STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS M. PENNY, II,

APPELLANT.

APPELLATE CASE NO. 2013-001554

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Appellant is entitled to a directed verdict on the charge of second degree burglary where the State failed to present any evidence that Appellant did not have consent or permission from the homeowner to enter the dwelling.

II. Appellant is entitled to a directed verdict on the charge of second degree burglary where the State did not present any evidence that Appellant had any intent to commit a crime within the dwelling when he entered the dwelling and where the mere kicking in of a door, without more, is not sufficient to support an inference that Appellant intended to commit a crime within the dwelling.

III. Appellant is entitled to a new trial where the Trial Court erred in refusing to suppress evidence of Appellant's flight after an Amber Alert was issued where there was no nexus between the flight and the charged offense of second degree burglary and where the admission of the Amber Alert was highly prejudicial as it suggested to the jury that Appellant abducted his children even though the State later determined that kidnapping charges were inappropriate.

STATEMENT OF THE CASE

On May 14, 2013, Appellant Dennis M. Penny, II was indicted by the Chesterfield County Grand Jury for one count of second degree burglary in violation of S.C. CODE ANN. § 16-11-312(A) for entering the dwelling of Joey Oliver on January 14, 2013 without consent and with the intent to commit a crime therein. R.*.

On June 3-4, 2013, Appellant was tried before the Honorable Paul M. Burch and a jury. June 3 Tr. 1; June 4 Tr. 1. Appellant was represented by Bryan C. Letteer, and the State was represented by Deputy Solicitor Kernard E. Redmond and Assistant Solicitor Adam M. Foard. June 3 Tr. 1; June 4 Tr. 1.

On June 4, 2013, the jury found Appellant guilty as charged. June 4 Tr. 87, ll. 1-5. Sentencing of Appellant was held on July 9, 2013. Judge Burch initially sentenced Appellant to five years suspended upon the service of four years with two years probation. July 9 Tr. 13, ll. 16-19. On July 10, 2013, after Appellant indicated that he did not want any probation, Judge Burch sentenced Appellant to a straight five year sentence with no suspended sentence and no probation with time served credit of 206 days. July 10 Tr. 12, ll. 9-11; R.* (Sentencing sheet).

Appellant timely filed and served his Notice of Appeal.

STATEMENT OF FACTS

Joey Oliver testified that on December 20, 2012, he was living with his wife, his children, including Chasity Penny, and Chasity's four children. June 4 Tr. 20, l. 25 – 21, l. 7. Chasity had her own residence, but had spent the night with her children at Mr. Oliver's home. Id. at 21, ll. 13-22. He testified that Appellant was not a resident of his home. Id. at 21, ll. 8-12.

Mr. Oliver explained that Chasity had moved back to South Carolina about three to four weeks prior to December 20, 2012. She had been living in Pennsylvania where Appellant, her husband, had taken a job. Chasity indicated to her father that she and Appellant had been having some issues, and she called her parents wanting to come back home. So her parents arranged transportation for her to move back to South Carolina. Id. at 21, l. 23 – 22, l. 10.

Mr. Oliver said the last time he remembered Appellant visiting his home was Father's Day 2012. Id. at 22, ll. 23-25. Mr. Oliver recalled that the relationship between Chasity and Appellant was not strained at Father's Day but had become strained by December 20, 2012. Id. at 23, ll. 1 – 10.

On December 20, 2012, Appellant came to Mr. Oliver's house. Mr. Oliver had not called Appellant, had not invited him over that day, and did not know that Appellant was planning to come to his house that day. Id. at 23, ll. 18-25; 24, ll. 1-2.

Mr. Oliver testified that when Appellant arrived at his house, Appellant "snatched the storm door open and kicked the metal door in." Id. at 24, l. 25 – 25, l. 3. After Appellant kicked the door, Appellant went inside and Mr. Oliver asked him what he was

doing. Appellant picked up his two oldest children, turned, and went back out the door. Id. at 25, ll. 9-13.

Mr. Oliver testified that as a result of Appellant kicking the metal door, the two doors had to be replaced and were replaced that day. Id. at 25, ll. 18-22. The latch on the storm door had been broken and the storm door had been "whooped up." The door jamb had been ripped out and the door was bent in. Id. at 31, ll. 10-15.

