STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

RECEIVED
JUL 12 2017
SC Court of Appeals

Appeal from Williamsburg County

Honorable Clifton B. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDEN JOSHUA KIRBY,

APPELLANT

APPELLATE CASE NO 2016-001406

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying the Appellant's motion for directed verdict on the charge of possession of burglary tools where the state failed to present substantial circumstantial evidence that Appellant possessed the tools or that Appellant had any intent to use the tools in the commission of a crime?

STATEMENT OF THE CASE

On July 25, 2013, the Williamsburg County Grand Jury indicted Appellant Branden Kirby with one count of grand larceny, value over $2,000 but less than $10,000) and one count of possession of burglary tools. Kirby's co-defendant, Tim Mcnell Cannon, Jr. was charged with the same and an additional count of possession of methamphetamine. R. 169

On October 21, 2014, Kirby was tried *in absentia* before the Honorable Clifton B. Newman and a jury. Kirby was represented by M. Amanda Shuler, and the state was represented by assistant solicitor Tyler B. Brown. R. 1; R. 28. The jury convicted Kirby of the possession of burglary tools count, but acquitted him of grand larceny. R. 149, ll. 4-20.

On June 29, 2016, Kirby appeared before Judge Newman for the imposition of the sealed sentence. Judge Newman originally imposed a sentence of five years, but modified the sentence to four years upon the defense's motion. R. 161, l. 1 – 162, l. 13; R. 168, ll.1-3.

This appeal follows.

ARGUMENT

The trial judge erred in denying the Appellant's motion for directed verdict on the charge of possession of burglary tools where the state failed to present substantial circumstantial evidence that Appellant possessed the tools or that Appellant had any intent to use the tools in the commission of a crime.

Relevant Facts

Appellant Kirby and co-defendant Tim Cannon, Jr., were caught on a parcel of rural property owned by Michael Lane with a trailer full of scrap metal. Cannon pled guilty to one count of grand larceny and one drug charge, but had additional charges for grand larceny and possession of burglary tools dropped in exchange for his testimony against Kirby. Cannon testified that the two men were driving when they saw the abandoned farm. They pulled in and loaded up the "junk" scrap metal, which they intended to sell. R. 87, l. 24 – 91, l. 10; R. 92, l. 14 – 93, l. 20. Cannon said that the chainsaw, welding machine, ax, and bolt cutters that were found in his vehicle belonged to him and were used for legitimate work removing debris. He further indicated that none of the tools were used on the night of the incident at Lane's property. R. 91, ll. 11-25; R. 94, ll. 19-21.

At the close of the state's case, defense counsel made a motion for directed verdict on the possession of burglary tools charge. She argued that the state's own witness, Tim Cannon, testified that there was no intent to use the items enumerated in the indictment to effectuate any larceny and that the "mere presence of the tools" is not sufficient to satisfy the elements of the alleged crime. She further noted that the man hired to watch the property, Michael Graham,[1] never testified that he heard any tools being used. Rather, he heard only the clanging of metal,

[1] Michael Graham, who also served as the Chief of Police in the nearby town of Greeleyville, was an acquaintance of the property owner, Michael Lane, and lived near the incident location. Lane paid him one hundred dollars to watch the property on the night of April 4, 2014, due to reports from other family members that items had been moved around or taken from the property. R. 36, l. 19 – 40, l. 6; R. 62, l. 14 – 67, l. 1; R. 76, l. 14 – 77, l. 14.

presumably as it was being moved. R. 100, l. 22 – 101, l. 17. In response, the solicitor cited the testimony of Michael Lane that "it appeared that debris, bushes or brush had been cleared out away from [or] cut away from [the missing metal]" which he averred could have been accomplished with the use of the tools. R. 101, l. 19 – 102, l. 5. R. 102, ll. 8-12. Specifically, the following exchange occurred during Lane's direct testimony:

> SOLICITOR: Going specifically to where these items were taken, please describe the surroundings around them and any observations you had about that?
>
> WITNESS LANE: Okay. The angle iron was behind a ditch and there were trees around it with vines growing over the heavy angle iron that had been stacked out a while. It was in good shape. The saw mill track was up close to the old house where my grandmother and grandfather lived, and it had grass and kind of stuff but it was sticking up so they could see the front part of it so, you know, it was kind of grown over somewhat, but I assume.
>
> SOLICITOR: Going and looking at that, did you ever go and look at the location where the items were taken from after they had been taken?
>
> WITNESS LANE: I did.
>
> SOLICITOR: Did you have any observations about that?
>
> WITNESS LANE: It was vines and limbs cut and, you know, had been cleaned up around it where they could load it.

