

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

RECEIVED

MAY 27 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WILLIAM TRAVIS CALVERT,

APPELLANT

APPELLATE CASE NO. 2014-001930

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict on the charge of burglary in the first degree based upon his finding that a structure was a dwelling house despite the county having prohibited occupation of it due to the hazardous materials associated with the methamphetamine laboratory found there?

STATEMENT OF THE CASE

On May 27, 2014, a Greenville County grand jury indicted Appellant for burglary in the first degree (2014-GS-23-4271). R. * (indictment). The state, represented by Austin F. Watts, called the case for trial before the Honorable D. Garrison Hill and a jury on September 3 and 4, 2014. Charles S. Propst, Jr., represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 178, line 25 – Tr. 179, line 4. Judge Hill sentenced Appellant to the mandatory minimum sentence of fifteen years' imprisonment. Tr. 184, lines 2-5; R. * (sentence sheet).

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

ARGUMENT

The trial judge erred in failing to direct a verdict on the charge of burglary in the first degree based upon his finding that a structure was a dwelling house despite the county having prohibited occupation of it due to the hazardous materials associated with the methamphetamine laboratory found there.

Relevant facts

Prosecutor's Evidence

On November 13, 2013, Stephen Pepper was in jail awaiting disposition of his criminal charges related to manufacturing methamphetamine. Tr. 44, lines 17-21; Tr. 71, lines 4-11; Tr. 85, lines 23-25; Tr. 105, lines 13-20; Tr. 112, lines 6-10. The house he once occupied sat empty, having been condemned by Greenville County in light of the hazardous materials there.¹ These hazardous materials were in the structure due to Pepper's manufacturing of methamphetamine. The Greenville County Sheriff's Office posted signs warning of unsafe living conditions and threatened to prosecute anyone who entered the premises for trespassing. Despite the numerous signs warning of the dangerous materials and forbidding entry and occupation, people entered the structure daily. Tr. 45, lines 4-7; Tr. 48, line 18 – Tr. 49, line 22; Tr. 51, lines 13-14; Tr. 68, line 24 – Tr. 71, line 11; Tr. 94, line 25 – Tr. 95, line 20; Tr. 105, line 24 – Tr. 107, line 8; Tr. 112, lines 6-10. Pepper's neighbor, Christy Crawford, set up a baby monitor in the structure so that she could monitor the activity within it from her house next door. Tr. 43, lines 24-25; Tr. 45, lines 13-15.

¹ The inside of the house was ransacked - "items [were] everywhere." These conditions corroborated the signs warning of inhabitability. Tr. 63, lines 21-23; Tr. 71, lines 12-18; Tr. 95, line 24 – Tr. 96, line 9; Tr. 107, lines 9-20.

Late at night on November 18, 2013, Hannah Horne went for a ride with Johnny Banks and Appellant. Banks dropped Horne and Appellant at the vacant structure, while he went to visit Crawford, his ex-girlfriend. Tr. 97, line 23 – Tr. 98, line 3; Tr. 99, line 8 – Tr. 101, line 12. According to Horne, Appellant entered the structure by removing a window air conditioning unit. He then allowed Horne to enter through the back door. Tr. 102, lines 8-14. The two planned to steal tools. Tr. 102, lines 15-17. Crawford heard “talking, doors opening, closing” coming from the monitor. Alarmed, she contacted police. Tr. 45, line 16 – Tr. 46, line 20. When the police arrived, they found Horne and Appellant in the structure. Tr. 53, lines 3-4; Tr. 56, line 18 – Tr. 57, line 21; Tr. 66, lines 2-4; Tr. 74, lines 16-18; Tr. 79, lines 2-3; Tr. 90, lines 8-10; Tr. 103, line 21 – Tr. 104, line 4.

After Pepper’s release from jail on bond, he went to the condemned structure:

Q. And where did you go to live when you got out of jail?

A. Well, I couldn’t legally live in my house until it was reexamined by DHEC and certified. But, you know, I - - they tested it. And I moved back in thinking that they was [sic] going to turn that in. And they - - the officer went off to Myrtle Beach, whatever. And it - - they come out and fined me \$500 for being there. And then it was cleared up. And the Judge dropped it to \$150. And I’m legally now allowed to live in my house.

Tr. 114, lines 10-19; Tr. 116, line 16 – Tr. 117, line 11.