Mr. Oliver further testified that while Appellant did not have permission to kick in his door, if Appellant had knocked, Mr. Oliver would have opened the door for Appellant. Mr. Oliver asserted that Appellant just did not have permission to enter the way he did – by kicking the door. Id. at 26, ll. 3-11.

Mr. Oliver also affirmed on direct examination that he still loved Appellant as a son and had no hard feelings against him. Id. at 24, ll. 16-21.

On cross-examination, Mr. Oliver admitted that if the State had not subpoenaed him for trial, he probably would not have even appeared for trial. Id. at 27, ll. 1-9. Mr. Oliver also stated that Chasity and Appellant used to live behind his residence in a box trailer. Chasity would stay there while Appellant was overseas, and Appellant would stay there when he was home. Id. at 27, ll. 10-16.

Mr. Oliver acknowledged that Chasity and Appellant could have stayed in Mr. Oliver's house but that they chose to live in the camper. Both Chasity and Appellant received mail at Mr. Oliver's house and in fact, as of the date of trial, Appellant was still receiving mail at Mr. Oliver's house. Id. at 27, l. 17 – 28, l. 1.

Mr. Oliver reiterated that had Appellant knocked on the door, Mr. Oliver would have opened it for Appellant. Id. at 28, ll. 6-9. Mr. Oliver also stated that even though

Appellant had not been at his house in a while, it was not because Appellant was not welcomed at Mr. Oliver's house. It was just Appellant's decision not to visit. Id. at 28, ll. 2-5.

Mr. Oliver was emphatic that he never told Appellant that he was not welcomed at his house. Id. at 30, ll. 1-4. He testified that while everything happened so quick on December 20, 2012, Mr. Oliver did not deny Appellant permission. Id. at 30, ll. 5-10. He again stated that while Appellant was not welcomed to kick in his door, if Appellant had knocked on the door, Mr. Oliver would have let him inside. Id. at 30, ll. 11-15.

Mr. Oliver also testified that he gave a statement to law enforcement on the day of the incident but could not remember if his statement was written down. Id. at 29, ll. 5-23.

Deputy Randall Carnes of the Chesterfield County Sheriff's Office testified that he responded to Mr. Oliver's home for a burglary and possible kidnapping. Id. at 32, ll. 2-25. When he arrived at the scene, Mr. Oliver, his wife, his two daughters, one of whom was Appellant's wife, and two small children belonging to Appellant and Appellant's wife, were at the home. Id. at 33, ll. 2-8.

As a part of his investigation, Deputy Carnes determined that the door was forcefully kicked in by Appellant. Id. at 33, ll. 17 – 23. Deputy Carnes observed that the screen door was damaged and that the front door was kicked in where the deadbolt and the actual handle lock. Id. at 34, ll. 1-3. The door jamb had been damaged and pieces of the door jamb were lying on the living room floor. Id. at 34, ll. 11-15.

Appellant's counsel asked Deputy Carnes on cross-examination whether it was true that none of the interviews of witnesses were written down. Deputy Carnes disagreed and said he issued a voluntary statement form to Appellant's mother-in-law and

his wife. Deputy Carnes testified he turned those statements over to an investigator, but did not know if the investigator turned the statements over to the State. Id. at 35, ll. 6-18. It turned out that these statements were never turned over to the defense during discovery. Id. at 36, l. 13 – 38, l. 15.

Major Matt Shaw of the Lancaster County Sheriff's Office testified that on December 20, 2012, he received notification of an Amber Alert from Chesterfield County. Within minutes of receiving the alert, the Lancaster City Police Department advised that they had located the vehicle somewhere near Main Street. Major Shaw ultimately assisted in the chase of the vehicle. Id. at 43, l. 11 – 44, l. 4.

Several miles outside of the City of Lancaster, the suspect vehicle had pulled over on the side of Route 521. When Major Shaw arrived on the scene, there were approximately ten other police units there mostly from the City of Lancaster. Several investigators from the City Police Department were talking to Appellant trying to get him to come out of the vehicle. Appellant stayed in the vehicle. Id. at 44, ll. 8-22.

