

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAY 03 2016

Appeal from Charleston County

SC Court of Appeals

Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN HENRY HOLMES, JR.,

APPELLANT

APPELLATE CASE NO. 2015-002195

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Holmes motion for a directed verdict on first degree burglary and to proceed on a second degree burglary because the state did not prove that the building was a dwelling because the owner had not lived there in three years and was in poor health, and the state did not prove that Holmes entered the building with the intent to commit a crime when he said he just wanted a place to sleep; he had no stolen items on his person, and the owner's daughter said nothing was missing from the building?

STATEMENT OF THE CASE

On October 6, 2014, the Charleston County Grand Jury indicted John Henry Holmes on the charge of burglary first degree. On October 12-13, 2015, Holmes proceeded to trial before the Honorable Roger E. Henderson and a jury. Appellant Holmes was represented by John Kozelski and Annie Andrews. The state was represented by Chris Lietzow and Charles Condon. Tr. 1. The jury returned a verdict of guilty as indicted. Tr. 239, ll. 1-13. Judge Henderson sentenced Holmes to eighteen years incarceration. Tr. 249, ll. 11 – 23. Holmes' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On July 30, 2014 around 12:30 in the morning, the North Charleston Police Department received a 911 call that the caller had heard breaking glass and then saw someone going into the house of Ms. Anne Blandin nearby. Officer Tony Bunch arrived at the scene within four and one half minutes. Tr. 60, ll. 8 – Tr. 61, ll. 6; Tr. 81, ll. 10 – Tr. 83, ll. 8.

When he arrived, Officer Bunch saw broken glass in the back and saw that the interior door was open. He and his partner suspected that the person was still inside the building. The officer began announcing they were the police, and called for the person to come out with their hands up. At that point, Appellant Holmes came from the building with his hands up. He was handcuffed and arrested. The police team then cleared the building and determined no other person was there. Tr. 83, ll. 9 – Tr. 87, ll. 3.

The officer searched Holmes and found nothing except some trash on him. Officer Bunch identified Holmes in court during the trial as the person that was in the building that night. Tr. 87, ll. 4 – 20.

Officer Bunch read the Miranda rights to Holmes who appeared to understand according to Officer Bunch, and then Holmes waived his rights. When Officer Bunch asked Holmes what he was doing there, at first he said he did not know. It was the testimony of Officer Bunch that Holmes said he entered through a patio window and then through the open door. Both of those areas had broken glass. Holmes allegedly told the officer that he did not know the owner of the house and that he did not have permission to be inside the house. Tr. 88, ll. 5 – Tr. 92, ll. 9.

On cross - examination, Officer Bunch then admitted that his sergeant had advised him that the CAD report indicated that Holmes said he thought the house was vacant. The officer also admitted that Holmes said he was homeless and was just trying to find a place to sleep. Holmes told

the officer that he got into the house through “a broken glass window.” Officer Bunch did not ask Holmes if he broke the window. Tr. 92, ll. 13 – 25; Tr. 104, ll. 1 – Tr. 109, ll. 22.

On cross-examination, Officer Bunch stated that he considered this area a “hot crime area.” There were a number of burglaries reported in that area around the time of this incident. Tr. 96, ll. 13 – Tr. 97, ll. 24. When asked about the check of the house, Officer Bunch said he could crawl through the broken window as it was that big. He could see boxes in the house. Tr. 98, ll. 12 – Tr. 99, ll. 25.

The officer continued to admit that Holmes complied with every instruction the officer gave him. He agreed that Holmes was not wearing a ski mask nor gloves. Holmes did not try to escape. Officer Bunch searched Holmes for weapons but did not report finding any. The officer checked Holmes’ pockets and found nothing but “junk.” There were no burglary tools found, and no items from the house were found on Holmes. Tr. 100, ll. 1 – Tr. 103, ll. 13.

