ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE L. BLAND,

APPELLANT

APPELLATE CASE NO. 2017-002406

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitution

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred when it failed to direct a verdict of acquittal on first degree burglary where there was no substantial circumstantial evidence appellant entered the dwelling without consent?

2.

Whether the trial court erred where it ruled a search warrant was not needed for gunshot residue testing where the suspect refused to consent and where the judge erroneously ruled in the alternative that the search warrant obtained was valid since it did not specify how the prior incident provided probable cause to believe appellant was the shooter in this incident?

STATEMENT OF THE CASE

On June 10, 2016, appellant was indicted by a Greenwood County Grand Jury for discharging a firearm into a dwelling; three counts of attempted murder; failure to stop for a blue light; and first degree burglary. R. p. *(Indictments). On November 3, 2017, a Greenwood County Grand Jury indicted appellant for first degree assault and battery. R. p. *(Indictment).

Appellant proceeded to trial before the Honorable William P. Keesley and a jury, November 6 – 9, 2017. Tr. 1. Michael Gambrell represented appellant. Josh Thomas and Wade Dowtin represented the state. Tr. 1.

Appellant was convicted of discharging a firearm into a dwelling, failure to stop for a blue light, first degree burglary, and first degree assault and battery. R. p. *(Sentence sheets). Appellant was also convicted of three counts of second degree assault and battery as lesser included offenses of attempted murder. R. p. *(Sentence sheets). The jury found appellant not guilty of one count of possession of a firearm during the commission of a violent crime. Tr. 444, ll. 10-13.

This appeal follows.

STATEMENT OF FACTS

State's witness Xavier Harris had a child with appellant's sister and had seven charges pending at the time of his testimony. Tr. 165, ll. 1-3; Tr. 184, ll. 10-11; Tr. 206, l. 17 – 208, l. 3. Harris admitted he had two counts of second degree criminal domestic violence pending, but when asked if he was facing a third charge of domestic violence, he said, "I ain't sure about that." Tr. 209, l. 4 – 210, l. 2. Harris did, according to the solicitor. Tr. 207, ll. 24-25. Harris had also been convicted of dealing drugs. Tr. 202, l. 15 – 206, l. 8.

It was undisputed that appellant lived within two miles of his "baby sister" and would regularly visit her and her daughter, appellant's two-year old niece. Tr. 343, ll. 14-17; Tr. 344, l. 6 – 345, l. 15; Tr. 168, ll. 8-15; Tr. 170, ll. 2-4; Tr. 177, ll. 10-11; Tr. 229, l. 22 – 230, l. 3. Appellant regularly visited them three to four times a week. Tr. 345, l. 11 – 346, l. 7; Tr. 177, ll. 10-11.

On February 27, 2016, appellant was told Harris had been beating his sister again, and he went to speak with Harris at his sister's house. Tr. 346, l. 13 – 347, l. 2. Appellant testified that Harris had attacked his sister on "numerous occasions. This is not the first incident." Tr. 356, ll. 12-14. Appellant testified he knocked, his sister let him in, and he confronted Harris about abusing his sister. Tr. 346, l. 20 – 347, l. 5. Appellant admitted he woke Harris and punched him on the nose. Tr. 347, ll. 6-11.

According to Harris, he was asleep when appellant came in, woke him up, and hit him in the face. Tr. 186, l. 20 – 188, l. 25. Harris put peroxide and a band aid over the cut on his nose. Tr. 178, ll. 18-24. Harris claimed that before appellant left, he said he would shoot Harris, although appellant denied this claim. Tr. 347, ll. 13-18; Tr. 187, l. 22 – 188, l. 2. Harris said appellant left in a white Lincoln town car. Tr. 188, ll. 3-6.

Harris called the police and appellant was charged with burglary. Tr. 188, ll. 7-8.

Appellant's sister (hereinafter Ms. Bland) said that when appellant came over, he knocked, she opened the door and stood to the side, and appellant "just came right on in." Tr. 170, l. 12 – 171, l. 9. Ms. Bland testified that appellant did not push past her or rush past her. Tr. 171, ll. 4-5.

> Q. You—he pushed you out of the way is what you told us previously.
>
> A. No. He didn't—he didn't really push me, because I was really to the side. So he just came right on in.

Tr. 171, ll. 6-9.

Ms. Bland agreed that she had not invited appellant over, but said he came over all the time. She said appellant was welcome to come over when he wanted to. Tr. 169, l. 25 – 170, l. 8. Ms. Bland told Deputy Robertson that appellant was "uninvited," but she did not say his entry into the house was "unwanted." Tr. 221, ll. 7-9; Tr. 233, l. 21 – 234, l. 8.

