STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Maite Murphy, Circuit Court Judge

Opinion No. 2015-UP-362 (S.C. Ct. App. filed 7/15/2015)
2013-GS-18-0364

THE STATE,

RESPONDENT,

V.

MARTIN DAMEON FLOYD,

PETITIONER

APPELLATE CASE NO. 2013-002736

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on July 15, 2015. App. 1 – 3. Counsel for Petitioner certifies that the petition for rehearing was made on July 29, 2015 and finally ruled on by the Court of Appeals on August 20, 2015.[1] App. 4 – 19; App. 20.

[1] On September 29, 2015, this Court granted Petitioner's request to file the Petition for Writ of Certiorari and accompanying Appendix out of time.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming Petitioner's conviction for first degree burglary where Petitioner was entitled to a directed verdict because the State failed to present any direct or substantial circumstance evidence that Petitioner had any intent to commit a crime within the trailer when he entered the trailer?

II. Whether the Court of Appeals erred in affirming Petitioner's conviction for first degree burglary where Petitioner was entitled to a directed verdict because the State did not prove that the property entered by Petitioner qualified as a dwelling where the sole owner of the property was deceased at the time of entry?

STATEMENT OF THE CASE

On November 4, 2013, Petitioner Martin Floyd was indicted by the Dorchester County Grand Jury for of one count of first degree burglary in violation of S.C. CODE ANN. § 16-11-311. R. 197 (Indictment). The State alleged that Floyd "did willfully and unlawfully enter the dwelling of the Estate of Charles Alvin Rearick, without consent and with the intent to commit a crime therein . . . ." Id.

Floyd proceeded to trial on December 17, 2013 before the Honorable Maité Murphy and a jury. R. 1. Floyd was represented by Mary P. LeMatty and Michelle R. Suggs, and the State was represented by assistant solicitors Glenn P. Justis and Mandy W. Kimmons. Id.

On December 19, 2013, the jury found Floyd guilty as charged. R. 188, ll. 11-16. Pursuant to S.C. CODE ANN. § 17-25-45, Judge Murphy sentenced him to life without parole. R. 194, ll. 15-17; R. 195 (Sentencing sheet).

Floyd appealed and the South Carolina Court of Appeals affirmed Floyd's conviction and sentence on July 15, 2015. State v. Floyd, Opinion No. 2015-UP-362 (S.C. Ct. App. filed July 15, 2015). App. 1 – 3. Floyd subsequently filed a petition for rehearing on July 29, 2015. App. 4 – 19. The South Carolina Court of Appeals issued an Order denying the petition for rehearing on August 20, 2015. App. 20.

This petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Trial Testimony

On January 17, 2013, Charlie Rearick died as a result of a heart attack he had while driving that caused him to collide with another vehicle. R. 5, ll. 19-24. Petitioner Floyd used to live with Mr. Rearick, and while Floyd had since moved out, he continued to do renovation work for Mr. Rearick at Mr. Rearick's trailer. R. 16, ll. 5-11; 30, ll. 6-12; 39, ll. 4-11.

Testimony of Angela Fleeman

Floyd's girlfriend, Angela Fleeman, testified that on the night of the alleged burglary, Floyd received a telephone call from his mother who let him know that Mr. Rearick had passed away. R. 14, l. 4 – 15, l. 15. According to Angela, Floyd was very upset and crying. R. 15, ll. 9-15.

Angela testified that later that evening, their friends Rusty Norris and Candace Mauldin came over and the four of them were talking in the living room. R. 15, ll. 17-23. Floyd told his girlfriend and his friends that he "needed probably to go over and get some of his stuff from Mr. Rearick's trailer because he had been helping him remodel his trailer." R. 16, ll. 1-6. Because Floyd also used to live with Mr. Rearick, he also needed to go get his possessions that remained at Mr. Rearick's trailer before they ended up in probate. R. 16, ll. 6-11. This conversation took place at approximately 9:30 or 10:00 in the evening. R. 16, ll. 18-20.

After the conversation, the four of them rode over to Mr. Rearick's trailer together. R. 16, l. 21 – 17, l. 1. Candace drove the four of them in her truck. R. 17, ll. 2-5. When the four of them arrived at the property, they all got out of the truck. Floyd went to the front door and it was locked. Either Candace or Rusty pushed up on a window, and Candace went through the window. R. 17, ll. 11-16.

Candace opened the front door and the other three went in through the front door. Floyd turned on all the lights and asked Angela to go look at the back at the master bathroom which he had just finished remodeling before Mr. Rearick passed away. R. 17, ll. 19-21. The four walked back there and looked at the master bedroom and then went to the room where Floyd had stayed and saw some of Floyd's clothes on the foot of the bed, along with a bottle belonging to Floyd's daughter. R. 17, l. 22 – 18, l. 19.