Less than five minutes after Major Shaw arrived, one of the investigators from the City Police Department got close to the vehicle and tried to grab Appellant and pull him from the vehicle. Appellant drove off on Northbound 521. Id. at 44, l. 25 – 45, l. 5. Appellant continued north on 521. Id. at 45, ll. 17-18. The pursuit continued into North Carolina. Id. at 46, l. 11. Appellant was eventually forced off the side of the road in North Carolina. Id. at 47, ll. 8-12. Appellant was then apprehended. The children were removed from the vehicle and determined to be fine. Id. at 48, l. 8 – 49, l. 13.

Major Shaw testified that the chase of Appellant was based off of the Amber Alert and he claimed that included in the Amber Alert was the fact that Appellant was wanted

for burglary even though Amber Alerts were not typically issued for burglaries but issued solely for child abductions. Id. at 50, ll. 2-11. Major Shaw also testified that Amber Alerts could not be issued for just strictly custody matters. Id. at 50, ll. 13-18.

Investigator Ryan MacLamore, employed by the Lancaster County Sheriff's Office, testified he was the lead pursuit officer of Appellant as the officers were pursuing Appellant up 521 North after Appellant drove off when officers attempted to pull him out of the car when he first pulled off on the side of 521. Id. 51, l. 17 – 53, l. 16. Investigator MacLamore was involved in apprehending Appellant and placing him in handcuffs. Id. at 55, ll. 5 – 22. On cross-examination, Investigator MacLamore admitted that he had no idea if the Amber Alert was validly issued. Id. at 56, ll. 1-13.

Investigator Eric Jaillette of the Lancaster County Sheriff's Office also assisted in the apprehension of Appellant. Id. at 57, l. 3 – 59, l. 21. He also admitted that he had no idea if the Amber Alert was validly issued. Id. at 59, l. 25 – 60, l. 2.

ARGUMENT

I. Appellant is entitled to a directed verdict on the charge of second degree burglary where the State failed to present any evidence that Appellant did not have consent or permission from the homeowner to enter the dwelling.

At the conclusion of the evidence, Appellant moved for a directed verdict on the charge of second degree burglary where the State did not prove that Appellant lacked consent to enter Mr. Oliver's dwelling. To the contrary, the only testimony in the record was that Appellant did have consent. June 4 Tr. 61, l. 16 – 62, l. 10; 64, ll. 18-21. The Trial Court denied Appellant's directed verdict motion. Id. at 63, l. 11 – 65, l. 20.

A person is only guilty of second degree burglary "if the person enters a dwelling without consent and with intent to commit a crime therein." S.C. CODE ANN. § 16-11-312(A). Therefore, to prove burglary, the State must offer evidence that the accused entered a dwelling without the occupant's consent. See State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998) (discussing first degree burglary but required element of lack of consent is the same for both first and second degree burglary); State v. Brooks, 277 S.C. 111, 283 S.E.2d 830 (1981) (stating that the State must "present evidence to support each element of the crime charged [burglary] in order to uphold the conviction); see also State v. Johnson, 348 S.C. 442, 559 S.E.2d 864 (Ct. App. 2002).

A defendant is entitled to a directed verdict at trial 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). The grant of a directed verdict motion for acquittal by a defendant is proper if there is a failure of competent evidence tending to prove the charge. State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011); see also Jackson v. Virginia, 443 U.S. 307, 316 (1979) ("[N]o person shall be made to suffer the onus of a

criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.").

In this case, Mr. Oliver never once testified that Appellant did not have permission to enter his home. He testified that while he had not invited Appellant over that day, Appellant would have been welcomed inside had he knocked on the door. June 4 Tr. 23, l. 18 – 24, l. 2; 26, ll. 6-7; 30, ll. 19-20. He had never unwelcomed Appellant at his home. Id. at 28, ll. 3-5. Mr. Oliver agreed that he would have absolutely opened the door had Appellant knocked. Id. at 28, ll. 7-9. He emphasized that he had never told Appellant that he was not welcomed at his house. Id. at 30, ll. 1-4. Mr. Oliver even noted that Appellant still received mail at Mr. Oliver's home. Id. at 27, l. 21 – 28, l. 1.

According to Mr. Oliver, the only thing that Appellant did not have permission to do that day was kick the door. Id. at 26, ll. 3-11. Only the manner in which Appellant entered was done without Mr. Oliver's permission. Id. at 26, ll. 8-11.

