STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD AVON GREEN,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

In South Carolina, an attempt to commit a felony is a lesser included offense of the completed felony; evidence supports the jury's verdict that Appellant is guilty of attempted burglary in the first degree; and the Court of General Sessions has subject matter jurisdiction over the offense of attempted burglary in the first degree.

STATEMENT OF THE CASE

Appellant Green was indicted for burglary in the first degree. He proceeded to jury trial before the Honorable Howard P. King. Judge King granted directed verdict on the burglary charge on the basis that there was no evidence of an entry into the dwelling, but submitted the charge of attempted burglary in the first degree to the jury. The jury convicted Green of this charge and Judge King sentenced Green to twenty years' imprisonment.

STATEMENT OF FACTS

Victim was home alone. Her husband was working and so his truck was not in the driveway. At about 1:30 a.m., someone rang the doorbell. She peered through the keyhole and saw a man walking away. She then heard the man try and open the garage door, she could hear the garage door going up on its runner. But he was unable to open it. The man walked past her window and she could see it was Green. She knew Green for a long time, she grew up with him in the community and went to the same school. Her brother and Green were the same age. She retrieved her phone and her gun. When she tried to use the phone, it was dead. She was scared. Green started pulling on the front door and she contemplated shooting through the door at him, but refrained. She fired out

of the back door four times in hopes of scaring him away. She realized she left her cell phone in the car, but did not want to go outside in case Green was still there. She waited until 4 a.m., when she knew her neighbor would be going to his truck to leave for work. She attracted the neighbor's attention by turning her porch lights on and off. He escorted her to her car so she could call law enforcement from her cell phone. ROA. pp. 29-45.

The garage door was completely closed when she went to bed, but was two inches off the ground the next morning. ROA. pp. 46-47. She testified the Green never actually entered the house. ROA. p. 64.

Tyrone Mack was the neighbor who helped Davis. He testified that she got his attention when he went out to his truck by turning the porch lights on and off. She told him Richard Green was trying to break into her house. ROA. pp. 77-78.

Deputy Shawn DeBerry responded to Victim's residence and found Victim visibly upset and apprehensive about coming out of her house. She gave a description of Green's clothes and his goatee and informed DeBerry that she recognized the man trying to break into her house and it was Green. ROA. pp. 86-89.

Investigator Gardner testified he took pictures of the severed phone line. Victim's husband advised Gardner that one of the wheels had come off the garage door, but he had fixed it. ROA. p. 110, p. 120.

ARGUMENT

In South Carolina, an attempt to commit a felony is a lesser included offense of the completed felony; evidence supports the jury's verdict that Appellant is guilty of attempted burglary in the first degree; and the Court of General Sessions has subject matter jurisdiction over the offense of attempted burglary in the first degree.

Appellant Green complains the trial court erred in charging attempted first degree burglary to the jury after the trial court directed a verdict on first degree burglary. Green argues the charge should not have gone to the jury because it amounted to a material variance from the indictment.[1] The argument is premised on the mistaken belief that an attempt is not a lesser included offense of the completed offense. Green fails to cite the case that settled this issue and controls the result in the instant case, State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981).

In Hiott, the trial court found insufficient proof that any goods or monies were taken in a prosecution for armed robbery. However, the trial court elected to submit the charge of attempted armed robbery to the jury. Hiott argued that attempted armed robbery was not a lesser included offense of armed robbery and that the indictment was rendered insufficient once reference to the alleged stolen item, a toothbrush, was stricken from the indictment. Our state supreme court opined as follows: "Defendants contend that an

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[1] Alarmingly, Green cites case law to the effect that the language of an indictment goes to subject matter jurisdiction, citing State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002). This line of cases was explicitly overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (subject matter is the power of a court to hear a particular class of cases). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. at 101, 610 S.E.2d at 499. General Sessions undoubtedly has jurisdiction to hear trials for an attempted burglary.

attempted offense is not lesser included in the completed offense because in-completion of the offense is, in itself, a separate and distinct element. Defendants cite no support for this position and we find no logic in it." Id., 276 S.C. at 80, 276 S.E.2d at 166. The Court affirmed the conviction. Id.; see William Shepard McAninch, W. Gaston Fairy, and Lesley M. Coggiola, The Criminal Law of South Carolina at 45 (5th Ed. 2007) (Citing Hiott and concluding: "It would appear that the attempt to commit any felony would be a lesser included offense of that felony.").

Attempt crimes are specific intent crimes that require the State to prove the defendant's specific intent coupled with an overt act, beyond mere preparation and in furtherance of that intent, and the actual or present ability to complete the crime. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." State v. Quick, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942); see Hiott, ("'[I]t must appear that the circumstances were such that the crime would have been robbery had the attempt been successful.' 77 C.J.S. Robbery § 61.").

Green's quote of Thomason v. State, 892 S.W.2d 8 (Tex. Crim. App. 1994) is facially appealing in isolation, but Thomason has scant application to the instant case. In Thomason, the defendant was charged for theft of at least $20,000, without alleging a continuous course of conduct in the indictment. The theft occurred over the course of several months and involved receipt by the defendant of ten different checks based on invoices he submitted for non-existent computer equipment. The defendant argued Texas should have been required to elect between one of the ten transactions to proceed on since the indictment did not allege an aggregated theft. The case did not involve an attempted

offense. Id.

Burglary in the first degree is committed when a "person enters the dwelling of another without consent and with intent to commit a crime in the dwelling," and one of several enumerated aggravating circumstances exists. S.C. Code § 16-11-311. In the instant case, the aggravating circumstance was the incident occurred in the nighttime. § 16-11-311(A)(3).

In the instant case, Green was identified by Victim, who knew him all too well, she grew up with him and went to the same school. She testified he rang the doorbell, then went to the garage and pulled on the door, leaving it lifted from the ground and breaking a wheel in the process. Then he pulled on the front door and ceased attempting to break in only after she fired four shots out the other door.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must put the evidence in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). Evidence abundantly supports that Green was attempting to enter the dwelling, although he was unsuccessful. Green's attempt to enter the dwelling with such abundant force at such an early hour creates a reasonable inference for the jury that Green intended to commit a crime in the dwelling. State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (The intent of an act by the accused may be proven by the expressions or conduct of the accused

in light of the given circumstances). Accordingly, the charge was properly submitted to the jury.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

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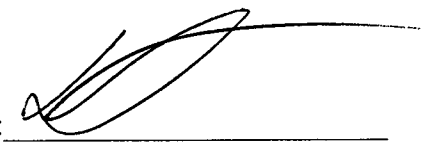

BY: _____
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ATTORNEYS FOR RESPONDENT

June 12, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

THE STATE, Respondent,

vs.

RICHARD AVON GREEN, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
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By: _____
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THE STATE, RESPONDENT,

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RICHARD AVON GREEN, APPELLANT.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Carmen V. Ganjehsani, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 12th day of June, 2013

NORMA BIGBEE
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ALAN WILSON
ATTORNEY GENERAL

June 12, 2013

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **The State v. Richard Avon Green**
Appellate Case No: 2011-199866

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** in the above matter for filing in your office. By copy of this letter we are serving David Alexander, Esquire with this brief today.

Sincerely,

David Spencer
Assistant Deputy Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: Carmen V. Ganjehsani, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)