Angela said that Floyd did not tell her that he was looking for anything specific other than that Floyd just wanted to get his possessions. R. 22, ll. 1-6. Floyd did notice that Mr. Rearick's guns were missing, and Floyd was worried that someone had already come in the trailer before they got there and stolen Mr. Rearick's guns. R. 22, l. 7 – 23, l. 7.

The four sat in the living room of the trailer and reminisced about Mr. Rearick and then they got ready to leave. When they left the trailer, Floyd walked around one more time, making sure the windows were locked, and the four left through the front door. R. 23, l. 22 – 24, l. 12.

Angela went to the truck. She was not sure where Floyd and Rusty went. Candace came back to the truck and talked with Angela. R. 24, ll. 13-21. Candace then left the truck and went behind the trailer because she needed to relieve herself, and Floyd came back to the truck and talked with Angela. Rusty went with Candace. R. 25, ll. 2-5. Floyd debated with Angela whether he should go home with her or stay at the trailer to make sure no one tried to rob it. R. 25, ll. 6 – 16.

Angela then saw bright lights. The police pulled their vehicle right behind the truck. The police took Floyd and placed him in the back of a police car. They handcuffed Angela. The police went looking for Rusty and Candace behind the trailer. R. 25, l. 17 – 26, l. 12. Angela was arrested that night and charged with first degree burglary. R. 26, ll. 19-24. Candace apparently ended up running that night and did not turn herself in for a couple of days. R. 27, ll. 20-25.

On cross-examination, Angela testified that during the course of her relationship with Floyd, she knew that Floyd worked on Mr. Rearick's trailer and had tools, items, and clothing at Mr. Rearick's house. R. 30, ll. 6-12. She confirmed that Floyd was very upset about Mr. Rearick's death and was concerned about Mr. Rearick's property. She also reiterated that Floyd wanted to go over to Mr. Rearick's property to secure the place and retrieve some items belonging to him. R. 30, ll. 13-21. She testified that Floyd turned on all the lights in the trailer, and that they saw a neighbor in a golf cart but no problems arose from seeing the neighbor. R. 33, ll. 6-18. Angela also testified that Floyd did not run when the police pulled up. R. 31, ll. 19-24.

Testimony of Rusty Norris

Rusty Norris testified at trial and stated that he was also charged with first degree burglary in this case. His girlfriend at the time was Candace. He recalled receiving a call from Floyd that a good friend of Floyd's had passed away. Floyd wanted a ride to the friend's trailer. Rusty and Candace drove over to Angela's residence. Floyd told them that since he had lived with Mr. Rearick, he wanted to go over there to secure his own possessions. R. 36, l. 12 – 39, l. 11.

Rusty believed they left Angela's to go to the trailer around 11:00 p.m. R. 39, ll. 20-23. He confirmed that when the four arrived at the trailer, Candace went through the window and unlocked the front door. Rusty testified that they turned on the living room light and then turned on pretty much every light in the trailer. R. 40, ll. 13 – 24.

Floyd told Rusty that he was looking for his own possessions that he left at the trailer since he used to live there with his ex-girlfriend and child. Rusty said that Floyd did mention that Mr. Rearick had a gun collection but Rusty testified that they were not there specifically looking for the guns. R. 41, ll. 4-14. Rusty testified that Floyd was worried that someone had already robbed the place when he realized the guns and a large welder were missing. R. 41, l. 17 – 42, l. 3.

Rusty testified that Floyd mentioned he had some tools in the shed so they walked back to the shed. The light was on inside the shed, but it was padlocked. Floyd told Rusty that some of the tools inside the shed were his, including a table saw and floor nailer. Rusty kept bolt cutters in his tool box of his truck, so he cut the lock off the shed so they could get Floyd's tools. R. 42, ll. 4-24; 44, ll. 4-15. Rusty testified that essentially right after that, the police pulled up. R. 43, ll. 1-25. He said Candace ran because she was on probation. R. 43, ll. 14-17.

Rusty admitted when the police found him, he had the lock he cut off the shed, a flashlight, and some gloves in his coat pocket. He further admitted that he had some other items in his coat pocket that he had taken from the trailer, including a wood stain, an air grinder, a blood pressure monitor, some scissors, a belt, and three pills. R. 51, l. 4 – 58, l. 11.

On cross-examination, Rusty testified that it was his understanding that the four of them went to Mr. Rearick's trailer to protect Mr. Rearick's property and allow Floyd to retrieve some of his own possessions. When the four arrived at the trailer, they turned on all the lights and made no efforts to hide that they were there. They stayed at the trailer for a good while, well over an hour. Rusty further testified that Floyd was concerned that someone had already burglarized Mr. Rearick's trailer. R. 160, ll. 2-22.