The statute requires that a person can only be guilty of second degree burglary if the person "enters a dwelling without consent." § 16-11-312(A). The evidence at trial establishes that Appellant had consent to enter Mr. Oliver's home, a place where Appellant even received his mail. Mr. Oliver just did not like the fact that Appellant kicked the door. But kicking a door without consent does not make a person guilty of second degree burglary. It is the entering of a dwelling without consent that is an element of second degree burglary. The State never once elicited any testimony from Mr. Oliver that Appellant did not have consent or permission to enter his home. To the

contrary, Mr. Oliver affirmatively testified that he had never told Appellant that he was not welcomed in his home. Appellant is therefore entitled to a directed verdict on the charge of second degree burglary where the State did not present any evidence that Appellant entered a dwelling without consent.

II. Appellant is entitled to a directed verdict on the charge of second degree burglary where the State did not present any evidence that Appellant had any intent to commit a crime within the dwelling when he entered the dwelling and where the mere kicking in of a door, without more, is not sufficient to support an inference that Appellant intended to commit a crime within the dwelling.

At the conclusion of the evidence, Appellant also moved for a directed verdict on the charge of second degree burglary where the State did not prove that Appellant had any intent to commit a crime within the dwelling. June 4 Tr. 61, l. 16 – 63, l. 10. Appellant pointed out that the evidence only established that a door was kicked open while Appellant was entering Mr. Oliver's home. While that may have been malicious injury to property, Appellant argued that was merely the means by which Appellant entered the house and was not a crime attempted to be committed inside the dwelling. Id. at 62, ll. 1-5.

Appellant further argued to the Trial Court that the State could not rely on trespass as the crime which Appellant allegedly intended to commit inside the dwelling because the testimony from Mr. Oliver established that Appellant was welcomed in the home and that Mr. Oliver had never told Appellant that he was not welcomed in the home. Id. at 28, ll. 3-9; 30, ll. 1-4; 62, l. 6- 63, l. 3.

The Trial Court agreed that Appellant had some "major points" that there was no trespass, but ruled that trespass was "not the key issue that keeps the State in this case." Id. at 63, ll. 14-16. The Trial Court determined that "[o]nce [Appellant] opened the outside door [the] entry was complete. Then he had broken the plain [sic] by kicking the inner door in doing the damage. Therefore, he committed a crime therein." Id. at 63, ll. 19-22. The Trial Court ruled the State had enough evidence to take the case to the jury on the element of intent to commit a crime therein. Id. at 63, ll. 22-24.

The Trial Court, while giving a charge to the jury on the malicious injury to property as being the potential crime that Appellant intended to commit therein, declined the State's request to also give a charge about trespass. Id. at 82, l. 7 – 84, l. 25. The Trial Court therefore limited the possible crime that Appellant intended to commit once he entered Mr. Oliver's dwelling to malicious injury to property.

Appellant is entitled to a directed verdict on the charge of second degree burglary where the State did not prove that Appellant entered a dwelling "with intent to commit a crime therein." § 16-11-312(A). Burglary requires that at the time the offender entered the dwelling, he intended to commit a crime ***once inside***. State v. Gilliland, 402 S.C. 389, 398, 741 S.E.2d 521, 526 (Ct. App. 2012) (discussing first degree burglary but same element of intent to commit a crime therein is also required for second degree burglary). Where the State failed to present evidence on this material element of second degree burglary, a directed verdict for Appellant is mandated. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

The State's only evidence is that Appellant damaged the storm door and the inner metal door when he snatched the storm door open and kicked in the metal door. June 4 Tr. 25, ll. 1-22; 31, ll. 10-15; 34, ll. 1 – 15. The State did not offer any evidence, direct or circumstantial, of any crime that Appellant intended to commit once inside the residence.

All Appellant did when he entered the residence was pick up his two oldest children and leave. Id. at 25, ll. 11-13. The State's evidence did not include any suggestion that Appellant had no right to pick up and leave with his children from Mr. Oliver's residence or that leaving with his own children was somehow unlawful. The

State offered no evidence that Appellant did not have custody of his children. The State in fact informed the Trial Court that the State subsequently made a decision that the kidnapping charge was inappropriate and acknowledged at sentencing that the retrieval of his children was not an element of the offense of second degree burglary. June 3 Tr. 23, ll. 17-18; July 9 Tr. 5, ll. 9-10.

