

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 10 2015

SC Court of Appeals

Appeal from Charleston County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OTIS ROBINSON,

APPELLANT

APPELLATE CASE NO. 2013-002392

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by failing to direct a verdict of acquittal in Appellant's favor when the state failed to present any direct or substantial circumstantial evidence that Appellant entered a *dwelling* as required under S.C. Code Ann. §16-11-311 for a first degree burglary conviction?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant at the September 12, 2011 term of General Sessions for first degree burglary. R. 380-381. His case was called to trial on October 28, 2013 before the Honorable R. Knox McMahon, and a jury. R. 1. Assistant Solicitors Stephanie Linder and Lindsey Byrd represented the state, and Wesley Locklair represented Appellant. R. 1.

At the conclusion of the trial on October 29, 2013, the jury found Appellant guilty. R. 321, l. 23 – 322, l. 9. Judge McMahon sentenced Appellant to life without parole after finding the state properly served Appellant and his counsel with notice of its intent to seek a life sentence pursuant to S.C. Code Ann. § 17-25-45. R. 327, l. 12 – 328, l. 18.

This appeal follows.

ARGUMENT

The court erred by failing to direct a verdict of acquittal in Appellant's favor when the state failed to present any direct or substantial circumstantial evidence that Appellant entered a *dwelling* as required under S.C. Code Ann. §16-11-311 for a first degree burglary conviction.

Relevant Facts

On May 31, 2011, Robert Fabian, Jr. stopped at his grandfather's house on St. Andrews Boulevard in Charleston to check on the property and discovered an intruder inside the home. Fabian parked his car in the driveway and approached the backdoor of the residence where he normally entered. He noticed the bay window located to the left of the backdoor was broken. Before entering the house, Fabian yelled, "Who's there?" and heard someone say, "It's me. It's me." Assuming the intruder was someone he knew, Fabian entered the house through the backdoor. Upon entering the kitchen, Fabian discovered it had been "ransacked" and that there was blood on the counter. He then heard someone running and leaving the home through the back window. He immediately ran out the backdoor and saw someone in the backyard. The individual had dropped something and was bending over to pick it up. The intruder then fled the backyard and Fabian gave chase. However, he was unable to catch the person. R. 146, l. 5 – 148, l. 24.

Fabian called 911 to report the burglary. R. 149, ll. 5-6. He told the 911 dispatcher that the intruder was a black male with a heavy build. He described the individual as being in his twenties or early thirties and maintained he had on dark pants, but was not wearing a shirt. Additionally, Fabian said the man may be bleeding. R. 166, ll. 2-15; R. 177, ll. 17-25. Detective Robert Keller responded to the burglarized home and interviewed Fabian. While

Keller was at the residence, he was informed that patrol officers had detained an individual matching the description Fabian had given about a quarter mile away. Keller then drove Fabian to the location where the individual was stopped to see if Fabian could identify the suspect. The individual detained was Appellant. He was wearing dark blue jeans, had no shirt on, and was bleeding. He was found with several DVD cases on his person along with a screwdriver in his pocket. Fabian identified Appellant as the man he saw fleeing his grandfather's house. R. 179, l. 16 – 180, l. 25; R. 194, l. 3 – 197, l. 2.

Richard Wiersma, the officer who processed the scene, testified that the house was in disarray. Dresser drawers had been pulled out and rifled through and a mattress in the bedroom had been moved. While processing the scene, Wiersma collected a DVD case and a t-shirt that were found on the ground in the backyard near the broken window. R. 194, ll. 15-19. He also collected a bloody rag that was found in the left corner of the kitchen sink. In addition to collecting these items, Wiersma also attempted to lift fingerprints from inside the house, but was unsuccessful. However, he was able to lift two fingerprints from the DVD case that was found in the backyard. Moreover, he observed “a reddish brown substance later determined to be blood” in several different areas inside the home, including the broken window, the curtains near the broken window, the refrigerator door, and the rag in the kitchen sink. He swabbed these areas and collected a sample of the blood for later analysis. R. 204, l. 12 – 208, l. 10.

Nada Kerstein, a latent print examiner for the Charleston Police Department, testified that one of the two prints lifted from the DVD case found in the backyard matched the left thumb print of Appellant. R. 230, l. 17-231, l. 2; R. 238, ll. 4-23. Moreover, Catherine Leisy, a forensic scientist employed by the South Carolina Law Enforcement

Division in its DNA and Serology Unit, testified that the blood found on the curtain and the rag matched the DNA profile of Appellant. R. 240, ll. 14-17; R. 252, l. 7 – 254, l. 3.

As mentioned earlier, Fabian's grandfather, James Fabian, Sr., was the owner of the burglarized house on St. Andrews Boulevard. However, the grandfather was ill and no longer lived at the property. Fabian testified that he stopped by the property about every other day and stored a drum set there. When he stopped by the property, he would play his drums and "hang out." He explained that he had recently moved back to the Charleston area from Montana and was "couch surfing" at the time. He would sleep at his father's house, his girlfriend's house, and his aunt's house. Fabian also claimed he occasionally slept at his grandfather's house on St. Andrews Boulevard, but "was trying not to stay there as much as [he] could" because the home was "old and in disrepair." R. 157, l. 24 – 162, l. 19.

When he was interviewed by law enforcement on the afternoon of the burglary, Fabian provided his home address and other contact information. The address Fabian provided as his home address was a residence on Garden Street in Charleston, not the burglarized home on St. Andrews Boulevard. R. 270, l. 2 – 271, l. 15.

In response to the testimony defense counsel elicited regarding whether Fabian actually lived and slept at the burglarized house, the state recalled Fabian to the stand. He testified that he had slept at his grandfather's home on St. Andrews Boulevard in the past, that he intended to sleep there at some point in the future, that he had possessions at the house, and that he had a bedroom at the house. R. 272, l. 13 – 273, l. 4; R. 274, ll. 7 – 275, l. 7.

