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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Trial Judge

Appellate Case No. 2012-213572

John Garner Kimble, ...Appellant,

v.

State of South Carolina, ...Respondent.

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in granting the State's motion to try Appellant in his absence on charges of armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime where no evidence was adduced on the record that Appellant received notice of the date of trial?

2. Did the trial judge err in denying Appellant's motion for a directed verdict on the charge of first degree burglary and holding the state adduced evidence sufficient to find Appellant guilty beyond a reasonable doubt when the State did not produce the resident of the home allegedly broken into to testify that Petitioner did not have consent to enter the home?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Appellant for first-degree burglary (2009-GS-23-0476), two counts of armed robbery (2009-GS-23-0477, -0478), and possession of a weapon during commission of a violent crime (2010-GS-23-2717). (App.pp.318-19; pp.321-22; pp.324-25; pp.327-28). H. Chase Harbin, Esquire represented Appellant.

After the State called the case to trial, Appellant was tried in absentia and found guilty of the charges as indicted. (App.p.264). On June 9, 2010, the Honorable Edward W. Miller sealed Appellant's sentence. (App.p.267). Appellant was represented by Mr. Harbin at the sentencing hearing on December 6, 2010. Judge Miller sentenced Appellant to concurrent terms of 30 years for first-degree burglary, 30 years for each count of armed robbery, and 5 years for possession of a weapon during commission of a violent crime. (App.p.320; p.323; p.326; p.329).

ARGUMENT

I. The trial judge did not err in trying Appellant in his absence.

Appellant argues the trial judge erred in trying Appellant in his absence because the evidence indicated Appellant received notice of a court date for separate charges. This argument is without merit.

Prior to jury selection, the assistant solicitor called the case and noted that, although Appellant was not present, she was prepared to go forward. (App.p.6). Trial counsel stated they had spoken the night before and was "surprised he's not here this morning." Trial counsel noted he had not missed any court appearances and asked that a

bench warrant be issued. (App.pp.6-7). The assistant solicitor noted one of the victims was present and the other was very scared and did not want to be present. The assistant solicitor noted she did not know if she would be able to locate him again and also stated they had been unable to locate any of the victims on the other unrelated charges. (App.pp.7-8). The assistant solicitor opined Appellant was "playing a game with the system" in hopes the victims would not appear in court. (App.p.8). The trial judge instructed the parties to have the bond companies come to court. (App.pp.10-11).

Scott Willis from Palmetto Surety Corporation testified the original bondsperson applied for surety with his company. (App.pp.13-14). Willis testified this case was transferred to Aces High bond company and all mail was forwarded to that new bond company. (App.pp.14-15). Willis testified his company was also an underwriter for Appellant's bond on a second set of charges (which was carried by Catch-22 bond company). (App.p.15). Willis testified a home visit was made to Appellant's address. Willis testified Catch-22: (1) spoke to Appellant on May 11, (2) spoke to Appellant's aunt on June 1 about receiving the bond card, and (3) spoke to Appellant later and relayed the court date to him for June 8 (the day of trial). (App.p.17). Lindsey Kicklighter testified she was investigator for the solicitor's office. (App.p.21). Kicklighter testified she sent the bond card for this case to Appellant's home address.[1] (App.p.22).

Trial counsel argued the trial in absentia should be denied and a bench warrant issued. Trial counsel argued it could not be confirmed that he was notified for trial. Trial

[1] The address on Lake Loop in Traveler's Rest is the same as the address listed on his bond sheet. (App.p.17; p.22).

counsel argued Appellant reported for very roll call and that the State's responsibility for securing their witnesses' presence was not his concern. (App.pp.23-24). The trial judge allowed the case to be tried in absentia and found "[Appellant] knew he was supposed to be here and he didn't show up. He will just have to face the consequences." (App.p.24). The trial judge later asked for confirmation of the language on Appellant's bond form. (App.p.109). The assistant solicitor read into the record following acknowledgement by Appellant on the bond form: "I understand and have been informed that I have a right and obligation to be present at trial, and should I fail to attend the court, the trial will proceed in my absence." (App.p.109). The bond form was entered into evidence as a court's exhibit. (App.p.110).