Motion for Directed Verdict

Appellant moved for a directed verdict, arguing that the prosecution “failed to meet the burden of establishing that the incident location was a dwelling house for the purposes of the burglary statute.” After referencing the statutory definition for a dwelling house, Appellant directed the court’s attention to State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (2008). Appellant argued “that whether a building is a dwelling turns on

whether the occupant left with the intention to return.” Additionally, Appellant cited State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979) to explain that “although a temporary absence of occupants would not prevent a residence from becoming the subject of a burglary, [the statute] required that the occupant leave with the purpose of returning.” Appellant noted that burglary is an offense against habitation, not property; thus, occupation is required. Appellant also provided the trial judge with the statutory provision – S.C. Code Ann. 31-15-320 – governing condemnation of property when unfit for human habitation. Pursuant to the statute, when a county finds a structure unfit for human habitation, the county may preclude individuals from living in the structure and may demolish the structure. Appellant argued that Pepper could have no intent to return to the home because occupation of the home was illegal. Tr. 122, line 15 – Tr. 127, line 24.

Citing State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002), the prosecutor argued against the directed verdict motion. The prosecutor characterized Pepper as being temporarily absent from the structure, and argued that the temporary absence had “absolutely no bearing on whether this is a dwelling or not.” Agreeing that the test to determine whether a structure is a dwelling is whether someone intends to return, the prosecutor argued that Pepper intended to return and that this intent was shown through his actual returning to the property even “before he was able to get in the house and was cited for a criminal offense.” Additionally the prosecutor argued that the fact that the structure was empty was not a factor for the court’s consideration when determining whether the structure of the dwelling. Tr. 128, line 4 – Tr. 133, line 22.

Ruling on the Motion for Directed Verdict

Judge Hill denied the motion for directed verdict based on the statutory definition of dwelling and “the case law refinement of that.” Citing Evans, supra, he concluded “it is a jury question about whether or not this structure constituted a dwelling in the context of the burglary first statute.” Tr. 134, lines 4-8.

Closing Arguments

The prosecutor told the jury that “the crux of this case is really going to turn on whether you, the finders of fact, determined that this house was a dwelling.” Tr. 151, lines 3 – 5. The prosecutor classified the defense argument “a legal nuance.” Tr. 151, lines 5 – 7. Thereafter, the prosecutor argued that Pepper was “temporarily absent.” Tr. 151, line 22 – Tr. 152, line 2. In direct contradiction of testimony by law enforcement, the prosecutor argued that the structure had *not* been condemned. Tr. 102, lines 20 – 25. Further, the prosecutor argued Pepper intended to return because he actually returned. On this point, the prosecutor argued:

Quite frankly, he broke the law. There’s no doubt he intended to return. He, actually, returned. He even came so early that they were able to let him in yet. He had to pay a fine because he came back too early before DHEC inspected the house. Quite frankly, it sounds like – – quite honestly, a moneymaking scheme where they just need him to pay for something and they take the little pockets off and there he goes.

Tr. 153, lines 7 – 17.

The prosecutor argued the defense was “disingenuous” “to argue that this house is so bad that Mr. Pepper can’t go in it, but, yet, he can.” Confusing the legal argument, the prosecutor told the jury that the defense was arguing that “Mr. Pepper can’t go in the house, but I sure can steal your stuff. That place is condemned. It’s terrible. You can’t go in there, but I can steal your stuff, and something about burglary in the second degree.” Tr. 154, lines 6-13. The prosecutor anticipated that the defense would argue

that “because of the alleged meth laboratory,” the structure was “transferred into something more akin to a building, a watercraft, and aircraft.” He characterized such an argument as “a stretch.” Tr. 159, lines 17 – 23.

Appellant argued the prosecution had failed to prove the structure was a dwelling house. Agreeing with the prosecutor that whether a structure is a dwelling turns on whether there is an intent to return, Appellant argued Pepper could have no intent to return because doing so was illegal. Tr. 161, line 8 – Tr. 162, line 3. Appellant highlighted the testimony of a law enforcement officer who “agreed that the building was condemned.” The undisputed testimony was that it was illegal for anyone to be in the building due to the meth laboratory’s hazardous and dangerous materials. Tr. 162, lines 11-23; Tr. 163, lines 10-17. Appellant clarified that he was not arguing that it was “right” for Appellant to be there. Rather, he was arguing that the structure was not a dwelling because Pepper could not have an intent to return to somewhere he could not be. Tr. 163, lines 18-21. “[B]ottom line, it’s literally illegal to live in this house. It’s illegal to be in the house. It’s illegal to live there. In order to live there, it’s got to be legal. You can’t live there. You can’t return there because it’s illegal.” Therefore, the structure could not be considered a dwelling under the burglary statute. Tr. 164, lines 8-17; Tr. 165, lines 14-21.

