

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Marion County
Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

The State of South Carolina,

Respondent,

v.

Malcolm Antwon Williams,

Appellant.

Appellate Case No.: 2017---1175

Pro-Se Appeal Brief
Pursuant to Anders

By: Malcolm A. Williams
BRCI-Wateree Unit
4460 Broad River Rd.
Columbia, S.C. 29210

STATEMENT OF THE CASE

On or about November 3, 2016, the Appellant was indicted in the County of Marion, South Carolina, charged with Kidnapping, possession of a weapon during a violent crime, criminal sexual conduct in the 1st degree, burglary in the first degree, and resisting arrest.

Appellant exercised his Fifth, Sixth and Fourteenth Amendment right to a trial by jury, as opposed to pleading guilty to a crime for which he did not commit. As a result, the State represented by John Holt and Patty Parker, called the case to trial on May 8, 11-12 of 2017, before the Honorable Michael G. Nettles and a jury.

Appellant was represented by Scott Floyd. At the end of trial, Appellant was convicted of burglary first (of the residence he resided at); possession of a weapon during a violent crime; and resisting arrest. Puzzling however, Appellant was found "NOT GUILTY" of kidnapping and criminal sexual conduct in the 1st degree. R.

248 II.

The trial court sentenced Appellant to seventeen years (17) imprisonment for the burglary 1st; 493 days time served, for possession of a weapon (to which Appellant never possessed); and 300 days for resisting arrest. R. 254, I. 22-R. 255, I. 10; R. 262-264. All sentences were imposed "concurrently".

AS a result of the above convictions. Appellant requested

his direct appeal be filed. Mr. Floyd served notice of Appellant's appeal request to the South Carolina Court of Appeals on May 15, 2017.

STATEMENT OF FACTS BY APPELLANT

After the notice of appeal was filed. Appellant's case was transferred to the South Carolina Commission on Indigent defense, and the case was assigned to Ms. Susan B. Hackett. Appellant contacted Ms. Hackett on numerous occasions to discuss the details of his appeal, as well as outlining the important aspects of his case; in which the transcript of record may not have provided. To which were meritorious.

Appellant counsel dismissed "all of Appellant's concerns", and instead filed a Anders Brief, coupled by a motion to be relieved as counsel, on January 8, 2018. As a result, the Court of Appeals issued a 45-day period for which Appellant himself, could raise arguable issues in which he feels have merit.

Appellate counsel raised the sole issue:

Whether the trial judge erred when he permitted the State to introduce evidence of an alleged threat made by Appellant to a witness almost three weeks prior to the charged offenses where the danger of unfair prejudice substantially outweighed its probative value where the state's case depended entirely upon the jury believing the witness and the threat injected emotion into the jury's calculus.

SUMMARY OF APPELLANT'S ARGUMENTS

1. Whether the State failed to meet it's burden of proof with regards to First Degree Burglary, in accordance with the plain language of §16-11-311?
2. Whether Appellant's Due Process rights were violated based on such failure?
3. Whether the trial judge abused its discretion by failing to grant a directed verdict based on "missing elements" within the testimony of the alleged victim, in regards to First Degree Burglary?
4. And whether this case presents the "extraordinary circumstances" to review the otherwise Sixth Amendment violation of Ineffective Assistance of Counsel on direct appeal, by counsel's failure to reiterate the need to revisit the denial of the directed verdict request after the Appellant had been acquitted of Kidnapping?
5. Whether appeal counsel rendered ineffective assistance, by filing an Anders brief instead of a merits brief in light of the pro-se appellate brief herein?

Argument (1.).

Under the Due Process Clause of the Fifth Amendment, the prosecution is required to "prove beyond a reasonable doubt every essential element of the crime with which the defendant is charged". See In re Winship, 397 U.S. 358, 364 (1970) Justice Harlan noted that the standard is founded on a "fundamental value determination of our society that it is far worse to convict an innocent man than to let 100 guilty men go free". Id. at 372 (Harlan J., concurring)

Appellant begins by outlining the plain language of the statute under which he was convicted. §16-11-311 In regards to the First Degree Burglary charge.

"A person is guilty of burglary in the first degree by entering of a (building or dwelling) without consent **"AND"** with the intent to commit a crime therein".
Id. §16-11-311.

The balance of the statute's operation describes alternative, aggravating circumstances, of which a convicted person could potentially receive a life sentence. However, the statute's operation stands or falls on its initial reading, describing its terms.

Here, the plain language unmistakably confirms "a suspect must enter the (building or dwelling) without consent **"AND"** with the intent to commit a crime therein".

