

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY EUGENE PASSMORE,

APPELLANT

APPELLATE CASE NO. 2014-000727

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT

The court erred by refusing to direct a verdict on the charge of burglary in the first degree since the state failed to present direct or substantial circumstantial evidence that appellant willfully and unlawfully entered the dwelling (1) without consent and (2) with the intent to commit a crime therein. 5

Introduction 5

Relevant Facts 5

Other Evidence 8

Discussion 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

<u>State v. Arnold</u> , 361 S.C. 386, 605 S.E.2d 529 (2004).....	12
<u>State v. Bostick</u> , 392 S.C. 134, 708 S.E.2d 774 (2011).....	11
<u>State v. Lollis</u> , 343 S.C. 580, 541 S.E.2d 254 (2001).....	11
<u>State v. Martin</u> , 340 S.C. 597, 533 S.E.2d 572 (2000).....	11
<u>State v. Mitchell</u> , 341 S.C. 406, 535 S.E.2d 126 (2000).....	12
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000).....	10
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984).....	12
<u>State v. Singley</u> , 392 S.C. 270, 709 S.E.2d 603 (2011).....	9
<u>State v. Smith</u> , 274 S.C. 622, 266 S.E.2d 422 (1980).....	10

Statutes

S.C. Code §16-11-310 (3).....	9
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the charge of burglary in the first degree since the state failed to present direct or substantial circumstantial evidence that appellant willfully and unlawfully entered the dwelling (1) without consent and (2) with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was indicted by the York County Grand Jury for the offenses of burglary in the first degree, kidnapping, criminal domestic violence of a high and aggravated nature, and possession of a weapon during a violent crime. Appellant's case was called to trial on March 31, 2014 before the Honorable John C. Hayes, III, and a jury. Dan Hall represented appellant. Jessica Holland was the assistant solicitor. R. 1.

On April 1, 2014 the jury found appellant not guilty of kidnapping, not guilty of criminal domestic violence of a high and aggravated nature, not guilty of possession of a weapon during a violent crime, but guilty of burglary in the first degree. R. 246, l. 16 – 247, l. 5. Judge Hayes sentenced appellant to thirty years imprisonment for burglary in the first degree. R. 253, ll. 2-9.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict on the charge of burglary in the first degree since the state failed to present direct or substantial circumstantial evidence that appellant willfully and unlawfully entered the dwelling (1) without consent and (2) with the intent to commit a crime therein.

Introduction

Defense Counsel 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.

Relevant facts

Julia Coleman was the mother of appellant’s three children. They were a daughter, sixteen years old, and sons, fourteen and ten years old. R. 60, l. 16 – 61, l. 5. Sixteen-year-old Tara and fourteen-year-old Cody resided with Coleman. Ten-year-old James lived with his grandmother. R. 61, ll. 6-14.

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. Coleman testified that on June 19, 2013 the incident occurred that was the subject of this criminal action. R. 65, ll. 7-11.

Coleman’s daughter, Tara, testified she was sixteen years old at the time. Appellant telephoned her at about twelve-thirty that morning. R. 86, ll. 5-22. Tara testified there was a lot of cussing and “a lot of racism” during appellant’s ranting phone call. Tara decided to tape part of the conversation. R. 86, l. 23 – 88, l. 3.

Tara testified when the conversation was over she told her mother, “You might want to listen to this recording.” Her mother “listened to maybe three minutes of it, if that, and put the phone down and she just blew it off.” R. 90, ll. 15-19. There would be other evidence that Coleman, the mother, was not afraid of appellant.

Coleman claimed that Chip left about ten-thirty that evening. R. 66, ll. 1-2. She said that at about five o’clock in the morning, on June 19, 2013, 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.

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. 5.¹

¹ As seen, the jury acquitted appellant on all other charges. A clear indication it did not believe Coleman’s testimony.

Coleman maintained that appellant then went to Tara's room, woke her up, and said: "Get the fuck up. You are going with me." R. 67, ll. 23-25. Coleman also claimed she heard appellant ask Tara: "Where the fuck is Cody?" Tara answered, "Daddy I sent him out the back door to call the police." Appellant allegedly said: "The police, Tara? Really? The fucking police, Tara?" Coleman claimed Tara answered: "Yeah daddy. I love you but I love my mama too and I can't watch you kill my mama." Appellant and his brother Mickey then walked away. R. 68, ll. 1-15.

Coleman remembered that appellant and Mickey then walked out on the porch. 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.

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 moved for a directed verdict of acquittal on of all the charges. As to burglary, Defense Counsel Hall 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.

As seen, 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.

Other Evidence

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. 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.

Rebecca Rogers was living with appellant, appellant's brother Mickey, and appellant's girlfriend at the time. R. 180, ll. 5-13. Rogers testified that she was awoken about three o'clock in the morning because Mickey wanted her to drive him to the store to get some more beer. Rogers told the jury: "I had the car, the license, and I was sober." Rogers said she ultimately agreed to drive Mickey and appellant in her "old Lincoln Town car" over to Clover, South Carolina. Rogers described how her car was in very bad shape. The hood on the car had to be

lifted to start it. Mickey would “get under the hood,” and he would start the car “in some way.” Further, “my brake lights were hooked with a toggle switch and my toggle switch had broken off, and I was trying to get my brake lights to go in the off position, cause I couldn’t ride down the road with my brake lights on.” R. 183, l. 1 – 184, l. 13.

