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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Hampton County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS HAIR,

APPELLANT

APPELLATE CASE NO. 2014-000260

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUE ON APPEAL

In this trial for burglary first degree, did the trial judge err in refusing to direct a verdict of acquittal when the State failed to prove the entry was made with the intent to commit a crime, an element of burglary?

STATEMENT OF THE CASE

In December of 2013, the Hampton County Grand Jury indicted Hair for burglary first degree, indictment #2013-GS-24-435. On February 3, 2014, Hair, and his co-defendant, Tonya McAlhaney, proceeded to jury trial before the Honorable Brooks Goldsmith. Stephanie Smart-Gittings represented Hair at trial. Steve Plexico represented the co-defendant. Kelvin Wright prosecuted the case. The jury returned with verdicts of guilty. Judge Goldsmith sentenced both Hair and McAlhaney to fifteen (15) years in prison. A timely notice of intent to appeal was served on February 6, 2014. This appeal follows.

ARGUMENT

In this trial for burglary first degree, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove the entry was made with the intent to commit a crime, an element of burglary.

On November 24, 2013, officers with the Hampton Police Department responded to a burglary call at the home of Charles DeLoach. Mr. DeLoach passed away in September of 2013, and his family members were in the process of closing out his affairs. (R. pp. 158-159). When police arrived they found the co-defendant, Tonya McAlhaney, inside of the residence. (R. pp. 128-131). McAlhaney was arrested and gave consent to allow officers to search her house. (R. p. 131, line 25 – p. 132, line 1; pp. 137-138). The night before, on November 23, 2013, Major James Bolton of the Hampton Police Department received a report of a burglary of the same residence. (R. p. 253, lines 11-17). Appellant and another co-defendant, Ricky Sauls, were at McAlhaney's house when the police arrived to search. (R. p. 254, lines 3-9). Police found several stolen items inside McAlhaney's house. Roma Muller, Charles DeLoach's sister, identified items found in McAlhaney's house as belonging to her brother. (R. pp. 167-168).

Ricky Sauls testified as a State's witness at trial. According to Sauls, on the evening of November 23, 2013, Larry Crosby asked McAlhaney to go into Mr. DeLoach's house and get some pills. (R. p. 198, line 25 – pp. 199 – 201). Sauls testified that both Crosby and Appellant Hair had been helping Mr. DeLoach's daughter move things out of the house. Sauls admitted going in the unlocked back door of the house and taking knives and liquor. (R. p. 191, line 1 – p. 192, lines 1-23). According to Sauls, McAlhaney and Appellant also went in the house and all three of them were inside for less than ten minutes. (R. p. 191, lines 1-5). Sauls testified that Appellant went in the house and went to sleep. (R. p. 197,

lines 13-17). Sauls did not know if McAhaney or Appellant took any items from inside the house. (R. p. 194, lines 1-25). When the police found McAlhaney in the house the next morning, she had a watch and a bottle of cough syrup prescribed to Charles DeLoach. (R. p. 132, lines 11-14; p. 253, lines 4-10). Sauls' testimony was the State's sole evidence against Appellant.

At the close of the State's case Appellant moved for a directed verdict of acquittal based on mere presence[1] and the State's failure to prove an intent to commit a crime. (R. p. 269, line 1 – p. 270, lines 1-2). The trial court denied the motion stating, "Ms. Gittings, I agree with the arguments made by the solicitor on this issue. I think there is sufficient evidence that he was guilty of trespass and that that intent to commit a crime can be – could be found by the jury that evidence has been submitted." (R. p. 272, line 21 – p. 273, line 1). During the jury's deliberations the jury asked, "[C]an it become trespassing, being that there's not enough information on Travis' evidence . . ." (R. p. 340, lines 9-11). The judge then instructed the jury that neither defendant could be found guilty of any violation not listed on the verdict form. (R. p. 344, lines 10-22). The charges listed on the verdict form were burglary first and second degree. The trial court erred in refusing to direct a verdict of acquittal for Appellant Hair.

