THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWNDELL QUINTEL McCLENTON

APPELLANT

Appellate Case No: 2014-000978

FINAL BRIEF OF APPELLANT

Joshua B. Raffini
Attorney for Appellant
PRUITT & PRUITT
101 N. Murray Ave.
Anderson, SC 29625
(864) 224-3121

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred by not granting appellant a directed verdict as to both counts of burglary in the first degree where there was no direct or substantial circumstantial evidence that appellant entered either residence during nighttime hours?

2. Whether the trial court erred in in admitting an unreliable identification based on an unnecessarily suggestive procedure and circumstances that created a substantial risk of irreparable misidentification where the witness had limited time to observe and little need to perceive details?

STATEMENT OF THE CASE

In May of 2012, Shawndell McClenton ("McClenton") was indicted for two (2) counts of burglary of a dwelling, first degree, and breaking and entering a motor vehicle. R. pp. 179-184. On April 21-23, 2014, McClenton was tried in Charleston County before the Honorable Clifton Newman and a jury. R. p. 1. Benjamin C. Lewis represented McClenton. R. p. 6. Timmy Finch and Greg Voight represented the State. R. p. 1. The jury found McClenton guilty on all three charges. R. p. 175. Judge Newman sentenced McClenton to twenty-four years imprisonment on each of the burglary convictions and five years' imprisonment for the breaking and entering a motor vehicle conviction, all sentences to run concurrently. R. p. 178, Tr. 424. McClenton was afforded 654 days credit for time already served. R. p. 178. On April 30, 2014, McClenton served his notice of appeal. This appeal follows.

STATEMENT OF FACTS

On February 25, 2012, someone burglarized two separate apartments within the apartment complex located at 700 Ellis Drive on James Island. R. p. 86, lines 4-8. Multiple law enforcement officers responded to reports of a burglary. R. p. 50, lines 10-24. Crime scene technician Jeffrey Miller found that someone had forced entry into Amanda Mitchell's apartment and documented damage to the door of that dwelling. R. p. 90, lines 11-14. Further investigation revealed that a vehicle belonging to Amanda Mitchell had been broken into. Ms. Mitchell identified a variety of items that were missing from her apartment, including jewelry, two computers, wines, and some clothing. R. p. 108, lines 6-23. Crime scene technician Miller also documented entry into Caitlyn Horton's apartment and a displaced window screen. R. p. 89, line 7-8. Ms. Horton testified that her wallet was missing from the apartment but was later recovered. R. p. 128, lines 16-21.

Officer Joe Piech, responding to the burglary call, stopped a vehicle in the vicinity. R. p. 55, lines 23-24. McClenton was a passenger in that vehicle. R. p. 57, line 23 – p. 58, line 2. A subsequent search revealed a white trash bag in the trunk of the vehicle containing wine bottles, electronics, and other items. R. p. 69, line 11 – p. 70, line 14.

The State presented evidence that the two apartments at issue were burglarized between approximately 6:30 and 10:25 p.m. Caitlyn Horton testified that she left her apartment at 6:30 or 7:00 p.m. R. p. 131, lines 22-23. Amanda Mitchell testified that she left her apartment at around 7:30 p.m. and that it was "getting dark." R. p. 111, lines 1-18. Officers were called to the scene at approximately 10:25 p.m. R. p. 114, lines 23-24.

No witnesses or direct evidence placed McClenton inside either apartment. No fingerprints were found in either apartment. R. p. 88, lines 16-17; R. p. 90, lines 15-17. The State presented no direct evidence regarding the exact timing of entry into either apartment.

ARGUMENT

1. The trial court erred by failing to direct a verdict as to both counts of burglary in the first degree where there was no direct or substantial circumstantial evidence that appellant entered either residence during nighttime hours.

At the conclusion of the State's case, McClenton moved for a directed verdict as to the burglary in the first degree charges, arguing that no evidence was presented regarding entry or remaining during nighttime hours. R. p. 132, lines 20-23. Judge Newman denied the motion. R. p. 138, lines 5-6. McClenton renewed his motion following the verdict, and made motions to set aside the verdict and for a new trial. R. p. 176, lines 22-24. Judge Newman denied all post-trial motions. R. p. 177, lines 5-6.

The South Carolina Supreme Court "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." State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct.App. 2013). "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). See also Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). In this case, the evidence presented by the

State was insufficient to move beyond suspicion of guilt as to each element of the offense charged.

