STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2013-001554

THE STATE,

Respondent,

v.

DENNIS M. PENNY, II,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

The trial court correctly denied Appellant's request for directed verdict on the basis that the State had not presented evidence of intent to commit a crime inside the premises. Evidence that Appellant broke an outer storm door, kicked in an inner door, and stormed inside the premises supports an inference of intent.

III.

The issue of whether the trial court erred in admitting evidence of flight was not preserved for review where Appellant failed to follow his pre-trial motion *in limine* with a contemporaneous objection to any testimony regarding flight. Even if the issue were preserved, the evidence was properly admitted.

STATEMENT OF THE CASE

Dennis Penny ("Appellant") was indicted for First Degree Burglary, but the indictment was amended prior to trial to Second Degree Burglary. (R. p. __, Indictment; June 3 Tr. pp. 30-31.) He proceeded to a jury trial before the Honorable Paul M. Burch on June 3-4, 2013. He was convicted of the lesser offense of Second Degree Burglary (Non-Violent). Judge Burch deferred sentencing and requested that a pre-sentencing investigation be conducted by the Department of Probation, Pardon, and Parole Services (DPPPS). (June 4 Tr. p. 89.) The matter was reconvened on July 9, 2013. Appellant was sentenced to five years' imprisonment, suspended upon the service of four years to two years' probation. (July 9 Tr. p. 13.) However, on July 10, 2013, a DPPPS agent reported Appellant had been uncooperative when they attempted to complete paperwork and expressed concern that Appellant could not be supervised. (July 10 Tr. pp. 4-5.) Appellant informed the court that he did not want a probationary sentence. (July 10 Tr. p. 5-6.) Judge Burch then pronounced a sentence of five years' imprisonment. (July 10 Tr. p. 12.)

STATEMENT OF FACTS

Joey Oliver and his spouse lived at a home in Chesterfield County. (June 4 Tr. p. 20.) On December 20, 2012, their daughter, Chasity Penny, and her four children were also staying at the home. (June 4 Tr. p. 21.) Her husband, Appellant, was not a resident of the home at the time. (June 4 Tr. p. 21.) Chasity had come to stay with her parents a few weeks prior. (June 4 Tr. pp. 21-22.) Chasity and her husband, Appellant, were having "some issues," and she had decided to leave the home she and Appellant shared in Pennsylvania to stay with her parents. (June 4 Tr. p. 22.)

Appellant came to the house without invitation. (June 4 Tr. pp. 23-24; p. 26.) He "snatched the storm door open and kicked the metal door in." (June 4 Tr. p. 25.) Oliver asked Appellant what he was doing, and Appellant responded, "'You're harboring my children.'" (June 4 Tr. p. 25.)

The doors had to be replaced as a result of Appellant's action. (Tr. p. 25.) The storm door was "whooped up" - the door was bent in, the door jamb ripped out, and the latch broken. (June 4 Tr. p. 31; p. 34.) The home could not be secured again until repairs were made.

As Appellant fled with the two children, officers attending a training class in nearby Lancaster County received notice of an Amber Alert being issued. (June 4 Tr. p. 43.) When information followed that the suspect was being pursued in Lancaster County, the officers left the class to assist. (June 4 Tr. pp. 43-44; p. 52.) When Matt Shaw of the Lancaster County Sheriff's Office arrived on scene, Appellant had stopped his vehicle along Highway 521. (June 4 Tr. p. 44.) Officers tried to get Appellant to exit the vehicle, but he fled again, leading the officers onto a back road traveling toward the North Carolina border. (June 4 Tr. p. 44-46; pp. 52-53.) Officers initiated a rolling roadblock, a

maneuver intended to slow the fleeing vehicle and eventually force it to stop. (June 24 Tr. p. 45; p. 53; p. 58.) Appellant continued to drive evasively, crossed the state border, and ultimately veered onto a dirt road leading to a poultry barn with about twenty officers in pursuit. (June 4 Tr. p.46-48; pp. 53-55.) There they were finally able to apprehend Appellant after a physical struggle. (June 4 Tr. pp. 48-49; p. 55; p. 59.)

ARGUMENT

I.

Evidence was presented that Appellant did not have permission to enter the Oliver home on December 20, 2012. While he may have been invited in if he had knocked, Appellant chose to approach the home unannounced and destroy the storm door and inner door of the home, thereby forcing his way inside. The trial court correctly denied the request for directed verdict on this basis.

