refrigerator at that time. Id. at 408, 535 S.E.2d at 127. When he returned that evening, he found no beer. Id. His children denied any involvement with the disappearing beer. Id. Eight days later, Mathis found an unlocked window, broken glass on the floor, and a hole in the window. Id. Upon searching his home, Mathis found two guns missing. Id. The police found a screen leaning against the house. On the screen, Mitchell's fingerprint was found. Mathis admitted that Mitchell had been to his home multiple times. Id. The Court noted the prosecution's case was entirely circumstantial, and the only evidence linking Mitchell to the burglary was the fingerprint. Concerning the screen, the Court explained the prosecution presented no evidence that the screen was on the window at the time the window was broken or when the screen was removed. Mitchell's fingerprint on the screen simply did not prove entry. Id. at 409, 535 S.E.2d at 127.

Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage

unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn

pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

Recently, this Court granted a directed verdict to Karl Lane on the charge of burglary in the first degree. On April 21, 2011, Mark McSwain discovered several firearms were stolen from his safe. McSwain's neighbor saw a car carrying two people pull into McSwain's driveway at 3:20 p.m. that day. One of the individuals approached the front door of the home, return to the car, and then approach the back door. The neighbor described the car as red or burgundy with a paper tag and the front passenger panel was covered in gray primer. After police left the scene, McSwain noticed a folded piece of paper in the grass beside the driveway. The paper was from the unemployment office, where Lane had visited the day of the burglary and was located about three miles from McSwain's house. Lane, 406 S.C. at 119-120, 749 S.E.2d at 166-167.

The prosecution presented evidence that at times Lane drove a car matching the description provided by McSwain's neighbor and was driving the car the day of the burglary, that the folded piece of paper belonged to Lane, and that Lane did not want to talk to the police the day after the burglary. However, this Court found the evidence did not meet the standard of substantial circumstantial evidence. "At most, the evidence the state presented raise[d] only a mere suspicion that Lane committed the crime." Id.

In South Carolina, “[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with the intent to commit a crime in the dwelling, and ... he or another participant in the crime is armed with a deadly weapon or explosive; or ... the entering or remaining occurs in the nighttime.” S.C. Code Ann. § 16-11-311. Pursuant to S.C. Code Ann. § 16-11-310(2), a dwelling “means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person” and the definition found in section 16-11-10 of the Code. According to section 16-11-10 of the South Carolina Code, a dwelling is “any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property.” The definition also includes “all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance.” S.C. Code Ann. § 16-11-10. In State v. Stone, 350 S.C. 442, 446-447, 567 S.E.2d 244, 246 (2002), the South Carolina Supreme Court held a porch was part of the dwelling where the porch was completely enclosed and was utilized for the protection of the property.


The trial judge erred in failing to direct a verdict in Appellant’s favor on the charge of burglary in the first degree where the prosecution failed to prove Appellant entered the dwelling. The fingerprint on the glass window on the exterior of the home simply could not prove entry. See Mitchell, supra. Elias’s testimony that Appellant entered the garage while armed was simply preposterous as demonstrated by the jury’s verdict finding Appellant not guilty of kidnapping. Had the jury believed Elias – that Appellant entered the garage while carrying a weapon – the jury would have found

Appellant guilty of kidnapping. However, the jury clearly discredited Elias's testimony by finding Appellant not guilty of that charge. Additionally, the jury's note indicated the jury did not believe Elias. The jury asked, "Do you have to enter the dwelling for it to constitute burglary, or does physical damage to the screen constitute this crime?" R. 231. Clearly, the jury did not believe Appellant had entered the garage as Elias claimed. Had the jury believed Appellant entered the garage, then the jury would not have been concerned with whether physical damage to the screen was sufficient to satisfy the entry element of burglary in the first degree. In light of the jury's verdict and questions, it is clear the jury discredited Elias's testimony concerning entry. Thus, the trial judge erred in failing to direct a verdict of acquittal in Appellant's favor on the charge of burglary in the first degree.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court and direct a verdict of acquittal in Appellant's favor.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2014.

STATE OF SOUTH CAROLINA

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

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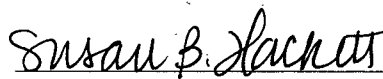
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dayton Frinks states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edward B. Cottingham, which was held on May 16, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Dayton Frinks.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2014.

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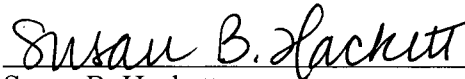
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Transcript of Jury Selection
- (2) Entire trial transcript
- (3) True-billed indictment(s);
- (4) Sentence sheet for Burglary
- (5) Court's Exhibit # 1 (Jury Note)

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

July 29th, 2014



Susan B. Hackett
Appellate Defender

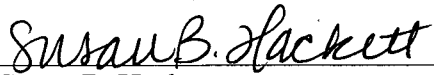
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

July 29, 2014



Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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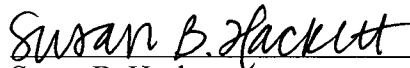
V.

DAYTON FRINKS,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case have been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Dayton Frinks, #355560 at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of July, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022