Rogers drove appellant and Mickey over to the mobile home in Clover. She remembered Coleman standing with Mickey on the porch while smoking a cigarette. Rogers remembered Coleman telling appellant and Mickey: “I ain’t got time for this shit, I got to go to work.” Rogers estimated the conversation only lasted a couple of minutes, and appellant and Mickey then told her: “We got to go. Let’s go.” R. 185, l. 2 – 187, l. 3. She heard appellant or Mickey ask Coleman: “Are you going to let Cody come with us?” Rogers did not hear Coleman’s answer, “but Cody didn’t come with us either so.” R. 187, ll. 2-21.

Discussion

Burglary in the first degree is a very serious crime because it involves an invasion into the home of another by a person intending to commit a crime inside. State v. Singley, 392 S.C. 270, 709 S.E.2d 603 (2011). Appellant should have been granted a directed verdict because the state failed to offer direct or 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. 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). There simply was no direct or substantial circumstantial evidence that appellant entered the mobile home without consent.

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).

This is a most unusual burglary case since appellant came to the home of his estranged wife, or ex-wife, and his children. He was obviously known there by his son, and he was allowed to enter. There was no direct or substantial circumstantial evidence that appellant and his twin brother forced their way into the home without consent.

Further, there was no direct or substantial circumstantial evidence appellant entered the home with the intent to commit a crime therein. Again, speculation regarding what might have occurred if Chip, the boyfriend, had been there is mere speculation which is not sufficient to survive a directed verdict motion.

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.

There certainly was not substantial circumstantial evidence appellant entered without consent of his son, Cody, or Coleman, and that he intended to commit a crime upon his entry. Again, the kidnapping and criminal domestic violence of a high and aggravated nature charges ended in an acquittal.

“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).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state’s case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick’s next door property. Bostick’s mother testified she never used accelerants in the burn pile.

The Supreme Court noted that the evidence above, as well as the fact Bostick had a pattern of gasoline on his shoes, where gasoline was the accelerant used to start the fire at the Polite home were all insufficient to survive a directed verdict motion. The Court held this evidence only raised a suspicion that Bostick may have been guilty and it was not sufficient for the case to get beyond the directed verdict stage. See, also, State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)(murder case where the defendant’s car or a very similar car is spotted at the victim’s apartment complex on the night of the murder. Items linked to the victim are located in a trash can outside the bar where the defendant’s girlfriend worked. The defendant and the co-defendant, when the defendant’s girlfriend asked them why they were late picking her up on the night of the murder, responded thusly: “Somebody may have died tonight,” and “some shit happened.” This evidence as a whole, in the

light most favorable to the state, *was insufficient* to withstand a directed verdict motion). State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (The defendant admitted he smoked the brand of cigarette, Marlboro, which matched the cigarette butt found at the crime scene. A similar footprint to that of the defendant was also found at the crime scene. The defendant also suspiciously disposed of the clothes and the shoes he had been wearing at the time, and he did not present an alibi. The state could not get a saliva match off of the cigarette butt, and the Court ruled the state's circumstantial evidence only raised a suspicion of the defendant's guilt on the murder charge, and a directed verdict should have been issued); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) (The victim, Cox, was shot, and his body found off of a road in Colleton County. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car. The Supreme Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126 (2000) (a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. Mitchell's fingerprint was found on a screen leaning up against the house. The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house did not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." *The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed*, and the directed verdict motion should have been granted).

The state failed to present direct or substantial circumstantial evidence in this case that appellant (1) entered the dwelling without consent, **and** (2) that he entered with the intent to

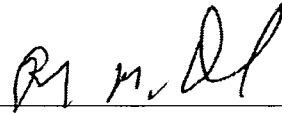
commit a crime therein. The failure to prove **both** of those elements entitled appellant to a directed verdict.

The burglary conviction in this case resulted in a thirty year prison term where appellant was correctly acquitted on the other charges. This is not a burglary case, and an order of acquittal should now be issued since a directed verdict should have been issued on this charge.

CONCLUSION

By reason of the foregoing arguments, a verdict of acquittal should now be issued based on the refusal of the trial court to direct a verdict on the charge of burglary in the first degree.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

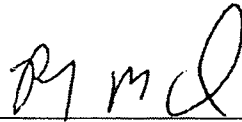
ATTORNEY FOR APPELLANT

This 24th day of August, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 24, 2015



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
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THE STATE,

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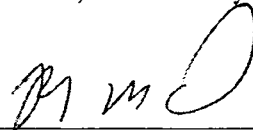
RICKY EUGENE PASSMORE,

APPELLANT

APPELLATE CASE NO. 2014-000727

CERTIFICATE OF SERVICE

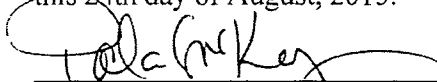
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of August, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2015.



Notary Public for South Carolina
My Commission Expires: July 24, 2022.

(L.S.)



