STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY EUGENE PASSMORE,

APPELLANT

APPELLATE CASE NO. 2014-000727

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the charge of burglary in the first degree since the state failed to present direct or substantial circumstantial evidence that appellant willfully and unlawfully entered the dwelling (1) without consent and (2) with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was indicted by the York County Grand Jury for the offenses of burglary in the first degree, kidnapping, criminal domestic violence of a high and aggravated nature, and possession of a weapon during a violent crime. Appellant's case was called to trial on March 31, 2014 before the Honorable John C. Hayes, III, and a jury. Dan Hall represented appellant. Jessica Holland was the assistant solicitor. Tr. 1.

On April 1, 2014 the jury found appellant not guilty of kidnapping, not guilty of criminal domestic violence of a high and aggravated nature, not guilty of possession of a weapon during a violent crime, but guilty of burglary in the first degree. Tr. 277, l. 16 – 278, l. 5. Judge Hayes sentenced appellant to thirty years imprisonment for burglary in the first degree. Tr. 284, ll. 2-9.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict on the charge of burglary in the first degree since the state failed to present direct or substantial circumstantial evidence that appellant willfully and unlawfully entered the dwelling (1) without consent and (2) with the intent to commit a crime therein.

Introduction

Defense Counsel Hall told the jury in closing that they had heard a recording of a telephone call between appellant and his teenage daughter where he went on a "redneck rant" about his wife dating a black man, and that his children did not like this man. "It's ugly and it's embarrassing, but that's the nature of redneck rants and redneck divorces." Tr. 229, l. 13 – 231, l. 13. Defense counsel told the jurors that "kidnappers and burglars" did not act the way appellant did on the night when he came to be charged with these crimes, including burglary. Tr. 231, l. 14 – 237, l. 13.

Relevant facts

Julia Coleman was the mother of appellant's three children. They were a daughter, sixteen years old, and sons, fourteen and ten years old. Tr. 91, l. 16 – 92, l. 5. Sixteen-year-old Tara and fourteen-year-old Cody resided with Coleman. Ten-year-old James lived with his grandmother. Tr. 92, ll. 6-14.

Coleman testified her new boyfriend was Chip. Tr. 92, ll. 15-21. Coleman said she had a prior phone conversations, and "nasty voice mails" from appellant about her dating Chip. Tr. 95, ll. 4-19.

Coleman testified that appellant said he would show up at her house when her boyfriend was there, and that "we'll see who the real man is." Coleman told appellant: "Ricky, don't show

up at my fucking house." Tr. 96, ll. 2-6. Coleman testified that on June 19, 2013 the incident occurred that was the subject of this criminal action. Tr. 96, ll. 7-11.

Coleman's daughter, Tara, testified she was sixteen years old at the time. Appellant telephoned her at about twelve-thirty that morning. Tr. 117, ll. 5-22. Tara testified there was a lot of cussing and "a lot of racism" during appellant's ranting phone call. Tara decided to tape part of the conversation. Tr. 117, l. 23 – 119, l. 3.

Tara testified when the conversation was over she told her mother, "You might want to listen to this recording." Her mother "listened to maybe three minutes of it, if that, and put the phone down and she just blew it off." Tr. 121, ll. 15-19. There would be other evidence that Coleman, the mother, was not afraid of appellant.

Coleman claimed that Chip left about ten-thirty that evening. Tr. 97, ll. 1-2. She said that at about five o'clock in the morning, on June 19, 2013, she was sleeping on the couch and her children were in bed. Tr. 96, ll. 4-25.

Coleman testified there was a knock on the door and her son, Cody, went to the door. She claimed he said: "Mama, it's Chip." Coleman said she told him to open the door and then Cody said, "Mama it's daddy" and that appellant and his brother, Mickey, walked inside. Tr. 97, l. 22 – 98, l. 6.

Coleman claimed appellant asked her, "Where is Chip?" and she answered: "He's not here." Coleman maintained she started looking for the phone, and that appellant pulled out a sword, pushed her on the couch and said: "Bitch you move, you die." Tr. 98, l. 10 – 99, l. 5. [1]

[1] As seen, the jury acquitted appellant on all other charges. A clear indication it did not believe Coleman's testimony.

