

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001930

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SC Court of Appeals

THE STATE,

RESPONDENT

v.

WILLIAM TRAVIS CALVERT,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied a motion for a directed verdict on the charge of burglary in the first degree, as the classification of a temporarily uninhabitable house as a “dwelling” pursuant to S.C. Code Ann. §16-11-311 was a question of fact for the jury.

STATEMENT OF THE CASE

Appellant was indicted on May 27, 2015, by a Greenville County grand jury for first degree burglary. (Indictment) On September 3, 2014, Appellant was tried by jury before the Honorable D. Garrison Hill. (R, p. 1) Charles S. Propst, Esquire, represented Appellant and Assistant Solicitor Austin F. Watts represented the State. (R, p. 1.) Appellant was found guilty of burglary in the first degree and was sentenced to the mandatory minimum fifteen years' imprisonment. (R. p. 138, lines 2-5.) Appellant filed a notice of intent to appeal, and this appeal follows.

STATEMENT OF FACTS

Late in the evening of November 18, 2013, at approximately 11:00 pm, Appellant and co-defendant Hannah Horne entered the home of Stephen Pepper (Pepper), who was incarcerated at the time. (R. p. 61-62; p. 63, lines. 9-17.) Appellant intended to steal tools from the residence and sell them. (R. p. 66, lines. 15-17.)

Pepper asked his neighbor Christy Crawford (Crawford) to keep watch on his home during his period of incarceration. (R. p. 9, lines. 4-25.) The home was deemed temporarily uninhabitable due to Pepper's production of methamphetamine on site, but Crawford was allowed inside on an earlier occasion by the police, who were investigating another break in. (R. p. 12, lines 4-12.) Crawford placed a baby monitor inside Pepper's house so she could listen for unauthorized activity. (R. p. 9, lines 14-15.) Crawford testified voices of a man and woman woke her around 11:00 pm or 12:00 am on the night in question. (R. p. 10, lines 1-12.) She was scared because she could hear the voices so clearly she thought the intruders were in her house. (R. p. 9, lines 20-21.) Crawford called the police to report the break in. (R. p. 10, lines 17-20.)

Deputy Lovelace (Lovelace), with the Greenville County Sherriff's department, was the first to arrive on scene. (R. p. 17, lines. 23-24.) Lovelace approached Crawford's house and then drove toward Pepper's home with the lights on his vehicle extinguished. (R. pp. 17-19.) Lovelace heard multiple voices inside, so he waited for back up. (R. p. 18, lines 1-6.) Once the other officers arrived, they surveyed the perimeter of Pepper's house and discovered the point of entry was a window on the rear side of the house, where Appellant had removed a window air conditioning unit to gain access. (R. p. 19, lines. 15-22.) The officers shined their lights on the house and called out, identifying themselves and commanding anyone inside to exit the home. (R. p. 20, lines 15-17.) Lovelace

spotted Horne in one of the windows and instructed her to leave through the front door. (R. p. 20, lines 18-22.) Horne attempted to comply but the door was barricaded. (R. p. 19, lines 23-25.) Upon further instruction, Horne exited the back door and was detained. (T. p. 21, lines 18-21.) Horne informed the officers only Appellant remained in the house. (R, p. 21, lines 22-25.)

Appellant refused to exit the home or respond in any way, despite further commands in which he was addressed by his first name. (R. p. 22, lines. 1-14.) Two officers entered the back door while others remained outside, calling out for Appellant to show himself. (R. pp. 22-24.) Because the officers knew Appellant was inside but unresponsive, they became concerned for their safety. (R. p. 24, lines. 20-25.) The officers held their positions while waiting for a K9 unit to arrive to assist in the search of the house. (R. p. 26, lines 1-5.) Officers warned Appellant the K9 unit was en route. (R. p. 26, lines 2-3.) The officers called the detention center holding Pepper and confirmed he did not know Appellant or Horne, or give them permission to be in his home. (R. p. 77, lines 2-9.) The officers also requested Pepper's permission to enter the home with the K9 and detain Appellant. (R. p. 77, lines 2-9.) Once the K9 unit arrived, the officers advised Appellant he would be bitten by the police dog if he did not exit the home. (R. p. 26, lines. 14-20.)

Appellant was not found on the first search of the dwelling, (R. p. 28, lines 4-5.) Officers did notice tools gathered together in tubs, however, which seemed out of place in an otherwise ransacked and disordered home. (R. p. 52, lines. 14-23.) On the secondary search, an officer noticed a pair of boots sticking out from under a pile of clothing on a bed. (R. p. 28, lines. 6-21.) All the officers then entered the room to aid in the arrest. (R.

p. 28, lines 17-25.) The officers shouted to Appellant to show his hands, but he still did not comply with their commands. (R. p. 29, lines 12-13.) An officer engaged his K9 partner Kroc onto the bed to detain Appellant. (R. p. 29, lines 12-15.) Appellant revealed his left hand but not the other, so the dog bit him on his left arm. (R. p. 29, lines 15-16.) Appellant was arrested and taken to the hospital for treatment before booking. (R. p. 30, lines. 2-15.)