A person is guilty of first-degree burglary if he "enters a dwelling without consent and with intent to commit a crime in the dwelling" and "the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A). The additional requirement that the entering or remaining occur in the nighttime is one of three possible statutory factors that elevates a burglary charge to first-degree. Id. In this case, the only aggravating factor alleged in the indictments was that the burglary occurred during the nighttime hours. R. pp. 179-184. "'Nighttime' ... is, as was held at common law, that period between sunset and sunrise during which there is not daylight enough by which to discern or identify a man's face, except by artificial light or moonlight." Bannister v. State, 333 S.C. 298, 305, 509 S.E.2d 807 (1998) (quoting 12A C.J.S. Burglary § 26 (1980)).

The Court is required to review the evidence in the light most favorable to the State. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011). Even in this light, there was insufficient evidence regarding the time of any entry or remaining. It was undisputed that there was no direct evidence placing McClenton inside either apartment. The only witness identification at trial, by Jeremy Jacobs, placed McClenton at the apartment complex and at the vehicle later identified as belonging to Amanda Mitchell. R. pp. 22-24. Additional witness testimony placed an individual in and around the exterior of the apartment building.[1] Warren Johnson testified he saw an individual in the breezeway and bushes outside of the apartment building at issue.[2] R. pp. 32-35. Mr.

[1] The State offered the testimony of Warren Johnson, including his attempt to identify McClenton, but Judge Newman excluded the identification. R. ____, Tr. p. 209, line 20 – p. 210, line 2. Mr. Johnson was allowed, however, to testify regarding his observations. R. ____, Tr. p. 210, lines 1-2.

[2] Both eyewitnesses, as well as both victims, resided in building 14 within the complex.

Johnson also described rustling noises he heard around that same time, including "an awkward sound of glass and plastic." R. p. 35, lines 23-25. Finally, Mr. Johnson related that he saw the same individual with a "bag of stuff." R. p. 43, lines 4-5.

The testimony of both Johnson and Jacobs admittedly describes conduct occurring during the nighttime hours. However, neither witness could identify McClenton entering, inside of, or exiting either of the burglarized apartments. R. pp. 21-29; R. p. 42, line 24 – p. 43, line 3. In the absence of such evidence, the State failed to prove each element of the offense charged and the trial court erred in refusing to direct a verdict.

In State v. Mitchell, another burglary case, the State's only evidence was a fingerprint on a screen in close proximity to a broken window. 341 S.C. 406, 409, 535 S.E.2d 126 (2000). In that case, it was undisputed that the defendant had previously been to the victim's home several times. Id. Accordingly, that Court concluded that evidence placing the defendant "in and around the victim's house" was insufficient to prove burglary. Id. In this case, viewing the evidence in the light most favorable to the State, while testimony placed McClenton near the scene of the burglary close to the time of the crime, there is a similar lack of evidence placing him inside the dwelling. Furthermore, and specific to the grounds for McClenton's directed verdict motion, the key here is the absence of evidence placing McClenton inside either dwelling at a specific time: during nighttime hours.[3]

[3] Of further note, in Mitchell the State relied on the Defendant's stipulation to previous burglary convictions in order to prove one of the required aggravating factors for burglary in the first degree conviction. Mitchell, 341 S.C. 408. Thus, substantial circumstantial evidence of burglary would have been sufficient to sustain the charge. In contrast, the State here relies on the nighttime hours aggravator to elevate McClenton's conviction to burglary in the first degree. Assuming, arguendo, that substantial circumstantial evidence of burglary- of any degree- exists, the burden here is higher than in Mitchell as the State was also required to present substantial circumstantial evidence of the additional element required for a conviction.

In State v. Bostick, the defendant was convicted of murder based on DNA evidence that excluded 99% of the population and property belonging to the victim found on the defendant's property. 392 S.C. 134, 708 S.E.2d 774 (2011). In that case, the State also presented evidence that the defendant's clothing had both gasoline and blood on them where the victim was found in a burning house and the fire had been accelerated with gasoline. Id. at 136-137. The Supreme Court found the circumstantial evidence in Bostick insufficient and reversed the conviction. In this case, subsequent possession of property is similarly insufficient to withstand a directed verdict motion where there is no evidence tying McClenton to the inside of either dwelling during the nighttime hours, as required to sustain his convictions.

