STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD EARL TEDFORD,

APPELLANT

APPELLATE CASE NO. 2015-002213

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying appellant's motion to consider two twenty-three-year-old burglary convictions that happened on the same day and were pled at the same time as only one conviction for purposes of enhancing appellant's charges to first-degree burglary and second-degree burglary?

STATEMENT OF THE CASE

On October 21, 2014, a Greenville County grand jury indicted appellant for two counts of first-degree burglary and two counts of grand larceny. R. 611-618. On October 13, 2015, appellant was tried before the Honorable Perry H. Gravely and a jury. R. 1. Mark Moyer represented the State. R. 1. Richard Warder represented appellant. R. 1.

The trial court granted appellant a directed verdict on one of the counts of first-degree burglary because the State failed to prove the crime scene was a dwelling, reducing it to second-degree burglary. R. 439, l. 25 – 442, l. 3. The trial court also granted appellant a directed verdict on one of the counts of grand larceny because the State agreed it failed to prove the required value of the items stolen, reducing it to petit larceny. R. 435, l. 25 – 438, l. 15.

The jury convicted appellant of first-degree burglary, second-degree burglary, grand larceny, and petit larceny. R. 595, l. 20 – 596, l. 15. Judge Gravely sentenced appellant to concurrent terms of twenty-three years' imprisonment for first-degree burglary, twelve years' imprisonment for second-degree burglary, ten years' imprisonment for grand larceny, and thirty days' imprisonment for petit larceny. R. 609, l. 17 – 610, l. 3. This appeal follows.

ARGUMENT

The trial court erred in denying appellant's motion to consider two twenty-three-year-old burglary convictions that happened on the same day and were pled at the same time as only one conviction for purposes of enhancing appellant's offenses to first-degree burglary and second-degree burglary.

Relevant Facts

The State charged appellant Richard Tedford with two burglaries that occurred on the same day in a rural area of Greenville County. Appellant was convicted of first-degree burglary arising from an incident that happened at the home of Melody Wilbanks ("Wilbanks"). R. 108, ll. 17 – 21. Wilbanks testified that her husband left for work "between quarter of 6:00 and 6:00." R. 109, ll. 11 – 13. She stayed in bed. R. 109, ll. 17 – 18. The sound of breaking glass awakened Wilbanks. R. 109, ll. 19 – 20.

Wilbanks went to her living room and saw a man "coming in through the window." R. 110, l. 13 – 111, l. 6. She ran into her bedroom, locked the bedroom door, and retrieved her husband's pistol from under their mattress. R. 112, ll. 9 – 19. She also got her phone. R. 112, ll. 14 – 19. Wilbanks went into the bathroom and locked the door. R. 112, ll. 20 – 23.

Wilbanks heard someone kick in her bedroom door. R. 114, ll. 16 – 20. She heard someone rummaging through her furniture in the bedroom. R. 114, ll. 16 – 115, l. 1. When she heard the door knob of the bathroom turn, Wilbanks fired the gun. R. 115, ll. 2 – 5. She shot the gun into the shower stall and not into the door. R. 116, ll. 8 – 20. Wilbanks heard the man say "whoa" or "stop," then grab her car keys. R. 116, l. 21 – 117, l. 7.

Wilbanks called 911. R. 117, ll. 20 – 24. After the police arrived, Wilbanks discovered her car was missing. R. 118, l. 10 – 119, l. 22. The car was a 2011 black Toyota Scion. R. 120, ll. 4 – 6. The car was found later that day behind a medical office in Greer. R. 291, l. 5 – 297, l. 7.

Wilbanks could not identify the person she saw in her living room. R. 138, l. 20 – 139, l. 4. During her direct-examination, Wilbanks claimed the man was white. R. 111, l. 23 – 112, l. 2. During cross-examination, Wilbanks denied telling a police officer that the man had what "sounded like a black voice." R. 142, ll. 9 – 22. However, a police officer contradicted Wilbanks and testified that she told him that "from the sound of his voice, he sounded like he was black." R. 311, ll. 7 – 17. At sentencing, Wilbanks told the court that her "daily routine begins every day with checking the Greenville County Inmate Search page to make sure he's still there. I look at his face every morning. I've looked at [it] for seven hundred and ninety four days, since it happened." R. 605, ll. 8 – 13.

