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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD AVON GREEN,

APPELLANT

Appellate Case No. 2011-199866

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the jury to consider an act that was not alleged in the one-count indictment for first degree burglary, when the trial court granted a directed verdict on the first degree burglary charge, and at the State's request, erroneously sent the common-law offense of attempted burglary to the jury as a lesser-included offense, thereby creating a structural due process defect that deprived Appellant of a fair trial?

STATEMENT OF THE CASE

On September 2, 2010, Appellant Richard Avon Green was indicted by the Sumter County Grand Jury for first degree burglary. R. 192.

On September 12, 2011, Appellant proceeded to trial before the Honorable Howard P. King and a jury. R. 1. Appellant was represented by Calvin Hastie, and the State was represented by Assistant Solicitor John P. Meadors. After the close of the State's case, defense counsel moved for a directed verdict. R. 130, l. 21 – 132, l. 17. The State then requested that the trial court also "consider the lesser included offense of attempted armed robbery." R. 136, ll. 2-7.

In response, the trial court stated, "I am convinced that *there is no evidence* in the record upon which the jury could convict [Appellant] of burglary in the first degree because *the evidence is simply not there for a showing of entry* which is one of the elements of [the] crime of burglary in the first degree." R. 145, ll. 1-6 (emphasis added). Yet, the trial court also ruled, "I am going to submit the case to the jury on the lesser included offense of attempted burglary in the first degree . . . and I will *charge the elements as an attempt . . . instead of actually requiring an entry.*" R. 146, ll. 16-21 (emphasis added).

On September 13, 2011, the jury found Appellant "on the charge of attempted burglary in the first degree guilty." R. 187, l. 24 – 188, l. 1. The trial court then sentenced Appellant to twenty years imprisonment. R. 189, ll. 4-8.

STATEMENT OF FACTS

Indictment

The one-count indictment charged Appellant with first degree burglary. R. 192. Specifically, the relevant text of the indictment alleged:

> That Richard Avon Green did in Sumter County on or about May 4, 2010 ***enter the dwelling*** of Rita Davis located at [address] without consent and with the intent to commit a crime therein and when, ***in effecting entry*** or while in the dwelling or in immediate flight and ***the entering*** or remaining occurred in the nighttime, **in violation of Section 16-11-0311(A)**, Code of Laws of South Carolina, 1976, as amended.

R. 193 (emphasis added). No request was made at trial to amend the indictment.

Motion for a Directed Verdict

After the close of the State's case, defense counsel moved for a directed verdict. R. 130, l. 21 – 132, l. 17. Defense counsel argued, "[O]ne of the four elements of burglary is [that] there must be an entry. And there's been no testimony whatsoever today that [Appellant] or anyone else actually entered into that house." R. 131, l. 24 – 132, l. 2. Defense counsel further argued, "I think [the State's case] fails on the elements itself because there never was an entry into Ms. Davis' home." R. 132, ll. 15-17.

The State then requested that the trial court also "consider the lesser included offense of attempted armed robbery." R. 136, ll. 2-7. The trial court replied, "I can't find a case on it as to whether it's a lesser included of attempting, and I wondered if that was going to be your argument that it wasn't indicted for attempted." R. 136, ll. 14-17. The trial court also noted, "[U]nder the statute 16-1-80 the offense of attempted is punishable by the principal offense. But the attempted, I guess the way this is indicted, it would have to be a lesser included and that may be a different issue all together." R. 136, ll. 17-22.

In response, defense counsel stated:

> Your Honor, I just think that the prosecutor is now scrambling trying to get something on this client. *I disagree with the attempted burglary.* I disagree with this man being accused of with - - the [South Carolina] code [of Laws] is very clear on the elements of the burglary. *There was no entry and I think that's clear.* And I just disagree with that to allow that for him to come back and say maybe there was some type of attempt.

R. 137, l. 25 – 138, l. 8 (emphasis added). The trial court then asked defense counsel, "What say you as to whether attempted burglary is a lesser included offense of burglary?" and defense counsel replied, "*I say not.*" R. 138, ll. 9-12 (emphasis added). Defense counsel further argued, "I disagree with attempted burglary and trial [for] burglary [in the] first [degree] and I just disagree with that issue at this time." R. 139, ll. 5-7.