The daughter of the owner came to the scene. According to Officer Bunch, the daughter said no one was in the house because the AC was broken and that she “mentioned some health issues.” Tr. 87, ll. 21 – Tr. 88, ll. 4. The officer talked with the daughter about the incident but did not get her to write a statement. Defense counsel asked the officer if he did not learn from the daughter that the house had been broken into earlier that day. Officer Bunch said he did not ask her about any previous break-ins. According to the officer, there was no follow up investigation done. Tr. 104, ll. 2 – Tr. 106, ll. 1.

At the trial, Corona Campbell, the daughter of the owner, testified on direct that her mother was 71 and that her mother’s health was not good. Her mother has kidney failure and was in the hospital at the time of this trial. Ms. Campbell described herself as her mother’s caretaker. The daughter stated that her mother’s permanent address in July 2014 was the house that was

burglarized. However, her mother stayed with the daughter at the daughter's house too. Her mother learned in October 2013, which was before this incident, that she had kidney failure and started dialysis then. How the mother felt would determine where she stayed and slept. There was a refrigerator at the mother's house as well as clothes and she received her mail there. All of this information was provided by the daughter. Tr. 113, ll. 11 - Tr. 116, ll. 24.

The daughter denied that the house was abandoned although one of the doors had boards over it. She explained that the door was "broken out." When the solicitor asked her if she had noticed the broken glass, she said that she noticed it that morning. She said the glass was broken that morning. She was not sure about the door. She said that each time the house was broken into and the glass broken, she put up a board. Tr. 126, ll. Tr. 127, ll. 25.

On cross-examination, Ms. Campbell admitted that her mother had lived with her for almost three years before this incident. Her mother was not living in the house when this incident occurred. She denied that the house was used for storage. Defense counsel asked her about the police report that her mother made in July 2013 when a burglary had occurred at her mother's house a year before the current burglary in 2014. Ms. Campbell said she did not remember. Defense counsel then said that in the report her mother said that she lived with her daughter at her daughter's house, and that the mother's house was used only for storage. Tr. 128, ll. 5 - Tr. 129, ll. 25.

Ms. Campbell said that she called the police every time she saw any signs of vandalism. Tr. 130, ll. 1 - 22. She admitted that her mother's house had been broken into twelve times during the month of July 2014 during the time this incident occurred. She said that a "lot of items" were taken from that property. Tr. 132, ll.1 - 24.

Ms. Campbell admitted that a burglary occurred in June 2014 when the glass door on the patio was broken. Officer Thomas did a follow up on that burglary. Then Ms. Campbell

remembered talking with Officer Thomas because “he was the one that responded earlier in the day to the burglary that occurred” on July 29, 2014. Defense counsel said that Officer Thomas made an incident report on July 29th of the broken windows from that incident. Then twelve hours later on July 30th, Ms. Campbell received another call that the house had been burglarized and that was when she talked with Officer Bunch on this incident. She went through the house on July 30 and found that nothing was missing. Tr. 133, ll. 1 – Tr. 134, ll. 23.

Ms. Campbell had to board up the house every time someone came and broke glass. She said she had boarded more than eight windows and two large full size commercial doors. Tr. 135, ll. 1 – 16.

Lisa Kubicsko was the crime scene technician with the North Charleston Police Department who processed the scene of this incident on July 30 2014. She did not dust for fingerprints and did not collect samples of DNA as she said she only did that when they had an unknown suspect and were seeking to identify that suspect. Tr. 67, ll. 3 – Tr. 68, ll. 18; Tr. 73, ll. 1 – 12.

Ms. Kubicsko did not go inside the house and did not collect any physical evidence. She was not aware of the earlier burglary at the house that same day. Tr. 77, ll. 1 – Tr. 80, ll. 17. She only took photographs of the Google map photos of the house in March 2015. These were not photographs of the house at the time of the burglary. Tr. 68, ll. 19 – Tr. 70, ll. 5.

At the close of the state’s case, defense counsel made a motion for a directed verdict. Tr. 136, ll. 24 – 25; Tr. 138, ll. 1-11. Counsel argued for a directed verdict based on two points. The first was that the house was not a dwelling as required by the burglary first degree statute; and the state did not prove that Appellant Holmes had any criminal intent to commit a crime when he entered the house. Counsel said that the case could still go forward on a burglary second degree or

burglary third degree if the court thought the house was some type of storage unit. Tr. 138, ll. 8 – Tr. 141, ll. 4.