ARGUMENT

The trial judge properly denied a motion for a directed verdict on the charge of burglary in the first degree, as the classification of a temporarily uninhabitable house as a “dwelling” pursuant to S.C. Code Ann. §16-11-311 was a question of fact for the jury.

Appellant argues the trial court erred in failing to grant a directed verdict on the charge of burglary in the first degree, as Pepper’s house should not have been considered a “dwelling” within the context of S.C. Code Ann. §16-11-311 because it was “condemned by Greenville County.” (Appellant’s Brief p. 5.) Appellant’s statement of the law is in error and his argument is without merit.

“In criminal cases, the appellate court sits in review of errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court, reviewing the denial of a directed verdict motion is concerned with the existence, or nonexistence of evidence, not its weight. State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (2008). “On appeal from the denial of a motion for directed verdict, the evidence must be viewed in the light most favorable to the state.” State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). 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)). Stated more strongly: “unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

The sole issue on appeal is whether Mr. Pepper's house was a "dwelling" per the burglary statute, or merely a "building." That distinction is the difference between burglary in the first and second degree. For purposes of the burglary statute, a "dwelling" is defined as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (1976). Further, a dwelling can also mean "the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person." S.C. Code Ann. § 16-11-310(2) (1976). Alternatively, a "building" is defined as "any structure, vehicle, watercraft, or aircraft: where any person lodges or lives; or where people assemble for purposed of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored." S.C. Code Ann. § 16-11-310(1) (1976).

The State disagrees with Appellant's interpretation of relevant case law. Historically, burglary has been viewed as "an offense against habitation rather than against property," despite the fact that it is codified under chapter 11, "Crimes against Property." State v. Ferebee, 273 S.C. 403, 406, 257 S.E.2d 154, 155 (1979). However, it would be inequitable to prevent an occupant's property from being the subject of a burglary simply because he is not home. State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002) (see also People v. Fleetwood, 171 Cal.App.3d 982, 217 Cal. Rptr. 612 (1985) (holding that "dwelling" status is not affected by the temporary absence of occupant)). Consistent with this view, the Supreme Court of South Carolina has repeatedly held that a dwelling remains a dwelling, when there is an identifiable occupant, regardless of temporary absences, as long as the occupant leaves with the intent to return. See State v.

Phillips, 393 S.C. 407, 712 S.E.2d 457 (2011); State v. Glenn, 279 S.C. 29, 374 S.E.2d 671 (1988).

For purposes of the burglary statute, a second home, which had not been “lived in” for three years was held do be a dwelling because of sufficient evidence of intent to return by the occupants. State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (2008). In Evans, a neighbor noticed suspicious activity at the vacation home of the Shaw family and called the police. Id. Shaw owned the home for the previous ten years, but had been unable to spend any significant time there in the last three years because of his wife’s medical condition. Id. at 423, 656 S.E.2d at 783. The court found Shaw’s efforts to maintain the property as “ready to be lived in” were sufficient evidence of a dwelling. Id. at 425, 656 S.E.2d at 784. Likewise, the court in Phillips found intent to return exists when an occupant leaves personal or valuable belongings on the property. State v. Phillips, 393 S.C. 407, 712 S.E.2d 457 (2011); see also State v. Glenn, 279 S.C. 29, 374 S.E.2d 671 (1988) (leaving over \$10,000 worth of personal possessions in mobile home proved occupant did not vacate the home but rather left with an intention of returning). In Phillips, the occupant packed most of his belongings in his vehicle and told his neighbor he was leaving town. Phillips, at 410, 712 S.E.2d at 459. The court held, however, because Phillips left his animals, his golf club, and his lawnmower behind, he demonstrated an intent to return. Id. at 413, 712 S.E.2d at 460.

In the case at hand, Pepper was only absent from his home for a period of about two months during his incarceration. (R. p. 78, lines 20-25.) Pepper even asked his neighbor to look after his house and protect it from intruders in his absence. (R. p. 9, lines. 1-15.) Unlike the occupants in Phillips and Glenn, Pepper did not pack up his

possessions in the process of a move; he was taken away from his house and taken to jail, leaving all of his belongings behind. Though the home was ransacked, presumably from prior break-ins, no evidence suggests Pepper left the home in that condition. He clearly stored valuable tools in the home, which is what Appellant attempted to steal. (R. p. 66, line 17.) The vandals may not have left home “live in ready” by Evans standards, but the nature of the house at the time of the burglary is not indicative of Pepper’s lack of intent to return. Finally, Pepper actually returned to his home when he was released on bond, which is prima facie evidence of his intent to return. Pepper testified he mistakenly believed the final approval of occupancy had been filed with DHEC when he returned home. (R. p. 78, lines 12-19.) He received a fine, which was later reduced. (R. p. 78, lines 17-19.)