There was no evidence presented that anyone else was living or sleeping at the house on St. Andrews Boulevard the day that it was burglarized.

Motion for a Directed Verdict

At the conclusion of the state's case, defense counsel moved for a directed verdict. He argued the state failed to prove that the burglarized house located on St. Andrews Boulevard was a dwelling, an essential element of first degree burglary. Counsel maintained the evidence presented showed the house was owned by Fabian's elderly grandfather, that the house was "old and in disrepair," and that neither Fabian nor anyone else lived at the house. He pointed out Fabian's testimony that he was "couch surfing" at the time and "would crash" at his father's house, his girlfriend's house, his aunt's house, and occasionally at the burglarized home owned by his grandfather. Lastly, counsel argued that Fabian himself listed his home address as a residence located on Garden Street, not the house on St. Andrews Boulevard. R. 278, l. 12 – 280, l. 11.

The assistant solicitor argued the testimony showed Fabian had control over the house, had a key to the house, and occasionally slept at the house. She compared the evidence in this case to cases involving vacation homes where the owner does not reside permanently, but visits the home periodically. Citing State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008), she maintained that the key is whether the occupant has "an intent to return." R. 281, l. 3 – 282, l. 9.

The court ultimately denied the motion for a directed verdict finding there was "no question this residence constitutes a dwelling for purposes of the burglary statute." The court cited to Evans, State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002), and State v. Singley, 383 S.C. 441, 679 S.E.2d 538 (Ct. App. 2009) in support of its ruling. R. 283, l. 2 – 284, l. 10.

Discussion

The court erred by failing to direct a verdict of acquittal in Appellant's favor when the state failed to present any direct or substantial circumstantial evidence that Appellant entered a **dwelling** as required under S.C. Code Ann. §16-11-311 for a first degree burglary conviction.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged.” State v. Pearson, 410 S.C. 392, 398, 764 S.E.2d 706, 710 (Ct. App. 2014) (citing State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013); 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). Likewise, a directed verdict is proper when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a belief or opinion as to guilt based upon

facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)).

In this case, the state failed to present any direct evidence or substantial circumstantial evidence that the burglarized house on St. Andrews Boulevard constituted a dwelling under the first degree burglary statute. Under S.C. Code Ann. § 16-11-311, “[a] person is guilty of burglary in the first degree in the person enters a **dwelling** without consent and with intent to commit a crime in the dwelling, and” one or more of the aggravating factors listed in the statute is met. (emphasis added). A dwelling is defined in S.C. Code Ann. § 16-11-10 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** shall be deemed a dwelling house.” (emphasis added). It is further defined in S.C. Code Ann. § 16-11-310(2) as “the living quarters of a building which is used or **normally used for sleeping, living, or lodging by a person.**” (emphasis added).

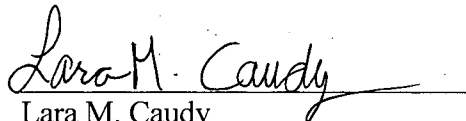
The evidence presented by the state failed to show the house on St. Andrews Boulevard constituted a dwelling. Fabian testified that the house belonged to his grandfather who was ill and had not lived at the property in quite some time. He also testified that he did not live at the property, but merely used it as a place to store and play his drums. Significantly, when asked to provide a home address, Fabian provided law enforcement with an address on Garden Street, not the house on St. Andrews Boulevard. While he claimed he occasionally slept at the house, this fact does not convert the building into a dwelling under the law. Therefore, the trial court erred by failing to direct

a verdict of acquittal in Appellant's favor. Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of August, 2015.

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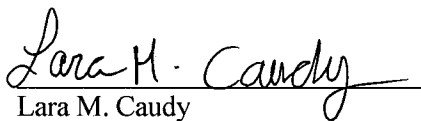
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Otis Robinson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge R. Knox McMahon that was held on October 28-29, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue that arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Otis Robinson.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of August, 2015.

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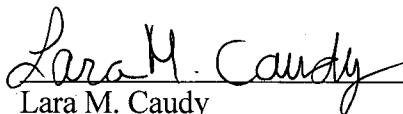
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-Billed Indictment;
- (2) Entire Trial Transcript dated October 28-29, 2013;
- (3) State's Exhibit Nos. 8-23 (Photographs);
- (4) State's Exhibit No. 25 (Indictment and Sentence Sheet);
- (5) State's Exhibit No. 28 (Indictment and Sentence Sheet);
- (6) Court's Exhibit No. 1 (Stipulation);
- (7) Court's Exhibit No. 2 (Jury Note).

I certify that this designation contains no matter which is irrelevant to this appeal.

August 10, 2015



Lara M. Caudy
Appellate Defender

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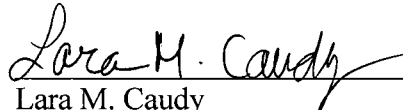
Attorney for Appellant

CERTIFICATE OF COUNSEL

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The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 10, 2015



Lara M. Caudy
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Attorney for Appellant

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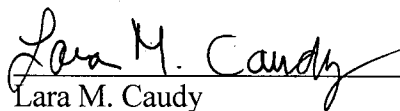
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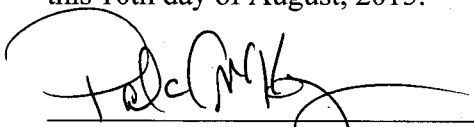
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders 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 a copy of the Anders Brief of Appellant and Designation of Matter have been served upon Otis Robinson, #288206 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of August, 2015. A copy of the Record on Appeal was served upon Otis Robinson on the 4th day of August, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of August, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.