The state argued the burglary was the basis for charging appellant with first degree assault and battery for punching Harris. Tr. 370, ll. 5-25; Tr. 422, ll. 16-18. In closing, the solicitor told the jury that if it found appellant "had consent to be in there, he didn't commit assault and battery first degree." Tr. 380, ll. 11-17.

At the close of the state's case, appellant moved for a directed verdict on the burglary, and argued the state had not produced evidence that appellant's entry into the house was without the consent of his sister, who was in lawful possession of the home. Tr. 317, l. 13 – 24. Counsel noted the testimony was that appellant "came over there and entered into her house the same way he had many, many times in the past." Tr. 318, ll. 1-2. "[S]he testified that he knocked, she opened the door, and she was sort of standing off to the side when he walked in. I believe that is conclusive with regard to he had her consent." Tr. 318, ll. 2-6.

The state argued that the sister's statement appellant was "uninvited" was sufficient to send the case to the jury. Tr. 319, ll. 10-18. The solicitor also cited *State v. Dixon*,[1] even though there had been no evidence appellant used fraud or deceit to enter. Defense counsel responded that there had been no evidence appellant tried to "trick" his sister to get into the house. Tr. 321, l. 12 – 322, l. 1. However, the court denied the directed verdict motion. Tr. 322, ll. 16-19.

Late the next night, someone fired several shots into appellant's sister's home. Tr. 191, ll. 6-12; Tr. 192, ll. 7-10. Harris, Ms. Bland, and her child were in the home but got on the floor and were fortunately unharmed. Tr. 192, ll. 14-19. The state alleged appellant shot into the home in retaliation for being charged with burglary, and insinuated that he thought his sister and niece were away from home during the shooting. Tr. 137, ll. 13-17; Tr. 360, ll. 11-13. Neither Harris nor Ms. Bland saw who did the shooting.

John Coleman, who lived next door, heard the shots and called 911. Tr. 151, ll. 4-5; Tr. 155, ll. 4-5. Coleman told the 911 operator that he did not see a car. Tr. 155, ll. 12-13. However, Coleman testified that after he heard the shots, he saw a white Mercury that was "like a" Continental or "Crown Vic." Tr. 152, l. 16 – 154, l. 17. When officers arrived, he told them he had seen a white car. Tr. 156, ll. 17-19.

After hearing Coleman saw a white car, Harris "made the assumption" it was appellant because of their "r[un] in[ ]" the previous day, and Harris told officers appellant was the shooter, although Harris had not seen the shooter or the car. Tr. 213, l. 1 – 214, l. 7. Police issued a "BOLO" for appellant's vehicle based on this information. Tr. 277, ll. 3-8. It was undisputed that appellant was seen shortly thereafter and failed to stop when signaled by police officers, and that a chase ensued for ten to fifteen minutes. Tr. 256, l. 14 – 258, l. 24; Tr. 277, ll. 6-11. Once the

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[1] *State v. Dixon*, 337 S.C. 455, 523 S.E.2d 784 (Ct. App. 1999).

car stopped, appellant was cooperative with the arrest on the outstanding burglary warrant. Tr. 258, ll. 19-20. There was no gun in his car. Tr. 228, ll. 14-16.

However, when officers attempted to collect a gunshot residue (GSR) kit from appellant in booking, appellant refused to consent. Tr. 278, ll. 2-4. Lieutenant Smith obtained a search warrant to swab appellant's person for gunshot residue and did so. Tr. 278, ll. 14-17. However, officers did not tell appellant they had a search warrant, and he continued to struggle. Tr. 365, ll. 2-5; Tr. 261, l. 23 – 262, l. 5; Tr. 286, ll. 14-22. Smith said their policy was not to read the search warrant to the suspect until after they had completed a search. Tr. 286, ll. 17-18. Four officers "had to physically force him to give it to us." Tr. 278, ll. 16-17.

The search warrant was made a court's exhibit. Tr. 278, ll. 5-6. R. p. *(Search warrant). The judge noted the "affidavit on the search warrant has some issues in it . . ." Tr. 91, l. 25 – 1.

On February 29th, Lieutenant Smith wrote in the warrant affidavit that the reason he was seeking to search appellant for GSR was that on February 28th, deputies

> responded to a shooting into the dwelling located at [redacted] Wheatfield Drive. Deputies had worked **an incident** on the 27th of February 2016 at this address involving **a subject** driving a white Lincoln and arrest warrants were signed. Deputies attempted to arrest the subject but could not locate. Shortly, the shooting incident took place at the same address and a neighbor witness a box style Lincoln leave the area. Deputies did locate the vehicle in the area and a vehicle pursuit started. Deputies did arrest the subject identified as Terrance Lee Bland.