Appellant first contends the trial judge erred in denying his motion for directed verdict because no evidence was presented establishing that he lacked consent to enter Joey Oliver's residence. Indeed, pursuant to S.C. Code §16-11-312(A), burglary in the second degree occurs when a "person enters a dwelling without consent and with intent to commit a crime therein." The phrase "enters a building without consent" is statutorily defined as: "to enter a building without the consent of the person in lawful possession." S.C. Code §16-11-310(3)(a). Oliver was unquestionably the person in lawful possession of the home Appellant entered, and Appellant lacked Oliver's consent to enter at the moment he kicked the door in. The trial judge correctly denied Appellant's motion for directed verdict on the basis of consent, and Appellant's conviction should be affirmed.

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the

evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences 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 substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

The trial court correctly denied Appellant's request for a directed verdict based on consent. Appellant essentially argues that he had unfettered access to the Oliver home when he kicked the door in, essentially claiming that he had lawful possession. Appellant contends that he only lacked consent to kick the locked door which kept him out of the premises. Alternatively, Appellant appears to assert that since he would have been given permission to enter if he had knocked, he should be deemed to have permission to enter by the alternate means of a violent, unannounced kick to the door. Either assertion fails.

Joey Oliver testified:

- Appellant was not invited to his home on December 20. (June 4 Tr. p. 23-24.)
- Oliver did not know Appellant was coming to the home. (June 4 Tr. p. 23.)

- Appellant's previous access to the home had been under different circumstances. (June 4 Tr. p. 24.)
- If Appellant had knocked, Oliver would have opened the door, but Appellant did not have permission to kick the door in and enter. (June 4 Tr. p. 26.)
- While Appellant had previously lived in a camper on Oliver's property and still received mail at the address, Appellant no longer lived there on December 20. Appellant and his family could have lived in the Oliver home "during that time [the time they lived in the camper]. They chose to live in the camper." (June 4 Tr. p. 27.)
- Chasity, Appellant's estranged spouse, was staying at the home at the time as a temporary visitor. (June 4 Tr. p. 21-22.) Chasity had a key to the Oliver home, but Appellant did not. Chasity would pick up mail addressed to Appellant. (June 4 Tr. pp. 28-29.)
- Oliver was always present when Appellant assisted with work on the house. (June 4. Tr. p. 28.)

No evidence indicates Appellant was in lawful possession of the Oliver home. He was in no way a legal resident of the home. Georgia has held that a person does not even have unlimited consent as a matter of law to enter the home of an estranged spouse. State v. Kennedy, 266 Ga. 195, 467 S.E.2d 493 (1996). Certainly unlimited consent would not extend to a home where an estranged spouse was staying as a visitor on a temporary basis. Appellant's contention that he had previously lived in a camper on the property and still received mail there likewise fails to support his claim to consent to enter the home. It would be ludicrous to suggest that, for example, that an apartment tenant who vacated after his lease expired continued to enjoy consent to enter the apartment because his mail

still arrived at that address. The claim becomes even more ridiculous in light of the fact that Appellant never exercised his putative right to freely enter Oliver's home even when he lived in the camper on the property. (June 4 Tr. p. 27.) See State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998) (Motion for directed verdict properly denied based on evidence appellant was not in lawful possession of the mobile home at the time of the stabbings after Kelly had told him to leave. Though Appellant had paid rent several times, Kelly had only key, Kelly's was only name signed on lease, and appellant's license was attached to lease only as an approved visitor. This evidence supported inference that appellant was a visitor.)

Oliver's testimony that if Appellant had knocked he would have opened the door indicates that Appellant did not enjoy unfettered access or lawful possession of the home. Appellant was required to knock before entering. Had he knocked, Oliver would have opened the door. However, Appellant did not give Oliver an opportunity to invite him in. Oliver's assertion that a knock was required clearly indicates Oliver did not grant Appellant unconditional consent at all times to enter.

Appellant's contention that he had never been unwelcomed likewise fails. Oliver was not required to provide formal notice to Appellant that he could not enter, particularly by kicking the door in. Oliver's closed and locked door was a sign to the world that privacy was intended.