R. 73, l. 11 – 74, l. 4. Thus, the solicitor argued: "I certainly think that although it's not [the] strongest of the two charges, there is evidence to take [it] to the jury." R. 102, ll. 5-7.

Defense counsel reiterated that there was no evidence that the burglary tools belonged to Kirby and that mere presence in the vehicle where the tools were found is not sufficient to submit the charge to the jury. R. 102, ll. 14-23; R. 103, ll. 14-20. The solicitor responded that the hand of one is the hand of all such that ownership of the tools did not matter, and again relied

on Lane's testimony to support his assertion that the tools were used or potentially used in the commission of the grand larceny. R. 102, l. 25 – 103, l. 12.

Judge Newman denied the directed verdict motion, stating that "if the evidence conflicts then it's a jury question" and referencing the "hand of one, hand of all" theory of liability. Trial R. 103, l. 21 – 104, l. 17. Defense counsel argued that Lane's testimony was that there were vines growing over the scrap metal, such that the mere removal of the scrap metal would "obviously" make it appear that the vines were cut. Thus, she argued that Lane's testimony was "not enough evidence to submit this issue to the jury." R. 104, ll. 18-25. Judge Newman said that he understood counsel's argument and that she may be successful with the jury, but that it was going to be the jury's decision. R. 105, ll. 11-13.

In closing arguments, the solicitor admitted that the state's case for possession of burglary tools was not their "strongest case." He acknowledged Cannon's testimony that the tools were not used that night. However, the solicitor submitted that the state had proven its case beyond a reasonable doubt, asking the jury to infer that the men used the ax found in the truck to cut downs vines and branches around the materials. R. 120, ll. 7-23. Defense counsel argued that there was no testimony about hearing the chainsaw running that night and noted that the ax was still rusty. She asked the jurors to use their common sense, that if the ax were used its end would be shiny where it scraped against metal. Most importantly, she noted Cannon's own testimony that the tools belonged to him, were used in his business, and that there was no intent to use them that night. R. 131, l. 10 – 133, l. 5; R. 134, l. 3 – 135, l. 4. The jury was charged on

the elements of possession of burglary tools and on the "hand of one, hand of all" theory of accomplice liability.[2] R. 142, ll. 6-25.

Following the jury's return of a not guilty verdict on the grand larceny charge but guilty on the possession of burglary tools, defense counsel argued that there was not sufficient evidence to sustain the conviction. She further noted the absence of any photographs to corroborate Lane's testimony regarding the appearance that vines and branches were cut. R. 151, l. 24 – 152, l. 7; R. 152, l. 23 – 153, l. 15. Judge Newman denied the post-trial motion, stating:

> All right. Well, the jury was given the case based on the testimony of the victim that it appeared the area had been cleaned off, and the jury was given the charge on direct and circumstantial evidence which could easily lead them to conclude that the tools were used or were intended to use in assisting in the commission of the crime. Pictures aren't necessary and testimony is sufficient if believed by the jury, and I respectfully deny the motion.

R. 153, ll. 16-25.

Prior to sentencing, defense counsel reiterated that "the mere presence of a defendant where the burglary tools were found or the mere association by the defendant with people who possess the burglary tools is insufficient proof that the defendant himself possessed the burglary tools." R. 155, l. 18 – 156, l. 11. Judge Newman found that there was evidence to support the verdict, again denying the post-trial motion. R. 157, ll. 10-17.

---

[2] The jury was not charged on "mere presence." See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) ("Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.").

Discussion

In order to survive the motion for directed verdict, the state had to present *substantial circumstantial evidence* that Kirby intended to use the tools enumerated in the indictment – a chainsaw, an ax, a welding machine and bolt cutters – to commit a larceny. It utterly failed to do so, instead asking the jury to speculate that the tools were intended to be so used in what appeared to be a theft of scrap metal from an open field. See State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) ("Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt."); State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) ("The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty.").

The trial judge admitted that his first inclination was to agree with defense counsel and find that there was no evidence that tools were being used to commit the crime. R. 104, ll. 5-11. Instead he ruled: "But if there is evidence that they, direct or circumstantial evidence that they were used to assist in any way in committing a crime, then it can be burglary tools so I think it's a jury issue, however slight perhaps, and I deny the motion for directed verdict." R. 104, ll. 12-17. The key component missing in the standard applied by the trial judge was that the circumstantial evidence must be **substantial**. See State v. Pearson, 415 S.C. 463, 469, 783 S.E.2d 802, 805 (2016).