Testimony of Law Enforcement

Deputy Shawn Angelo of the Dorchester County Sheriff's Department responded to a call about Mr. Rearick's trailer. He testified that no lights were on at the trailer, but that the lights were on at the shed. R. 61, l. 8 – 64, l. 8. Deputy Angelo testified that on Floyd's person, he found scrap metal yard receipt, a pen shell, and a silver pocketknife. R. 70, ll. 10-20.

Deputy Angelo acknowledged that Floyd did not run from him or make any effort to hide. Deputy Angelo did not observe Floyd putting any items in the truck or anything like that. He

confirmed that he only collected a pocketknife, a pen shell, and a receipt off of Floyd's person. R. 71, l. 25 – 72, l. 13.

Detective Stephanie Stover of the Dorchester County Sheriff's Department testified that she was dispatched to the trailer around 1:40 in the morning on January 18, 2013. R. 77, l. 22 – 78, l. 22. She obtained a search warrant to search the truck. Inside the truck, she found some pillows, a shop vac, a painting, and a Microsoft Windows XP Professional computer software box. The software box was found behind a seat in the truck. R. 79, l. 11 – 80, l. 2. On cross-examination, Detective Stover said she also found many other items in the truck such as laundry, personal hygiene products, and laundry detergent. R. 86, ll. 6-25.

Testimony of Kevin and Jennifer Felkel

Kevin Felkel was Mr. Rearick's son-in-law. R. 91, ll. 4 – 14. He received news of Mr. Rearick's passing on January 17, 2013, and he and his wife, Jennifer, drove down from Lexington to Summerville and went to Mr. Rearick's trailer. They arrived around 4:00 p.m. R. 92, l. 1 – 93, l. 24. They collected some of Mr. Rearick's sentimental and other valuable items, such as his war medals, his guns, checkbooks, and bank records. R. 94, l. 17 – 95, l. 7. They did not go into the shed. They left around 9:00 that evening. R. 94, ll. 8-18.

Jennifer Felkel, Mr. Rearick's daughter, confirmed that Floyd used to live with her father and did renovation work at her father's trailer. R. 103, l. 24 – 106, l. 24.

Testimony of Rita Smith

Floyd's mother, Rita Smith, testified at trial and said she had known Mr. Rearick for about eight years. She testified that there was a period of time that Floyd lived with his ex-girlfriend and child at Mr. Rearick's trailer. She said Floyd also did remodeling work for Mr. Rearick. Floyd's mother testified that Floyd had all sorts of items at Mr. Rearick's trailer, including clothes, tools,

furniture, artwork, and miscellaneous personal items. She also testified that the painting police retrieved from the truck was a painting that Floyd drew. R. 126, l. 24 – 130, l. 14.

Floyd's mother testified that even though Floyd moved out of Mr. Rearick's trailer around July 2012, Floyd continued to do remodeling work for Mr. Rearick. R. 133, l. 9 – 134, l. 22.

Motion for Directed Verdict

At the conclusion of the State's case, defense counsel moved for a directed verdict on two grounds. First, she argued that the State failed to prove that Floyd had the requisite intent to commit a crime when he entered the trailer. R. 117, l. 10 – 121, l. 14. She pointed out that the State's witnesses testified consistently with each other that Floyd had no intention to do anything wrong when he entered the property. The State's own witnesses testified that Floyd went to the property to protect it and to retrieve his own possessions. R. 120, l. 25 – 121, l. 13. The State argued that the evidence of an intent to commit a crime was Rusty's taking of the whistle from the residence and the movement of items that did not belong to Floyd from other rooms to a table. R. 121, l. 19 – 122, l. 7.

Defense counsel also moved for directed verdict because the State failed to prove that the location at issue constituted a dwelling where, at the time of the incident, there was no occupant of the premises since Mr. Rearick was deceased. She argued that at the time of the incident there was no identifiable occupant and that "the Estate of Charles Rearick," used in the indictment, is not a person. Because the property was not a dwelling, defense counsel argued that Floyd could not be convicted of first degree burglary. R. 117, l. 10 – 121, l. 14. The State argued that Mr. Rearick had the intention to return when he left that morning and that his death that day is of no consequence. The solicitor opined that acceptance of defense counsel's argument would mean that there is no

protection for anything that belongs a deceased person, apparently overlooking defense counsel's discussion of the various degrees of burglary. R. 122, l. 8 – 124, l. 7.

