

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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RESPONDENT

SC Court of Appeals

THE STATE,

V.

DENNIS M. PENNY, II,

APPELLANT

APPELLATE CASE NO. 2013-001554

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

Opinion No. 2016-UP-065

PETITION FOR REHEARING

On February 17, 2016, this Court affirmed Appellant Dennis M. Penny, II's conviction for second degree burglary in an unpublished opinion.¹ Penny respectfully petitions this Court for a rehearing of a portion of its Unpublished Opinion No. 2016-UP-065, specifically its decision as to the second issue raised in Appellant's Brief:

¹ Penny was sentenced to five years incarceration. As part of his sentence, the trial judge recommended that SCDC coordinate an assessment and treatment with the Department of Veteran Affairs. R. 94, ll. 1-5; R. 108, l. 20 – 109, l. 4; R. 126 (Sentencing Sheet).

Whether Appellant is entitled to a directed verdict on the charge of second degree burglary where the State did not present any evidence that Appellant had any intent to commit a crime within the dwelling when he entered the dwelling and where the mere kicking in of a door, without more, is not sufficient to support an inference that Appellant intended to commit a crime within the dwelling?

See Appellant's Brief, pp. 13-17. Pursuant to Rule 221(a), SCACR, Penny avers that the following points were overlooked or misapprehended by the Court:

Unlike the cases cited in this Court's opinion, Penny (1) did not enter in the nighttime, (2) the house he entered was not that of a stranger, (3) his entry was not unexplained, and (4) he did not attempt to commit any crime once he entered. Penny's father-in-law, Joey Oliver, testified that on December 20, 2012, Penny came to his house, "snatched the storm door open and kicked the metal door in." App. 29, l. 18 – 31, l. 8. Penny then came in the house. Oliver asked him what he was doing. Penny responded: "You're harboring my children." Penny then "picked up his two oldest children, turned and went back out the door." App. 31, ll. 9-13. The entire incident lasted "less than 10 seconds."² App. 36, ll. 7-10.

In hindsight, Appellant Penny should have knocked and asked to enter his in-law's home rather than kicking in the door. Had he done so, his father-in-law said that he would have let Penny inside the residence: "He wouldn't be welcomed to kick my door in, but if he would have had knocked on my door I would have let him." App. 36, ll. 11-13. However, Penny's conduct did not amount to the felony offense of second degree burglary. See S.C. CODE ANN. § 16-11-312(A) ("A

² As this Court is aware, Appellant Penny was in the armed services for thirteen years, was gainfully employed up until a week before this incident, and worked as a volunteer firefighter. Penny and his wife were married for sixteen years and had four children. Due to some marital difficulties, Penny's wife, along with the children, came to South Carolina from their common home in Pennsylvania three to four weeks before the incident. R. 27, l. 4 – 28, l. 15; R. 33, l. 10 – 34, l. 1; R. 102, l. 24 – 103, l. 11. There was no custody order in place at the time of the incident, thus Penny's wife had no superior custodial interest and Penny was not violating any court order when he took his two oldest children from his in-law's home. App. 6, l. 25 – 7, l. 7.

person is guilty of burglary in the second degree if the person enters a dwelling without consent *and with intent to commit a crime therein.*” (emphasis added)). This Court found that “Penny correctly asserts a conviction for burglary in the second degree requires evidence that the defendant entered a dwelling with the intent to commit a crime therein.” State v. Penny, Opinion No. 2016-UP-065 (Ct. App. Feb. 17, 2016). However, this Court found that “Penny’s forcible entry into the victim’s residence, which resulted in damage to both the storm door and the inside metal door, gave rise to an inference of his intent to commit a crime once he gained entry to the home.” Id.

Penny argued that the mere entry into a dwelling, whether by force or otherwise, does not give rise to a reasonable inference of intent to commit a crime inside. See Commonwealth v. Wilamowski, 633 A.2d 141, 144 (Pa. 1993) (“**The Commonwealth must establish, as part of its evidentiary burden, additional evidence that goes beyond the mere breaking in of a door or window. Without this evidence the required inference of intent will derive from mere conjecture or surmise and a defendant’s right to rely on a presumption of innocence will be little more than illusory.**”); see also State v. Pitts, 728 P.2d 113, 117 (Utah 1986) (“**The mere unlawful entry into private premises may not alone support a finding of intent [to support a burglary conviction].**”); Simpson v. State, 81 Fla. 292 (1921) (“Here the burden is on the state to prove affirmatively either by direct or circumstantial evidence that the act was done with the requisite specific intent. But it is sufficient in such cases to prove facts from which the specific intent may be inferred. **The facts, however, must be something more than mere breaking and entering.**” (emphasis added)). As it stands, this Court’s opinion sanctions speculation by the jury from a defendant’s manner of entry alone.

