

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2019-000355

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SC Court of Appeals

THE STATE,

Respondent,

v.

BEN REED, IV,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

A trial court should give a requested jury instruction if it is supported by evidence. Reed requested a charge on 2nd degree burglary on the theory that the victim's home was abandoned and no longer a dwelling. The victim testified she had not abandoned her home, which was filled with her personal property when burglarized. Did the court err by refusing the charge?

STATEMENT OF THE CASE

At 11:30 pm on November 7, 2017, police responded to a report of a burglary at 2303 Southside Boulevard in Beaufort. (R.p.19–20). A responding officer spoke with the victim, Andreda Singleton. (R.p.20). Singleton lived in the home with her two children. (R.p.133 line 21–p.134, line 4). When the family returned home that evening, they witnessed an intruder fleeing from the home and called the police. (R.p.139). Officers discovered the kitchen window ajar and found the TV had been moved from the TV stand to the floor near the rear door. (R.p.21–22). Some of Singleton’s possessions were missing, including electronics and two guns. (R.p.22).

The house was burglarized again ten days later, on November 17, 2017. (R.p.24). Again, Singleton was not home. She was sleeping at her mother’s house, as she had been in the nights since the burglary, because she was afraid to stay at her own home. (R.p.148). A neighbor witnessed someone enter the house around 1:00 am and called the police. (R.p.24). Police surrounded the house and called Singleton to unlock the door so they wouldn’t have to break it in. (State’s Exhibit 2). Singleton arrived shortly later but forgot her key. She had a friend bring another copy.¹ (State’s Exhibit 2). Police officers entered the house and found Appellant, Ben Reed, hiding in a closet. (R.p.28–29). At the police station, Reed confessed to breaking into Singleton’s home on both November 7 and 17. (R.p.71–73). A fingerprint recovered from the kitchen window following the first burglary was later matched to him. (R.p.126).

A Beaufort County grand jury indicted Reed for two counts of first degree burglary. He proceeded to jury trial before the Honorable Robert E. Hood on February 19–21, 2019. Reed

¹ Appellant’s brief seems to suggest Singleton didn’t have a key to the house, but in the officer’s body cam video Singleton states she forgot her key because she was in a hurry. State’s Exhibit 2.

was convicted of second degree burglary (violent) for the November 7 burglary and first degree burglary for the November 17 burglary. In this direct appeal, he challenges only his conviction for first degree burglary stemming from the November 17 burglary, alleging the trial court should have charged the jury on second degree burglary because the jury could have determined Singleton's home was not a dwelling.

STANDARD OF REVIEW

“To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. A trial judge's failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.” State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) (internal citation omitted).

ARGUMENT

I.

The trial court correctly refused to charge the jury on 2nd degree burglary because the evidence did not support a finding that the victim abandoned her dwelling.

Reed alleges the trial court erred by refusing to instruct the jury on second degree burglary as a lesser offense for the November 17 incident. He claims the jury could have determined the victim abandoned her residence after the first burglary, transforming it into a mere “building.” His argument fails because the evidence did not support a charge on second degree burglary. Rather, the evidence conclusively showed the victim was temporarily absent because she was afraid to sleep in her home after it was burglarized by Reed days before. Because she planned to return to the home and used it “with a view to the protection of property,” it was a dwelling. This Court should affirm.

a. Courts should not charge on irrelevant matters.

The purpose of a trial judge’s jury instructions should be to enlighten the jury and aid it in arriving at a correct verdict. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). The evidence in a case determines the law which must be charged and every charge of the law must be reviewed in the light of the evidence. State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). The trial court should not instruct the jury on irrelevant matters because it may confuse the jury. See State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944); State v. Leonard, 292 S.C. 133, 138, 355 S.E.2d 270, 273 (1987). Trial courts are not required to charge a lesser-included offense of second or third degree burglary where there is “no

evidence from which the jury could infer that appellant committed second or third degree burglary rather than first degree burglary.” State v. Goldenbaum, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988).

b. Dwelling defined.

The term “dwelling” is defined by statute as “any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property.” S.C. Code Ann. § 16-11-10 (2015). This definition reflects the common law understanding of burglary as an offense against habitation, not ownership. See State v. Alford, 142 S.C. 43, 140 S.E. 261, 262 (1927).