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August 24, 2015

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Re: The State v. Ricky Eugene Passmore

Dear David:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/pcm

Enclosures

STATE OF SOUTH CAROLINA
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John C. Hayes, III, Circuit Court Judge

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THE STATE,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENT

Evidence supported the denial of directed verdict for burglary where evidence showed Appellant, armed with a sword, entered the victim’s dwelling without consent and intended to commit a crime therein to “protect” his children from being around victim’s African-American boyfriend as demonstrated by the fact that he told his daughter he would kill her mother if “necessary” and admitted he had the sword to send the boyfriend “a message.”16

CONCLUSION.....24

TABLE OF AUTHORITIES

Cases:

<u>Adcock v. State</u> , 603 S.E.2d 340 (Ga. Ct. App. 2004)	18, 19
<u>Fletcher v. Commonwealth</u> , 59 S.W.3d 920 (Ky. Ct. App. 2001).....	18
<u>In re Harry C.</u> , 280 S.C. 308, 313 S.E.2d 287 (1984)	18
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	17
<u>McMillian v. State</u> , 383 S.C. 480, 680 S.E.2d 905 (2009)	22
<u>Pinckney v. State</u> , 368 S.C. 502, 629 S.E.2d 367 (2006).....	23
<u>State v. Brown</u> , 626 S.E.2d 307 (N.C. Ct. App. 2006)	19, 20
<u>State v. Gilland</u> , 402 S.C. 389, 741 S.E.2d 521 (Ct. App. 2012).....	21
<u>State v. Haney</u> , 257 S.C. 89, 184 S.E.2d 344 (1971).....	21
<u>State v. McGowan</u> , 347 S.C. 618, 557 S.E.2d 657 (2001)	17
<u>State v. Meggett</u> , 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012)	21
<u>State v. Peterson</u> , 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999).....	20, 22
<u>State v. Robinson</u> , 310 S.C. 535, 426 S.E.2d 317 (1992).....	17
<u>State v. Singley</u> , 392 S.C. 270, 709 S.E.2d 603 (2011)	21
<u>State v. Tuggle</u> , 504 So.2d 1016 (La. Ct. App. 1987).....	19
<u>State v. Walker</u> , 349 S.C. 49, 562 S.E.2d 313 (2002).....	17

Other Authorities:

S.C. Code §16-3-600 (E)(1).....	22
S.C. Code § 16-11-310(3).....	16
S.C. Code § 16-11-311(A).....	16

STATEMENT OF ISSUE ON APPEAL

Evidence supported the denial of directed verdict for burglary where evidence showed Appellant, armed with a sword, entered the victim's dwelling without consent and intended to commit a crime therein to "protect" his children from being around victim's African-American boyfriend as demonstrated by the fact that he told his daughter he would kill her mother if "necessary" and admitted he had the sword to send the boyfriend "a message."

STATEMENT OF THE CASE

Appellant Passmore was indicted for burglary in the first degree, kidnapping, criminal domestic violence of a high and aggravated nature, and possession of a weapon during a violent crime. Passmore was tried by jury before the Honorable John C. Hayes, III, on March 31 through April 1, 2014. Passmore was found guilty of burglary and acquitted of the remaining charges. Judge Hayes sentenced Passmore to thirty years imprisonment.

STATEMENT OF FACTS

Appellant Ricky Passmore barged in his wife Julia's house (Passmore and Julia lived separately) at 5:00 a.m. on June 19, 2013, looking for her African-American boyfriend, Chip. Passmore explained his state of mind to his daughter, Tara, hours earlier during a midnight phone call. Tara recorded much of the phone call. Passmore's appellate counsel desperately tries to minimize the call as a "redneck rant" in his brief but the phone call is nothing less than a chilling warning of Passmore's evil, racially-motivated plans. State's Exhibit No. 9. In his delusional mind, Passmore was chivalrously protecting his children from what he termed the "nigger¹ assault" on his children's home by charging into Julia's house with a sword. State's Exhibit No. 9 at approximately 4:45.

The call between Passmore and Tara

The phone call between Passmore and Tara was published to the jury, and it gives illuminating insight into the deranged and violent state of mind Passmore possessed when stepping into Julia's home. Passmore betrays his malignant mindset in the following passages:

What I need is one of y'all to call me and let me know when that nigger is there. And then I am going to roll up over there and we're going to see who the man of that goddamn house is. As long as my young'uns are there, I am the man of the house. . . . And I am going to need y'all's help. . . . I promise you when the role goes down, it ain't just going to be just me. It's going to be several mother fuckers and they ain't going to be playing. What their goddamn mind is set on is protecting Tara, Cody, and James. Everybody else is absolutely expendable and can be put down.

¹ This disgusting term is often used during Passmore's conversation with his daughter. The State finds it necessary to publish it in this brief, however, since Passmore made intent an issue on appeal and attempted to whitewash the reality of the extreme racial animus motivating Passmore's crime.

State's Exhibit No. 9 (6:40 - 7:45).

And you might hate me for a while . . . what I am telling you is you might end up hating me. Because I am going to take you out of that situation . . . I hope you don't go and say anything about it because what I am actually doing is sacrificing myself for y'all.

State's Exhibit No. 9 (8:10 - 8:50).

And you ain't got goddamn niggers sniffing around [Passmore's house]. . . . That's Julia's whorehouse, Julia's nigger-loving whorehouse. And I would be less than a father and less than a man if I sit here and let her rub my children's face in that. What she is doing now is calling me weak and my children worthless.

State's Exhibit No. 9 (9:15 - 10:00).

And I am telling you now, just like I told Julia before, don't make me choose between you and these kids. Because I promise you, you will lose the vote. I will stand by Tara, Cody, and James with my dying breath unlike you. I will stand by them with my dying breath. And even if it comes to it **I will kill you to protect them.**

State's Exhibit No. 9 (11:10 - 11:40).

