THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Clifton Newman, Circuit Court Judge

RECEIVED

JUL 14 2016

SC Court of Appeals

THE STATE,

RESPONDENT

V.

SHAWNDELL MCCLENTON,

APPELLANT

Appellate Case No: 2014-000978

PETITION FOR REHEARING

Appellant asks that this Court re-examine its opinion in this case, pursuant to Rules 221 and 240, SCACR, and grant a re-hearing in this matter. In affirming the decision below, the Court overlooked key points that necessitate reversal of Appellant's conviction. In affirming denial of Appellant's directed verdict motion, the Court failed to address the sufficiency of evidence as to the particular crime charged. State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). Furthermore, the Court erred in applying the appropriate standard for directed verdict motions. State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016).

In addressing the absence of direct or substantial circumstantial evidence of entering or remaining during nighttime hours, this Court was not required to consider alternative hypotheses but rather the existence of evidence as to each element of the crime charged.

1. There was no direct or substantial circumstantial evidence of entry.

State v. Odems should dictate the result in this case. 395 S.C. 582, 720 S.E.2d 48 (2011). The South Carolina Supreme Court "has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." Id. A person is guilty of first-degree burglary if he "enters a dwelling without consent and with intent to commit a crime in the dwelling" and "the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A). In this case, there was no direct evidence placing Appellant inside either apartment. Furthermore, in the absence of such evidence of entry or remaining, the State was unable to prove the time of entry.

Reviewing the evidence in the light most favorable to the State, as this is Court must, the evidence adduced at trial proves the following: (1) Appellant was present at the apartment complex, (2) Appellant was in possession of property from the apartments, (3) at the times referenced by witnesses placing him outside of the apartments and at the time of his arrest, it was nighttime. While Appellant concedes, as he must, that there was evidence presented of his guilt for a crime, the trial court was and this Court is necessarily concerned with the evidence of the particular crime charged. "The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

2. Appellant's entitlement to a directed verdict is based on the non-existence of evidence rather than the Court's consideration of alternative hypotheses.

Our Supreme Court has recently provided additional guidance as to the appropriate standard for directed verdict motions. As this Court correctly pointed out, determination of disputed facts that lend themselves to more than one hypothesis creates a question for the jury rather than the Court. State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was property submitted to the jury."). Furthermore, neither the trial court nor the appellate court is required "to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." Id. at 236, 781 S.E.2d at 354. In applying that standard to this case, this Court respectfully overlooked the failure of proof as to evidence of entry and the timing of any entry.

Appellant's case is readily distinguishable for Bennett. In Bennett, the State presented evidence of the Defendant's presence at a burglarized community center. Bennett's blood was found at the location within the community center where a television had been stolen during that burglary. Id. at 233. Furthermore, the State presented evidence that the specific location of the blood and missing items were situated within the center at a location where Bennett had no business being during his previous visits to that location. Id. The trial court denied Bennett's directed verdict motion, but this Court reversed. State v. Bennett, 408 S.C. 302, 758 S.E.2d 743 (Ct. App. 2014). The Supreme Court reversed and reinstated Bennett's conviction, explaining "in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must

determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). In particular, the Supreme Court pointed to the following passage for the Court of Appeals decision:

> [W]e cannot say it would be unexpected to find Bennett's DNA in the computer room and his fingerprint in the community room. Though the exact locations of the DNA and fingerprint evidence do raise a suspicion of his guilt, the evidence simply does not rise above suspicion. The evidence undoubtedly placed Bennett at the location where a crime ultimately occurred; however, it is undisputed that Bennett was a frequent visitor to the location prior to the crime, and we disagree with the State's assertion that the evidence placed Bennett at the scene of the crime.
>
> Bennett, 415 S.C. at 236 (quoting Bennett, 408 S.C. at 307, 758 S.E.2d at 746 (Ct.App.2014)).

Based on the foregoing, the Supreme Court was concerned with appellate review of alternative theories of the evidence, rather than its existence, in the context of a directed verdict motion.

In Appellant's case, the evidence merely placed him near the scene of the crime and in possession of stolen goods. There was no evidence placing him at the specific scene of the ***burglary***: to wit, inside either apartment. In asking this Court to apply the standard articulated in Bennett, Appellant is NOT asking the Court to consider another, innocent explanation for evidence placing him at the specific scene of the crime. Rather, Appellant is asking the Court to review whether the jury could have reasonably

concluded that he entered or remained in either burglarized dwelling despite the absence of evidence placing him inside either apartment. In Bennett, the jury necessarily concluded that the hypothesis pointing to the Defendant's guilt was the appropriate conclusion. The Supreme Court underscored that the determination was one for the jury. Bennett, 415 S.C. at 237. In this case, Appellant seeks to have this Court conclude that the jury's determination that he crossed the threshold into the burglarized apartments was necessarily based on either suspicion or speculation, as they lacked a reasonable basis to make that conclusion based on the evidence presented. In the absence of evidence of entry during nighttime hours, charges against Appellant for first degree burglary fell within the trial court's province of evaluating the existence of evidence rather than competing conclusions. Respectfully, this Court erred to the extent it relied on Bennett to reach the contrary conclusion.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing as to the directed verdict issue with the ultimate relief of reversing Appellant's conviction and directing a verdict in his favor.

Respectfully Submitted,

Joshua B. Raffini
Attorney for Appellant

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 14th day of July, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Clifton Newman, Circuit Court Judge

Appellate Case No: 2014-000978

THE STATE,

RESPONDENT,

V.

SHAWNDELL MCCLENTON,

APPELLANT

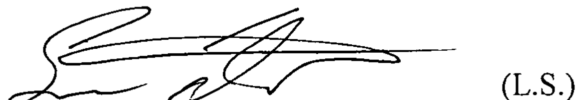
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Petition for Rehearing in the above referenced case has been served upon Mark Reynolds Farthing, Esquire, at PO Box 11549, Columbia, SC 29211, this 14th day of July, 2015.

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2020.