Distinguishing Appellant's Case

In support of its opinion, this Court cited McMillian v. State, 383 S.C. 480, 680 S.E.2d 905 (2009). McMillian pled guilty to first degree burglary after beating on and breaking the door of the home occupied by Lanelle Hicks and her adult son, Mark Hicks. 383 S.C. at 482, 680 S.E.2d at 906. As soon as McMillian entered the home, Mark Hicks took him back outside and held him until police arrived. Id. at 482-83, 680 S.E.2d at 906. McMillian appealed from the denial of his application for post-conviction relief, in which he argued that plea counsel was ineffective in advising him to plead guilty to first degree burglary because he had no intent to commit a crime. Id. at 484, 680 S.E.2d at 906-07. The McMillian Court found that plea counsel was not deficient because “a jury would have been free to disbelieve McMillian’s version of events and find that he had the intent to commit a crime based on his conduct at the time of this offense.” Id. at 487, 680 S.E.2d at 487.

Plea counsel had advised McMillian that a jury could infer the crime of trespass. Id. at 484, 680 S.E.2d at 908. The McMillian Court acknowledged that “the element of intent to commit a crime of a lesser grade could be satisfied by a trespass.” Id. at 486, 680 S.E.2d at 908 (citing State v. Christensen, 194 S.C. 1319 S.E.2d 555 (1940) (holding that “if . . . the defendant in this case broke and entered into the dwelling house of the tenant for the purpose of securing possession of property under the distress warrant which was required to be taken in a peaceable manner, he is guilty of a trespass and an invasion of the rights of the tenant unwarranted in law.”)). The McMillian Court also noted that “the presence of closed doors and locked windows is notice to the world that entry is forbidden,” so as to support a finding of unlawful trespass. Id. at 488, 680 S.E.2d at 909. Notably, in the present case, Oliver testified that Penny was welcome in his home, just not welcome to damage his door. Oliver further agreed that he “absolutely”

would have opened the *unlocked* door if Penny had knocked. R. 34, ll. 2-9; R. 36, ll. 1-15. Thus, Penny did not commit a trespass.

The McMillian Court further found that a reasonable inference of intent to commit larceny can be drawn from an unexplained breaking and entry into the property of another in the nighttime. Id. at 487-88, 680 S.E.2d at 908-09. It was approximately 1:00 a.m. when McMillian broke the door to the Hicks' home. Id. at 482, 680 S.E.2d at 906. McMillian said that he was drunk and high on crack cocaine and thought someone was chasing him and trying to kill him. Id. at 483, 680 S.E.2d at 906. He admitted that he should not have broken the door, but said that his only intent was to seek help. Id. However, the victims would have testified that they never heard any cries for help. Id. In the present case, the entry occurred at approximately 7:30 in the morning into the home of Penny's in-laws, where his wife was staying with their four children. R. 18, l. 22 – 19, l. 4. Notably there was no court order in place giving Penny's wife any superior custodial interest than Penny. R. 7, ll. 1-7. Thus, Penny's entry did not occur in the nighttime and he had a legitimate purpose in being there.

This Court cited State v. Peterson, for the proposition that that the jury's failure to convict a defendant of a crime alleged to have occurred within the dwelling is immaterial to the validity of the burglary charge. 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999). Our Supreme Court noted the following evidence of Peterson's intent to commit a crime therein:

The victim testified that Peterson grabbed her and covered her mouth; that he was wearing gloves; that he threw her on her bed; that he choked her; that he was "humping" her; that he suggested she cooperate; that she screamed for help; that he told her to be quiet so that her child would not wake up; and that when the child did awaken and began crying, Peterson released the victim and ran away.

Id. at 8, 518 S.E.2d at 278. Thus, the jury's failure to convict Peterson of any sexual assault was not dispositive. Peterson's actions inside the home, thwarted only by the cries of the victim's

child, were the substantial circumstantial evidence of his intent necessary to submit the case to the jury. His failure to complete his intended act did not prevent the jury from reasonably concluding that Peterson's intent was to commit a sexual assault.

This Court also cited Pinckney v. State, 368 S.C. 502, 505, 629 S.E.2d 367, 369 (2006). Pinckney was a PCR case, where the petitioner argued that "trial counsel was ineffective for failing to request an additional charge emphasizing that the intent to commit a crime must exist at the time of entry, and limiting the jury's consideration of intent to whether there was intent to commit the crime set forth in the indictment." 368 S.C. at 503, 629 S.E.2d at 368. Pickney was convicted of first degree burglary after he broke into a home at night and barricaded himself in the bathroom. Id. When police officers arrived, he threatened to kill himself and the officers by spilling lamp oil and lighting it. Id. In addition to finding that an adequate jury charge was given, the Pickney Court held "there is no requirement that the intent element is satisfied only by proving an intent to commit the specific crime that is charged in the indictment as an aggravating circumstance. The only requirement is that there be intent to commit any crime at the time of entry." Id. at 504-05, 629 S.E.2d at 369 (citing Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999)).