Counsel argued that the evidence presented at trial was that the owner of the house, Ms. Blandin, had been sick for several years and lived with her daughter. Ms. Blandin had said in her statement to the police in July 2013, one year before this incident, that the house was used only for storage. There was no evidence that Ms. Blandin planned to return to that house. She was on dialysis, and her daughter, Ms. Campbell, was the primary caretaker of her mother. The house had been broken into twelve times during July 2014 when this incident occurred. Counsel argued that certainly neither the daughter nor Ms. Blandin lived there during July 2014 with the numerous break-ins occurring. Counsel argued that this house did not constitute a dwelling under the burglary first degree statute. Tr. 138, ll. 8 – Tr. 139, ll. 24.

Counsel's second argument for a directed verdict was that the state did not prove that Holmes had any criminal intent to commit a crime when he entered the house. He said that if Holmes had broken the window to enter, maybe intent could be inferred. However, the testimony of Ms. Campbell was that the windows were broken earlier on that day, the 29th, when she made a police report on an earlier burglary. Holmes simply entered the house at night without intent to commit a crime and without consent through the already open window which was not burglary according to counsel. Tr. 139, ll. 25- Tr. 141, ll. 4.

The state argued that on a directed verdict the judge had to consider the existence or non-existence of evidence and not its weight. The solicitor argued that temporary absence did not prevent a residence from being the "subject of a burglary." He said what was important was that the occupants had the intent to return to the dwelling. Ms. Campbell said that her mother slept at the house sometimes. Tr. 141, ll. 6 – Tr. 142, ll. 6.

On the intent issue, the solicitor argued that it was only necessary that Holmes had the intent to commit any crime when he entered. He argued that intent could be inferred. He said the bottom line was that this was a decision for the jury to make. Tr. 142, ll. 6 – Tr. 144, ll. 8.

Defense counsel responded with the argument that there was no evidence that this was a breaking and entering as the 911 call did not see the person breaking glass but only heard it. Therefore, there was no intent to commit a crime by Holmes. Holmes said he was only looking for a place to sleep, and the state had not disproved that. Tr. 144, ll. 10 – Tr. 145, ll. 14.

The trial judge denied the directed verdict motion because he said it was a jury question. He ruled that Ms. Campbell, the daughter, offered conflicting testimony as to whether the house was a dwelling or not. The jury would have to “sift through that conflicting testimony that she offered.” The judge then ruled that intent could be inferred from the incident occurring at night. Tr. 145, ll. 18 – Tr. 146, ll. 12.

The defense did not present a case and rested after the state. Defense counsel then renewed all of his previous motions and the directed verdict motion which the judge denied. Tr. 158, ll. 1 – 22.

During deliberations, the jury sent out two questions. First the jury asked to review the testimony and police report. Secondly, the jury wanted to review the jury charge on intent. Tr. 195, ll. 9 – Tr. 196, ll. 25. Then the jury sent another question. They wanted to know how the law defined the term burglary. Tr. 197, ll. 10 – 25.

The judge read to the jury the entire charge on first degree burglary. Then he said he would play the entire testimony of Officer Bunch. The judge also read the charge on intent to them again and sent a copy of the charge to the jury room with them. Tr. 198, ll. 1 – Tr. 237, ll. 25.

The jury returned a verdict of guilty as indicted. Tr. 239, ll. 1-10.

Defense counsel renewed all previous motions and objections and asked for a new trial. He asked the court to consider a judgment notwithstanding the verdict as the state did not provide any evidence that Holmes had any intent to commit a crime. The judge denied the motions and ruled that counsel could not make a JNOV in a criminal case. Tr. 242, ll. 6 – Tr. 243, ll. 7.

The judge sentenced Appellant Holmes to eighteen years incarceration. Tr. 249, ll. 11 – 23.