While Applicant may have been welcomed as a guest if he had knocked, this does not amount to unlimited consent. Appellant did not have Oliver's consent to enter by kicking the door in. He did not have consent to enter at the moment he kicked the door in because he had not knocked and requested entry. Just as a person drawing a weapon to force a monetary "loan" which may have been obtained from a friendly request would

still be armed robbery, a person cannot choose to violently and forcibly enter a home he may have been granted access to upon verbal request. Evidence abounds that Appellant did not gain the consent he needed to enter the home on December 20. For all these reasons, evidence supports the trial court's denial of a directed verdict.

II.

The trial court correctly denied Appellant's request for directed verdict on the basis that the State had not presented evidence of intent to commit a crime inside the premises. Evidence that Appellant broke an outer storm door, kicked in an inner door, and stormed inside the premises supports an inference of intent.

The standard of review for this question is the same as that detailed in Issue I. In ruling on Appellant's directed verdict motion, the Court noted:

> ... - - you don't have to have a breaking anymore. Of course, it's not like the old house breaking. So it's entry. Once he opened the outside door the entry was complete. Then he had broken the [plane] by kicking the inner door in doing the damage."

(June 4 Tr. p. 63) At trial, the State submitted that Appellant a crime in addition to the act of trespass and damage to the door, the manner of entry endangered the children. (June 4 Tr. p. 65; p. 70.) The forceful kicking in of the door certainly could have caused injury or fear of injury to any occupant of the home.

In the present case, the crossing of the threshold involved the destruction of Oliver's storm door and door. Appellant "snatched the storm door," which opened outward then kicked the metal door inward, heedless of any potential harm to Oliver's property or the occupants inside. Appellant's entry was complete upon snatching the storm door. The smallest entry of the space of the dwelling is sufficient to satisfy the

requirement.[1] Having made entry by removing the outer screen door, Appellant intended and did carry out a crime therein when he kicked in the inner door, breaking the door jamb, and stormed inside, trespassing upon the property. In addition to the actual crime of kicking in the door, thereby trespassing and destroying personal property, Appellant's manner of entry lends itself to an inference that he intended to commit a crime inside the home. The violent entry was certainly ample to put those inside in fear. While there was no charge that he carried out any act of violence or harm inside the home other than the breaking of the inner door, his action of kicking the door in surely lends itself to an inference of violent intent at the moment entry was made. See 12A CJS Burglary §96 (December 2014) (Some courts permit the factfinder to infer the requisite intent from the fact or manner of the defendant's unlawful entry). Even failure to convict of a crime inside the premises will not negate a burglary conviction. See State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (1999) (fact that defendant was not convicted of sexual assault was immaterial to validity of burglary conviction).

McMillian v. State, 383 S.C. 480, 680 S.E.2d 905 (2009), is instructive in this matter. McMillian sought post-conviction relief, alleging ineffective assistance of counsel in that counsel had allowed him to plead guilty where the facts did not support a charge of Burglary First Degree because he lacked the requisite "intent to commit a crime therein." In April 2004, McMillian knocked at the door of the home of Lanelle Hicks and her adult son, Mark. McMillian's knocking turned to beating on the door, and McMillian eventually "crashed the door open, damaging the door." Id. at 482, 680 S.E.2d 906.

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[1] "A breaking, essential to constitute the crime of burglary, may be any act of physical force, *however slight*, whereby any obstruction to entering is forcibly removed." State v. Clamp, 225 S.C. 89, 99, 80 S.E.2d 918, 922 (1954). [Emphasis supplied.] While decided under law requiring "breaking and entering," description of entry "however slight" is appropriate under current burglary statutes.

McMillian entered the home, but Mark immediately escorted him outside and held him until police arrived. McMillian claimed that he had approached the home in a grossly intoxicated state seeking help. Counsel believed McMillian's trespass upon the property was adequate to submit the question of intent to the jury. Similarly, in the present case, evidence that Appellant broke the inner door after making entry through the storm door and stormed into the living area of the home support an inference that he intended to commit a crime inside the home.[2] As with McMillian, Appellant was free to argue that he lacked the requisite intent; nonetheless, the evidence was sufficient to submit the case to the jury. The trial court correctly denied Appellant's request for a directed verdict on this basis.

III.

The issue of whether the trial court erred in admitting evidence of flight was not preserved for review where Appellant failed to follow his pre-trial motion *in limine* with a contemporaneous objection to any testimony regarding flight. Even if the issue were preserved, the evidence was properly admitted.