Accordingly, a building must have an identifiable occupant in order to be considered a dwelling. State v. Ferebee, 273 S.C. 403, 406, 257 S.E.2d 154, 155 (1979). Simply put, a dwelling is “a place where someone lives.” William Shepard McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina* 447 (4th ed. 2002).

c. Temporary absence does not convert a dwelling to a mere building.

A resident’s temporary absence does not convert a dwelling into a mere building. For example, in State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988), an arson case, the defendant asserted her mobile home was not a dwelling on the day it burned because she was in the process of moving out. The Supreme Court held the case was properly submitted to the jury,² emphasizing that Glenn “had returned to the mobile home many times after her husband’s death to gather more possessions.” Glenn, 297 S.C. at 32, 374 S.E.2d at 672. The court explained that when a dwelling’s habitational status is called into question by the occupier’s temporary absence, the key question is “whether the occupant has left with the intention to return.” Id. In other

² The issue in Glenn was whether the court properly denied a motion for directed verdict.

words, the question is whether the occupant has permanently moved out. Glenn’s intent to return—if only to gather possessions—was sufficient.

In State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct.App.2008), this Court considered whether a family’s second home was a dwelling even though the homeowners only occasionally went there, had not slept there for three years, and used the home essentially “as a storage building.” Id., 376 S.C. at 423, 656 S.E.2d at 783. This Court held the evidence supported a finding that the house was a dwelling,³ emphasizing that the house was filled with property, the utilities were on, and the house was “ready to be lived in.” Id. This Court explained that “Temporary absence from a ‘dwelling’ is irrelevant.” Id., 376 S.C. at 425, 656 S.E.2d at 784.

Similarly, in State v. Davis, 422 S.C.472, 812 S.E.2d 423 (Ct.App.2018), the defendant burglarized a home that was not being used for lodging at the time because its owner was living in a nursing home. The home was listed for sale and her son, who had power of attorney, “maintained and cared for the property, usually stopping by at least once a week.” State v. Davis, 422 S.C. 472, 477, 812 S.E.2d 423, 426 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. denied (Aug. 21, 2018). Despite the fact that the mother was not living there at the time, “it was the family's hope that she would be able to return to the home at some point.” Id. The utilities were on and the owner’s possessions were in the home. Id. This Court held that the evidence supported a finding that the house was a dwelling at the time of the burglary.⁴

Standing in contrast to these cases is State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979). There, the Supreme Court held that a vacant apartment, available “for rent” at the time of a burglary, was not a dwelling because “there was clearly no occupant or inhabitant against

³ As in Glenn, the issue in Evans was whether the court properly denied a motion for directed verdict.

⁴ Like Glenn and Evans, the issue in Davis was whether the court properly denied a motion for directed verdict.

whom the offense could have been committed. The former tenant had permanently abandoned the premises without the intention of returning.” State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979) (emphasis added).

d. The evidence supported only one conclusion—that Singleton’s home was a dwelling on November 17.

Reed argues the jury could have determined Singleton’s home was not a dwelling on November 17 if they believed she had abandoned the residence. However, the evidence presented at trial did not support such a finding. Not only had she not moved out on November 17, she never moved out—Singleton was still living in the home at the time of trial. (R.p.227, lines 11–18). She had personal property there on the night of the 17th, and was using the house “with a view to the protection of property.” The only conclusion supported by the evidence was that Singleton was temporarily absent on the night of November 17, and the trial court correctly refused to submit the question to the jury.

Singleton decided to stay at her mother’s house on the night of the 17th because she was “in fear.” (R.p.148, line 19). After encountering an intruder in her home on the 7th, she was “afraid they were coming back” to steal jewelry that was not taken during the first burglary. (R.p.148, lines 16–19). As a single parent, Singleton was afraid to sleep there with her children. (R.p.148, line 19). She testified she had been at her residence during the daytime on the 17th and that she intended to return the next day. (R.p.149, lines 9–10; p.151). She still had possessions in the house, including furniture and clothes. (R.p.148–49). She testified that as of November 17 she considered 2303 Southside Boulevard to be her home. (R.p.149). When asked on cross-examination whether she intended to “reinhabit” the house when she left after the first burglary, she answered: “I never left the house. I just wasn’t saying there.” (R.p.172, line 14). Singleton was later recalled to refute Reed’s insinuation that she had already moved out and was subletting

the house. Though she admitted that she had considered leaving, she never followed through because “[a]fter they caught him, there was no reason for me to leave.” (R.p.229, lines 8–9). At no point did she permanently abandon the residence.