The trial judge denied the directed verdict motions. She ruled there was direct evidence of intent to commit a crime therein because items belonging to Mr. Rearick were found on the co-defendants. R. 124, ll. 8-21. She further ruled that when Mr. Rearick left his home that morning, he intended to come back except for his death and that Mr. Rearick had not abandoned the property but was clearly living there. R. 124, l. 22 – 125, l. 8.

At the conclusion of the presentation of Petitioner's evidence, defense counsel renewed the motions for a directed verdict. R. 144, l. 18 – 146, l. 5. The Trial Court again denied the motions. R. 146, ll. 6-11.

ARGUMENT

I. The Court of Appeals erred in affirming Petitioner's conviction for first degree burglary where Petitioner was entitled to a directed verdict because the State failed to present any direct or substantial circumstance evidence that Petitioner had any intent to commit a crime within the trailer when he entered the trailer.

The Court of Appeals erred in affirming Floyd's conviction for first degree burglary where the State failed to present any direct or substantial circumstantial evidence of Floyd's intent to commit a crime when he entered the trailer, when viewing the evidence in the light most favorable to the State. See S.C. CODE ANN. § 16-11-311 ("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 . . . ."). The State theorized that Floyd and his three co-defendants, Angela Fleeman, Rusty Norris, and Candace Mauldin, went to the trailer of Charles Rearick to burglarize it after Floyd learned of Rearick's unexpected death earlier that day. Specifically, the State alleged that Floyd intended to steal a gun collection that was no longer in the trailer when they arrived. R. 8, ll. 4-6; R. 161, ll. 11-15; R. 163, ll. 22-24; R. 166, ll. 4-5; R. 169 , ll. 5-7; R. 173, ll. 6-10. However, the State did not present substantial circumstantial evidence support its theory. In fact, the State's witnesses testified consistently with each other that Floyd had no intention to do anything wrong when he entered the property. Rather, Floyd went to the property to protect it and to retrieve his own possessions. See R. 22, l. 9 – 23, l. 7; R. 31, ll. 9-15; R. 34, l. 22 – 35, l. 5; R. 40, l. 25 – 42, l. 3. The State's theory was thus based on conjecture and raised only a mere suspicion of Floyd's guilt.

"First-degree burglary requires that, ***at the time the offender entered the dwelling***, he intended to commit a crime once inside." State v. Gilliland, 402 S.C. 389, 398, 741 S.E.2d 521, 526 (Ct. App. 2012) (emphasis added). Where the State failed to present evidence on this material element of first degree burglary, a directed verdict for Petitioner is mandated. See, e.g., State v.

Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); see also Jackson v. Virginia, 443 U.S. 307, 316 (1979) ("[N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."). "Evidence must constitute positive proof of facts and circumstances which **reasonably** tends to prove guilt." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (emphasis added). "The lower court should not refuse to grant the motion where the evidence **merely raises a suspicion** that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (emphasis added). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001).

In State v. Bostick, 392 S.C. 134, 139-41, 708 S.E.2d 774, 777-78 (2011), this Court began its analysis with a review of "three seminal cases from our jurisprudence analyzing the proof necessary in cases with circumstantial evidence," which included State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Each of those cases resulted in reversal and remand for entry of judgment of acquittal because the State failed to produce substantial evidence to overcome the motion for directed verdict. 392 S.C. at 139-41, 708 S.E.2d at 777-78. This Court likewise determined that the evidence presented in Bostick "raised only a suspicion of guilt." Id. at 141, 708 S.E.2d at 778. Bostick was convicted of the murder of his neighbor, Polite, who died from carbon monoxide resulting from the arson of her home after she evidently suffered blunt force trauma to her head. Id. at 136-37, 708 S.E.2d at 775. The court found that there was no direct evidence against Bostick and the circumstantial evidence consisted of "(1) Polite's car keys, calculator, and other items from her home were found in the Bostick family's

burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to Polite's DNA." Id. at 141-42, 708 S.E.2d at 778. This Court noted that the State did not introduce the weapon used to beat Polite in the head or any evidence concerning Bostick's knowledge that Polite may have had money in the briefcase. Id. at 142, 708 S.E.2d at 778. This Court found that, at most, this evidence raised only mere suspicion that Bostick committed the murder, and accordingly found that the trial court erred in failing to direct a verdict in Bostick's favor. Id.

Shortly after Bostick, this Court noted in State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), that it has "repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." This Court held that the circumstantial evidence presented in Odems' case did not reasonably tend to prove his guilt, and thus failed the "***well-settled directive*** that circumstantial evidence that is not substantial is insufficient to go to a jury." 395 S.C. at 592, 720 S.E.2d at 53 (emphasis added). The primary pieces of circumstantial evidence against Odems were: "(1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." Id. at 588, 720 S.E.2d at 51. This Court found that even though Odems' overall actions may have appeared suspicious, mere suspicion is insufficient to support a guilty verdict. Id. at 590, 720 S.E.2d at 52.