The Pickney Court noted its prior affirmance of Pickney's conviction on direct appeal, where he had argued that he was entitled to a directed verdict of acquittal because there was no evidence he intended to commit a crime at the time he entered the dwelling. Id. at 503, n. 1, 629 S.E.2d at 367, n. 1. In the direct appeal opinion, the Pickney Court found that Pickney's "actions after he entered the house were some evidence of respondent's intent to commit a crime therein." State v. Pickney, 339 S.C. 346, 350, 529 S.E.2d 526, 528 (2000). Unlike Peterson and Pinckney, Penny's actions once inside the home were only to say "you're harboring my children," to pick

up the two oldest children, and to leave. App. 31, ll. 9-13. There was no evidence that Penny's intent was thwarted by the residents of the home or law enforcement such that he did not accomplish his intended purpose. Thus, his actions once inside the home did not point to any criminal intent. Any inference that Penny intended to commit a crime is speculative, not reasonable. See State v. Brown, 267 S.C. 311, 316, 227 S.E.2d 674, 677 (1976) (“[T]he motion for a directed verdict should be granted where evidence merely raises a suspicion of guilt, or is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt.”).

Finally, this Court cited State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), in which our Supreme Court held that “[i]ntent is seldom susceptible to proof by direct evidence and must ordinarily be proved by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.”³ Our Supreme Court recently explained in State v. Bennett:

[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. **This objective test is founded upon reasonableness.** Accordingly, in ruling on a directed verdict motion **where the State relies on circumstantial evidence, the court must determine whether the evidence**

³ While Appellant acknowledges that this concept is generally applicable to his case, the facts of Tuckness are inapposite. Tuckness appealed from his conviction for assault with intent to ravish. 257 S.C. at 298, 185 S.E.2d at 608. The victim testified that Tuckness entered the driveway of her rural home while she was hanging laundry out to dry. 257 S.C. 295, 300, 185 S.E.2d 607, 609 (1971). Utilizing what purported to be a gun, he ordered the victim to undress and lay on the ground. Id. at 300-01, 185 S.E.2d at 609. After approaching her, Tuckness warned the victim that if she screamed he would “rip her insides out.” Id. He then ejaculated on to her. Id. Tuckness testified that his intention was to masturbate, not to penetrate the victim. Id. at 302, 185 S.E.2d at 609. The Tuckness Court aptly found that “under the conflicting evidence in this case, that a clear issue for the jury as to whether the appellant intended to penetrate the sexual organ of the prosecutrix or to produce emission without penetration was presented.” Id.

presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

___ S.C. ___, 781 S.E.2d 352, 354 (2016) (internal quotations and citations omitted) (emphasis added). However, the Bennett Court noted that “[w]hen the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof.” Id. at ___, 781 S.E.2d at 353-54 (citing State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013)); see also State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

Thus, the issue here was whether the evidence permitted a *reasonable* inference that Penny intended to commit a crime in his in-laws’ home. Unlike McMillian, Peterson, and Pickney, all of which involved incredible claims by the defendants that they were being chased and seeking refuge, Penny was there to retrieve two of his own children. He did so and left. App. 31, ll. 9-13; App. 36, ll. 7-10. Candidly, Penny was upset when he went to his in-law’s house, as evidenced by his breaking of the door. His wife had left him in Pennsylvania three to four weeks earlier and taken their four children along with her to South Carolina. App. 27, l. 4 – 30, l. 18.

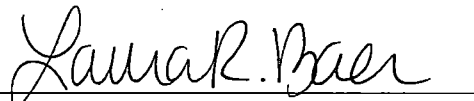
Even so, the State’s burden was to prove more than that Penny was upset – it had to prove beyond a reasonable doubt that Penny intended to commit a crime within the dwelling. See S.C. CODE ANN. § 16-11-312(A). Moreover, to survive the motion for directed verdict, the State had to present *substantial circumstantial evidence* that Penny intended to commit a crime within the dwelling, which it utterly failed to do. See State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Instead, the State asked the jury to speculate as to Penny’s intent, which well-settled case law prohibits. See State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (“Under settled principles, the trial court should grant a directed verdict motion when the

evidence presented merely raises a suspicion of guilt.”). Therefore, the trial court erred in denying Penny’s motion for directed verdict because the evidence was not “sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt” without speculating. See Bennett, ___ S.C. at ___, 781 S.E.2d at 354.

CONCLUSION

For the reasons set forth herein, Appellant Dennis M. Penny, II respectfully requests that the Opinion of the Court of Appeals be withdrawn and that this Court enter a directed verdict of acquittal.

Respectfully submitted,



Laura R. Baer
Appellate Defender

This 3rd day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 03 2016

SC Court of Appeals

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

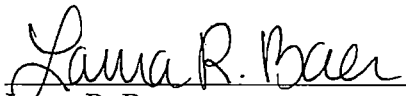
V.

DENNIS M. PENNY, II,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, and Mary Williams Leddon, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Dennis M. Penny, II, 27 E. Main Street, Mt. Croghan, SC, 29727, this 18th day of February, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day
of February, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.