Reed attempts to argue with these clear facts by citing portions of the police body cam footage taken when Singleton met officers at the scene of crime in the early morning hours of November 17. When police asked Singleton whether she had moved out, she replied “somewhat.” She replied that her furniture was still there and that a friend had a TV there.⁵ (State’s Exhibit 2). Reed also elicited testimony from the responding officer that he wasn’t sure whether Singleton “still actively lived there or was just in the process of moving.” (R.p.219, lines 10–11).

Contrary to Reed’s assertion, the trial court did not “weigh the credibility” of the officer’s testimony. Brief of Appellant at 12. Rather, he correctly recognized that the officer’s interpretation of Singleton’s statements at the scene was irrelevant, especially when Singleton’s words were captured on video and played for the jury. It was for the jury to decide whether Singleton had the intent to return, not the officer. They were able to view the body cam video and consider it along with Singleton’s unequivocal trial testimony. The officer’s assumptions about Singleton’s future plans did not constitute evidence that she had permanently abandoned the residence.

⁵ Reed avers Singleton told police her friend “was going to stay here.” Brief of Appellant at 11. But it is not at all clear what Singleton said around the 25 second mark of part two of State’s Exhibit 2. Her words are not clearly discernible on the video. She could have just as easily said “the guy who’s taking care.” This is consistent with her testimony that her friend was watching the house at night for her because he lived close by. (R.p.47; 59). Singleton’s indiscernible statement on the body cam video is not nearly enough to “give rise to an inference that her intention was not to return to the residence,” especially when her trial testimony was the exact opposite.

Even if Singleton had considered moving out after the first burglary, plans alone do not transform a dwelling into a mere building. Plans connote future action. Singleton clarified at trial that her friend Kelvin Simmons was watching the house for her because he lived close by. (R.p.47–58). She testified Simmons was letting her borrow a TV. (R.p.169, line 23). The body cam footage and pictures of the scene shows that the home was filled with household possessions: the kitchen was full of food, appliances, and cooking supplies; the den was furnished with couches and a chair; there were toiletries in the bathroom; there was a made bed in at least two of the bedrooms; and there was an American flag displayed at the front entrance to the home. (State’s Exhibit 2; R.p.109; State’s Exhibits #53–70). The house was therefore in substantially the same condition as if the family was sleeping there, and it would have appeared the same to a nighttime burglar who had been caught in the home just ten days before.

Believing that the burglar was coming back to steal more things, it makes perfect sense that Singleton would move some of her more valuable possessions from the home. But this hardly constitutes an abandonment of the residence. There is no “ambiguity” in the evidence. Brief of Appellant at 13. Singleton—the only person who could testify to her intent—could not have been clearer in her testimony that she never moved out of her home, and her testimony was corroborated by photographic evidence documenting the presence of her personal property there. (R.p.229). She had an intent to return, and was using the home with a view to the protection of property. The principles of Glenn, Ferebee, Evans, and Davis control this case. The house was a dwelling on November 17.

The evidence, including Singleton’s trial testimony and the pictures and body cam video showing the home filled with furniture and personal property, conclusively showed that Singleton had not permanently abandoned the home at the time of the second burglary. She was

temporarily absent. The officer's incorrect assumption about her future plans—formed before he had even seen the condition of the home on the night of the 17th—was not evidence supporting a finding that Singleton had permanently abandoned the home. Accordingly, the trial court correctly refused to instruct the jury on second degree burglary because the evidence did not support the charge. State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). Furthermore, Reed cannot show prejudice because “the only conclusion established by the evidence” was that the home was a dwelling and he was guilty of first degree burglary. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014). This Court should affirm.

CONCLUSION


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

Respectfully submitted,

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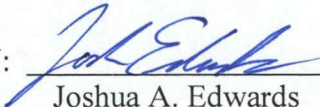
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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