ARGUMENT

The trial court erred in denying Appellant Holmes' motion for a directed verdict on first degree burglary and to proceed on a second degree burglary because the state did not prove that the building was a dwelling because the owner had not lived there in three years and was in poor health, and the state did not prove that Holmes entered the building with the intent to commit a crime when he said he just wanted a place to sleep; he had no stolen items on his person, and the owner's daughter said nothing was missing from the building.

South Carolina Code Section 16-11-311 (A) provides that a person is guilty of burglary first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling; and either:

- (1) when entering or while in the dwelling:
 - (a) is armed with a deadly weapon;
 - (b) causes physical injury to a person;
 - (c) uses or threatens to use a dangerous instrument;
 - (d) displays what is or appears to be a weapon;
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking
- (3) the entering or remaining occurs in the nighttime.

South Carolina Code Section 16-11-310 provides:

- (1) a building means any structure, vehicle, watercraft, or aircraft
 - (a) where any person lodges or lives; or

(b) where people assemble for purposes of business, government,or where goods are stored;

(2) a dwelling means its definition found in 16-11-10 , and also means the living quarters of a building which is normally used for sleeping, living, or lodging by a person.

Section 16-11-10 required that a house or building or shed where a person sleeps shall be deemed a dwelling for the purpose of the burglary statute.

South Carolina Code Section 16-11-312 provides:

(A) a person is guilty of burglary second degree if the person enters a dwelling without consent and with intent to commit a crime therein.

(B) a person is guilty of burglary second degree if the person enters a building without consent and with intent to commit a crime therein, and either:

(1) when in entering the building, the person

(a) is armed with a deadly weapon;

(b) causes physical injury to any person who is not a participant n the crime;

(c) uses or threatens to use a dangerous instrument;

(d) displays what is or appears to be a knife or weapon;

(2) the person had a prior record or two or more convictions for burglary or house breaking

(3) the entering occurs in the nighttime.

In State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016), the Supreme Court articulated the standard to determine whether the state has presented sufficient evidence to overcome a directed

verdict motion. On appeal from the denial of a directed verdict, the Supreme Court views the evidence in the light most favorable to the state. The Court's review is limited to considering the existence or nonexistence of evidence and not its weight. When the evidence 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. A court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

In State v. Goldenbaum, 294 S.C. 455, 365 S.E.2d 731 (1988), the Supreme Court cited Section 16-11-310 for the rule that a dwelling means the living quarters of a building which is normally used for sleeping, living or lodging. The Court wrote that, therefore, a dwelling was a more specific form or portion of a building.

The Court of Appeals held in State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008), that the test of whether a house is a "dwelling" for purposes of the burglary statutes turns on whether the occupant has left with the intention to return as an occupant's temporary absence was irrelevant. In Evans, the home that was burglarized was the vacation home of Mr. and Mrs. Evans which they had not visited frequently for the past three years due to Mrs. Evans illness and her medical treatments. The Court of Appeals held that the evidence was sufficient to establish that the burglarized building was a dwelling.

The Court of Appeals cited the Supreme Court case of State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979), where the Supreme Court held that a vacant apartment unit, which was abandoned a week earlier by the former tenants, was not a dwelling for the purposes of the burglary statute. The Supreme Court found that Section 16-11-10 required that the apartment have an identifiable occupant sleeping or residing there in order to qualify. The Court held that while the temporary absence of the occupants did not prevent a residence from becoming burglarized, it did

require that the occupant leave with the purpose of returning in order for the apartment to be considered a dwelling.

In State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002), the Supreme Court found that a motel room was a dwelling within the meaning of the burglary statutes, even if its occupants were not present when the defendant entered the room. However, one occupant and the children of an occupant's boyfriend had been in and out of the room all that day.

In State v. Clark, 85 S.C. 273, 67 S.E. 300 (1910), the Supreme Court found that the mere breaking and entering, or breaking with the intent to enter, a house, is not a crime unless done with the intent to commit a felony or other lesser crime therein.