In the present case, the State argued that criminal intent in a burglary case can be proven by a defendant's actions after he entered a dwelling. See State v. Pickney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) ("In a burglary trial, the defendant's actions after he entered the house can be evidence used to determine if he had the intent to commit a crime at the time of entry."). The State then pointed to the following as evidence of Floyd's intention to commit a crime within the dwelling:

(1) The entry occurred at night without permission from Rearick (who was deceased) or anyone else to come inside;

(2) Floyd had not lived in Rearick's trailer in months and did not have a key to the trailer;

(3) Floyd and the co-defendants entered through a back window;

(4) Floyd's co-defendant, Rusty, was "armed with tools commonly used in burglaries, such as bolt cutters, gloves, and a flashlight;"

(5) Floyd searched Rearick's home, beginning in Rearick's master bedroom, looking for items such as Rearick's valuable gun collection;

(6) Floyd did not collect items belonging to him and his infant daughter that were found in the bedroom where Floyd previously resided;

(7) Floyd's co-defendant, Rusty, took various items from Rearick's home;

(8) Floyd and his co-defendants amassed Rearick's belongings on the kitchen table, presumably for easy transport and proceeded to "ransack the home;"

(9) Floyd and Rusty removed the plywood and lock on the back shed and took various items; and

(10) Two of Floyd's co-defendants fled when police arrived.

Final Brief of Respondent, p. 11-13. However, many of these averments cannot be "fairly and logically deduced" from the evidence or are wholly contrary to the evidence. See Pickney, 339 S.C. at 349, 529 S.E.2d at 527. Further, even an evaluation of the evidence in the light most favorable to the State cannot require that the evidence be viewed in a complete vacuum.

The State presented the testimony of co-defendants Angela Fleeman and Rusty Norris, both of whom went to Rearick's trailer with Floyd on the night of the alleged burglary. They both

testified that Floyd's intention in going to the trailer was to secure some of his property that was left there, including items from when he used to live with Rearick and tools from remodeling work that he was continuing to do around Rearick's trailer. R. 29, l. 24 – 30, l. 24; R. 38, l. 23 – 39, l. 11; R. 60, ll. 2-22. Rearick's daughter, Jennifer Felkel, confirmed that Floyd previously resided with Rearick and did remodeling work for him. R. 105, l. 22 – 106, l. 12. Detective Stephanie Stover confirmed that there appeared to be a lot of remodeling construction going on inside the trailer when she viewed it on the night of the alleged burglary. R. 80, ll. 14-18. Admittedly, the entry into the trailer occurred at nighttime and Candace Mauldin, Rusty's girlfriend, entered through an unlocked window in the back of the trailer and let the other three in through the front door. R. 17, ll. 11-19; R. 30, l. 25 – 31, l. 3; R. 40, ll. 2-14. Though Floyd did not contact the family to ask permission to enter, Floyd indicated to his co-defendants that there would not be any problem with them going to the trailer that night, stating that he had a close relationship with Rearick's ex-wife. He also expressed an intention to remain there for the night once he became concerned that a third party had robbed Rearick's trailer before they arrived. R. 49, l. 19 – 50, l. 6.

The State averred that Floyd searched Rearick's home, beginning in Rearick's master bedroom, looking for items such as Rearick's valuable gun collection. However, the actual testimony presented was that Floyd showed his co-defendants the work he had done on Rearick's master bathroom. In doing so, they walked through the master bedroom. Angela recalled that as they were heading to the bathroom initially, Floyd looked under Rearick's mattress and in the closet for guns that he believed Rearick stored there. She testified that Floyd thought someone had stolen the guns and that he was "upset and disgusted." R. 22, l. 7 – 23, l. 7; R. 31, ll. 9-15. Floyd

suspected that his brother, Jimmy, may have taken the guns.[2] R. 34, l. 22 – 35, l. 5. Angela testified that the photograph of the master bathroom appeared as she remembered it, but that the photograph depicting the room where Floyd used to stay was "a lot more messier [sic]" than she remembered. R. 19, l. 21 – 20, l. 2. Rusty testified that Floyd mentioned that Rearick was a gun collector and that there may be some guns in the house, but that they were not there looking for a gun collection. Rather, Floyd was looking for his own possessions. R. 41, ll. 4-23. Rusty said that due to the empty gun cabinet and a missing piece of welding equipment, they surmised that someone else may have been there and stolen the items. R. 41, l. 17 – 42, l. 3.