In State v. Odems, another burglary case, the State convicted Odems based on his presence with the burglars and stolen property, evidence of flight, and efforts to secure assistance from a third-party to lie to law enforcement. 395 S.C. 582, 720 S.E.2d 48 (2011). In that case, the court found that flight and deception, alone, were insufficient to amount to substantial circumstantial evidence where there was no evidence placing the defendant at the crime scene. Id. at 590. Indeed, while noting the suspicious circumstances and conduct of the defendant, the court found the evidence insufficient to allow the jury to conclude that the defendant had committed the crimes charged. Id. at 592 (citing Bostick, 392 S.C. at 139–41, 708 S.E.2d at 777–78). The same principle applies to Appellant here. The circumstances might certainly raise a suspicion of guilt. However, the evidence presented by the State is insufficient to prove that McClenton committed the crime charged.

In the light most favorable to the State, the evidence adduced at trial proves the following: (1) McClenton was present at the apartment complex, (2) McClenton was in possession of property from the apartments, (3) at the times referenced by witnesses placing him outside of the apartments and at the time of his arrest, it was nighttime. The evidence presented raises a suspicion that McClenton might have crossed the threshold into one or both apartments, and may have done so during nighttime hours. However, no substantial circumstantial evidence places McClenton inside either apartment during nighttime to the exclusion of other reasonable hypotheses: that he might have entered prior to nightfall and merely completed larceny during nighttime, or that he merely possessed stolen goods without ever entering either dwelling.[4]

In refusing to direct a verdict for McClenton as to burglary in the first degree despite the lack of direct or substantial circumstantial evidence that he entered or remained at nighttime, the trial court erred.

2. The trial court erred in admitting an unreliable identification based on an unnecessarily suggestive procedure and circumstances that created a substantial risk of irreparable misidentification where the witness had limited time to observe and little need to perceive details.

At trial, the State offered the testimony of Jeremy Jacobs to identify McClenton. R. pp. 7-12; pp. 21-26. Mr. Jacobs was a resident of the apartment complex and made an out-of-court identification based on a single person show-up after McClenton was in police custody. R. pp. 7-11.

[4] McClenton did not take the stand to provide an explanation. However, Detective Feeters testified that McClenton told him that he had been dropped off by a friend and was at the apartment complex to see a friend. R. p. 124-125.

In reviewing the reliability of eyewitness identification testimony, "whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445 (2000). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. (quoting Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994)).

In applying standards articulated by the United States Supreme Court governing the admissibility of out-of-court identifications, our courts have explained that a two-prong inquiry is necessary. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445 (2000) (citing Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (additional citations omitted)). First, "[a] court must first determine whether the identification process was unduly suggestive .... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Moore, 343 S.C. 282, 287, 540 S.E.2d 445 (citations omitted). "Single person show-ups are particularly disfavored in the law." Id. (finding that where witness brought to view suspects surrounded by police officers but no other potential suspects, procedure was unduly suggestive). If the court determines that the process was suggestive, the inquiry turns to reliability under the totality of the circumstances. Under this second prong of the analysis, the following factors are to be considered: "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time

between the crime and the confrontation. Id. (quoting Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

The appellant sought to exclude Jacob's identification, and the trial court held a Biggers hearing. R. p. 7. Mr. Jacobs testified that he observed an individual going into a white vehicle. R. p. 9, lines 4-5. He admitted he only had "just a few moments" to view the individual, but claimed he had the opportunity to observe the individual's face and clothing. R. p. 9, line 22 - p. 10, line 7. The witness was unable to identify any particular, distinguishing features of the individual he saw apart from a basic description and clothing. R. p. 14, lines 8-20. He did, however, express confidence in his opinion. R. p. 11, line 22 – p. 12, line 1. Judge Newman, while describing the procedure as "highly suggestive" concluded that the identification still had indicia of reliability and denied the motion to suppress. R. p. 15, line 23 – p. 16, line 18. McClenton renewed his objection to the introduction of any identification when Jacobs testified as part of the State's case. R. p. 25, lines 20-22. McClenton also renewed his objection at the close of the State's case and after the verdict. R. p. 138, lines 10-14; R. p. 176, lines 22-24.

In this case, the show-up identification was inherently suggestive. Officers brought Mr. Jacobs to view the Appellant while handcuffed, and when he was already in police custody. R. p. 14, lines 1-2. The procedure was nearly identical to that in Moore, wherein that Court determined "it is patent the show-up procedure used was unduly suggestive." Moore, 343 S.C. 282, 287, 540 S.E.2d 445 (2000). So too here.

