

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARVIN XAVIER PORCHER,

APPELLANT

APPELLATE CASE NO. 2013-001620

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in not granting Appellant Porcher's directed verdict motion when the state did not prove he committed burglary by entering the home of Nancy Wohlberg without her permission when there was no forensic evidence he had been in the home, no eyewitness, and Porcher claimed he obtained the victim's laptop computer from someone on the street?

STATEMENT OF THE CASE

On July 8, 2013, the Charleston County Grand Jury indicted Marvin Xavier Porcher on the charge of burglary first degree. On July 18-19, 2013, Porcher proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Porcher was represented by William Ted Smith and Jason King. The state was represented by Tyler Whitaker and Jennifer Shealy. The jury returned a verdict of guilty as indicted. Judge Jefferson sentenced Porcher to the minimum sentence of fifteen years. Porcher's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Nancy Wohlberg was a neighbor of Marvin Porcher and his girlfriend, Cassie, as they lived next door to each other in a mobile home development. Nancy and Cassie also worked together as security guards. On November 2, 2011, Cassie and Porcher ate dinner with Nancy and her friend, Kenny, as Porcher was going to give Nancy a tattoo at her request. During that time, Nancy recalled that Porcher asked to use her laptop computer to check his Facebook account which he did. The next night, November 3, 2013, Nancy and Cassie decide to go out. Nancy paid Porcher for some repair work he did on her home, and he promptly gave the money to Cassie before they left. R. 23, ll. 12 – R. 33, ll. 3; R. 74, ll. 1 – 25; R. 76, ll. 1-25; R. 78, ll. 1-25; R. 80, ll. 1 – R. 85, ll. 25.

While they were out, Nancy received a phone call from the North Charleston police who asked if she had reported a burglary as they had her laptop computer. Nancy said she left her laptop on her bed. She met the police at her home, and discovered that her roommate's television was missing as well as some jewelry boxes which included some of her grandmother's jewelry. When the police told her they found the laptop and jewelry on Porcher, she and Cassie were shocked. R. 86, ll. 2 – R. 97, ll. 7.

Officer Fernando Salgado was working from five p m to one a.m. on November 3-4, 2011 patrolling an area around Stall Street in North Charleston. R. 34, ll. 1 – R. 36, ll. 12. He saw a person on a bicycle and noticed the bicycle did not have a rear blinking light. He turned around and stopped the bicyclist to tell him he needed a rear light. R. 37, ll. 1 – R. 40, ll. 25.

Officer Salgado recognized the man who told his name was Marvin Swinton. Officer Salgado knew this was wrong so he asked for the man's ID who did not give it to

him. When the officer called in and checked, there was nothing under the name Marvin Swinton in South Carolina or New York as Porcher told him he was from New York. Officer Salgado noticed a bulge in the man's jacket and the man appeared sweaty and nervous. Officer Salgado then asked for consent to search and the man consented. The officer found a laptop on the man as well as the man's wallet with his ID which had the name Marvin Porcher. Jewelry including a pearl necklace which Nancy Wohlberg had described were found in Porcher's pocket. According to the officer, Porcher told him he was going to a friend's house to get on the internet. Also found on Porcher were tools including a razor knife, a wrench, an Allen wrench, and a zip tie. Because he had given the officer a false name, Porcher was arrested for providing false information to the police. R. 41, ll. 1 – R. 48, ll. 14.

When they arrived at city hall in the detective unit, Detective Mark Evans came to talk to Porcher. Porcher was also arrested for possession of stolen property. R. 48, ll. 1 – R. 50, ll. 16. Porcher pled guilty to the two charges of providing false information to police and possession of stolen property in municipal court. R. 53, ll. 1 – R. 55, ll. 13

Detective Mark Evans interviewed Porcher who said he wanted to talk to the detective. Porcher told Detective Evans that Porcher purchased the laptop from a man on the street—Remount Road. He did not provide a name or description of the man. The detective opened the computer and learned it belonged to Nancy Wohlberg. He then called her Porcher denied any involvement in the theft of any of the property. The detective recorded the interview but it could not be found. R. 56, ll. 22 – R. 68, ll. 24.

Detective Evans admitted on cross examination that he did not follow up in any way on the information that Porcher provided to him. R. 69, ll. 14 – R. 72, ll. 24.

Deputy Gilbert Baldwin of the Charleston County Sheriff's Department, was dispatched to the home of Nancy Wohlberg on November 4, 2011. He and a police officer were the first to enter the home. He discovered that the rear door had been pried open from the outside which was the point of entry. He testified that many different metal items that were small enough to fit in the door of the jam could be used to pry open such a door. They determined that the missing items were the television from the roommate's room, jewelry boxes and items of jewelry, and the laptop computer. He also searched the next door home of Porcher and Cassie but found nothing. R. 109, ll. 17 – R. 122, ll. 9.

Kathy Kjellman worked as a forensic services investigator with the Charleston County Sheriff's Office, and was dispatched to the home of Nancy Wohlberg on November 4, 2011 to search for forensic evidence. She found two finger prints from a space heater that was in front of the dresser where the television had been. However, these prints were insufficient for identification. The other print was insufficient for SCAFIS which was the South Carolina Automated Fingerprint Identification System. R. 123, ll. 14 – R. 130, ll. 25.

On cross examination, Deputy Kjellman admitted that she did not process the laptop for fingerprints. She found no trace evidence, no DNA; she found only the two prints on the heater. R. 131, ll. 8 – R. 135, ll. 15.