Coleman maintained that appellant then went to Tara's room, woke her up, and said: "Get the fuck up. You are going with me." Tr. 98, ll. 23-25. Coleman also claimed she heard appellant ask Tara: "Where the fuck is Cody?" Tara answered, "Daddy I sent him out the back door to call the police." Appellant allegedly said: "The police, Tara? Really? The fucking police, Tara?" Coleman claimed Tara answered: "Yeah daddy. I love you but I love my mama too and I can't watch you kill my mama." Appellant and his brother Mickey then walked away. Tr. 99, ll. 1-15.

Coleman remembered that appellant and Mickey then walked out on the porch. Coleman claimed appellant said something about "turning your back on us." Coleman said she responded: "Whatever, get the hell away from here. They went down the steps and I pulled the door back and locked it." Tr. 100, ll. 10-17.

On cross-examination, Coleman admitted the sword appellant brought never touched anyone. Tr. 103, ll. 21-25. Coleman also acknowledged that appellant would "*say anything*" in conversations, and she essentially admitted she did not take his "rants" seriously. Tr. 106, l. 25 – 107, l. 25.

Coleman said she did not remember if she was smoking a cigarette during this alleged incident – others would confirm she was smoking -- but Coleman admitted she told appellant: "I don't have time for this shit I gotta go to work [in the morning]." Tr. 109, ll. 10-20.

Defense counsel moved for a directed verdict of acquittal on of all the charges. As to burglary, Defense Counsel Hall argued appellant was given permission to come to the house, **and** that he did not have any intention of harming anyone or committing any crime inside. Tr. 150, l. 21 – 151, l. 2.

As seen, the jury acquitted appellant on the kidnapping, criminal domestic violence of a high and aggravated nature, and firearm indictments. Tr. 150, l. 21 – 151, l. 2. The judge had denied the motion for a directed verdict on all of the counts. Tr. 152, l. 8 – 153, l. 12.

At the conclusion of the evidence, Defense Counsel Hall renewed his directed verdict motion, which was again denied. Tr. 227, ll. 14-24.

Other Evidence

Appellant testified in his own defense and said that his son, Cody, allowed him to enter the house that night, and further, Coleman did not oppose appellant coming inside. Tr. 164, ll. 7-21. Appellant admitted he had a sword with him because he did not know if Coleman's boyfriend was going to be there and whether there would be a confrontation with him. Appellant said any confrontation that might have occurred would have been between him and the boyfriend who, as seen above, was not present. Tr. 164, l. 24 – 165, l. 15.

Appellant also said that Coleman was smoking a cigarette during their conversations and that she asked him "Who or what is that fucking sword is for?" Appellant answered "That's for your boy when I catch him around my kids." Tr. 169, ll. 15-21. Appellant said that he was concerned for his children, and that Coleman was not afraid of him "in the least." Tr. 182, l. 24 – 185, l. 8.

Rebecca Rogers was living with appellant, appellant's brother Mickey, and appellant's girlfriend at the time. Tr. 211, ll. 5-13. Rogers testified that she was awoken about three o'clock in the morning because Mickey wanted her to drive him to the store to get some more beer. Rogers told the jury: "I had the car, the license, and I was sober." Rogers said she ultimately agreed to drive Mickey and appellant in her "old Lincoln Town car" over to Clover, South Carolina. Rogers described how her car was in very bad shape. The hood on the car had to be

lifted to start it. Mickey would "get under the hood," and he would start the car "in some way." Further, "my brake lights were hooked with a toggle switch and my toggle switch had broken off, and I was trying to get my brake lights to go in the off position, cause I couldn't ride down the road with my brake lights on." Tr. 214, l. 1 – 215, l. 13.

Rogers drove appellant and Mickey over to the mobile home in Clover. She remembered Coleman standing with Mickey on the porch while smoking a cigarette. Rogers remembered Coleman telling appellant and Mickey: "I ain't got time for this shit, I got to go to work." Rogers estimated the conversation only lasted a couple of minutes, and appellant and Mickey then told her: "We got to go. Let's go." Tr. 216, l. 2 – 218, l. 3. She heard appellant or Mickey ask Coleman: "Are you going to let Cody come with us?" Rogers did not hear Coleman's answer, "but Cody didn't come with us either so." Tr. 218, ll. 2-21.

Discussion

Burglary in the first degree is a very serious crime because it involves an invasion into the home of another by a person intending to commit a crime inside. State v. Singley, 392 S.C. 270, 709 S.E.2d 603 (2011). Appellant should have been granted a directed verdict because the state failed to offer direct or circumstantial evidence that appellant: (1) entered the dwelling without consent, and (2) that he entered with the intent to commit a crime therein.