Accordingly, it is necessary to evaluate the totality of the circumstances to determine whether the identification is reliable based on the factors outlined in Biggers. Moore, 343 S.C. 282, 287, 540 S.E.2d 445 (quoting Neil v. Biggers, 409 U.S. 188, 199,

93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). First, and by his own admission, the witness here had a very limited opportunity to view the suspect. R. p. 9, line 22 - p. 10, line 7. Next, as to degree of attention, Mr. Jacobs testified than in observing an individual at the car, "it didn't seem out of the ordinary to me." R. p. 9, lines 12-13. His own characterization of his observations suggests he had neither the time nor inclination to pay any particular regard to the identity of the person he briefly encountered. Third, while the witness provided a general description of the suspect, he failed to identify any distinguishing physical features that might otherwise serve to bolster the reliability of his identification. Finally, the time between observation and identification here is admittedly short and the witness expressed confidence.

Based on relevant circumstances, the reliability of Mr. Jacobs' identification is questionable. His admittedly limited opportunity to observe the individual he happened across, together with his opinion that nothing was out of the ordinary, suggests limited attention to recording his observations. Indeed, he failed to recount any details beyond a general description or the suspect's clothing. In the absence of additional details, it is difficult to evaluate his professed certainty compared to other relevant circumstances.

The totality of the circumstances here is similar to that in Moore. 343 S.C. 282, 540 S.E.2d 445 (2000). In that case, the court pointed out that the witness had a limited opportunity to view the suspect. Furthermore, the court also noted the important distinction between the attention paid by crime victims rather than a mere passerby. Id. (citing State v. Ford, 278 S.C. 384, 386, 296 S.E.2d 866, 867 (1982)). The witness description in Moore was also based primarily on race and clothing. Id. at 289-290.

While the asserted certainty of the witness in Moore was lower than that of Jacobs here, the overall circumstances are similar.[5]

The circumstances here are also notably contrast to other cases wherein courts found much stronger indicia of reliability. For example, the Supreme Court upheld an identification based on multiple opportunities to view the Defendant over a four-month period. State v. Roach, 613 S.E.2d 791, 364 S.C. 422 (2005). In State v. Frazier, the court found the identification sufficiently reliable where the witness saw the suspect clearly several times during the commission of the offense and had previously familiarity with him. 394 S.C. 213, 715 S.E.2d 650 (Ct.App. 2011). Similarly, in State v. Mansfield, the court upheld an identification based on, inter alia, the witness's "protracted opportunity" to view the Defendant. 343 S.C. 66, 79, 538 S.E.2d 257 (Ct.App. 2000). Finally, the Supreme Court upheld identifications from three victims where each had the opportunity to view the face of the Defendant clearly for between one and ten minutes. State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523 (2004).

Accordingly, and in light of the substantial risk of misidentification here, the Court should reverse admission of Jacob's identification testimony.

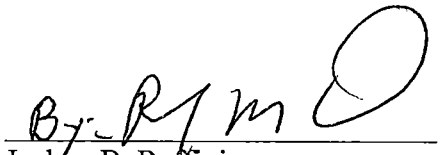
CONCLUSION

The State failed to present sufficient direct or substantial circumstantial evidence as to each element of the crime charged. In denying Appellant's motion for a directed verdict on that basis, the trial court erred. Admission of identification testimony from a witness obtained by virtue of an inherently suggestive procedure where such testimony

[5] Here, as in Moore, Jacobs failed to identify any particular facial feature and instead based his identification on clothing and circumstances- all against the backdrop of an inherently suggestive identification procedure. R. p. 28. Indeed, Jacobs agreed he did not necessarily get a great look at the individual's face. R. p. 28.

lacked sufficient reliability created a substantial risk of misidentification. In admitting such testimony despite that risk, the trial court erred. This Court should REVERSE Appellant's conviction for burglary in the first degree. In the alternative, this Court should REVERSE the trial court's admission of identification testimony and REMAND the case for a new trial.

Respectfully Submitted,



Joshua B. Raffini
Attorney for Appellant

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 10th day of June, 2015.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Clifton Newman, Circuit Court Judge

Appellate Case No: 2014-000978

RECEIVED
JUN 10 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHAWNDELL MCCLENTON,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

By: _____
JOSHUA B. RAFFINI

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

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

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Clifton Newman, Circuit Court Judge

Appellate Case No: 2014-000978

THE STATE,

RESPONDENT,

V.

SHAWNDELL MCCLENTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mary W. Leddon, Esquire, at PO Box 11549, Columbia, SC 29211, this 10th day of June, 2015.

By: [signature]

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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

[signature] (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.