They then looked at the room where Floyd had stayed when he lived there, where there were some of his clothes and his daughter's bottle at the foot of the bed. They returned to the living room and discussed the other renovation projects that Floyd had intended to work on for Rearick. R. 17, l. 19 – 18, l. 19; R. 21, ll. 3-10; R. 23, l. 22 – 24, l. 9. They all left through the front door, at which point Angela was unsure where Floyd and Rusty went while she and Candace returned to the truck. R. 24, ll. 9-21. Floyd returned the truck, at which point Candace went behind the trailer with Rusty. Floyd and Angela discussed whether he should stay at the trailer "to make sure no one came there to try to rob Mr. Charlie [Rearick]." The police then arrived. R. 25, ll. 2-24.

Despite the State's use of the word "ransack" in its brief, that word was never used at the trial and is not supported by the evidence. Final Brief of Respondent, pp. 6 and 13. There was testimony that some drawers were open and items were on the kitchen table that had not been there earlier that day, but nothing to the extent of the image that the State has attempted to portray. R. 96,

---

[2] Rearick's daughter, son-in-law, ex-wife, and family friend had come to Rearick's trailer earlier that day and collected Rearick's guns along with other items. R. 94, l. 20 – 95, l. 7.

ll. 18-24; R. 99, ll. 12-24; R. 112, l. 21 – 114, l. 12. With respect to the gun case that was lying on the floor of the master bedroom, Kevin Felkel, Rearick's son-in-law, testified that he removed the gun from inside of the case earlier that day. R. 96, ll. 8-13. It is hardly surprising that a soft-sided gun case could fall over without any gun inside. R. 82, l. 20 – 83, l. 3.

The State also pointed to the conduct of Floyd's co-defendant, Rusty, despite presenting no evidence that any of Rusty's conduct was actually even known to Floyd. Rusty admitted that he took several items from around Rearick's home and shed and placed them in the large pockets of his Carhartt jacket. Those included maple wood stain or filler, an air grinder attachment for an air compressor, a Navy whistle, an Accu-Chek blood pressure and glucose monitor, scissors, a belt, and three unidentified pills. There was no evidence that Floyd had any knowledge that Rusty took these items, all of which were found concealed in Rusty's jacket when he was handcuffed by police. R. 50, l. 22 – 51, l. 5; R. 52, 21 – 58, l. 11; R. 66, ll. 3-13. The State also pointed to Rusty's being "armed with tools commonly used in burglaries, such as bolt cutters, gloves, and a flashlight." Again, there was no indication that Floyd was aware that Rusty had those items. Rusty apparently did not make use of his flashlight when they arrived at trailer, as he hit his leg on trailer while walking the dark. R. 49, ll. 1-7. Both the flashlight and gloves were found in Rusty's coat. R. 52, ll. 3-20. Further, Rusty testified that he was initially at the shed alone. Floyd came back and pointed out a table saw and floor nailer that were his, which could be seen through cracks in the wood. Floyd went around to the front of trailer to talk to Angela. While Floyd was out front, Rusty decided, on his own, to use his bolt cutters and cut the lock off of the shed. R. 42, l. 4 – 43, l. 10. Thus, the State's averment that "Appellant and [Rusty] Norris then proceeded to the shed, secured with nailed down plywood and a lock, which they forcibly removed, and took various items" is an inaccurate portrayal of the evidence. Final Brief of Respondent, p. 12.

The only items actually collected from Floyd himself were a scrap metal receipt, a pen shell, and a silver pocketknife. R. 70, ll. 10-20. The items located in Candace's red truck included some pillows, a shop vac, a painting, and a computer program box. R. 79, ll. 6-22. Floyd's mother testified that the painting found in the back of truck was drawn by Floyd. R. 130, ll. 1-18. Otherwise, there was no evidence presented to connect or even suggest that the other items in the truck were obtained from Rearick's residence. The State also pointed to Floyd's alleged failure to collect items belonging to him and his infant daughter that were found in the bedroom where he previously resided. However, in comparison to his tools, Floyd's clothing and child's cup are hardly the type of items that warrant concern over securing. Further, Floyd was still on the property and according to the State's witnesses, Rusty and Angela, Floyd was considering staying in the trailer overnight to prevent a robbery.