At the directed verdict stage, the trial court "views the evidence in the light most favorable to the State and must submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." State v. Bennett, 415 S.C. 232, 236–37, 781 S.E.2d 352, 354 (2016); State v. Pearson, 415 S.C. 463, 473, 783 S.E.2d 802, 807 (2016). The trial court "must concern

itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Bennett, 415 S.C. at 237, 781 S.E.2d at 354. "This objective test is founded upon reasonableness." Id. "Accordingly, 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." Id. "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) (emphasis added). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001).

The offense commonly referred to as "possession of burglary tools" is codified in S.C. CODE ANN. § 16-11-20, which provides:

> It is unlawful for a person to make or mend, cause to be made or mended, or have in his possession any engine, machine, tool, false key, picklock, bit, nippers, nitroglycerine, dynamite cap, coil or fuse, steel wedge, drill, tap-pin, or other implement or thing adapted, designed, or commonly used for the commission of burglary, larceny, safecracking, or other crime, under circumstances evincing an intent to use, employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same are intended to be so used.
>
> A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both.

S.C. CODE ANN. § 16-11-20. Here, it is notable that the state's own witness claimed sole ownership of the tools and testified that there was no use or intent to use the tools during the incident. R. 91, ll. 11-25; R. 94, ll. 19-21. Putting aside that testimony, the only other evidence that the tools were used was the landowner's uncorroborated testimony that it appeared that limbs and vines were cut around the area where the scrap metal was taken. R. 73, l. 11 – 74, l. 4.

However, Lane also testified that the area from which the metal was taken was overgrown, such that common sense would dictate that the mere moving of the items would make it appear that the vines and branches were broken or torn. R. 73, ll. 14-22; see also R. 88, ll. 18-24. Moreover, the watchman, Michael Graham, who witnessed the event did not report hearing or seeing any tools. R. 39, l. 21 – 43, l. 24. Rather, he heard "clinging and clanging like they were, like metal banging together." R. 41, ll. 3-4.

In State v. Nicholson, 221 S.C. 472, 476, 71 S.E.2d 306, 307 (1952), our Supreme Court affirmed the denial of the motion for directed verdict on possession of burglary tools, finding that "under the evidence which was presented the issue of intent was for determination by the jury." In Nicholson, police were waiting at the appellant's house to serve unrelated warrants upon him and his co-defendant, Elliott Dean. 221 S.C. at 474, 71 S.E.2d at 306. They arrived at the home together in appellant's car, were placed under arrest, and their car was searched without objection. Id. Officers found a pair of bolt clippers under the front seat and found a heavy chisel, a wrecking bar, a pair of pliers, and three pair of canvas gloves in the back seat. Id. at 474-75, 71 S.E.2d at 306-307. The Court noted Nicholson's own testimony that he was an electrician and possessed the tools of his trade. Id. at 476, 71 S.E.2d at 307. However, Nicholson also admitted that he was unemployed at the time of his arrest and that his last job was as a police officer. Id. Additionally, the state's witnesses testified that Nicholson made a voluntary, incriminating statement "to the effect that he and his companion owned the tools and had been timely apprehended because they were . . . 'fixing to pull some big jobs . . . fixing to go into the business.'" Id. at 476, 71 S.E.2d at 307-08. Unlike Nicholson, Kirby made no incriminating statements, and it was the state's own witness who claimed ownership and possession of the

tools. Thus, there was no evidence that Kirby even knew that the items were in the car in order to develop an intent to use them in the commission of a crime.

The present case is further distinguishable from State v. Puckett, 237 S.C. 369, 117 S.E.2d 369 (1960), where our Supreme Court again affirmed the denial of the defense's motion for directed verdict motion on possession of burglary tools. Puckett was an appeal by three of five alleged co-conspirators, Gentry Puckett, John Burgess, and Don Wheeler, who attempted to rob a Piggly Wiggly. 237 S.C. at 370-71, 117 S.E.2d at 369-70. An officer patrolling the area at approximately 8:00 p.m. saw a man running from the front of a Piggly Wiggly supermarket to the side. Id. at 375, 117 S.E.3d at 372. After being unsuccessful in the catch the first man, later identified as Jimmy Lane, the patrolman came back to the front of the store. Id. at 375-76, 117 S.E.3d at 372-73. He saw Burgess, who claimed to be waiting on a ride from a North August police office, ostensibly referring to Puckett, who was terminated from such a position. Id. The patrolman saw Burgess attempt to hide his loaded 38 snubbed nosed pistol. Id. He also found a pair of gloves and crowbar on a platform near the store and found a fresh "skinned mark" on the front door of the store. Id.