Under the state's version, or the defense version, of the facts, appellant had consent to enter. Coleman's testimony was that Cody opened the door thinking he was letting in Chip, Coleman's boyfriend, but then Cody's father, appellant and appellant's brother, Mickey, walked in when Cody let them inside. There was no artifice or trick involved to gain entry. See S.C. Code §16-11-310 (3). There simply was no direct or substantial circumstantial evidence that appellant entered the mobile home without consent.

Further, there was no evidence appellant entered the home with the intent to commit a crime. Appellant did not touch anyone with the sword, and it is apparent he did not have any intent to harm Coleman or his own children. What might have happened had Coleman's boyfriend been in the house at the time would only be **speculation**, and speculation and conjecture are not sufficient to survive a directed verdict motion. See State v. Smith, 274 S.C. 622, 623-624, 266 S.E.2d 422, 423 (1980).

This is a most unusual burglary case since appellant came to the home of his estranged wife, or ex-wife, and his children. He was obviously known there by his son, and he was allowed to enter. There was no direct or substantial circumstantial evidence that appellant and his twin brother forced their way into the home without consent.

Further, there was no direct or substantial circumstantial evidence appellant entered the home with the intent to commit a crime therein. Again, speculation regarding what might have occurred if Chip, the boyfriend, had been there is mere speculation which is not sufficient to survive a directed verdict motion.

Further, evidence of what occurred after entry is relevant to prove the intent at the time of entry. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Appellant did not make any attempt to harm anyone inside, he did not attempt to steal anything, and all the state could do in this case is **speculate** what might have happened if Chip had been there. While appellant being acquitted of the other crimes charged is not conclusive on the issue of his intent, it is instructive that appellant was acquitted on the charges of criminal domestic violence of a high and aggravated nature and kidnapping. Those offenses were, noteworthy, in that they were supposedly directed at Julia Coleman, and not Chip anyway.

There certainly was not substantial circumstantial evidence appellant entered without consent of his son, Cody, or Coleman, and that he intended to commit a crime upon his entry. Again, the kidnapping and criminal domestic violence of a high and aggravated nature charges ended in an acquittal.

"Mere suspicion" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

The Supreme Court noted that the evidence above, as well as the fact Bostick had a pattern of gasoline on his shoes, where gasoline was the accelerant used to start the fire at the Polite home were all insufficient to survive a directed verdict motion. The Court held this evidence only raised a suspicion that Bostick may have been guilty and it was not sufficient for the case to get beyond the directed verdict stage. See, also, State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)(murder case where the defendant's car or a very similar car is spotted at the victim's apartment complex on the night of the murder. Items linked to the victim are located in a trash can outside the bar where the defendant's girlfriend worked. The defendant and the co-defendant, when the defendant's girlfriend asked them why they were late picking her up on the night of the murder, responded thusly: "Somebody may have died tonight," and "some shit happened." This evidence as a whole, in the

light most favorable to the state, *was insufficient* to withstand a directed verdict motion). State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (The defendant admitted he smoked the brand of cigarette, Marlboro, which matched the cigarette butt found at the crime scene. A similar footprint to that of the defendant was also found at the crime scene. The defendant also suspiciously disposed of the clothes and the shoes he had been wearing at the time, and he did not present an alibi. The state could not get a saliva match off of the cigarette butt, and the Court ruled the state's circumstantial evidence only raised a suspicion of the defendant's guilt on the murder charge, and a directed verdict should have been issued); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) (The victim, Cox, was shot, and his body found off of a road in Colleton County. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car. The Supreme Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126 (2000) (a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. Mitchell's fingerprint was found on a screen leaning up against the house. The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house did not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." *The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed*, and the directed verdict motion should have been granted).

The state failed to present direct or substantial circumstantial evidence in this case that appellant (1) entered the dwelling without consent, **and** (2) that he entered with the intent to

commit a crime therein. The failure to prove **both** of those elements entitled appellant to a directed verdict.

The burglary conviction in this case resulted in a thirty year prison term where appellant was correctly acquitted on the other charges. This is not a burglary case, and an order of acquittal should now be issued since a directed verdict should have been issued on this charge.

CONCLUSION

By reason of the foregoing arguments, a verdict of acquittal should now be issued based on the refusal of the trial court to direct a verdict on the charge of burglary in the first degree.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2015.