Lastly, the State noted the flight of two of Floyd's co-defendants when the police arrived. Neither Floyd nor Angela ran when the police arrived. R. 31, l. 19 – 32, l. 2; R. 71, l. 25 – 72, l. 9. When they saw the police lights, Floyd told Freeman "Don't freak out . . . . [I]t's the law. We're not doing anything wrong. We're fine." R. 25, l. 17-24. However, Candace, who was in the rear of the trailer when police arrived, ran into the woods because she was on probation. Rusty began to follow her, but he instead squatted down in the woods near the shed and was later found there by police. R. 11-25. Rusty's differing reaction from Floyd and Freeman was likely due to the fact that he had been pilfering small items from inside the house and shed and had them hidden in his jacket. R. 50, l. 22 – 51, l. 5; R. 52, 21 – 58, l. 11; R. 66, ll. 3-13. While one's own attempt to flee may be evidence of your consciousness of guilt, a co-defendant's flight should not support such an inference with respect to another co-defendant. See State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) ("A court assessing evidence of flight must determine whether the totality of the

evidence creates an inference that **the defendant** had knowledge that he was being sought by the authorities." (citing State v. Pagan, 369 S.C. 210, 209, 631 S.E.2d 262, 266) (emphasis added)). Floyd himself did not flee.

Thus, considering only the actual evidence presented and the reasonable inferences therefrom, the State failed to present substantial circumstantial evidence that Floyd intended to commit a crime inside of the trailer. Rather, at most, the evidence showed that the entry occurred in the nighttime, through a back window, and that some items were gathered on the kitchen table and some drawers were left open. A majority of the State's evidence related to the conduct of Floyd's co-defendant, Rusty Norris. However, there was no evidence that Rusty's conduct was anticipated by or known to Floyd. Notably, the State did not request a "hand of one, hand of all" instruction. R. 175, l. 17 – 186, l. 1. Furthermore, if the intent to commit a crime is formed after the entry, there is no burglary. R. 183, ll. 15-17.

"The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Here, it was the duty of the trial judge to grant the motion for directed verdict because, even viewing the circumstantial evidence in the light most favorable to the State, it did not reasonably tend to prove Floyd's guilt and fails this Court's well settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. At best, this evidence raises a suspicion of guilt. As discussed above, a mere suspicion is not sufficient evidence for submission to the jury. Thus, the trial judge and the Court of appeals erred in concluding that the State presented substantial circumstantial evidence that Floyd committed first degree burglary. Floyd was accordingly entitled to a directed verdict and the Court of Appeals erred in affirming his conviction for first degree burglary.

II. The Court of Appeals erred in affirming Petitioner's conviction for first degree burglary where Petitioner was entitled to a directed verdict because the State did not prove that the property entered by Petitioner qualified as a dwelling where the sole owner of the property was deceased at the time of entry.

The Court of Appeals erred in affirming Floyd's conviction for first degree burglary where the sole owner of the property entered upon was deceased at the time of entry. The question of whether a prior residence constitutes a dwelling after the sole owner dies is an issue of first impression in South Carolina. South Carolina's first degree burglary statute is aimed at protecting occupants inside a dwelling who could be harmed when intruders break in with intent to commit a crime inside. See State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011). Where the sole occupant is deceased, and such is known to the alleged burglars, this purpose cannot be accomplished.

A person is only guilty of first degree burglary if the person enters a "dwelling." S.C. CODE ANN. § 16-11-311. In S.C. CODE ANN. § 16-11-10, "dwelling" is defined as:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, 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, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

§ 16-11-10. Under S.C. CODE ANN. § 16-11-310(2), a "dwelling" also means "the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person."

In State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979), this Court reversed the trial court's denial of Ferebee's motion for directed verdict based on the State's failure to prove that the property constituted a dwelling house. In Ferebee, the apartment where the incident took place was

part of a duplex owned by a doctor and leased through a local real estate company. 273 S.C. at 404-05, 257 S.E.2d at 155. The former tenants vacated the premises one week prior to the incident and that side of the duplex was advertised for rent. Id. This Court recognized that while "the 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 a breaking and entering during their absence to constitute burglary." The mere fact that a building is suitable for use as a dwelling is insufficient. This Court further noted that "[t]he rationale for requiring that an identifiable occupant reside and sleep within the dwelling rests upon the development of burglary as an offense against habitation rather than against property." Id. In State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011), this Court reiterated that position, stating: "We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership."

Other jurisdictions have held that when a property is left vacant by the death of its sole owner and occupant, the property cannot be considered a dwelling for the purposes of the offense of burglary. People v. Hider, 351 N.W.2d 905, 906-08 (Mich. Ct. App. 1984) (holding that where occupant died the day before the breaking and entering, the property was not an occupied dwelling at the time of the crime because the deceased occupant's absence could hardly be considered temporary); People v. Ramos, 52 Cal. App. 4th 300, 301 (Cal. Ct. App. 1997) (holding that house was not inhabited as required to sustain a conviction for first degree burglary where the occupant of the house was deceased at the time of the defendant's entry, having died at his home from natural causes on the very day of the breaking and entering).