I know you don't understand things from a male perspective, but males are born with a natural instinct in them to protect their women. To see their women as sacred. . . . When a man don't stand up for them, it fusses and tortures him inside. He can't sleep good, he can't eat good. He starts to see himself as not a man, but a tiniest pissant. And that's what your mother is doing to Cody right now. Cody is being tortured inside every time he sees that fucking nigger walking in his house . . . **If I have to lay Julia . . . in the damn ground, I will not let my son down like she has.** At least one of these days he will be able to say you know what, my damn Daddy did not let me down son. My Daddy was a strong man and my Daddy put it on the goddamn line when it came to it.

State's Exhibit No. 9 (13:20 - 15:07).

She's helping them niggers program my son to believe he ain't shit. That he shouldn't be proud of his heritage. Oh no, it's a black man coming in here fucking your mamma, white boy. That's the message my son is getting in his heart right now. And I am supposed to just sit here and let them do that. That ain't going to happen, that ain't going to happen. **I am going to ask Julia one more time, let my kids come home and if she tells me no, that's a wrap. Then you're going to meet the other side of death.** And I am going to treat her when I walk in that door just exactly like I am going to treat that nigger. **I will have no mercy, period, on her.** That's why I said, y'all might hate me for a few years but one day when you get my age you will understand you know what, my Daddy was right motherfucker and he stood his goddamn ground, I will say that.

State's Exhibit No. 9 (15:55 - 17:05).

Note that when Tara said she did not want to see him locked up, Passmore replied, "I don't either, I want to enjoy my life as y'all do. Looks like your Momma hasn't left me no goddamn choice." State's Exhibit No. 9 (21:00 - 21:30).

Cody warns Sergeant Hawkins about the crazy man with the sword

Sergeant Phillip Hawkins of the Clover Police Department responded to Victim's residence in the early morning hours of June 19, 2013, based on a 911 call reporting that a man was inside the house with a sword. Sergeant Hawkins was familiar with the people living there. ROA. p. 23. Sergeant Hawkins described seeing children, Cody and Tara, running around the yard. Cody² exclaimed that a crazy man was in the house with a sword. ROA. p. 24. That crazy man was his biological father, Ricky Passmore. Identity was never an issue, Passmore later explained to the jury he was in the house with the sword to send a

² Cody was fourteen years old at the time of trial. ROA. p. 61.

message. ROA. p. 133, line 25.

Despite, or more likely because, it was their father, Cody and Tara were extremely fearful. Sergeant Hawkins described their demeanor: “[Cody] was pretty much white as a ghost is the best way to describe it and you could tell he was extremely fearful and the same thing with his sister, Tara, who also resided at the residence.” ROA. p. 24, lines 5-8. Sergeant Hawkins went to the house, waited, and listened for any commotion inside, and noticed Victim walking around the kitchen. Sergeant Hawkins knocked on the door and Julia answered. She was fearful as well; Sergeant Hawkins explained, “I would consider her hysterical.” ROA. p. 24, p. 52, line 11.

Sergeant Hawkins provided the information for the BOLO for a burgundy-colored Lincoln with two male passengers and a female driver. The York Police stopped a vehicle matching that description roughly ten to fifteen minutes later. The York Police confirmed there was a sword inside the vehicle. Sergeant Hawkins then drove over to where the vehicle was stopped. The three people were detained by police. In the vehicle was a sword, a loaded SKS assault rifle loaded with six rounds of ammunition and with a bayonet attached, an additional thirteen rounds of ammunition, a crowbar, rope, and a wooden handle with a pool ball tied on at the end. The sword was in the back passenger side of the vehicle. Passmore was in the backseat when the vehicle was stopped. ROA. pp. 29-30; p. 35. York Police also turned over brass knuckles to Sergeant Hawkins. ROA. p. 31.

The baseball bat was next to the front passenger seat where Passmore’s brother, Mickey, was sitting. ROA. p. 33. The pool-ball weapon was next to the sword on the floorboard, just underneath the passenger side front seat. ROA. pp. 33-34.

Julia Coleman's testimony

Julia is the mother of Passmore's three children, she no longer lived with Passmore at the time of the burglary, and she was in a relationship with Chip. She was still in the relationship with Chip at the time of trial. Julia testified that Passmore and Mickey had been to Julia's house before, but they did not have standing permission to come to her house. ROA. pp. 61-63. Passmore became aware of Julia's relationship with Chip. Julia testified about a phone conversation she had with Passmore. "[H]e asked me was I – that he had heard that I was dating a nigger and I told him that that was not accurate. That if he was asking if I was dating a black man, then the answer was yes." ROA. p. 64, lines 5-9.

Passmore did not approve of this relationship. About a week and a half to two weeks before the raid, Passmore told Julia, "let that nigger be there when I get there, we'll see who the real man is." Julia responded "Ricky, don't show up at my fucking house." ROA. p. 65, lines 2-6; p. 82, lines 24-25.

Mickey Passmore also did not approve of this relationship; Mickey left about four messages concerning Julia's relationship with Chip that were "very derogatory, nasty voice mails" a week and a half to two weeks before the incident. ROA. p. 64, lines 11-19.

Tara woke up Julia sometime around midnight, June 19, 2013, and started to play back a phone call Tara just had with Passmore. But after about thirty seconds Julia said, "I don't want to hear his bull crap and propaganda." ROA. p. 66, lines 4-10.