The trial court contemplated, "I tend to agree with [defense counsel] that there's not even [an] element of an entry . . . But I think simply trying to open a door, it could have been attempt." R. 140, ll. 7-18. The trial court also revealed, "The only question that I do have ... [is] whether or not it would be attempted burglary as a lesser included offense and I want to think about that a little bit more." R. 140, l. 22 – 141, l. 3. The trial court subsequently directed a verdict of acquittal on the first degree burglary charge:

> I am convinced that *there is no evidence* in the record upon which the jury could convict [Appellant] of burglary in the first degree because *the evidence is simply not there for a showing of entry* which is one of the elements of [the] crime of burglary in the first degree. . . . *There's just not any circumstantial evidence which would show an entry.*

R. 145, ll. 1-15 (emphasis added). Yet, the trial court noted, "That does not end the inquiry because then we have to look and determine whether or not the crime of attempted burglary should go to the jury as a lesser included offense[.]" R. 145, ll. 15-18.

Although the trial court was unable to cite the case name or citation, the trial court proceeded to refer to a case regarding the applicability of lesser-included offenses. Specifically, the trial court elaborated, "[T]his particular case goes on to say that when an indictment for [a] greater offense [the] trial court has *the requisite jurisdiction to charge and convict* a defendant of any lesser included offense inconclusive of instruction is required only whether the evidence warrants such an instruction." R. 146, ll. 4-9 (emphasis added).

The trial court ultimately found, "[T]here's evidence in the record of attempted burglary and attempted opening of [the] front door and attempt to open the garage door but no entry if the jury believes that the testimony and that would be a jury determination." R. 146, ll. 9-15. The trial court then ruled, "I am going to *submit the case to the jury on the lesser included offense of attempted burglary* in the first degree . . . and I will *charge the elements as an attempt . . . instead of actually requiring an entry.*" R. 146, ll. 16-21 (emphasis added). In response, defense counsel attempted to put his continued objection on the record, "Your Honor, I would like to on the record propose ---" when the trial court interjected, "You don't have to do; you're protected. You've already – I understand your position and it's not necessary under our rules to take exception." R. 147, ll. 1-6.

The trial court subsequently informed the jury of his decision:

> Before I call on the lawyers for closing arguments I want to tell you that *the Court has directed a verdict as far as the crime of burglary* is concerned because the State in my view there is no evidence of all the elements of the crime of burglary. However, under the theory that lesser included offense is included in the greater offense the matter will be for your decision as to whether or not there was an attempted burglary in this case. And so that is what the issue that will be before you, *whether there is an attempted burglary in the first degree, and that is on the basis of the fact of legal principle that the lesser included offense of greater offense, lesser intent offense being attempted burglary as opposed to*

> *burglary* so that is the issue that will be before you and that is what counsel will argue to you at this time.

R. 149, l. 16 – 150, l. 7 (emphasis added).

In the State's closing argument to the jury, Assistant Solicitor Meadors argued, "We [the State] *don't have to prove entry. Attempt [is] all we have to do . . . We don't have to prove it . . . We're now going forward on attempted burglary.* We submit there's no doubt of that, much less a reasonable doubt." R. 165, ll. 1-9 (emphasis added). The State further argued, "It goes down to whether you believe *the State has proved an attempt to enter that house* with an act beyond mere preparation, pulling up the door, pulling up the garage. We submit the State has proved it. The word verdict means to speak the truth." R. 168, ll. 5-10 (emphasis added).

The trial court later charged the jury on the law of first degree burglary under S.C. Code Ann. § 16-11-311(a) (2010) followed by the law of attempt crimes. R. 170, l. 11 – 174, l. 11. After the trial court finished with jury instructions, the trial court asked defense counsel, "[O]ther than the fact that you disagree or take exception to the charge of attempted burglary in the first degree going to the jury at all which the record is noted on that and your position is protected, are there any additions or exceptions to the charge?" Defense counsel replied, "No, sir, Your Honor." R. 176, ll. 14-20.