Jury Instructions

Relevant to this issue, the trial judge instructed that jury regarding the elements of first degree burglary and defined a dwelling:

The state, in order to convict [Appellant] of first degree burglary, must first prove beyond a reasonable doubt that he entered a dwelling without consent. A dwelling is any building or portion of a building in which a person ordinarily sleeps.

Dwelling is defined as any house, outhouse, apartment, building, erection, shed, or box in which there sleeps a person who lodges there with a view to the protection of property. But a structure is a dwelling even if the occupant is temporarily absent from the building, as long as you find the occupant has left with the intent to return. If, however, you find the occupant left the structure with no intent of returning, then the statute - - then the structure cannot be a dwelling.

Tr. 171, line 25 – Tr. 172, line 13. Additionally, the trial judge instructed the jury on the lesser-included offense of burglary in the second degree. Tr. 173, line 15 – Tr. 174, line 9.

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).

Burglary in the first degree is a statutory crime, and understanding the statute requires application of the rules of statutory construction. The analysis must begin with the

statute itself. The crime of burglary in the first degree requires the person (1) enter a dwelling (2) without consent (3) with the intent to commit a crime in the dwelling and (4) the existence of an enumerated aggravating circumstance. S.C. Code Ann. § 16-11-311(A). The primary issue before this Court is what structures are deemed “dwellings” for purposes of the burglary statute. The South Carolina Code defines a dwelling house as “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.” S.C. Code Ann. § 16-11-10. Further, a dwelling “also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person.” S.C. Code Ann. § 16-11-310(2). As required by the rules of statutory construction, courts must strictly construe the criminal statutes against the state. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

Burglary is “a crime against possession, not against property.” State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981). “The law of burglary is primarily designed to secure the sanctity of one’s home, especially at night time when peace, solitude, and safety are most desired and expected.” Id. “Thus, at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night.” Id. at 113, 283 S.E.2d at 831. “[B]urglary is an offence against the *habitation* of some other person.” State v. Trapp, 17 S.C. 467, 471 (1882) (emphasis in original); see also State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011) (“We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership”). “[T]he core of a dwelling constituting one’s home for burglary purposes is the expectation of peace and security therein. Mere ownership does not automatically confer

this status on a person. That ownership interest must be examined in light of who possesses that expectation of sanctity in the dwelling.” Singley, 392 S.C. at 276, 709 S.E.2d at 606.

In State v. Steadman, 257 S.C. 528, 541, 186 S.E.2d 712, 716, (1972), the defendant was charged with burglary in the first degree at South of the Border, a motel. The prosecuting witness maintained an apartment on the second floor of the office building where he resided “from time to time.” Id. He used the adjacent area for business purposes. Id. At the time of the burglary, the prosecuting witness was in the business office adjoining the living area. Id. The South Carolina Supreme Court found no error in a trial judge instructing the jury “that it was not necessary that the entire building be devoted to dwelling purposes, nor that the dwelling area entered be constantly inhabited every day or night of the year; and that the dwelling area might be in a building a portion of which is devoted to business purposes.” The Court noted, in approving the jury instructions, that “[i]t was made clear that the area entered must be devoted to dwelling purposes.” Id.

The South Carolina Supreme Court analyzed the meaning of “dwelling” in the seminal case of State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979). The Court concluded that the statutory definition of dwelling required that the structure “have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house.” Id. at 405, 257 S.E.2d at 155. The Court explained that although “temporary absence of occupants will not prevent a residence from becoming the subject of a burglary, it is required that such occupants leave with the purpose of returning in order for breaking and entering during their absence to constitute burglary.” Id. According to the Court, “the mere fact that a building is suitable for use as a dwelling is insufficient.” Even a house

furnished as a dwelling house “loses its character as such for the purpose of burglary, if the occupant leaves it without the intention to return.” Id. (internal citation omitted). This finding rested upon the centuries-old rationale that burglary is an offense against habitation, and not against property. Id. at 406, 257 S.E.2d at 155.