The 'alleged victim' in this case. Ms. Aisha Graves, and the State's star witness described the alleged circumstances surrounding the burglary from Tr. tr. pgs. 72-105, on direct by solicitor Holt. Specifically, on Tr. tr. p. 100, lines 1-9. It is clear Ap-

pellant was or is a resident who resided at this address with the alleged victim.

Moreover, "not once during Graves testimony did she suggest Appellant entered the dwelling without consent. Rather (as a normal circumstance), Graves testified "when Appellant knocked on the side of the residence". Such could only have alerted the occupants of the home, "he was there". Not consistent with a burglar attempting to gain access by stealth. Thus, the trial record is totally void of entering without consent.

Here, is is a cardinal rule of statutory construction that the primary purpose in interpreting statutes, is to ascertain the intent of the legislature. Hodges v. State, 341 S.C. 79, 533 S.E.2d 578, 581 (2000); State v. MARTIN, 293 S.C. 46, 358 S.E.2d 697 (1987). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. See Carolina Power & Light Co., v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (1994). And words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1998). Moreover, penal statute's must be construed strictly against the state and in favor of defendant. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (S.C. 1991).

Accordingly, section 16-11-311, requires 'strict compliance' with its provisions, and mandates that; "as key elements of the

first degree burglary charge and conviction. The State must produce evidence of "entering the dwelling without consent", "AND" with intent to commit a crime therein.

Appellant highlights the words "and/or" when used in a criminal statute. "And" when used connotes the inclusion of both topics. Whereas "OR" when used in a criminal statute, is to the exclusion of one in favor of the other. Where either topic is independent and can stand or fall on its own.

Looking at §16-11-311's language. It clearly uses the term "entering of a (building or dwelling) without consent "AND" with the intent to commit a crime therein". Thus, prior to charging a defendant of a suspected crime under the above statute. It's not whether the suspect committed "one or the other" violation. But rather, "whether there exist evidence of both"; (i.e. entering without consent "AND" with intent to commit a crime therein).

More important, is the jury's verdict acquitting the defendant "of any suspected or intended crime therein (i.e. kidnapping and criminal sexual conduct)". That essentially answers the central question of "whether a connected offense occurred while the Appellant was in the dwelling". See Tr. tr. p. 235, lines 23-25. Where the trial judge charged jurors post trial, in the following language in regards to first degree burglary:

The Court: The defendant is charged with first-degree burglary. The State "must first prove beyond a reasonable doubt that the defendant entered a dwelling without consent". Unquote!

Ms. Graves while on direct testified; "she heard a knock on the side of the house. Tr. tr. p. 79, lines 13-21. She immediately knew who it was of course. She popped up. Indicative of being familiar with Appellant's approach.

The trial court also charged on Tr. tr. p. 236, lines 12-15. That a suspect does not have to force his way in to gain entry. But can use deception, artifice, trick or misrepresentation to get consent to enter.

Reiterating; "Ms. Graves was not tricked or any of the above, she simply did not want Appellant to know she was sleeping around". Remember, she "woke her husband and came to answer her bedroom door, knowing it was Appellant". But told her husband before she left the room "to be quiet".

Appellant's defense was (a) he did not have a weapon, but came because both agreed to iron things out; (b) that she had an option to refuse to go with him; and the sexual encounter was concensual. And the gun found in the woods belonged to Ms. Graves and family, in which had to be placed there by them, as opposed to Appellant. Especially where "no forensic evidence connects Appellant to the gun he allegedly held on Ms. Graves, for what should have been a considerable time to deposit DNA on the weapon".

THE VERDICT

On Tr. tr. p. 248, lines 8-9. As to the offense of kidnapping, we, the jury, by unanimous consent find the defendant not guilty.

Tr.tr.p. 248, lines 13-14 states; "As to the offense of burglary first degree, we, the jury find by unanimous consent find the defendant guilty".

With regards with the criminal sexual conduct (another acquittal) "the jurors acquitted the Appellant of any attempted crime therein the dwelling". Resulting in "insufficient evidence" to sustain a conviction for first-degree burglary". Where there did not exist "an unlawful entry into the home Appellant resided in with the alleged victim at some point in time, close to the date of the alleged incident. Tr. tr. p. 100, lines 1-9. Coupled with the undisputed fact, "the intent to commit a crime therein", is negated by the jury's not guilty verdict by way of the kidnapping acquittal.

Here, with the acquittal of kidnapping "the other shoe falls off where the predicate offense to support burglary in the first degree fails".

finally, ineffective assistance of counsel "is not normally cognizable on direct appeal, except in extraordinary circumstances". See Rodriguez v. U.S. 675 F.3d 48, 55-56 (1st Cir. 2012)(claim of ineffective assistance of counsel reviewed on direct appeal only in exceptional circumstances); U.S. v. Cohen, 427 F.3d 164, 167 (2nd Cir. 2005)(claim of ineffective assistance of counsel reviewed when "the factual record is fully developed and the resolution of the Sixth Amendment claim on direct review is beyond any doubt in the interest of justice"); U.S. v. Frazier, 423 F.3d 526, 539 (6th Cir. 2005)(claim of ineffective assistance of counsel not reviewable when first raised on appeal "unless record is adequately de-

veloped to allow reviewing court to assess the merits of the claim). see e.g. State v. Hyman, 276 S.C. 559, 281 S.E.2nd 209 (S.C. 1981).