In State v. Pinckney, 339 S.C. 346, 529 S.E. 526 (2000), the Supreme Court wrote that first degree burglary required evidence that the defendant entered a dwelling without consent and with the intent to commit a crime in the dwelling. In Pinckney's case, the defendant broke into the house of Mary Fleming while she was inside. He barricaded himself in Fleming's bathroom as he said people were chasing him. He threatened to kill himself and the officers. He also threatened to "light the place up" and the officers could smell a fuel-type substance. After his arrest, a lighter was found on the bathroom floor. The Supreme Court found that Pinckney had the intent required for burglary as the Court ruled that a defendant's actions after he entered the house could be evidence used to determine if he had the intent to commit a crime at the time of entry.

The state did not provide sufficient evidence to overcome Appellant Holmes' directed verdict motion. The state did not prove that the house of Ms. Ann Blandin that was allegedly burglarized by Holmes was a dwelling. Although the daughter's testimony was conflicting, the statement of Ms. Blandin to police in 2013 was the most credible. She clearly told the police that she lived with her daughter at her daughter's residence. She said that her house was used for

storage. There was no evidence that Ms. Blandin intended to return to live at her house. She was on dialysis and was in the hospital at the time of the incident and at the time of trial.

Holmes' case is distinguished from Evans in that Evans was a vacation home. There is a reasonable presumption with a vacation home that the owners plan to return. Although Ms. Campbell, the daughter of Ms. Blandin, said she visited her mother's home sometimes, she also said that numerous windows and doors were boarded up. This would indicate that no one was living there. If no one is sleeping in the house, or living in the house, then it is not a dwelling. There was no evidence from the state that the absence of Ms. Blandin from the house was only temporary.

Holmes' case is also distinguished from State v. White, *supra*, which found that a motel room was a dwelling because the occupants of the motel room were in and out that same day.

The state did not provide substantial evidence that Holmes entered the house with the intent to commit a crime. He told the police that he was homeless and was looking for a place to sleep. He did not have any items from the house found on him. The daughter confirmed that no items were missing from the house. Holmes had no burglary tools, no drugs, nothing to indicate he had committed a crime or intended to.

The state argued that if Holmes broke into the home, then he had the intent to commit a crime therein. However, the state did not call the 911 caller to identify Holmes as the person they saw entering the house. The caller only heard the sound of breaking glass and did not see the person break the glass of the house. Officer Bunch admitted this was a "hot crime area" and that there had been numerous burglaries in the area during that time. It was a very reasonable probability that the caller heard breaking glass from another nearby incident. The daughter also said there had been a burglary at the house of her mother earlier that same day and the glass was broken then.

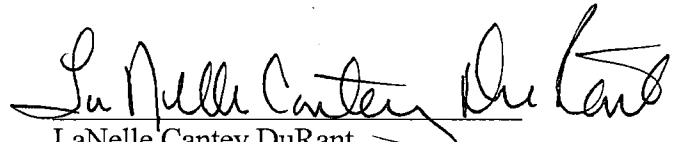
There was no evidence presented by the state to show that Holmes' actions inside the house indicated the intent to commit a crime. There was no evidence of anything Holmes did while he was inside the house.

In considering the standard for a directed verdict outlined by the Supreme Court in Bennett, there is at the most, a mere suspicion that Holmes intended to do anything other than sleep in the house. The trial judge erred by not granting the directed verdict to Holmes.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for the entry of a directed verdict on the first degree burglary.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of May, 2016.

STATE OF SOUTH CAROLINA

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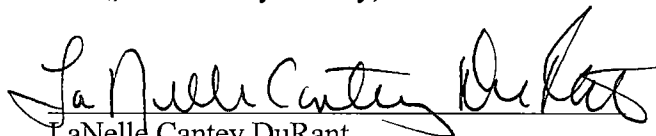
JOHN HENRY HOLMES, JR.,

APPELLANT

APPELLATE CASE NO. 2015-002195

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and John Holmes, #298643, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 3rd day of May, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of May, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.