In Commonwealth v. Wilamowski, 633 A.2d 141 (Pa. 1993), the Supreme Court of Pennsylvania considered a similar question to the one presented herein: whether the evidence was sufficient to support an attempted burglary conviction where the State's only evidence that the defendant intended to commit a crime therein was his mere breaking in of a door or window.

In Wilamowski, a sleeping homeowner was awakened around 11:00 p.m. by a loud noise and discovered that the door to his garage had been pushed in by a crushing blow which had caused it to split off from its frame and pulled off its three hinges. Id. at 142. The loud noise also awakened a neighbor who then heard a knock at his side door. The neighbor answered and the defendant was standing there inquiring about a different family and then asked for directions to another street. The defendant departed after the conversation with the neighbor concluded. Id.

The neighbor went to the garage where the homeowner was inspecting the damage to his garage. The two began pursuing the defendant who was still in sight, and they yelled stop to the defendant. The defendant was able to elude the neighbor and the homeowner. The police were able to later apprehend the defendant, and the defendant was charged with attempted burglary. Id.

In determining whether the evidence was sufficient to find that the defendant had the requisite intent to commit a crime inside to support a charge of attempted burglary, the Pennsylvania Supreme Court referenced long standing case law from its jurisdiction that "evidence of intentional entry into an occupied building is by itself insufficient to support an inference of an intent to steal." Id. at 143 (internal citations omitted). The court concluded that in the defendant's case:

> No additional evidence was presented to establish the actor's specific intent to commit a crime within the occupied structure and, upon reflection, we conclude that we will not accept a *per se* assumption in attempted burglary prosecutions that evidence of a forced opening into an occupied structure automatically gives rise to an acceptable inference of intent to commit a crime inside. More is required. . . . ***The Commonwealth must establish, as part of its evidentiary burden, additional evidence that goes beyond the mere breaking in of a door or window***. Without this evidence the required inference of intent will derive from mere conjecture or surmise and a defendant's right to rely on a presumption of innocence will be little more than illusory.

Id. at 144 (emphasis added).

The court reversed the defendant's conviction for attempted burglary, holding "[a]lthough the Commonwealth's facts prove that [the defendant] kicked at the door and tore it off its hinges, there was no additional evidence to establish that he possessed an intent to commit a crime inside." Id.

The facts of Appellant's case are similar to those in Wilamowski. While Appellant kicked in and damaged Mr. Oliver's storm and metal doors and broke the door jam, the State produced no additional evidence to establish that Appellant possessed any intent to commit a crime once inside as required for a second degree burglary conviction. The only thing Appellant did when he entered Mr. Oliver's house was retrieve his children, which, as pointed out above, the State did not allege was unlawful.

Therefore, Appellant is entitled to a directed verdict on the charge of second degree burglary where the State did not establish that he entered a dwelling with any intent to commit a crime therein.

III. Appellant is entitled to a new trial where the Trial Court erred in refusing to suppress evidence of Appellant's flight after an Amber Alert was issued where there was no nexus between the flight and the charged offense of second degree burglary and where the admission of the Amber Alert was highly prejudicial as it suggested to the jury that Appellant abducted his children even though the State later determined that kidnapping charges were inappropriate.

During pre-trial motions, Appellant moved to suppress evidence of Appellant's flight after an Amber Alert was issued. June 3 Tr. 19, ll. 22-23. Appellant argued that after he collected his children and drove toward Lancaster, an Amber Alert was issued. Law enforcement initiated a traffic stop pursuant to that Amber Alert. Appellant stopped and then subsequently drove off, and Appellant was chased by law enforcement and eventually apprehended. Appellant argued that the introduction by the State of evidence of that flight to show guilt would be improper. Id. at 19, l. 24 – 20, l. 8.

Appellant asserted that under State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013), *cert. denied* (July 25, 2014), there was no nexus between the crime charged – the second degree burglary – and the Amber Alert that was originally called in for kidnapping. Appellant argued that where the defendant flees while being investigated for another crime, evidence of the flight is inadmissible under Martin. June 3 Tr. 20, l. 10 – 21, l. 9.