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless they are clearly erroneous. State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014).

Before a trial in absentia begins, the trial court must make findings of fact regarding whether the appellant had received notice of his right to be present and whether the appellant had been warned that the trial would proceed in his absence upon a failure to attend court. State v. Jackson, 288 S.C. 94, 95–96, 341 S.E.2d 375, 375 (1986). "A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice." State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) (citation omitted).

The trial judge properly granted the State's motion to try Appellant in his absence because he found Appellant was on notice that a trial on these charges was scheduled for

the day in question. Trial counsel stated he was surprised Appellant did not appear that day, as he had spoken to Appellant about court the night before. (App.pp.6-7). Kicklighter testified she sent notice to Appellant at the Lake Loop address. (App.p.17; p.22). Appellant's bond form – which listed the Lake Loop address – indicated he was aware he would be tried in his absence if he did not appear in court. (App.p.109). Furthermore, Scott Willis testified Catch-22 bond company had verified with Appellant that he had a court date for June 8 – the day of Appellant's trial. (App.p.17). That Catch-22 held the bond for a subsequent set of charges (and not the charges Appellant went to trial for on June 8) is of no consequences. It is clear Appellant was aware these charges were being called for trial on June 8 – he and trial counsel had seriously discussed entering a guilty plea to these charges[2] – and instead chose not to appear.

The trial judge made the requisite findings of fact before proceeding with Appellant's trial in absentia. Jackson, 288 S.C. at 95-96, 341 S.E.2d at 375. Appellant cannot point to an error of law that was made in issuing those findings. Robinson, 410 S.C. at 526, 765 S.E.2d at 568. Accordingly, the trial judge did not err in granting the State's motion to proceed with the trial in absentia.

II. The trial judge did not err in denying Appellant's motion for directed verdict on the first-degree burglary charge.

Appellant argues the trial judge erred in denying the motion for directed verdict on the first-degree burglary charge because the State did not present evidence that Appellant did not have consent to enter the residence. This argument is without merit.

[2] App.pp.6-7.

Omar Arcos, one of the armed robbery victims, testified he was visiting Juan Garcia (the other armed robbery victim) at Garcia's residence.[3] (App.pp.86-87). Arcos testified he was working on his car when a woman approached him and offered sex in exchange for money. (App.p.88). Arcos said he declined and the woman asked if anyone inside the trailer would be interested. (App.p.89). Arcos testified a man put a pistol to his head. (App.pp.89-90). Arcos testified there were two men with the woman and they demanded money. (App.pp.90-91). Arcos testified he gave them money and they made him walk into Garcia's residence. (App.pp.90-92). Arcos testified Garcia also gave them money. (App.pp.93-95). Arcos testified he later identified Appellant in a photographic lineup as being the man who was armed with a gun. (App.pp.97-99).

Deputy Justin Carlisle responded to the scene. (App.pp.76-77). Deputy Carlisle testified spoke to Arcos because Garcia did not speak English. (App.pp.78-79). Deputy Carlisle testified Arcos gave descriptions of both the perpetrators and the vehicle they were driving. (App.pp.80-81).

Investigator Mike Jarvis testified Arcos later identified Appellant from photographic lineup and was "very confident. It was a very quick identification." (App.pp.191-93). Investigator Jarvis testified Arcos also identified the other two co-defendants in photographic lineups. (App.pp.196-98).

Stallard Anderson was the other male perpetrator in this case and had already pled guilty to his charges before testifying at Appellant's trial. (App.pp.119-20). Anderson

[3] Judy Best testifies she owns a farm and provides several trailers as housing for the workers. She confirmed Garcia's residence was one of these trailers. (App.pp.112-15).

testified he, Carol, and Appellant rode to the scene so Carol could exchange sex for money to buy drugs. (App.pp.121-23). Anderson testified that, after Carol spoke to the man outside of the trailer, he and Appellant got out of the car. Anderson testified he had a knife and Appellant had a gun and that Appellant pointed the gun at this man and demanded money. (App.pp.123-24). Anderson testified he took some amplifiers out of the man's car. (App.pp.124-25). Anderson testified Appellant forced the man to enter the trailer. (App.pp.125-26). Anderson testified he kept a knife pointed at the man who they brought inside and Appellant pointed his gun at the resident. (App.pp.126). Anderson testified they took some money and left. (App.p.129).