The Court of Appeals for North Carolina also held that a second degree arson charge should have been dismissed upon evidence that former occupants of the trailer were permanently absent

from the trailer at the time it burned. State v. Ward, 379 S.E.2d 251 (N.C. Ct. App. 1989). One occupant had permanently abandoned the trailer, and the other died several days before the trailer was burned. The court held: "While temporary absence from a dwelling will not affect its status as an inhabited dwelling, the inhabitant's death certainly renders it uninhabited since someone must 'live' in a dwelling for it to be 'inhabited.'" Id. at 253-54. Similar to the "offense against habitation" rationale announced by our Supreme Court in Ferebee, the Ward court recognized that the main purpose of common law arson was to protect against danger to those persons who might be in the dwelling house when it is burned. Id. at 253; see Ferebee, 273 S.C. at 406, 257 S.E.2d at 155.

The Virginia Court of Appeals has explained a similar rationale behind its burglary statute, stating:

> Burglary laws are based primarily upon a recognition of the dangers to **personal safety** created by the usual burglary situation-the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation **dangerous to personal safety**.

Rash v. Commonwealth, 383 S.E.2d 749, 751 (Va. Ct. App. 1989) (internal citations omitted) (emphasis added). The dissenting opinions in People v. Barney, 742 N.Y.S.2d 451 (N.Y. App. Div. 2002) (Green & Hurlbutt, JJ.) and Cochran v. Commonwealth, 114 S.W.3d 837 (Ky. 2003) (Cooper, Keller, & Stumbo, JJ., dissenting in part and concurring in part) also cited the purpose behind their state's burglary statutes as the basis for their disagreement with the majority decisions to uphold the burglary convictions where the occupants were deceased prior to the breaking and entering.

In Barney, the dissent concluded that "upon the death of its sole occupant, the building at issue lost its character as a dwelling" as defined in the burglary statute. 742 N.Y.S.2d at 453-54.

They noted that even in the common law definition of burglary, "[t]he requirement that the structure unlawfully entered be a dwelling was crucial because common-law burglary found its theoretical basis in the protection of man's right of habitation." Id. at 454. Despite its "statutory expansion and refinement," the dissent found that "the crime of burglary has never lost its theoretical underpinnings as an offense against habitation." Id. "From at least the time of Blackstone, burglary of a dwelling has been considered among the most serious crimes because of the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation." Id. at 455. The Barney dissent thus found that while the structure was adapted for occupancy, it had no present or prospective occupant where the sole occupant died three days prior to the breaking and entering and the owner lived elsewhere and did not intend to use the house as her residence. Id. Thus, the dissent would have reduced the conviction for second degree burglary to third degree burglary. Id. at 456.

In Cochran, the dissenters found it obvious that the legislature "did not classify the burglary of a dwelling as a more serious offense than the burglary of a building because of its structure or contents." 114 S.W.3d at 841. They found that the higher classification was instead a reflection of "the greater danger inherent in the burglary of a building usually occupied by a person lodging therein, *i.e.,* that the person usually lodging therein might be killed or injured while defending against the depredation." Id. (internal quotations omitted). They also noted that the victim's absence in Cochran was not temporary and that he could not have intended to return since he was deceased. Id. at 842.

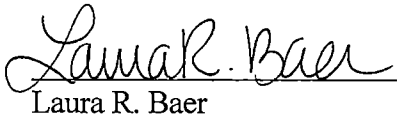
In the present case, there was no identifiable occupant of the trailer when Floyd entered it because Rearick was deceased. Whether Rearick had any intent to return could not be determined because he was no longer able to entertain any type of intent. Further, the rationale under the first

degree burglary statute for protecting occupants was absent with respect to the trailer when Rearick died. Therefore, the State failed to prove an essential element of the crime of first degree burglary. The trial court erred in concluding that the State presented evidence that the trailer was a dwelling after Rearick's death. Floyd was accordingly entitled to a directed verdict and the Court of Appeals erred in affirming his conviction for first degree burglary.

CONCLUSION

For the reasons set forth herein, Petitioner Martin Dameon Floyd respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review the decision, reverse the Opinion of the Court of Appeals, and reverse Petitioner's convictions.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Maite Murphy, Circuit Court Judge

Opinion No. 2015-UP-362 (S.C. Ct. App. filed 7/15/2015)
2013-GS-18-0364

THE STATE,

RESPONDENT,

V.

MARTIN DAMEON FLOYD,

PETITIONER

APPELLATE CASE NO. 2013-002736

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Martin D. Floyd, #290265, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, on this 12th day of October, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of October, 2015

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 12, 2015

Megan Harrigan Jameson, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Martin Dameon Floyd

Dear Megan:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Laura R. Baer

Laura R. Baer
Appellate Defender

LRB

Enclosures

cc: Court of Appeals