Jury Notes and *Allen* Charge

During deliberations, the jury sent out two jury notes. The first note from the jury contained two questions: (1) "Was Mrs. Davis wearing her glasses that morning?" and (2) "What type of door was her outer door? Storm?" R. 177, ll. 8-9; R. 190 (Court's Exhibit #1). The second note from the jury stated, "We are split." R. 180, ll. 6-23; R. 191 (Court's Exhibit #2). With consent from the State and defense counsel, the trial court issued an *Allen*

charge[1] to the jury. R. 181, l. 5 – 185, l. 20. The jury subsequently found Appellant "on the charge of attempted burglary in the first degree guilty." R. 187, l. 24 – 188, l. 1. The trial court then sentenced Appellant to twenty years imprisonment. R. 189, ll. 4-8.

[1] *Allen v. United States*, 164 U.S. 492 (1896) (defining charge used to encourage a deadlocked jury to reach a verdict).

ARGUMENT

The trial court erred in allowing the jury to consider an act that was not alleged in the one-count indictment for first degree burglary, when the trial court granted a directed verdict on the first degree burglary charge, and at the State's request, erroneously sent the common-law offense of attempted burglary to the jury as a lesser-included offense, thereby creating a structural due process defect that deprived Appellant of a fair trial.

"In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.'" *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting *State v. Cody*, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense." *Id.* (citation omitted); *See* 41 Am. Jur. 2d *Indictments & Informations* § 252 (2005) (stating that one of the two ways an indictment can be improperly modified is through "a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment").

"[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994) (citations omitted). "A conviction under the latter circumstance violates principles of due process . . . because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged." *Id.* (citations omitted); *see* 41 Am. Jur. 2d *Indictments & Informations* § 256 (2005) ("A material variance that violates a defendant's substantial right to be tried only on charges

presented in an indictment constitutes fatal error and warrants a reversal on an appeal of a judgment of conviction of the offense not charged in the indictment.").

A. The trial court erred in sending the common-law offense of attempted burglary to the jury as a lesser-included offense of first degree burglary.

In this case, the one-count indictment charged Appellant with first degree burglary. R. 192; *See* S.C. Code Ann. § 16-11-311(a)(3). Specifically, the relevant text of the indictment alleged:

> That Richard Avon Green did in Sumter County on or about May 4, 2010 ***enter the dwelling*** of Rita Davis located at [address] without consent and with the intent to commit a crime therein and when, ***in effecting entry*** or while in the dwelling or in immediate flight and ***the entering*** or remaining occurred in the nighttime, **in violation of Section 16-11-0311(A)**, Code of Laws of South Carolina, 1976, as amended.

R. 193 (emphasis added). No request was made at trial to amend the indictment under S.C. Code Ann. § 17-19-100 (2010) ("Amendment of indictments; proceedings after amendment").

After the close of the State's case, defense counsel moved for a directed verdict. R. 130, l. 21 – 132, l. 17. Defense counsel argued, "[O]ne of the four elements of burglary is [that] there must be an entry. And there's been no testimony whatsoever today that [Appellant] or anyone else actually entered into that house." R. 131, l. 24 – 132, l. 2. Defense counsel further argued, "I think [the State's case] fails on the elements itself because there never was an entry into Ms. Davis' home." R. 132, ll. 15-17.

The State then requested that the trial court also "consider the lesser included offense of attempted armed robbery." R. 136, ll. 2-7. The trial court replied, "I can't find a case on it as to whether it's a lesser included of attempting, and I wondered if that was going to be

your argument that it wasn't indicted for attempted." R. 136, ll. 14-17. The trial court also noted, "[U]nder the statute 16-1-80 the offense of attempted is punishable by the principal offense. But the attempted, I guess the way this is indicted, it would have to be a lesser included and that may be a different issue all together." R. 136, ll. 17-22.