Then Ricky showed up at five a.m., while it was still dark outside. Julia was asleep on the sofa; James and Tara were asleep in their rooms. Cody was awake playing video games. Chip, thankfully, was not there. He was at the house the prior evening, but left at

10:30 p.m. ROA. p. 65.

At 5:00 a.m., there was a knock on the door, and Cody got up and looked out the window of the door. He said, "Mama, it's Chip." Julia told Cody to open the door. Cody opened the door slightly and said, "Mama, it's Daddy" but by then Passmore came through the door and Mickey was immediately behind him. ROA. pp. 66-67.

Julia testified as follows:

I went to get off the couch. **The first thing Ricky said to me is, "Where is Chip?" I said, "he's not here." "Where is he?" I said, "it doesn't matter. He is not here."** I said "what are you doing here?" And then I said, "as a matter of fact, where's my phone?" and I started looking for the phone and that's the point where he pushed me down on the couch, **produced a sword**, and said, "bitch you move, you die."

He proceeded down the hallway. I would say about three steps into the hallway, he turned around, he told his twin brother, "she moves, she fucking dies."

He went to Tara's room. Forced the door open or slammed it open, whatever. Woke her up. "Get the fuck up. You are going with me."

Proceeded to James' and Cody's room. Woke James up. Something about him being brainwashed by Ricky's mother to be a nigger lover and you were never my son – that whole conversation was stupid, but then he came back towards the living room. He asked, where is Cody? Again he said, "where the fuck is Cody?" Tara said, "Daddy I sent him out the back door to call the police." He said, "the police, Tara? Really? The fucking police, Tara?" She said, "yeah Daddy. I love you but I love my mama too and I can't watch you kill my mama." At that point they were pretty much ready to exit the house.

ROA. p. 67, line 12 – p. 68, line 11 (emphasis added).

Julia testified that Mickey just stood in front of Julia while Passmore looked for the

children, but Mickey did not do anything to restrain her freedom. ROA. p. 68, lines 12-18.³ On cross-examination, Julia admitted that she told officers Mickey needed to be charged with at least trespassing. Julia testified she did not see the sword when Passmore entered the house – it was behind his back in his overalls. Julia testified that throughout the incident, while he was waking up the children, Passmore appeared to be looking for Chip. ROA. pp. 68-69. Julia naturally was able to identify Passmore. He was the man in the camouflage shirt and overalls. ROA. p. 71, line 18.

Julia clarified on cross-examination that she told Passmore and Mickey to leave when they entered the house. ROA. p. 78, lines 13-14. She confirmed that if she knew it was Passmore and Mickey outside, she would not have told Cody to open the door. ROA. p. 83, lines 18-24. Julia testified Passmore made his way inside her house as follows: “Cody opened the door slightly. The door opens out so I don’t know maybe three to four inches. Cody turns back, he says, ‘Momma, it’s Daddy,’ but by that time Ricky had already opened the door the rest of the way and was coming into the residence.” ROA. p. 84, lines 2-6.

Tara’s testimony

Tara was the hero in the sordid series of events transpiring that day. Tara testified that at 12:30 a.m., Passmore called her on her cell phone and spoke with lots of cussing and racism. As audible in the recording she made of the phone call, Passmore warned her he would do something that would make her hate him. ROA. pp. 86-88. Tara explained why

³ This is likely the reason the jury returned a not guilty verdict for kidnapping, which would mean the jury found her testimony credible, contrary to Passmore’s musings in his brief. Br. App. p. 6. The trial court made a guilty verdict for kidnapping a predicate for guilt on the weapon charge in the court’s instructions to the jury. ROA. p. 235, lines 16-19. No evidence indicates that Passmore actually physically injured anyone, which explains the acquittal for CDV-HAN. The jury certainly did not find Passmore’s testimony credible for reasons that will be

she started recording the phone call, testifying as follows:

About the time when he said that he was going to do something that I might hate him for for a really long time, and I said, "I don't think I could hate you," and then I thought about it a minute and I was like, okay, well, I'm going to ask him what it was and that's when I started recording. Right around that time is when I started recording.

ROA. p. 89, line 25 – p. 90, line 6. After the phone call ended, Tara tried to get Julia to listen to the recording of the phone call. Julia listened for only three minutes and "just blew it off." ROA. p. 90.

Tara went to sleep afterwards but woke up to her bedroom door being flung open and hitting her bed. Tara testified she jumped up and rolled out of bed to check on Julia. "At the time, . . . Mickey was going to let my mother out of the house." ROA. p. 91, lines 11-14. Meanwhile, as Tara went down the hallway, she met up with Cody, slung the backdoor open, and pushed Cody out the door, telling him to call the police. ROA. p. 91.

Passmore turned to Tara and said something to the effect of "Where the F is Cody? Cody, where the F are you." ROA. p. 91, lines 22-24. Tara told him she called the police. Passmore expressed his displeasure in his usual expletive-laden manner, and Tara explained, "Well, Daddy, I love you, too, but I love my momma, too, and I can't see my mama die. I can't do it." ROA. p. 91, line 25 – p. 92, line 4. Passmore was disappointed in her and he left. ROA. pp. 92-93. Julia shut and locked the door and told Tara to run and check on Cody. Cody was stuttering into the neighbor's phone, he could not get the words out right. Tara grabbed the phone but saw lights from the police vehicle. She ran to the road to wave the patrol car down. Sergeant Hawkins arrived and the family was safe. ROA. pp. 93-94.

obvious further below.