Sarah Lippe, of the Clerk of Court's Office, testified to the two previous convictions for burglary for Porcher. Both were guilty pleas. One was burglary second degree from November 2005 with a conviction date of May 24, 2006. The second one was for a burglary third degree from November 2005 with a conviction date of May 24, 2006. R. 136, ll. 24 – R. 141, ll. 25.

At the close of the state's case, defense counsel moved for a directed verdict on the basis that the state failed to prove Porcher committed burglary because there was no evidence that he entered the home. There were no eyewitnesses, and no forensic evidence. Counsel argued that Porcher had pled guilty to receiving stolen goods and providing false information. Counsel said; "We believe that that is what this case is and should have been resolved for." Counsel argued that the state did not meet their burden of proof for burglary. R. 142, ll. 10 – R. 143, ll. 11.

The state argued that they had proven entry which was most likely made with a tool "consistent with the ones found on his person," and the proximity of time and the short distance from the victim's home and the fact that he had the goods from the home on him. R. 143, ll. 12 – 21.

The judge denied the directed verdict motion by finding there was substantial circumstantial evidence reasonably tending to prove the defendant's guilt. R. 143, ll. 22 – R. 145, ll. 12.

Defense counsel moved again for a directed verdict on the same grounds at the close of the defense case although the defense presented no evidence. R. 146, ll. 7 – 17. After the verdict, defense moved for a new trial and directed verdict. The judge denied both. R. 177, ll. 12 – 178, ll. 6.

ARGUMENT

The trial court erred in not granting Appellant Porcher's directed verdict motion when the state did not prove he committed burglary by entering the home of Nancy Wohlberg without her permission when there was no forensic evidence he had been in the home, no eyewitness, and Porcher claimed he obtained the victim's laptop computer from someone on the street.

In State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004), the Supreme Court held that in cases where the state has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. Only if the state has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, then the Supreme Court must affirm the trial court's decision to submit the case to the jury. Id.

S.C. Code Section 16-11-311(A) provides: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling."

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the Supreme Court reversed finding there was not substantial circumstantial evidence for a conviction and the trial court erred in refusing to direct the verdict. Odems was convicted of burglary first degree along with other charges. The evidence presented against Odems was circumstantial and consisted of: (1) less than 90 minutes after the burglary, police found Odems in the getaway car with the burglars and the stolen goods; (2) Odems fled from the police; (3) Odems asked an uniformed person to lie for him to the police. An eyewitness saw only two people at the

crime scene; fingerprints found at the scene did not match Odems; and a co-defendant said Odems did not participate.

Appellant Porcher's case is similar to Odems in that the stolen goods were found on Porcher; and Porcher lied to the police. No fingerprints were found that matched Porcher. Although he did not have a co-defendant testifying, Porcher had a reasonable explanation for having the stolen goods. However, Porcher's case is distinguished in that he did not run from the police but was willing to talk to them.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court again reversed the case by finding that the trial court erred in not directing a verdict because the state presented insufficient circumstantial evidence to submit the murder charge to the jury. The evidence against Bostick was: (1) the victim's personal items were found in a burn pile in a neighboring home owned by the defendant's mother; (2) a heavy petroleum product was used as an accelerant in the burn pile and the defendant's mother testified she did not use such accelerants; (3) a pattern of gasoline was found on the defendant's shoes and was used as an accelerant to start a fire in the victim's home after her assailant struck her; (4) blood found on the defendant's jeans and the DNA expert could exclude 99 percent of the population although she could not conclusively state the blood was the victim's.

In State v. Green, 406 S.C. 589, 753 S.E.2d 259 (Ct. App. 2014), the Court of Appeals held that attempted first degree burglary was a lesser included charge of first degree burglary. Green was charged with first degree burglary, and the trial court held "there was no evidence in the record upon which the jury could convict Green of burglary first degree because the evidence was simply not there for a showing of entry which is one of the elements of the crime of burglary in the first degree." The trial court granted the directed

verdict on first degree burglary but submitted the case to the jury on attempted first degree burglary which did not require an entry. The Court of Appeals affirmed the trial court.

In Porcher's case, there was no evidence presented that Porcher entered the home of Nancy Wohlberg without her consent. There was no evidence of his entry. The officer checked the door for prints where the lock was broken, but no prints were found. There is less evidence against Porcher than in the case of Odems. The trial court should have directed the verdict of first degree burglary because the state did not prove the elements of the offense which required entry. The most the state could prove against Porcher was being in possession of stolen goods and providing false information to the police. Porcher's explanation that he bought the items from a man on the street was reasonable, and it was reasonable that he gave a false name if he thought the items may have been stolen.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

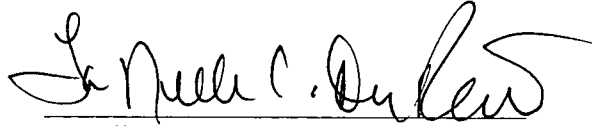
ATTORNEY FOR APPELLANT

This 31st day of July, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 31st, 2014

A handwritten signature in black ink, appearing to read "LaNelle C. DuRant", written over a horizontal line.

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STATE OF SOUTH CAROLINA

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Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

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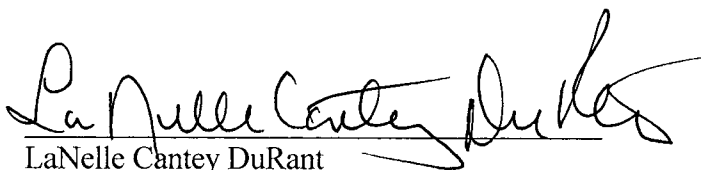
V.

MARVIN XAVIER PORCHER,

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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 William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, at this 31st day of July, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of July, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.