Notably, the trial court directed a verdict of acquittal on the first degree burglary charge:

> I am convinced that *there is no evidence* in the record upon which the jury could convict [Appellant] of burglary in the first degree because *the evidence is simply not there for a showing of entry* which is one of the elements of [the] crime of burglary in the first degree. . . . *There's just not any circumstantial evidence which would show an entry.*

R. 145, ll. 1-15 (emphasis added); *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) (holding "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

Yet, the trial court noted, "That does not end the inquiry because then we have to look and determine whether or not the crime of attempted burglary should go to the jury as a lesser included offense[.]" R. 145, ll. 15-18. The trial court ultimately found, "[T]here's evidence in the record of attempted burglary and attempted opening of [the] front door and attempt to open the garage door but no entry if the jury believes that the testimony and that would be a jury determination." R. 146, ll. 9-15. The trial court then ruled, "I am going to *submit the case to the jury on the lesser included offense of attempted burglary in the first degree* . . . and I will *charge the elements as an attempt . . . instead of actually requiring an entry*." R. 146, ll. 16-21 (emphasis added).

"In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses." *See State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) (citations omitted). "The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *See State v. Bland*, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1997) (citations omitted); *see also State v. Kirby*, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) (noting "[a]n indictment will sustain a conviction for a lesser included offense only if the lesser offense is included within the greater charged offense.").

Here, the one-count indictment charged Appellant with first degree burglary and contained absolutely no language regarding attempt. *See* § 16-11-311(a)(3) (replacing the prior common-law burglary statute in 1985 and dividing the offense into three degrees of burglary). The State also never moved to amend the one-count indictment. Therefore, the common-law offense of attempted first degree burglary does not constitute as a lesser-included offense of the statutory offense of first degree burglary because attempted first-degree burglary does not necessarily include all elements of first degree burglary. *See* S.C. Code Ann. § 16-1-80 (2003) ("A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense."); *see also State v. Reid*, 393 S.C. 325, 329-330, 713 S.E.2d 274, 276-277 (2011) (affirming "to prove attempt, the State must prove that the defendant has the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent" (citing *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)).

Notably, the trial court would have also directed a verdict of acquittal if Appellant had been indicted without the attempt language for second or third degree burglary under S.C. Code Ann. § 16-11-312, 313 (2010) because all three degrees of burglary require the element of entry. *See State v. Mathis*, 355 S.C. 87, 584 S.E.2d 366 (2003) (noting second degree burglary is a lesser-included offense of first degree burglary), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). As persuasive authority to the instant case, in *Hope v. State*, 328 S.C. 78, 81-82, 492 S.E.2d 76, 78-79 (1997), our Supreme Court compared § 16-11-311 (Supp. 1996) (first degree burglary) to S.C. Code Ann. § 16-13-170 (1976) (entering or *attempting* to enter a house without breaking).

The *Hope* Court "defined [§ 16-11-311], in pertinent part, as entering 'a dwelling without consent and with intent to commit a crime in the dwelling.'" *Id.* at 81, 492 S.E.2d at 78. The Court then "defined [§ 16-13-170], in pertinent part, as entering, without breaking, or *attempting to enter* any house or vessel, with intent to steal or commit any other crime." *Id.* The Court also defined "breaking" as "any act of physical force, however slight, whereby any obstruction to entering is forcibly removed." *Id.*, 328 S.C. at 82, n.7, 492 S.E.2d at 79, n.7 (citation omitted). The Court held that § 16-13-170 is *not* a lesser-included offense of first degree burglary "[b]ecause first degree burglary does not necessarily include all elements of 'entering [or attempting to enter] without breaking[.]'" *See Cody*, 180 S.C. at 423, 186 S.E.2d at 167-68 (finding "[i]t is manifest that these are two separate and distinct offenses. They are not the same in law or fact, and involve different acts of wrongdoing. Proof of one does not prove the other or warrant a conviction therefor.").

The indictment apprised Appellant that he had to defend only against the allegation that he "on or about May 4, 2010 *enter the dwelling* of Rita Davis . . . without consent and with the intent to commit a crime therein and when, *in effecting entry* or while in the dwelling or in immediate flight and *the entering* or remaining occurred in the nighttime." R. 193 (emphasis added); *See Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) ("The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.,* to apprise him of the elements of the offense and to ***allow him to decide whether to plead guilty or stand trial***, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.") (emphasis added). The trial court's decision to submit the common-law offense of attempted first degree burglary constituted a material variance between the State's evidence and the allegations in the indictment. *See Gunn*, 313 S.C. at 136, 437 S.E.2d at 82.