R. p. *(Search warrant) (emphasis added).

Gunshot primer residue was ultimately found on appellant's left hand and on his sweatshirt.[2] Tr. 303, ll. 10-18; Tr. 305, l. 21 – 306, l. 5; Tr. 311, ll. 7-9.

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[2] Appellant's sweatshirt was taken without a search warrant from his property at the jail. Tr. 280, ll. 3-11.

Defense counsel moved to suppress the GSR kit evidence, arguing the magistrate did not consider the *Schmerber* factors[3] when it issued the search warrant, and that the search warrant affidavit was misleading. Tr. 63, ll. 13 – 66, l. 12; Tr. 72, l. 12-17. Defense counsel argued the GSR test was a bodily intrusion and the state failed to show factors that must be considered by the magistrate before issuing a warrant that authorized a bodily intrusion. Counsel cited *State v. Register* for the articulation of those factors. Tr. 87, l. 13 – 88, l. 17.

The court stated the intrusion on appellant was "minimal." Tr. 123, ll. 22-23. The trial court found that as an "issue of first impression," no search warrant was needed before performing a GSR test on appellant's person, and that alternatively, even if one was required, the search warrant obtained was proper. Tr. 123, l. 20 – 124, l. 5.

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[3] *Schmerber v. California*, 384 U.S. 757, 767 (1966).

ARGUMENT

1.

The trial court erred when it failed to direct a verdict of acquittal on first degree burglary where there was no substantial circumstantial evidence appellant entered the dwelling without consent.

Standard of review

"Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). "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." *Id.* at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." *Id.* at 139, 708 S.E.2d at 777; *see also State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

If the state failed to present any direct evidence or any **substantial circumstantial evidence** reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. *Hepburn*, 406 S.C. at 416, 753 S.E.2d at 409 (emphasis added); *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Discussion

The court erred in denying appellant's motion for a directed verdict on the burglary since the evidence in the light most favorable to the state was only that appellant had not been verbally invited in by his sister, where it was undisputed appellant visited his sister three to four times a week. Defense counsel was correct when he argued that whether appellant had been invited over to start with was irrelevant since appellant's sister allowed him in, as she always did.

S.C. Code Ann. §16-11-310(3) provides that "enters a building without consent" means to "enter a building without the consent of the person in lawful possession," or to "enter a building by using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession."

Ms. Bland said that appellant knocked, she opened the door and stood to the side, and appellant "just came right on in." Tr. 170, l. 12 – 171, l. 9. Despite the solicitor's attempts to lead her as a hostile witness, Ms. Bland testified that appellant did not push past her or rush past her. Tr. 171, ll. 4-5; Tr. 171, ll. 6-9.

It was undisputed appellant and his sister visited regularly and lived less than two miles apart. She was not surprised by his appearance or his entry. Ms. Bland said appellant came over all the time and was welcome to come over when he wanted. Tr. 169, l. 25 – 170, l. 8. She told police that on this occasion he was "uninvited," but she did not say his entry into the house was "unwanted." Tr. 221, ll. 7-9; Tr. 233, l. 21 – 234, l. 8.

The solicitor's reliance on *State v. Dixon*, 337 S.C. 455, 523 S.E.2d 784 (Ct. App. 1999), was erroneous, as defense counsel correctly pointed out there was no evidence appellant used fraud or trickery to get in the home.

Denial of a directed verdict motion is only proper where viewing the evidence in the light most favorable to the state, the evidence could induce a reasonable juror to find the defendant guilty. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016). "[I]n 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). Here, the evidence was insufficient to allow the jury to find appellant entered

his sister's home without consent beyond a reasonable doubt, and the court erred when it failed to direct a verdict of acquittal on this offense.

Because the evidence was insufficient to support a verdict of guilty on the burglary charge, appellant's conviction for first degree assault and battery must also be vacated, since burglary was an element of the offense relied upon by the state.

2.

The trial court erred where it ruled a search warrant was not needed for gunshot residue testing where the suspect refused to consent and where the judge erroneously ruled in the alternative that the search warrant obtained was valid since it did not specify how the prior incident provided probable cause to believe appellant was the shooter in this incident.

Standard of review

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court reviews questions of law *de novo*. *State v. Bash*, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). "As to a circuit court's finding of fact, we must affirm if there is any evidence to support it, and may reverse only for clear error." *Id.* (internal quotations omitted).

Discussion

The search warrant sought a bodily intrusion and was invalid as it did not provide sufficient information to constitute probable cause appellant was the person who shot into the home. The court's incorrect determination the state did not need a search warrant strongly shaded the judge's analysis in his alternative ruling that the search warrant, if needed, was valid.