Here, the above all agree ineffective assistance is normally not cognizable on direct appeal. Unless the appeals court finds by addressing the merits of such claim, it would work a manifested injustice. 427 F.3d 164.

The manifest injustice prong is demonstrably shown where counsel, the State and the trial court all overlooked the missing essential element of first-degree burglary. Needed in order to sustain a conviction for the crime charged.

In otherwords, Ms. Graves (the alleged victim), while on direct exam, Tr.tr.p. 72-105, lines 1-16. Not once stated Appellant entered the home without consent. As a matter of fact, based on his knocking on the side of the house (a normal condition) to alert the occupants of his arrival. Did he enter the home. Where the home dwellers knew exactly who it was that knocked. And expected him to enter as usual. Without anybody refusing Appellant entry into the dwelling.

Had it not been for the presence of Marcus Graves, at the home when Appellant arrived. There is a high probability Ms. Graves and Appellant would have had the conversation and subsequent sexual encounter "right there at the dwelling", as opposed to an alternative location. For these above reasons, Appellant should reap the benefit of claiming also, "that counsel was ineffective for the first time on direct review".

Whether the trial judge abused it's discretion by failing to grant a directed verdict based on "missing elements" within the testimony of the alleged victim, in regards to First-Degree Burglary?

Here, the trial judge abused its discretion by failing to render a directed verdict of NOT GUILTY, prior to submitting the case to the jury. Where the state's lead theory (of First-Degree Burglary) came from the alleged victim, Ms. Graves. "Yet she never once testified on direct exam, Appellant entered the home without consent". And the other shoe falls off; "where the jury did'nt buy Appellant attempted, or kidnapped Ms. Graves". Evident by the jury's acquittal as to the kidnapping and CSC charges.

On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State. State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014). The Court's review is limited to considering "the existence or nonexistence of the evidence, not it's weight". State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 479 (2004). When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on the facts or circumstances which do not amount to proof. See State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).

Here, as the trial court "charged" the first element of burglary being; "the unlawful entry, or, entering without consent". The Appellant "lived at the address at a point in time close to the time of said incident". And the state based its entire case on the sole star witness/alleged victim. That failed entirely, while on direct exam, "to mention anything even related to Appellant unlawfully entering the dwelling." Coupled with; "the jury's acquittal of any suspected crime therein."

For these reasons, "we have a clear case of 'nonexisting evidence' with regards to the First Degree Burglary conviction". AND on this bases, the conviction of the lower court should be reversed.

Whether appellate counsel rendered ineffective assistance by filing an Anders Brief, instead of a merits brief in light of the pro-se appellate brief herein?

Appellant's concern is with the basis of appeal counsel filing a Anders Brief when the Appellant clearly discussed the issues contained within this pro-se brief.

The concern is related to the discussion in Anders v. State of California, 386 U.S. 738, 87 S. Ct. 1396 (1967). Where this Court concluded; Beginning with Griffin v. People of Illinois, 351 U.S. 12, 76 S. Ct. 100 (1956), where it was held that equal justice was not afforded an indigent appellant where the nature of the review 'depends on the amount of money he has, at 19, 76 S. Ct. 591, and continuing through Douglas v. People of California,


372 U.S. 353, 83 S.Ct. 814 (1963), this Court has consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the benefits of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself". Id. at 83 S. Ct. at 817.

In Conclusion, Appellant argues the identical circumstance the United States Supreme Court thought relevant in Anders. To wit; a appeal lawyers disconcern with an indigent's appeal. While more effort is employed by the same attorney, "if confronted by a rich client".

For all the reasons stated herein, Appellant respectfully request that the convictions and sentences are vacated and remanded to the lower court, with instructions to dismiss the First Degree Burglary charge, "based on insufficient evidence, and any other reason in the interest of justice".

Sworn to and subscribed
2nd before me this
day of March, 2018

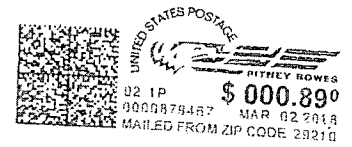
Respectfully Submitted,

/s/ 
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LISA BROWN-ALSTON
Notary Public, State of South Carolina
My Commission Expires 2/5/2023

cc: filed
3/1/2018

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