Appellant moved pre-trial to suppress any evidence related to flight, arguing a lack of nexus between the flight and the charged crime. (June 3 Tr. pp. 19-25.) Appellant's motion was a motion *in limine* seeking to prevent admission of evidence regarding the issuance of an Amber Alert and the Appellant's flight from police officers. A ruling on a motion *in limine* is not final, however, and is subject to change. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). Therefore, a contemporaneous objection is

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[2] The Pennsylvania case cited by Appellant varies from the circumstances of this case in a crucial way. In Commonwealth v. Wilamowski, 534 Pa. 373, 380, 633 A.2d 141 (1993), the Pennsylvania Supreme Court declined to accept a per se assumption that a forced entry alone "automatically gives rise to an acceptable inference of intent to commit a crime inside." However, Wilamowski broke a door "without any showing that he entered the structure or attempted to enter. His path into the structure was now unobstructed, but he chose to walk away and go to the neighbor's house to ask for directions." Id. Wilamowski made no further foray into the premises, where Appellant, not content to have destroyed his father-in-law's door, continued inside the home.

required when the matter is presented to the jury. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). However, no objection was made when officers testified regarding Appellant's flight. (June 4 Tr. pp. 43-49; pp. 51-55; pp. 57-59.) Therefore, this issue is not preserved for review.

Even if Appellant had preserved the issue for review, it would be without merit. Flight evidence may be admissible as some evidence of consciousness of guilt. State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013). "Flight evidence is relevant where there is a nexus between the flight and the offense charged." State v. Orozco, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (Ct. App. 2011) (cert. granted October 17, 2012). "Yhe critical factor to the admissibility of evidence of flight is whether the totalitu of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) (citing State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).) There must be an inference that "the defendant'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." Id. [Emphasis supplied.] For there to be a nexus, evidence must link the flight to the charged crime. As stated in U.S. v. Obi, 239 F.3d 663, 665 (4th Cir. 2001):

> To establish this causal chain, there must be evidence that the defendant fled or attempted to flee and that supports inferences that (1) the defendant's flight was the product of consciousness of guilt, and (2) his consciousness of guilt was in relation to the crime with which he was *ultimately charged* and on which the evidence is offered.

[Emphasis added.]

Appellant argues he "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," but he would not have known he was being sought for Second Degree Burglary as he was not charged with that offense until two weeks later. The knowledge of guilt required for the admission of flight evidence does not require that the defendant decipher which particular offenses he may be charged with as a result of a given course of conduct. A fleeing defendant does not have to conduct an accurate legal analysis of which crimes he may be charged with in order to have consciousness of wrongful conduct. He need not parse out the legal particularities of, for example, the varying degrees of burglary, in order to know that he has committed a criminal act. In the example of burglary, it matters not whether a fleeing defendant believes he has committed first or second degree burglary; it matters only that he is aware that his conduct on a given occasion may be the cause of the authorities' pursuit.

In the present case, even if Appellant was unsure of which offenses he may be charged with or whether an Amber Alert was founded, he was certainly aware that he was being sought as a result of his removal of his children from Oliver's home. This removal involved the forcible entry for which he was ultimately tried. It was with awareness of the wrongfulness of this limited course of conduct that he fled.

Moreover, there is no merit to Appellant's contention that mention of the Amber Alert could have caused the jury to premise their finding of guilt on an improper basis, that is, the removal of the children as the crime intended in the Oliver residence. The only argument made to the jury was that Appellant intended trespass, damage to the Oliver's property, and possibly endangerment or intimidation of those inside. The jury was instructed on trespass and malicious injury to property. (June 4 Tr. pp. 83-84.) It is

presumed that jurors followed the instructions of the court. State v. Queen, 264 S.C. 515, 216 S.E.2d 182 (1975). The evidence of both trespass and malicious injury to property was clear. Therefore, Appellant's argument regarding prejudice in this regard must be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 12, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2013-001554

THE STATE,

Respondent,

v.

DENNIS M. PENNY, II,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served. This 12th day of January, 2015.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

January 12, 2015

Laura R. Baer, Esquire
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RE: State v. Dennis M. Penny, II
Appellate Case No. 2013-001554

Dear Ms. Baer:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary W. Leddon

Mary Williams Leddon
Assistant Attorney General
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MWL/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services