

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAMONT SELDON,

APPELLANT

APPELLATE CASE NO 2019-000592

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

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ATTORNEY FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial court erred in failing to direct a verdict in Appellant’s favor on the charge of second degree burglary, where the state presented no evidence to corroborate the homeowner’s claim that Appellant was in his home with the intent to commit a crime.4

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL8

TABLE OF AUTHORITIES

Cases

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) 3

State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006)..... 5

State v. Hepburn, 406 S.C. 416 753 S.E.2d 402 (2013) 3

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000)..... 3

State v. Weston, 367 S.C. 279, 625 S.E.2d 641(2006)..... 5

Statutes

S.C. Code Ann. § 16-11-312(A)..... 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to direct a verdict in Appellant's favor on the charge of second degree burglary, where the state presented no evidence to corroborate the homeowner's claim that Appellant was in his home with the intent to commit a crime?

STATEMENT OF THE CASE

Appellant was indicted by an Horry County grand jury on November 17, 2016 for burglary in the second degree. R. 92. He proceeded to trial before the Honorable Steven H. John and a jury on April 3, 2019. R. 1. James D. Stanko represented Appellant; Christopher D. Helms appeared on behalf of the state. After a one-day trial, the jury found Appellant guilty as indicted. R. 85, ll. 10 – 14. Judge John sentenced Appellant to ten years' incarceration suspended upon the service of five years. R. 89, l. 12 – R. 90, l. 4.

This appeal follows.

STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “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, [an appellate 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, 429 S.E.2d at 409.

ARGUMENT

The trial court erred in failing to direct a verdict in Appellant's favor on the charge of second degree burglary, where the state presented no evidence to corroborate the homeowner's claim that Appellant was in his home with the intent to commit a crime.

Relevant facts

On August 29, 2016, Richard Harrelson saw a man standing in his house holding a sander and skill saw. R. 47, l. 1 – R. 50, l. 25. Harrelson was in the process of renovating his home. Id. Harrelson hit the man three times with a paint roller before the man dove out of the house and away from the property. Id.; R. 53, l. 25 – R. 54, l. 9. Harrelson then called 911; an officer arrived and arrested the man. Id. During Appellant's trial, Harrelson identified him as the man who was inside his house. Id.

Harrelson did not inform law enforcement about Appellant allegedly holding the two power tools. R. 54, ll. 10 – 19. He remembered to advise the officer of his successful attempt to "beat [Appellant] with [the paint] roller." R. 54, ll. 3 – 22. Notably, at the time of his trial, Appellant was down to "about nine percent of his cardiac muscle being actually functioning." R. 88, l. 14 – R. 89, l. 9. A potential juror was excused from his trial because she had treated him at the hospital with regards to his pacemaker. Nonetheless, Harrelson compared Appellant's dive out the window to that of an Olympic diver. R. 54, ll. 3 – 9.

Harrelson's daughter, Tammy, testified at Appellant's trial as well. She indicated that she was with him ten minutes before he supposedly found Appellant in his home. R. 57, ll. 9 – 23. By the time she arrived at Harrelson's house, law enforcement had already arrived and

stopped Appellant on the street. Id. She offered no testimony regarding Appellant's alleged entry into the home or brief possession of two power tools.

Vili Schwenke, an officer with the City of Conway Police Department, arrived at Harrelson's house in response to the call. R. 34, ll. 1 – 24. He arrested Appellant based on Harrelson's description and charged him with burglary in the second degree. R. 34, l. 25 – R. 35, ll. 20. Appellant was taken to the Horry County jail. R. 40, ll. 8 – 11.

After the state presented the testimony of these three witnesses during its case-in-chief, Appellant moved for a directed verdict. R. 59, l. 24 – R. 61, l. 1. The trial judge denied the motion. R. 61, l. 2 – R. 62, l. 11. Appellant renewed his motion before the jury was charged. R. 66, ll. 19 – 20. The trial court again denied the motion. R. 66, l. 21 – R. 67, l. 4.

Discussion

“A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged.” State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). A trial court considering a motion for directed verdict is concerned with the existence or nonexistence of evidence, not with its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). “A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.” S.C. Code Ann. § 16-11-312(A).

Schwenke failed to corroborate Harrelson's contentions. As a result, the unsubstantiated allegations were insufficient to send the case to the jury. On cross-examination, Schwenke admitted that he arrested Appellant after Harrelson pointed him out. R. 42, ll. 6 – 11. Other than Harrelson's verbal claim, Schwenke did nothing to investigate or verify the assertion that Appellant had been in the house. Schwenke straightforwardly remarked that he did not take any

pictures. R. 42, l. 12 – R. 43, l. 23. He did not go into Harrelson's home. He did not take any fingerprints. He did not check for DNA. Id.

No video surveillance was available in the area. Id. Further, Schwenke did not request that the Conway Police Department's Crime Scene Unit send a crime scene specialist to the scene. Id. Schwenke noted that he had the ability to investigate further but did not do so. Id. Additionally, Schwenke's report did not contain any mention of Appellant holding tools in Harrelson's home. R. 45, ll. 10 – 12. As such, Schwenke never confirmed that a sander and skill saw were present in the home.

The case should not have been sent to the jury. The Conway Police Department did not conduct any sort of follow-up investigation, and the evidence as a result was insufficient to survive the directed verdict stage.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction based upon the trial court's error in failing to direct a verdict in his favor.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2020.

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IN THE COURT OF APPEALS

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Counsel for Lamont Seldon states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Steven H. John, which was held on April 3, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Lamont Seldon.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of January, 2020.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire trial transcript dated April 3, 2019.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 02, 2020



Taylor D Gilliam
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

January 02, 2020.



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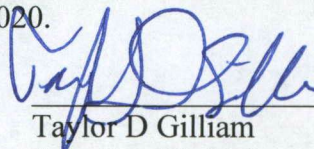
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Lamont Seldon, 379729, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of January, 2020.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2020.

Mary Algire (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2027.