The South Carolina Supreme Court has addressed the requirements of an order issued pursuant to South Carolina's search warrant statute[4] as it regards procuring "evidence from a person's body." *In re Snyder*, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992), held that the considerations for determining whether or not there exists probable cause to permit the acquisition of "involuntary nontestimonial identification evidence" are: "probable cause to believe the suspect has committed the crime;" "a clear indication that relevant material evidence will be found;" and "the method used to secure it is safe and reliable." "Additional factors to be

[4] S.C. Code Ann. § 17-13-140.

weighed are the seriousness of the crime and the importance of the evidence to the investigation. The judge is required to balance the necessity for acquiring [the] evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures." *Id*; *accord State v. Register*, 308 S.C. 534, 419 S.E.2d 771 (1992).

"An order issued pursuant to § 17-13-140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment." *State v. Baccus*, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006).

In seeking a GSR test on appellant regarding the shooting, the search warrant affidavit only said that three days before, police had responded to "an incident" involving "a subject" at the same address as the shooting. R. p. *(Search warrant). The affidavit did not say what the prior incident was, or how it was relevant to the shooting. It did not even specify that appellant was the suspect in the prior incident. This information was insufficient to provide "probable cause to believe the suspect has committed the crime" and "a clear indication that relevant material evidence will be found" pursuant to *Snyder* and *Register*.

As to the seriousness of the crime, the search warrant only specified "a shooting into the dwelling." This offense carries up to ten years imprisonment. While this offense is not minor, it is not as serious as a homicide.

There was not enough information provided in the affidavit to adduce the importance of the evidence to the investigation.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966); U.S. CONST. amend. IV. The Fourth Amendment constrains "against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768.

The United States Supreme Court in *Maryland v. King*, 569 U.S. 435, 446 (2013), found a buccal swab taken as part of a typical arrest procedure was a minimal intrusion. However, of note is the Court's reasoning that the process was in line with Fourth Amendment jurisprudence that allowed "police to take certain routine administrative steps incident to arrest—*i.e.*, booking, photographing, and fingerprinting." *Id.* at 461 (internal quotations and alterations omitted). "[T]here can be little reason to question the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." *Id.* (internal quotations omitted).

The United States Supreme Court found a bodily "intrusion undertaken" when a suspect's fingernails were scraped. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). It found a bodily intrusion where a person's inner cheek was swabbed. *Maryland v. King*, 569 U.S. at 446. *See also Terry v. Ohio*, 392 U.S. 1, 26 (1968) (pat-down of outer clothes "intrusion upon the sanctity of the person"). That a bodily intrusion was involved is apparent since four officers had to forcibly restrain appellant against his will to obtain the sample by swabbing his arms and hands. It is clear appellant did not wish the intrusion, as evidenced by his refusal and struggle that required officers "to physically force him to give it to us." Tr. 278, ll. 16-17. As noted above, officers did not tell appellant they had a warrant.

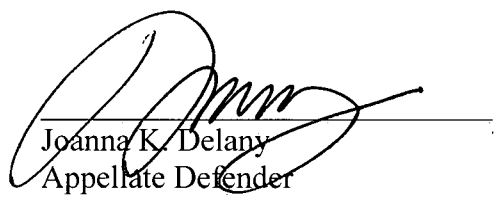
In *Jones v. State*, 74 A.3d 802, 805 (Md. Ct. App. 2013), police officers saw Jones leaving the scene of a shooting to which they had just been dispatched, and when they attempted to stop him, Jones pulled and pointed a gun at officers. While the Maryland Court of Special Appeals found no warrant was needed to perform a GSR test, it was determined there that the invasion of privacy was justified by "exigent circumstances" because of "how easily GSR

evidence can be destroyed." *Id.* at 813-14. However, the United States Supreme Court has held that the fact that a particular type of evidence is likely to disappear quickly does not create a *per se* exigency exception to the Fourth Amendment's warrant requirement. *See Missouri v. McNeely*, 569 U.S. 141, 165 (2013).

Appellant asserts the Fourth Amendment required a valid search warrant to obtain GSR evidence from his body, and that S.C. Code Ann. § 17-13-140 governed the matter. The trial court erred when it ruled authorities do not need a search warrant before attempting to obtain GSR from a suspect. The court further erred when it ruled that alternatively the search warrant was valid, given its deficiencies.

CONCLUSION

Based on the foregoing arguments, appellant requests this Court direct a verdict of acquittal on the offense of first degree burglary. Because burglary was a necessary element of first degree assault and battery, appellant requests this Court vacate his conviction and sentence for first degree assault and battery. Appellant requests this Court grant him a new trial on the offenses of discharging a firearm into a dwelling and the three counts of second degree assault and battery.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE L. BLAND,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Terrance L. Bland, 321793, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 16th day of November, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of November, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028