The manager of the Piggly Wiggly testified that there were no markings on the door when he closed it at 6:00 that evening and that his examination of the door after the incident revealed "that the outer edge had been shelled off" and scratches on the lock. 237 S.C. at 376, 117 S.E.3d at 373. Further, there was testimony from the fire chief in North Augusta that the fire department was missing a halligan tool identical to the one found on the scene and that Puckett was a member of the police department housed in the same building at the time it went missing. Id. Floyd Trantham, one of the co-defendants who testified for the state, said that Puckett told him "that he got two good bars off of a fire truck at North Augusta." Id.

After seeing police lights at the store, Trantham gave his car to Don Wheeler and Jimmy Lane and then returned with Puckett to the Piggly Wiggly. 237 S.C. at 376-77, 117 S.E.3d at 373. They drove by several times and were eventually stopped by police. Id. Puckett's car was searched and police found: "a 38 snub nosed pistol, a carbine rifle, with ammunition consisting of several clips and a belt with several clips, a sledge hammer, a large file, two feelers, described as tools used to trip tumblers of a safe, safe peeler, glass cutter, a punch, a flash light, and aluminum knucks." Id. Officers testified that the tools "were adapted to use in various activities connected with house breaking and safe cracking." Id. Even Puckett admitted that certain of the tools found in his car could be so used. Id. The co-appellants all denied knowledge of the gloves and crowbar found at the store. Id. While Puckett admitted possessing the items in his car, he denied that he had them for purpose of committing a crime. Id. at 377-78, 117 S.E.3d at 373-74. The other co-defendants denied any knowledge of the possession of the tools by Puckett. Id.

In affirming the denial of the directed verdict motion, the Puckett Court noted the conflict in the evidence presented by the state and the appellants, and even among the appellants. 237 S.C. at 378, 117 S.E.3d at 374. The Court found that "[t]here was a reasonable conclusion to be drawn from the evidence that the appellants had an intent to use the tools and implements found in the car of the appellant, Puckett, in the commission of a crime." Id. at 379, 117 S.E.3d at 374. The court further noted that "[m]any of the tools so found could be put to a lawful use but it is not reasonable to suppose that a person without criminal intent would be driving about with such an assorted and complete collection of tools and implements commonly used in burglary, larceny and safe cracking." Id.

It is clear in Puckett that there was substantial circumstantial evidence to connect the co-conspirators to each other and to the items found at the scene and in Puckett's car. There was

ample testimony for a jury to reasonably conclude that Puckett stole the crowbar found at the scene from the fire department, casting serious doubt on the other's testimony that they were unaware of the slew of other items in Puckett's car when another item almost certainly from his car was used. Further, there was testimony upon which the jury could have believed that one or more of the men attempted to gain access to the store with the crowbar based on the freshness of the markings and the manager's testimony that the door was unscratched just two hours prior.

Unlike Puckett, there was no evidence in the present case that Kirby had any knowledge that Cannon's jeep contained tools. No tools were found in or around the area from which the metal was taken and Michael Graham, who observed the entire incident, never noted the use of any tools. Further, an welding machine, ax, chainsaw, and two pairs of bolt cutters are hardly "an assorted and complete collection" of tools "commonly" used in burglary, larceny, or safecracking like the laundry list of items in Puckett. The state simply cannot survive the directed verdict motion on Michael Lane's testimony that he went back to the incident location at some point and "[i]t was vines and limbs cut and, you know, had been cleaned up around it where they could load it." R. 73, l. 23 – 74, l. 4. Notably, unlike the store manager in Puckett who had seen the door just two hours prior, Lane was last at the property two days prior to the incident and there was no timeframe specified regarding when he returned to "look at the location." R. 64, l. 22 – 65, l. 9.

In summary, the proper inquiry for the trial judge in this case was whether the state's evidence was sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt or merely raised a suspicion that Kirby was guilty of possessing burglary tools. "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court." State v.

Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Here, it was the duty of the trial judge to grant the motion for directed verdict because, even viewing the circumstantial evidence in the light most favorable to the State, it did not reasonably tend to prove Kirby's guilt of possessing burglary tools and fails this Court's well settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. At best, this evidence raised a mere suspicion of guilt, which is not sufficient evidence for submission to the jury. Thus, Kirby was entitled to a directed verdict on the possession of burglary tools charge.

CONCLUSION

Based on the foregoing, Appellant Branden Joshua Kirby respectfully requests that this Court reverse his conviction for possession of burglary tools and enter a directed verdict of acquittal.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2017.

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 12, 2017

Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589