The trial court thus created a structural due process defect that deprived Appellant of a fair trial when the trial court granted a directed verdict on the first degree burglary charge, and at the State's request, erroneously sent the common-law offense of attempted burglary to the jury as a lesser-included offense. Accordingly, the trial court erred in allowing the jury to convict Appellant of an act that was not alleged in the one-count indictment for first degree burglary.

B. Even if the common-law offense of attempted first degree burglary is a lesser-included offense of first degree burglary, the trial court improperly "enlarged" the indictment by instructing the jury that it could convict Appellant of a crime not alleged in the indictment.

In *Bailey v. State*, 392 S.C. 422, 709 S.E.2d 671 (2011), Bailey argued that the PCR judge erred in denying his PCR claim that trial counsel was ineffective in failing to object to supplemental jury instructions that allowed the jury to convict him for an act that was not

alleged in the indictment. In *Bailey*, 392 S.C. at 434-35, 709 S.E.2d at 677-78, our Supreme Court agreed with the reasoning presented in *Castillo v. State*, 7 S.W.3d 253 (Tex. Ct. App. 1999), and applied the analysis of the Texas Court of Appeals to the facts in that case. "In *Castillo*, the defendant was charged with the felony offense of intentionally and knowingly causing serious bodily injury to a child and convicted of the lesser-included offense of reckless injury to a child pursuant to section 22.04(a)(1) of the Texas Penal Code." *Id.* at 434, 709 S.E.2d at 677.

Notably, "[i]n prefacing its analysis, the Texas Court of Appeals noted that '[b]y including a more specific description, the State undertook the burden of proving the specific allegations to obtain a conviction.'" *Id.* "On appeal, Castillo raised several issues, including an argument that the trial judge egregiously erred by adding, through a lesser-included offense charge, a theory of prosecution ("shaking") that was not supported by the indictment. Id. at 254." *Id.*, 392 S.C. at 435, 709 S.E.2d at 678. The *Bailey* Court agreed with the following reasoning: "The Texas Court of Appeals agreed with Castillo's argument, finding the trial court erred in 'enlarging' the indictment by adding 'shaking' as an additional manner and means of committing the charged offense. Id. at 260. In so ruling, the court recognized that a defendant may only be tried and convicted of the crimes alleged in the indictment and the State is bound by the theory alleged in the indictment. Id. at 258-59." *Id.*

Applying this analysis to the facts in *Bailey*, the Supreme Court held, "[T]he trial judge's instructions improperly 'enlarged' the indictment by instructing the jury that it could convict Bailey of a crime not alleged in the indictment." *Id.* The *Bailey* Court further held, "Such an instruction was in direct contravention of the specific act alleged in

the indictment and, thus, constituted a material variance or a 'constructive amendment' to the indictment." *Id.* Consequently, the *Bailey* Court found "that Bailey was prejudiced by counsel's deficient performance." *Id.*, 392 S.C. at 437, 709 S.E.2d at 679.

In this case, the State never moved to amend the indictment to include any allegation of Appellant "attempt(ing) to enter" the dwelling. Same as in *Castillo*, "[b]y including a more specific description, the State undertook the burden of proving the specific allegations to obtain a conviction." 7 S.W.3d at 255. Applying the analysis of *Castillo* to the facts of the instant case, even if the common-law offense of attempted first degree burglary is a lesser-included offense of first degree burglary, the trial court improperly "enlarged" the indictment by instructing the jury that it could convict Appellant of a crime not alleged in the indictment. *See Bailey*, 392 S.C. at 434-35, 709 S.E.2d at 677-78; *see also Castillo*, 7 S.W.3d 253. Thus, the jury convicted Appellant of an unindicted crime, as the jury found evidence of attempted first-degree burglary rather than the specifically alleged act of entry into the dwelling.

C. The trial court's error is unduly prejudicial and cannot be harmless because trial court created a structural due process defect that deprived Appellant of a fair trial.