Judy Carol Rogers was the female perpetrator in this case and had already pled guilty to her charges before testifying at Appellant's trial. (App.pp.137-38). Rogers confirmed she, Anderson, and Appellant went to the residence so that she could trade sex for money in order to buy drugs. (App.pp.139-40). Rogers testified she propositioned the man outside the trailer, who declined. (App.p.142). Rogers testified she entered to trailer to talk to Garcia and saw Appellant with the man outside (while Anderson was taking his speakers). (App.pp.142-43). Rogers testified Anderson and Appellant forced the man to enter the trailer. (App.pp.143-44). Rogers testified they took Garcia's wallet and a jar of change. (App.pp.144-45)

Bill Cromer was qualified as an expert in fingerprint analysis. (App.p.167). Cromer testified Carol's fingerprint was found in a bottle in the residence and Appellant's fingerprint was found on a magazine in Arcos's car. (App.p.170).

At the close of the State's case, trial counsel made a motion for directed verdict.

As to the first-degree burglary charge, trial counsel argued "there's been no evidence from the proprietor, the owner of the dwelling, the person that actually lives in the dwelling, that [Appellant] did not have permission to go into the dwelling." (App.p.201). The trial judge found there was "certainly a reasonable inference to be drawn from the evidence presented." (App.p.202).

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . . when, in effecting entry or while in the dwelling . . . he or another participant in the crime is armed with a deadly weapon." S.C. Code Ann. § 16-11-311(A)(1)(a) (2003).

When ruling upon a motion for directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Abraham, 408 S.C. 589, 591-92, 759 S.E.2d 440, 441 (Ct. App. 2014). In reviewing a motion for directed verdict, the appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Weston, 367 S.C. at 292, 625 S.E.2d at 648. "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 submitted to the jury." State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004); see also State v. Lynch, 412 S.C. 156, 171, 771 S.E.2d 346, 355 (Ct. App. 2015).

The trial judge properly denied Appellant's motion for a directed verdict as to the first-degree burglary charge. During its case-in-chief, the State provided both evidence and testimony that reasonably tended to prove Appellant was guilty of the offense of first-

degree burglary. Judy Best testified the residence in question was one of the trailers provided by her farm as housing for workers. (App.pp.112-15). Omar Arcos testified this was Garcia's residence. (App.pp.86-87). Carol Rogers testified she knew Garcia and had visited him at his residence prior the day in question. (App.pp.141-42). There was no evidence or testimony presented that this trailer was not Garcia's residence. See Weston, 367 S.C. at 292, 625 S.E.2d at 648. There was no evidence or testimony presented that Appellant or Anderson were given permission to enter the residence. Rather, the testimony was that the two men forced Arcos to enter the residence and they followed. (App.pp.90-92; pp.125-26; pp.143-44). Appellant was armed with a gun and Anderson was armed with a knife and they entered the residence in order to rob the occupant. (App.pp.91-94; pp.124-29; pp.143-45).

In the light most favorable to the State, there was direct or substantial circumstantial evidence that reasonably tended to prove Appellant was guilty of all the elements of first-degree burglary. See Cherry, 361 S.C. at 593-94, 606 S.E.2d at 478. Accordingly, the trial judge did not err in denying Appellant's motion for directed verdict on that charge.

CONCLUSION

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

Respectfully submitted,

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July 20, 2015

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent Pursuant to White v. State upon Appellant by depositing a copy of the same in the inter-agency mail and addressed to:

Benjamin J. Tripp, Esquire
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I further certify that all parties required by Rule to be served have been served. This 20th day of July, 2015.

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