Tara confirmed Passmore carried a sword with him during the burglary. Tara testified that while they were in the home, Passmore and Mickey were turning on lights, they turned on the bedroom lights, and the bathroom light. Tara testified, "I guess after that they didn't find Chip in the house so they left especially when they knew the police were coming." ROA. p. 94, lines 18-23.

Tara recognized the pool-ball mace and testified that Passmore kept it hanging up in his home. Tara testified that Passmore called it a "nigger beater." ROA. pp. 95-96. Tara recognized the rope from the backroom at Passmore's house. ROA. pp. 96-97. She also recognized the crowbar, the sword, and the gun from Passmore's house. She testified she had never seen Passmore take the gun or the sword from the house. ROA. pp. 97-99. She also recognized the bat, which was often kept next to Mickey's chair. Mickey lived with Passmore. ROA. p. 99.

Passmore's testimony

Passmore testified he and Julia agreed she would keep Chip away from the children. But, according to Passmore, Julia found herself in a financial bind. ROA. pp. 127-128. According to Passmore, he asked her "why are you doing this, you can't tell me you love him." Julia replied, "No, I don't love him, but I need my bills paid." ROA. p. 129, lines 1-3.

Passmore then testified as follows:

And I asked her, I said, "Well, there's plenty of white men out there that would help you pay your bills, why didn't you find one of them?" She said, "Because white men ain't shit," and I said, "Okay. Is this what you're telling our son?" I mean, imagine this. This conversation went on. By the end of the conversation, she agreed that she'd keep him away.

ROA. p. 129, lines 4-10. Passmore claimed he didn't want to fuss and fight with Julia, but wanted Julia to keep Chip away from the children. Passmore explained: "People want to sit here and call me a racist. I got nothing against a black person that don't hurt white people, nothing." ROA. p. 131, lines 6-8.

Passmore explained why he went over to Julia's house:

I did not try to creep up in the middle of the night because it was dark. It was the only opportunity I had. I had like a week to go. I was supposed to be in child support court. I had all ideas I was going to the chain gang, because I was dead broke. I didn't have the money to pay them.

ROA. p. 131, lines 19-24.

Passmore claimed Julia allowed Cody to let him in the house. Passmore admitted he had a sword and gave the following explanation why:

I carried the sword with me to send Chip a message. I told Tara that if it come, if it come to it then I would get violent with him to keep him away from my children. I was trying to keep it from coming to that by sending him a message.

ROA. p. 133 line 25 – p. 134, line 5.

According to Passmore, Julia asked Passmore what he was doing at the house and he told her "I come to talk to you about your boy and our agreement for you to keep him away from the kids." ROA. p. 134, lines 19-24. According to Passmore, he went down the hall and knocked on the children's doors to wake them up. Tara came out of her room and screamed "Call the cops, Cody!" ROA. p. 136, lines 1-24. Passmore decided to leave, and he found Mickey and Julia on the porch talking. Passmore asked her if she would keep Chip away from the children, and she said no. She also refused to let the children stay with

Passmore. Passmore replied to the refusals, "Okay, Julia. Have it your way, but when I come back, you remember who turned their back first. Now, tell your boy I'll be back to see him." ROA. p. 137, lines 3-18.

Passmore explained he did not threaten anyone with the sword. When Julia asked him what the sword was for, Passmore replied, "That's for your boy when I catch him around my kids. Now, you make sure you go back and tell him that." ROA. p. 138, lines 15-22.

Passmore admitted carrying brass knuckles on him but claimed they were for breaking up ice to put in his tea. ROA. pp. 139-140. Passmore identified the pool ball with a stick, he called it a pool ball mace. Passmore claimed he made it for Julia years ago to carry across the grocery store ^{parking lot} at night because she did not have a gun. He claimed the rifle was Mickey's, and it was kept in the trunk of the car. He referred to the car as a "four-wheel storage shed." ROA. p. 141. According to Passmore, the only thing he brought to the car was the sword. ROA. p. 142.

Passmore claimed he knew Chip was not at the house before entering. Passmore explained:

If I had got there and this guy had actually been there that night, then what would have – would or would not have happened at that point would have been depending entirely on him. I was not trying to ruin the rest of my life. I was trying to stop it from coming to a point to where I had to as I told them in that recording, to sacrifice myself and give up the rest of my life to protect my children which I would have done if it come to that, but it had not come to that, and I was trying to talk to her to get – to stop it from coming to that.

ROA. p. 145, lines 4-13. On cross-examination, Passmore explained his message he intended to send was for Chip to stay away from his children. The prosecutor asked "Or

what?" and Passmore answered, "Or what? Leave it up to him to decide or what." ROA. p. 146, lines 18-25.

Passmore confirmed on cross-examination that he believed Chip was maintaining the relationship with Julia for access to Tara, testifying as follows:

Q: Didn't you say that a part of the reason that you believed this black man was in your house [sic], this African-American, was to get to your daughter?

A: Exactly. You think he's looking at Julia.

Q: And what evidence do you have at that?

A: He's looking at the – What evidence do I have? Because I know plenty of them. I've listened to them talk.

Q: You've listened to them talk?

A: Yes.

Q: By them you mean?

A: I mean, street thug African-Americans. I know how many times I cannot tell you I've heard, "Yeah, white girl," this, "Yeah, white girl," that, and just because I recognized that, you want to call me a racist.