An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly

[1] Counsel did not request a jury charge on the law of mere presence and no such charge was given to the jury. This issue may need to be raised in post conviction relief.

submitted to the jury." Id. at 292–93, 625 S.E.2d at 648. The trial court may not consider the weight of the evidence. *Id.* at 292, 625 S.E.2d at 648. However, "when the [circumstantial] evidence presented merely raises a suspicion of guilt," the trial court should direct a verdict in favor of the accused. State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). A mere suspicion is a belief that is inspired by "facts or circumstances which do not amount to proof." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

A person is guilty of first-degree burglary if he "enters a dwelling without consent and with intent to commit a crime in the dwelling" and either enters or remains in the dwelling during the nighttime. S.C.Code Ann. § 16–11–311(A) (2003). Although the intent to commit a crime must exist at the time the accused enters the dwelling, the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling. State v. Pinckney, 339 S.C. 346, 349–50, 529 S.E.2d 526, 527–28 (2000).

Viewing the evidence in the light most favorable to the State, Sauls testified that Appellant entered, through an unlocked door, the house where he had been helping to move things and he went to sleep. There is no proof that Appellant had the intent to commit a crime when he entered the house, a required element for burglary. Appellant's action, once inside the house, of going to sleep rather than removing items, further demonstrates the lack of intent. The judge erred in refusing to direct a verdict of acquittal.

The State relying on McMillian v. State, 383 S.C. 480, 487, 680 S.E.2d 905, 908 (2009) argued that the intent to commit a crime element of burglary can be inferred from

the act of trespassing in the nighttime. (R. p. 270, lines 14-20). McMillian was a post conviction relief action where the Court found that, in the context of a guilty plea, counsel was not ineffective for advising that the intent to commit a crime could be inferred from the act of trespassing. During the guilty plea McMillian said he had been drinking and drugging" (with crack cocaine) the night of the incident and that he thought someone was chasing him and trying to kill him. McMillian maintained he knocked on the door of the Hicks home in order to get some help, but he admitted that he pushed the door open to get inside the home. McMillian stated he believed he "was justified in asking for help," but admitted that he "know[s] that [he] did wrong." Id. 383 S.C. at 483, 680 S.E.2d at 906.

Plea counsel testified that she hired a private investigator to look into McMillian's story that he had been chased by someone and, "[a]fter a period of time ... he [McMillian] said the person kind of existed in his head, I guess." She said a neighbor saw McMillian "looking in the windows of the home prior to him just bursting in the door." Thus, she could not substantiate McMillian's claim that he believed someone was chasing him. Id. 383 S.C. at 484, 680 S.E.2d at 906.

The Court in McMillian also noted, "In contrast, the solicitor advised the plea judge that according to the victims they never heard McMillian ask for help and 'he never asked for the police. All he did was kick their door in and rip the door jam off.' Earlier in the plea proceeding, the solicitor noted that McMillian has a criminal record dating back to 1977 that includes prior convictions for, among other things, housebreaking, malicious injury to real property, second-degree burglary, and strong armed robbery." Id. 383 S.C. at 483, 680 S.E.2d at 906.

In ruling the Court in McMillian wrote:

> 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. In State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971), this Court observed that "proof of intent necessarily rests on inference from conduct." We noted the unexplained breaking and entry of a dwelling in the night is itself evidence of intent to commit larceny:
>
> When the building entered is a dwelling house, the weight of authority holds that the unexplained breaking and entry in the night is itself evidence of intent to commit larceny rather than some other crime. "The fundamental theory, in the absence 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).

McMillian, 383 S.C. at 487, 680 S.E.2d at 908.

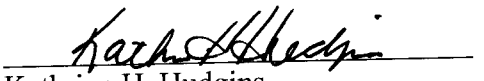
McMillian should not stand for the proposition that a trespass alone can be inferred as an intent to commit a crime for purposes of the burglary statute. In the present case there was evidence that Appellant entered the house to take a nap. The State failed to prove an intent to commit a crime. The judge erred in refusing to direct a verdict of acquittal.

Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. State v. Condrey, 349 S.C. 184, 195, 562 S.E.2d 320, 325 (Ct.App.2002). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal]." State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977). The State failed to prove that Appellant knew a crime was going to be committed. The State failed to prove that Appellant arranged, aided, encouraged, or abetted in the perpetration of a crime.

CONCLUSION

Based on the above argument Appellant's conviction and sentence should be reversed and the case remanded for an entry of a judgment of acquittal.

Respectfully submitted,



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This 8th day of December, 2014.