No physical evidence collected at Wilbanks' house tied appellant to the burglary. R. 313, l. 24 – 323, l. 20. Appellant testified and denied any involvement in the Wilbanks burglary. R. 461, ll. 7 – 13. The night before the burglary, appellant and his fiancé got into an argument in her car. R. 449, l. 15 – 450, l. 19. Appellant got out of the car and began walking. R. 450, ll. 13 – 19. Appellant "walked for hours" and made phone calls trying to convince someone to give him a ride home. R. 451, ll. 1 – 16. He was covered in red mud. R. 452, ll. 21 – 25.

Eventually, appellant learned that a friend of his fiancé's named Derek was coming to get him. R. 451, l. 17 – 452, l. 25. By this time, appellant was in a subdivision

where new houses were being built. R. 453, ll. 1 – 9. Appellant admitted that he paid a construction worker twenty dollars to let him in a house that he thought was for sale so that he could take a bath. R. 452, l. 4 – 454, l. 13. Appellant "didn't know [the house] belonged to anybody."[1] R. 455, ll. 8 – 14.

Derek arrived in a black Scion. R. 454, ll. 20 – 25. Appellant had never seen Derek drive a black Scion. R. 456, ll. 19 – 22. Derek went into the house to use drugs and while appellant waited, he fell asleep. R. 457, l. 18 – 458, l. 7. When appellant awakened, Derek was "fumbling in the back" of the car and a man appellant did not know approached and told him to leave. R. 458, ll. 9 – 24. Derek ran. R. 458, ll. 15 – 20. Appellant had to look for the keys in the back of the Scion. R. 458, l. 20 – 459, l. 4. He located the keys in the back of the car and drove off, finding Derek at the end of the street. R. 458, l. 21 – 459, l. 4. Derek drove and appellant again fell asleep. R. 459, ll. 1 – 4.

The man who approached appellant was Gerald Lockhart ("Lockhart"). R. 153, l. 4 – 164, l. 16. Lockhart testified that he noticed the Scion in his driveway at approximately 6:30 AM. R. 150, ll. 12 – 22. All four doors and the trunk were open. R. 150, ll. 21 – 22. Lockhart initially saw no one at the car, but when he approached, he saw one person "leaning over the trunk." R. 150, l. 23 – 151, l. 4. R. 153, ll. 11 – 19. Like appellant, Lockhart testified that when appellant tried to leave, appellant had to retrieve the keys from the trunk. R. 155, l. 10 – 156, l. 25.

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[1] Appellant was convicted of second-degree burglary for this incident. R. 595, l. 20 – 596, l. 15. The trial judge directed a verdict on first-degree burglary because the house was not occupied and therefore not a dwelling. R. 439, l. 25 – 442, l. 3. The house had been recently purchased by Brian and Arlene Walker, but they had yet to move into the house. R. 229, l.11 – 230, l. 5.

When appellant next awakened, he was at a house he did not recognize and the car's hatch was open. R. 459, ll. 5 – 22. Assuming he was at the house of one of Derek's friends, appellant rang the doorbell and asked the woman who answered if Derek was there. R. 459, ll. 5 – 22. She said "no" and appellant walked back to the car. R. 459, ll. 5 – 22. Derek was in the driveway. R. 459, ll. 5 – 22. Derek drove appellant to a convenience store and they "parted ways" at approximately 10:00 AM. R. 459, l. 20 – 460, l. 8. When appellant left Derek, the Scion was undamaged and had none of the items found in the car when it was discovered later in the day. R. 460, ll. 3 – 8.

The woman who answered the door was Natalie Powell ("Powell"). R. 187, l. 15 – 190, l. 5. Powell testified that appellant rang her doorbell at approximately 8:00 AM. R. 187, ll. 15 – 19. Powell saw the Scion parked in front of her house. R. 191, ll. 4 – 8. She also testified that appellant asked if Derek was at her house. R. 190, ll. 2 – 5. While Powell testified that she did not see anybody else with appellant, she went back into her house did not watch appellant leave. R. 195, ll. 20 – 22. R. 191, ll. 14 – 24.

When the police found Wilbanks' black Scion, they took a number of items into inventory and forensics processed some of the items. R. 225, ll. 1 – 14. Some of the items were from the house belonging to the Walkers where appellant took a bath. R. 253, l. 12 – 256, l. 12. Some of the items in the Scion did not belong to the Walkers and the police were never able to find anyone who claimed the items. R. 256, l. 19 – 257, l. 7. R. 384, l. 2 – 385, l. 19. The police obtained ten fingerprints from the Scion, but only one matched appellant. R. 357, ll. 6 – 15. The prints on the items from the Walkers' house did not belong to appellant. R. 361, l. 12 – 362, l. 11.

