THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKY EUGENE PASSMORE,

APPELLANT

APPELLATE CASE NO. 2014-000727

Appeal from York County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2016-UP-097

PETITION FOR REHEARING

Appellant Ricky Passmore seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that there was no direct of substantial circumstantial evidence that he entered a building or dwelling without consent or by using "deception, artifice, trick or misrepresentation to gain consent" with the intent to commit a crime in the dwelling. State v. Ricky Eugene Passmore, 2016-UP-097 (filed March 2, 2016) at p. 2. While appellant understands that a defendant's intent will often be a jury question *the fact remains in this case that appellant Passmore was voluntarily let into the dwelling, and he did not trick his son into allowing him to enter.* Therefore, a directed verdict should have been issued on these most unusual facts.

Defense Counsel Dan Hall, now Judge Hall, told the jury in closing that they had heard a recording of a telephone call between appellant and his teenage daughter where he went on a "redneck rant" about his wife dating a black man, and that his children did not like this man. "It's ugly and it's embarrassing, but that's the nature of redneck rants and redneck divorces." R. 198, l. 13 – 200, l. 13. Defense counsel told the jurors that "kidnappers and burglars" did not act the way appellant did on the night when he came to be charged with these crimes, including burglary. R. 200, l. 14 – 206, l. 13.

A brief review of the important facts in necessary to this petition. Julia Coleman was the mother of appellant's three children. Coleman testified her new boyfriend was Chip. R. 61, ll. 15-21. Coleman said she had a prior phone conversations, and "nasty voice mails" from appellant about her dating Chip. R. 64, ll. 4-19.

Coleman testified that appellant said he would show up at her house when her boyfriend was there, and that "we'll see who the real man is." Coleman told appellant: "Ricky, don't show up at my fucking house." R. 65, ll. 2-6. Although there was evidence of appellant's "rants," there was other evidence that Coleman certainly was not afraid of appellant, and she was used to his bluster.

Coleman claimed that Chip left about ten-thirty on the evening in question. R. 66, ll. 1-2. She said that at about five o'clock in the morning, she was sleeping on the couch and her children were in bed. R. 65, ll. 4-25. Coleman testified there was a knock on the door and her son, Cody, went to the door. She claimed he said: "Mama, it's Chip." Coleman said she told him to open the door and then Cody said, "Mama it's daddy" and that appellant and his brother, Mickey, walked inside. R. 66, l. 22 – 67, l. 6. The jury acquitted appellant on all other charges. A clear indication it did not believe Coleman's testimony.

Coleman claimed appellant asked her, "Where is Chip?" and she answered: "He's not here." Coleman maintained she started looking for the phone, and that appellant pulled out a sword, pushed her on the couch and said: "Bitch you move, you die." R. 67, l. 10 – 68, l. 5.

Coleman remembered that appellant and Mickey left the house after her daughter told them Chip was not there. Coleman claimed appellant said something about "turning your back on us." Coleman said she responded: "*Whatever, get the hell away from here. They went down the steps and I pulled the door back and locked it.*" R. 69, ll. 10-17. (emphasis added).

On cross-examination, Coleman admitted the sword appellant brought never touched anyone. R. 72, ll. 21-25. Coleman also acknowledged that appellant would "*say anything*" in conversations, and she essentially admitted she did not take his "rants" seriously. R. 75, l. 25 – 76, l. 25.

Coleman said she did not remember if she was smoking a cigarette during this alleged incident -- others would confirm she was smoking -- but Coleman admitted she told appellant: "I don't have time for this shit I gotta go to work [in the morning]." R. 78, ll. 10-20.

Defense counsel Hall moved for a directed verdict of acquittal on of all the charges. As to burglary, counsel argued appellant **was given permission to come to the house, and** that he did not have any intention of harming anyone or committing any crime inside. R. 119, l. 21 – 120, l. 2. (emphasis added).

The jury acquitted appellant on the kidnapping, criminal domestic violence of a high and aggravated nature, and firearm indictments. R. 119, l. 21 – 120, l. 2. The judge had denied the motion for a directed verdict on all of the counts. R. 121, l. 8 – 122, l. 12.

At the conclusion of the evidence, Defense Counsel Hall renewed his directed verdict motion, which was again denied. R. 196, ll. 14-24.

Appellant testified in his own defense and said that his son, Cody, allowed him to enter the house that night, and further, Coleman did not oppose appellant coming inside. R. 133, ll. 7-21. Appellant admitted he had a sword with him because he did not know **if** Coleman's boyfriend was going to be there and **whether** there would be a confrontation with him if he was there. Appellant said any confrontation that might have occurred would have been between him and the boyfriend who, as seen above, was not present. R. 133, l. 24 – 134, l. 15.

Appellant also said that Coleman was smoking a cigarette during their conversations and that she asked him "Who or what is that fucking sword is for?" Appellant answered "That's for your boy when I catch him around my kids." R. 138, ll. 15-21. Appellant said that he was concerned for his children, and that Coleman was not afraid of him "in the least." R. 151, l. 24 – 154, l. 8.

This Court should grant rehearing because it may have overlooked the fact the state failed to offer direct or substantial circumstantial evidence that appellant: (1) entered the dwelling without consent, and (2) that he entered with the intent to commit a crime therein.

Under the state's version, or the defense version, of the facts, appellant had consent to enter. *There was simply no substantial circumstantial evidence that appellant tricked his son into allowing him to enter. Any contention to that effect would be mere speculation and not substantial circumstantial evidence.* Even Coleman's testimony was that Cody opened the door thinking he was letting in Chip, Coleman's boyfriend, but then Cody's father, appellant and appellant's brother, Mickey, walked in when Cody let them inside. There was no artifice or trick involved to gain entry. See S.C. Code §16-11-310 (3). Further, there was no evidence appellant entered the home with the intent to commit a crime. Appellant did not touch anyone with the sword, and it is apparent he did not have any intent to harm Coleman or his own children. What

might have happened had Coleman's boyfriend been in the house at the time would only be **speculation**, and speculation and conjecture are not sufficient to survive a directed verdict motion. See State v. Smith, 274 S.C. 622, 623-624, 266 S.E.2d 422, 423 (1980). Further, evidence of what occurred after entry is relevant to prove the intent at the time of entry. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Appellant did not make any attempt to harm anyone inside, he did not attempt to steal anything, and all the state could do in this case is **speculate** what might have happened if Chip had been there. While appellant being acquitted of the other crimes charged is not conclusive on the issue of his intent, it is instructive that appellant was acquitted on the charges of criminal domestic violence of a high and aggravated nature and kidnapping. Those offenses were, noteworthy, in that they were supposedly directed at Julia Coleman, and not Chip anyway. "Mere suspicion" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

Again, the burglary conviction in this case resulted in a thirty-year prison term where appellant was correctly acquitted on the other charges. This was not a burglary case as shown above -- the state's evidence on that charge was insufficient to withstand a directed verdict motion -- and rehearing should be granted.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

This 16th day of March, 2016.

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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 David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ricky Eugene Passmore, #315667, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of March, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day
of March, 2016.

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