Appellant also contended that but for the Amber Alert and the allegations that Appellant somehow kidnapped his own children, law enforcement would have never initiated the traffic stop from which Appellant fled. Appellant repeated that the investigation and the pursuit by law enforcement was to recover and return the children pursuant to the Amber Alert. Id. at 22, l. 18 – 23, l. 10.

In response, the State argued that the evidence at trial would show that the "missing status of those children was the primary concern of law enforcement." The State argued that Appellant knew he was being sought because of the Amber Alert and because he

entered the house and removed his children. The State believed that even though the State subsequently determined that the kidnapping charge was inappropriate, that did not negate the fact that at the time the Amber Alert was issued, Appellant knew why he was being sought. Id. at 23, l. 11 – 24, l. 3.

The Trial Court overruled Appellant's motion to suppress any evidence relating to Appellant's flight after the issuance of the Amber Alert. Id. at 24, ll. 6-13. This ruling was erroneous, and all evidence of Appellant's flight as a result of being sought pursuant to the Amber Alert for the alleged kidnapping of his children should have been suppressed at Appellant's trial for second degree burglary.

As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This general rule applies to evidence of particular acts, including flight. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Our State's Supreme Court has identified the "critical factor to the admissibility of evidence of flight" as "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities ... [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). In addition, this Court has held evidence of "unexplained" flight:

> is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. However, we have further noted that [t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. ***Flight evidence is relevant when there is a nexus between the flight and the offense charged.*** It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police

> officers were aware of his wrongdoing and were seeking him for that purpose. ***Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted.***

Orozco, 392 S.C. at 220, 708 S.E.2d at 231 (citations and internal quotation marks omitted) (emphasis added).

This Court has also recognized that South Carolina's rule echoes the federal rule:

> ***[T]he relevance of flight evidence is premised on a nexus between the flight and the offense charged.*** See, e.g., United States v. Beahm, 664 F.2d 414, 419–20 (4th Cir.1981) (finding evidence of flight inadmissible where a defendant flees "after 'commencement of an investigation' unrelated to the crime charged, or of which the defendant was unaware"); United States v. Foutz, 540 F.2d 733, 740 (4th Cir.1976) (stating that evidence of flight should be excluded where defendant flees while being investigated for another crime).

State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004) (emphasis added).

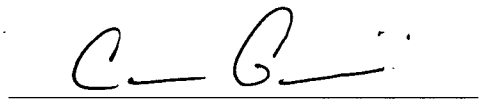
While Appellant may have had knowledge that law enforcement was seeking him pursuant to the Amber Alert and that law enforcement was in the process of trying to recover his children, Appellant would not have realized he was being sought for second degree burglary which he was not even charged with until some two weeks after the incident. June 3 Tr. 23, ll. 6-10. "An inference that guilty knowledge motivated the accused to flee 'would be completely unfounded where a defendant fle[d] after commencement of an investigation unrelated to the crime charged, or of which the defendant was unaware.'" Martin, 403 S.C. at 29, 742 S.E.2d at 47 (quoting Beahm, 664 F.2d at 419–20). As such, any inference that Appellant knew he was guilty of second degree burglary would be tenuous in this case where he fled after the issuance of an Amber Alert unrelated to the second degree burglary charge.

The Trial Court's admission of Appellant's flight after the Amber Alert was issued was not harmless. This evidence likely gave the jury the impression that Appellant had wrongfully taken his children which in fact was not the case. The jury's decision to convict Appellant of second degree burglary may have been improperly based on their incorrect belief that he abducted his own children. It cannot be said beyond a reasonable doubt that evidence of Appellant's flight after the issuance of the Amber Alert did not contribute to the jury's verdict. Appellant is entitled to a new trial where the Trial Court should have suppressed all evidence of Appellant's flight following the issuance of the Amber Alert.

CONCLUSION

For the foregoing reasons, Appellant Dennis M. Penny, II respectfully requests this Court to reverse his conviction and sentence for second degree burglary and either (1) issue an Order of Acquittal; or (2) remand for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS M. PENNY, II,

APPELLANT.

APPELLATE CASE NO. 2013-001554

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Dennis Penny, #356084 at Evans Correctional Insitution this 27th day of August, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.