"[O]ur appellate courts have consistently held that a trial court should only be reversed when an error is prejudicial and not harmless." *State v. White*, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006). "The determination of prejudice must be based on the entire record[,] and the result will generally turn on the facts of each case." *State v. Sweat*, 362 S.C. 117, 128-29, 606 S.E.2d 508, 514 (Ct. App. 2004) (internal citation and quotation marks omitted). An error is harmless if it could not have reasonably affected the result of the trial. *State v. Key*, 256 S.C. 90, 93-94, 180 S.E.2d

888, 889-90 (1971).

Here, the trial court directed a verdict of acquittal on the one-count indictment for first degree burglary. R. 145, ll. 1-15. Yet, the trial court found that common-law offense of attempted burglary was lesser-included offense of first degree burglary and ruled, "I am going to submit the case to the jury on the lesser included offense of attempted burglary in the first degree . . . and I will charge the elements as an attempt . . . instead of actually requiring an entry." R. 146, ll. 16-21.

The trial court subsequently informed the jury of this decision:

> Before I call on the lawyers for closing arguments I want to tell you that *the Court has directed a verdict as far as the crime of burglary* is concerned because the State in my view there is no evidence of all the elements of the crime of burglary. However, under the theory that lesser included offense is included in the greater offense the matter will be for your decision as to whether or not there was an attempted burglary in this case. And so that is what the issue that will be before you, *whether there is an attempted burglary in the first degree, and that is on the basis of the fact of legal principle that the lesser included offense of greater offense, lesser intent offense being attempted burglary as opposed to burglary* so that is the issue that will be before you and that is what counsel will argue to you at this time.

R. 149, l. 16 – 150, l. 7 (emphasis added).

Furthermore, in the State's closing argument to the jury, Assistant Solicitor Meadors argued, "We [the State] *don't have to prove entry. Attempt [is] all we have to do . . . We don't have to prove it . . . We're now going forward on attempted burglary.* We submit there's no doubt of that, much less a reasonable doubt." R. 165, ll. 1-9 (emphasis added). The State also argued, "It goes down to whether you believe *the State has proved an attempt to enter that house* with an act beyond mere preparation, pulling up the door, pulling up the garage. We submit the State has proved it. The word verdict means to speak the truth." R.

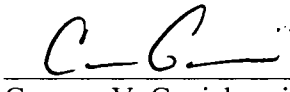
168, ll. 5-10 (emphasis added).

The trial court subsequently charged the jury on the law of first degree burglary under S.C. Code Ann. § 16-11-311(a) (2010) followed by the law of attempt crimes. R. 170, l. 11 – 174, l. 11. During deliberations, the jury sent out two jury notes. The first note from the jury contained two questions: (1) "Was Mrs. Davis wearing her glasses that morning?" and (2) "What type of door was her outer door? Storm?" R. 177, ll. 8-9; R. 190 (Court's Exhibit #1). The second note from the jury stated, "We are split." R. 180, ll. 6-23; R. 191 (Court's Exhibit #2). With consent from the State and defense counsel, the trial court issued an *Allen* charge to the jury. R. 181, l. 5 – 185, l. 20. Accordingly, the trial court's error is unduly prejudicial and cannot be harmless because trial court created a structural due process defect that deprived Appellant of a fair trial.

CONCLUSION

For the forgoing reasons, Appellant Richard Green respectfully requests that this Court reverse his conviction and sentence for the unindicted crime of attempted first degree burglary and remand this case to the Sumter County Court of General Sessions.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of May, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

May 24th, 2013

Carmen V. Ganjehsani
Appellate Defender

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THE STATE,

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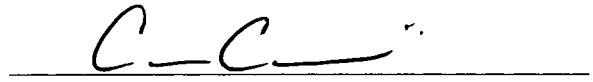
RICHARD AVON GREEN,

APPELLANT

Appellate Case No. 2011-199866

CERTIFICATE OF SERVICE

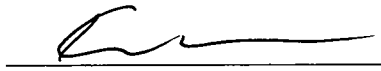
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of May, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.