Ferebee was accused of burglarizing a vacant apartment. Id. at 404, 257 S.E.2d at 155. The issue before the Court was “whether the apartment was being used as a dwelling house *at the time* of the alleged offense.” Id. (emphasis added). The apartment was owned by a doctor and leased through a local real estate agency. “The building was a duplex containing two separate living units which had been utilized as rental property for the past three years.” Id. Although one unit remained occupied, the unit alleged to have been burglarized was vacant because the former tenants had moved out the prior week. Id. at 405, 257 S.E.2d at 155. The unit was partially furnished and available for rent at the time of the break-in. Id. The Court found “there was clearly no occupant or inhabitant against him the offense could have been committed” where the “former tenant had permanently abandoned the premises without the intention of returning.” Id. at 406, 257 S.E.2d at 155. Based on this reasoning, the Court reversed Ferebee’s conviction for burglary. Id. at 406, 257 S.E.2d at 156.

Relying upon the test in Ferebee, the Court found a mobile home was a dwelling house based upon evidence showing the occupant intended to return. State v. Glenn, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988). Glenn and her husband purchased a mobile home in 1985. Id. at 30, 374 S.E.2d at 671. The following year, Glenn’s husband died. Id. Shortly after the funeral, Glenn learned that she would have to surrender the mobile home or it would be repossessed. Id. Within a week of the funeral, Glenn stopped by the

mobile home to retrieve a Bible. Id. at 31, 374 S.E.2d at 671. Shortly after Glenn left the mobile home, a passerby noticed it was on fire. Id. at 31, 374 S.E.2d at 671-672. The only issue before the appellate court was whether the mobile home was a dwelling house at the time of the fire. Id. at 31, 374 S.E.2d at 672. The Court found the mobile home was a dwelling house because Glenn had \$10,000 worth of personal possessions in the mobile home and had returned to the home many times after her husband's death to gather possessions, evidencing her intent to return. Id. at 32, 374 S.E.2d at 672.

This Court found a vacation home to be a dwelling in State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008). The owner of the home burglarized, Charles Shaw, testified that he had owned the home for the past ten years as a secondary residence. Id. at 424, 656 S.E.2d at 783. The home was set on heavily wooded, mountainous, and secluded terrain. Id. The family had lived in the home "off and on" for years until three years before the break-in when Shaw's wife became ill preventing the family from spending significant amounts of time at the property. Id. Nevertheless, Shaw went to the home "once every two weeks or once a month." In fact, he had been at the home just weeks prior to the break-in. Id. This Court found "sufficient evidence of the Shaws' intent to return to the mountain property." Id. at 425, 656 S.E.2d at 784.

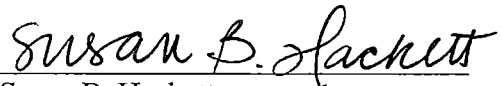
In the present case, the trial judge erred in finding the structure burglarized to be a dwelling. Appellant's entrance into the home could not have been an offense against possession because no one had a possessory right to the house. Greenville County had declared the house uninhabitable due to the hazardous materials contained in the house as by-products of the methamphetamine laboratory that Pepper was running. The county forbade not only occupation, but entry onto the property by everyone, including Pepper.

When Pepper entered the property, he was cited by the county for illegal conduct – trespassing. Certainly, he could not have been fined for trespassing on his own property if he had a possessory interest at the time. In light of the county’s actions of condemning the property and prohibiting entry and occupation, no one, including Pepper, had a possessory interest in the property. The structure was akin to the vacant apartment in Evans, supra. Although the apartment bore all the hallmarks of a dwelling, including furnishings, it was not a dwelling because no one had a possessory interest in the vacant apartment at the time of the break-in. Pepper could have no intent to return to the structure because doing so was illegal – as evidenced by the undisputed evidence presented at trial, including the signs posted by the county prohibiting entry and occupation and ticket and fine Pepper received when he returned to the structure.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in his favor on the charge of burglary in the first degree.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2015.

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APPELLANT

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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. William Travis Calvert, #323038, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of May, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2015.

[Signature] (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.