Conceding intent to return is the proper test to characterize a place as a dwelling, Appellant primarily argues “Pepper could have no intent to return to the structure because doing so was illegal.” (Appellant’s Brief p. 15.) The argument does not follow. The legality of his return has nothing to do with his intent to return. Criminals frequently intend illegal actions. If illegality negated intent, then crimes such as the one charged in this case, which states, “a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with *intent to commit a crime . . .*,” would be null and void. S.C. Code Ann. § 16-11-311(A) (1976) (emphasis added). Appellant argues incomplete logic, emphasizing that Pepper could not have intent to go home because it was illegal to live there. (Appellant’s Brief p. 9.) Pepper returned home, regardless, just as Appellant entered the home, regardless, despite the fact that both actions were illegal.

Appellant cites State v. Ferebee, 273 SC 403, 257 S.E.2d 154 (1979) in support of his argument. In Ferebee, a partially furnished apartment was burglarized a week after it was abandoned by its tenants. The apartment was deemed a building rather than a dwelling, and the defendant's conviction for burglary in the first degree was overturned because the owner never occupied or intended to occupy the unit. Id. The case at hand is clearly distinguishable from Ferebee because Pepper was neither a renter nor had he abandoned his home.

Appellant maintains that because the house was condemned by the county, "no one had possessory right to the house." (Appellant's Brief p. 14.) Appellant argues although the house, like the partially furnished apartment in Ferebee, possessed some of the "hallmarks" of a dwelling; it was not a dwelling due to the lack of possessory interest at the time of the burglary. Id. Appellant's argument lacks evidentiary support from the record, however. Appellant provided no clear evidence of exactly what prohibitions were placed on Pepper's use of the property by Greenville County, or if, in fact, condemnation proceedings were commenced. Pepper testified he was ordered to pay a fine because DHEC had not yet certified the house as habitable, but the record is unclear whether he lacked property or possessory rights to the premises. According to Pepper, the house had been inspected by the time he returned, but the inspection had not yet been filed with the State. Certainly one could argue that once the house passed inspection, any suspended possessory rights returned. The inspection may have occurred before the break in; the record does not say.

As shown in trial testimony, however, even law enforcement recognized Pepper's property rights. Pepper had the interest and power to enlist Crawford's help to survey the

property while he was in jail. In fact, the police allowed her entry to the home to place the monitor for Pepper. (R. p. 12, lines 4-12.) The officers who responded to the scene that night called Pepper in jail before they entered his house to ask if he knew Appellant or if he had given anyone permission to be in the home. When Pepper responded in the negative, the officer asked permission to move forward with the investigation and to bring in a K9 to conduct a search. (R. pp. 77-78).

Pepper is the title owner and occupant of the home broken into on November 13, 2013. (R. p. 9, lines 8-15.) Pepper's possessory interest was acknowledged and preserved by the deputies who responded to the scene when they called and asked his permission to enter the home. (R. p. 77, lines 2-9.) Despite his temporary absence from the home and the county's temporary prohibition of occupancy of the property, Pepper maintained his intent to return home. His intent is evidenced by his ownership of the home, his storage of his personal belongings in the home, his involuntary removal from the home, his request to his neighbor to watch over the house during his incarceration, and finally, his actual return to the home when he was released on bond.

In viewing the evidence in the light most favorable to the State, the record reflects more than enough competent evidence to support jury's finding the homeowner had intent to return to the property, regardless of the pending DHEC certification, thereby satisfying all the elements of S.C. Code Ann, §16-11-311, burglary in the first degree.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

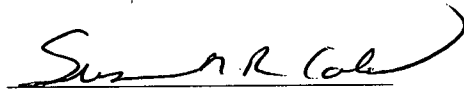
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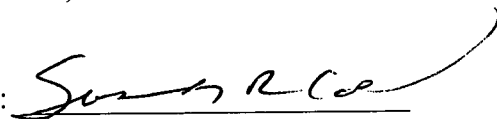
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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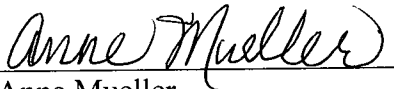
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PROOF OF SERVICE

I, Anne Mueller, Legal Assistant, hereby certify that I have served the within Final Brief of Respondent dated August 21, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Susan B. Hackett, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certified that all parties required by Rule to be served have been served.
This 21st day of August, 2015.


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