ROA. p. 152, lines 5-18.⁴

Passmore confirmed the pool ball mace was normally kept in his house, but he claimed he did not know why it was in the car that night. ROA. p. 155. Passmore admitted he drank three twenty-two ounce beers that night, but that "don't do nothing for a two hundred and sixty pound country boy." ROA. p. 167, lines 4-7. Passmore reiterated he had a

⁴ Passmore's delusional explanation on cross-examination is consistent with Passmore's warning to his daughter that "[t]hey want to make you pump out fucking monkey kids so no other white people will want nothing to do with you." State's Exhibit No. 9 (1:30 to 1:40).

problem with Chip being around his children; but if Julia was dating a white man, it would not be as bad. ROA. p. 170, lines 9-16.

Passmore testified further on cross-examination as follows:

Q: You told Tara that you were going to lay it all on the line for them?

A: I would lay it all on the line for them anytime. That's what I'm supposed to do.

Q: By killing Chip?

A: If it had come to that. . . .

ROA. p. 171, lines 18-23.

ARGUMENT

Evidence supported the denial of directed verdict for burglary where evidence showed Appellant, armed with a sword, entered the victim's dwelling without consent and intended to commit a crime therein to "protect" his children from being around victim's African-American boyfriend as demonstrated by the fact that he told his daughter he would kill her mother if "necessary" and admitted he had the sword to send the boyfriend "a message."

Passmore argues the trial court erred in denying the motion for directed verdict because (1) there was no evidence that when Passmore carried his sword into the house he was told to stay away from, he entered without consent; and (2) there was no evidence that when he brought his sword to the house to send Chip a message that he had an intent to commit a crime therein. Evidence in the light most favorable to the State demonstrates Passmore did not have Julia's consent to enter the home when he came into the house with a concealed sword. Of course, a rational juror could conclude Passmore intended to assault Chip or Julia based on his racist diatribe to Tara, his actions inside the house, and his own testimony. Passmore clearly entered Julia's house intending to commit a crime.

Burglary in the first degree is committed by a person "if the person enters a dwelling without consent and with intent to commit a crime in the dwelling," and at least one of several enumerated aggravating circumstances is present. S.C. Code § 16-11-311(A). "Enters a building without consent" means: (a) To enter a building without the consent of the person in lawful possession; or (b) To enter a building by using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession." S.C. Code § 16-11-310(3).

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, at 319 (emphasis in original).

Passmore entered the trailer without consent

Evidence indicates that during a phone conversation roughly two weeks prior to the

burglary, Passmore told Julia “let that nigger be there when I get there, we’ll see who the real man is.” ROA. p. 65, lines 2-4. Julia responded “Ricky, don’t show up at my fucking house.” ROA. p. 65, lines 2-6. The State presented evidence that when Passmore disregarded her request and came over to the house, Julia’s son, Cody, opened the door slightly. Passmore then opened the door the rest of the way, entered, pushed Julia on the couch, and pulled a sword from behind his back. This constitutes an entry without consent.

The evidence, in the light most favorable to the State, clearly indicates Passmore did not have Julia’s consent to enter her house with a sword to send Chip a message. Cody opened the door slightly, but neither Julia nor Cody expressly consented to allowing Passmore to enter. Fletcher v. Commonwealth, 59 S.W.3d 920, 922-23 (Ky. Ct. App. 2001) (finding that merely the victim opening the door for the defendant without an explicit or implicit invitation to enter the home does not constitute consent for purposes of burglary); see also In re Harry C., 280 S.C. 308, 309, 313 S.E.2d 287, 287 (1984) (finding the breaking element for the common law offense of housebreaking was satisfied when the juvenile and his accomplice entered a temporarily vacant house where the door was slightly ajar; the accomplice testified that he had to push the door open wide enough to gain entry to the house).

In Adcock v. State, 603 S.E.2d 340 (Ga. Ct. App. 2004), the Georgia Court of Appeals rejected the defendant’s contention that because the victim saw defendant through the peephole and opened the door for him that he had consent to enter. The victim opened the door because she recognized defendant as a friend of her son. The testimony indicated that although she opened the door, the victim did not invite the defendant inside. Instead, the

defendant and two other men rushed her, grabbed her chest, and pushed her back into the living room. Id. at 341-342. In the instant case, when Passmore entered the house, pushed Julia down, and drew his sword, he did not have consent to enter.

Further, the mere fact that Cody opened the door does not amount to consent for Passmore to enter. In State v. Tuggle, 504 So.2d 1016 (La. Ct. App. 1987), the victim's ten year-old daughter testified the daughter opened the door for Tuggle "and then he just walked in." Id. at 1020. The court found this did not indicate the ten year-old gave Tuggle specific permission to enter the house and further found "[e]ven assuming that the defendant entered the house with the daughter's consent, a ten-year-old girl lacked the authority and capacity to give such consent." Id. Likewise, a reasonable juror could conclude Cody lacked authority to consent to Passmore entering the house.

An opinion from the North Carolina Court of Appeals is instructive. In State v. Brown, 626 S.E.2d 307 (N.C. Ct. App. 2006), the court observed:

Our courts have . . . recognized that a child who has a room in his or her parents' house does not have unlimited authority to allow entry to visitors. . . . Courts considering consent to entry given by a son or daughter have focused on the purpose of the entry and whether the child had authority to consent to entry for that purpose.

Id. at 312 (citations omitted).