As an aggravating factor for the two burglaries, the State introduced appellant's two 1992 prior convictions for burglary. R. 423, ll. 12 – 21. R. 620 – 625. Both burglaries occurred on the same day. R. 620 – 625. Appellant pled guilty to both burglaries on June 3, 1992, before the Honorable Frank Eppes. R. 620 – 625.

Prior to trial, appellant moved to have these 1992 convictions considered as one conviction for purposes of the burglary statute. R. 7, l. 12 – 8, l. 11. Appellant argued that the crimes occurred on the same day and the houses were next to each other—facts that were not disputed by the State. R. 7, l. 12 – 9, l. 22. The trial judge denied appellant's motion. R. 9, l. 23 – 10, l. 21. The court charged the jury that appellant's two prior convictions could be considered as an aggravating factor for both first-degree burglary and second-degree burglary. R. 570, ll. 10 – 24. R. 572, ll. 19 – 24.

Discussion

The trial judge erred in refusing to consider the two twenty-three year old burglaries as one conviction under the burglary statutes. Offenses which are "committed at times so closely connected in point of time" may be considered as one offense "notwithstanding under the law they constitute separate and distinct offenses." S.C. Code Ann. § 17-25-50. Under section 17-25-50, the 1992 burglaries, which occurred on the same day at houses next to each other "share an immediate temporal proximity" and are one offense. Bryant v. State, 384 S.C. 525, 534-35, 683 S.E.2d 280, 285 (2009) (interpreting section 17-25-50 in an LWOP case). See also State v. Pee Dee News Co., 286 S.C. 562, 568, 336 S.E.2d 8, 11 (1985) (construing 49 indictments for distribution of obscene material as one conviction for sentencing).

Both first- and second-degree burglary contain enhancements if a defendant has two or more prior burglary convictions. S.C. Code Ann. § 16-11-311(A)(2). S.C. Code Ann. § 16-11-312(B)(2). These provisions are designed to punish recidivism. State v. Washington, 338 S.C. 392, 396, 526 S.E.2d 709, 710-11 (2000). In Washington, the Court stated that "section 16-11-311 allows the State to punish Defendant's recidivism by using his previous convictions to elevate actions that would normally constitute a burglary, second degree charge to a charge of burglary, first degree." Id.

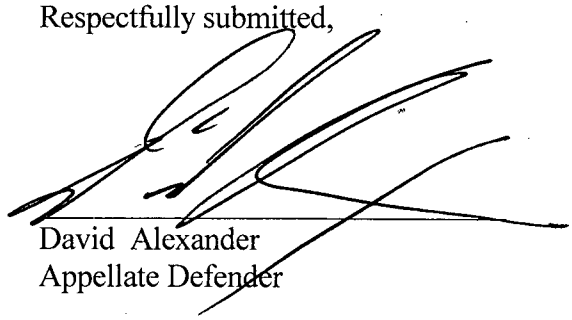
Section 17-25-50 has been construed to apply to other criminal statutes that enhance punishment for recidivism. State v. Boyd, 288 S.C. 206, 208-09, 341 S.E.2d 144, 146 (Ct. App. 1986). In Boyd, the Court interpreted section 17-25-50 as applying to the defendant's charge of possession with intent to distribute marijuana. Id. This Court reversed the defendant's sentences. Id. at 210, 341 S.E.2d at 147. As in Boyd, the trial court here erred in refusing to consider the two prior convictions as one offense.

The trial court's ruling prejudiced appellant. It was an issue of fact whether the burglary at the Wilbanks' residence occurred in the nighttime. The court charged the jury on the definition of "nighttime." R. 571, ll. 14 – 20. With the two convictions entered into evidence, the jury could easily have avoided the difficult decision on the "nighttime" element. None of the other aggravators were present in the Wilbanks incident or the Walker incident. S.C. Code Ann. §16-11-311(A)(1)(a) – (d). S.C. Code Ann. § 16-11-312(B)(1)(a) – (d). The second-degree burglary charge did not have the nighttime element, so the convictions were the only aggravator. R. 572, ll. 23 – 25. The jury asked to be recharged on the four charges. R. 626. Therefore, this Court should reverse appellant's burglary convictions and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, appellant's burglary convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,



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This 5th day of December, 2016.

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CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

December 5, 2016

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