In Brown, the victim, a minor Brown contacted through the internet, unlocked her bedroom window for Brown, hid him in her room from her parents, and later had intercourse with him in her closet. Id. at 310-11. The North Carolina Court of Appeals held that Brown could not have reasonably believed the thirteen year-old minor had authority to let him in the

house to further his purpose of committing statutory rape and found the evidence sufficient to support his conviction for burglary. *Id.* at 312. Likewise, Passmore could not have reasonably believed that Cody had authority to let Passmore into the house with a sword so Passmore could “send a message.”

In the instant case, after Passmore discussed confronting Chip to see who the real man was, Julia told him not to come to her house. Cody did not open the door all the way and never actually invited Passmore inside. Passmore entered the house, hiding his sword behind his back in his overalls. Further, the jury could rationally believe Passmore was aware Cody did not have authority to consent to Passmore entering the house with his sword for purposes of “sending” Chip “a message.” Evidence supports the trial court’s denial of directed verdict.

Passmore had the intent to commit a crime therein

Passmore’s claim that there was no evidence to commit a crime in the residence strains credulity. Passmore’s intentions are hardly difficult to discern and do not require speculation.⁵ He was going to do something that would cause his children to hate him until one day they would say he took a stand. Everyone was expendable in his efforts to rescue his children from the menace his bigoted mind saw. He was going to treat Julia the same as “that nigger.” Passmore was going to show her no mercy. He was at the house to send Chip a message with the sword. He also had brass knuckles. It would be up to Chip what happened. Maybe Passmore would have to kill Chip, Passmore mused on cross-examination.

⁵ Passmore clings to his acquittals on other charges as relevant towards his argument. Passmore fails to cite the authority refuting his argument on this exact point. *State v. Peterson*, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (finding acquittal for assault with intent to commit criminal sexual conduct “immaterial” in the

Passmore was accompanied by Mickey, the like-minded brother who left nasty, derogatory messages on Julia's phone about Julia's relationship with Chip. They had a loaded rifle, a "nigger-beater," a bat, and rope ready in their car. Passmore searched for Chip. Passmore pushed Julia down on the couch. Passmore told Mickey that if Julia moved, she was dead.

"Although the intent to commit a crime must exist at the time the accused enters the dwelling, the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling." State v. Gilland, 402 S.C. 389, 397, 741 S.E.2d 521, 526 (Ct. App. 2012). "[W]hether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct." State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012); accord State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971) ("Absent an admission by the defendant, proof of intent necessarily rests on inference from conduct.").

The burglary statute is a protection of "the right to be safe and secure in one's home." State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011). As a policy matter, a jury question should exist as to whether a defendant intends to commit a crime in the dwelling when a defendant enters a home without consent and armed with a weapon, like a sword. That is consistent with the legislative aim of protecting one's right to feel safe in one's home.

Further, when Passmore told Julia his plans to find out "who the real man is," Julia told Passmore not to turn up at her house. ROA. p. 95, lines 2-6. Passmore did not listen to her. The intent to trespass on its own is sufficient for a jury to find that a defendant has the

determination of sufficiency of the evidence for burglary).

intent to commit a crime in the dwelling. McMillian v. State, 383 S.C. 480, 680 S.E.2d 905 (2009) (finding trespass after notice is a crime sufficient to satisfy the intent to commit a crime element of burglary).

Of course, rational jurors could find Passmore entered the house with the intent of maiming and perhaps killing Chip. This case chillingly recalls the racial violence of the earlier twentieth century when black men were lynched. The jury could reach the conclusion that Passmore and his brother entered the trailer to commit a twenty-first century lynching.

Certainly, Passmore's comments to Tara and his admissions of intending to send Chip a message indicate his intention to threaten Chip and that is not lawful conduct. Passmore's self-announced intent to "send a message" to Chip constitutes assault and battery under current statutory law. See e.g., S.C. Code §16-3-600 (E)(1) ("A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, **or offers or attempts to injure another person with the present ability to do so**" (emphasis added)). Passmore intended to assault Chip by his own admission, it just so happens Chip was not there, but evidence shows that Passmore was looking for Chip when he entered the house, so he had the requisite intent. See State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (citing authority recognizing it is not necessary that the intended crime be committed to prove burglary).

Further, evidence is even stronger that Passmore intended to harm Julia, contrary to his less-than-convincing assurances at trial that he meant no harm to her. Passmore talked about killing Julia (but only "if necessary") several times during his racist rant with Tara. The jury could infer from his comments from a few hours earlier that he intended to harm

Julia. He even told her that if she moved, she would die. ROA. p. 67, lines 18-19. Certainly that was what was on Tara's mind when she told Passmore, "I love you but I love my mama too and I can't watch you kill my mama." ROA. p. 68, lines 9-10.

In the instant case, the jury reasonably determined that Passmore entered the dwelling with the intent to commit a crime therein, he seemed to have several on his mind. Pinckney v. State, 368 S.C. 502, 509, 629 S.E.2d 367, 369 (2006) (noting "[t]he only requirement is that there be intent to commit any crime at the time of entry"). Accordingly, the trial court did not err in denying the motion for directed verdict.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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August 19, 2015

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IN THE COURT OF APPEALS

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John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

v.

RICKY EUGENE PASSMORE,

Appellant.

CERTIFICATE OF COUNSEL

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

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Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Robert M. Dudek, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of August, 2015.


NORMA BIGBEE
Legal Assistant

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