STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BEN REED, IV

APPELLANT

ORIGINAL

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SC Court of Appeals

APPELLATE CASE NO 2019-000355

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in refusing to instruct the jury on the lesser-included offense of burglary in the second degree where there was evidence in the record that Singleton (the alleged victim) had moved out of her home after the first burglary and therefore changed the legal status of the structure from a "dwelling" to a "building" prior to the second burglary?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County grand jury for two counts of burglary in the first degree. R. 318-321. Appellant's jury trial was held before the Honorable Robert E. Hood from February 19 through February 21, 2019. R. 1. Appellant was represented by Jeffrey Stephens. R. 1. The state was represented by Leigh Staggs and Jacob McFadden. R. 1.

The jury found Appellant guilty of one count of burglary in the first degree and one count of burglary in the second degree. The judge sentenced Appellant to ten years imprisonment for the burglary in the second degree and seventeen years imprisonment for the burglary in the first degree, both sentences to run concurrently. R. 315, ll. 8 – 23.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166–67.

"The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v.

Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

STATEMENT OF FACTS

On November 7, 2017, Officer Joel Blackwell, with the Beaufort Police Department, was dispatched to the residence of Andrea Singleton at around 11:30 p.m. for a possible burglary. R. 18, l. 7 – 130, l. 3. Blackwell cleared the residence and found that nobody was inside. R. 21, ll. 7 – 10. Singleton claimed that several items in the home were out of place and several of her belongings were missing, including firearms and electronics. R. 21, l. 11 – 22, l. 17. Blackwell suspected that the window above the kitchen, which was open, was the point of entry. R. 23, ll. 6 – 18. Singleton stated that no one had permission to be inside her home. R. 24, ll. 4 – 12.

Investigator Josh Dowling with the Beaufort Police Department responded to Singleton's residence that same day and collected numerous fingerprints from throughout the house. R. 59, l. 20 – 60, l. 1. Dowling submitted three fingerprints, one from the kitchen window and two from a television that was out of place to be analyzed by Carl Shultz, the fingerprint examiner at the Orangeburg Police Department. R. 61, l. 10 – 62, l. 4. Shultz was later qualified at Appellant's trial as an expert in fingerprint examination and testified that the fingerprints from the scene matched those of Appellant. R. 125, l. 25 – 127, l. 5.

The same house was again burglarized ten days later on November 17, 2017. Blackwell responded to the scene again, this time at around 1:00 a.m. R. 24, l. 13 – 25, l. 9. The responding officers made a perimeter around the house because they believed the suspect was still inside. R. 25, l. 21 – 26, l. 8. Singleton was not present at the time and it was a neighbor who called the police. R. 26, ll. 9 – 22. When Singleton arrived on scene, she did not have a key to the house claiming that she left it at a different house where she was currently residing. Defense Exhibit 1, part 1 and 2 (body camera footage on file with this Court). Instead, a man named Kelvin Simmons ("Kelvin") brought the key to the house. R. 27, ll. 6 – 12. Singleton

told Blackwell that Kelvin "is the guy who's going to stay here." Defense Ex. 1, part 2 (body camera footage). Officers made entry into the residence with the key provided by Kelvin and found Appellant hiding in a closet inside. R. 28, l. 1 – 29, l. 15.

After Appellant was arrested and taken to jail, he was interviewed by Investigator Dowling. R. 68, ll. 10 – 17. Appellant confessed to entering Singleton's residence on both November 7 and November 17. R. 71, ll. 8 – 25; R. 73, ll. 6 – 15.

ARGUMENT

The court erred in refusing to instruct the jury on the lesser-included offense of burglary in the second degree because there was evidence in the record that Singleton (the alleged victim) had moved out of her home after the first burglary and therefore changed the legal status of the structure from a "dwelling" to a "building" prior to the second burglary.

Relevant Facts

After the state rested its case, defense counsel requested the trial judge to instruct the jury as to the lesser-included offense of burglary in the second degree on both charges. R. 201, ll. 15 – 16. The court agreed to charge the lesser-included burglary second degree as to the November 7 charge but refused as to the November 17 charge. R. 204, ll. 19 – 22.

As to the November 7 charge, the state alleged that it was a burglary in the first degree because a firearm was stolen and therefore Appellant was "armed." R. 196, l. 25 – 197, l. 5. Investigator Dowling testified that when he interviewed Appellant about the burglaries, Appellant admitted he knew a gun was taken during the November 7 burglary but that he was not the person who took it. R. 74, l. 5 – 75, l. 6; R. 84, l. 17 – 85, l. 6.

As to the November 17 charge, defense counsel argued that Appellant was entitled to a lesser-included instruction because there was evidence in the record to support a jury finding that the structure was no longer a "dwelling" under the statute because Singleton had moved out of the home and into her mother's house. R. 201, l. 24 – 202, l. 22. Counsel pointed out that while the definition of "dwelling" as it pertains to burglary cases says that a structure is still considered a dwelling even when the occupant is "temporarily absent," there was no definition as to what "temporary absence" was. R. 202, l. 24 – 203, l. 8. For this reason, defense counsel argued that

it was for the jury to determine whether Singleton's absence from the home was temporary or not, such that the structure was no longer a "dwelling." R. 203, l. 22 – 204, l. 6.

The assistant solicitor responded that even under the defense's theory that Singleton had moved out, Kelvin had moved in and therefore the structure was still a "dwelling." R. 204, ll. 7 – 15. The court refused to charge the jury on the lesser-included offense of burglary in the second degree as to the November 17 burglary. R. 204, ll. 19 – 22.

After this ruling, defense counsel called Officer Joel Blackwell to the stand to introduce a portion of his body camera footage from the scene of the November 17 burglary that the state had not entered into evidence. R. 215, l. 13 – 217, l. 10; Defense Ex. 1, parts 1 and 2. Blackwell admitted that when he spoke to Singleton on November 17, she told him she was "in the process of moving" and that "[she] and her family are at their new residence in Ridgeland." R. 217, l. 19 – 218, l. 13.

When defense counsel asked Blackwell if he got the impression that Singleton was still living at the residence which was burglarized, he answered: "I don't know if she still actively lived there or was just in the process of moving. From my understanding, she was staying down in Ridgeland." R. 219, ll. 6 – 12. Blackwell also admitted that it was Kelvin, not Singleton, who brought the key to the house so that the officers could gain entry the night of November 17. R. 220, l. 21 – 222, l. 12.

The state then recalled Singleton who admitted that on November 17 she was staying at her mother's house in Ridgeland because she was scared after the first burglary from November 7. R. 226, ll. 13 – 22. Although Singleton claimed that her intention was to continue to live at her residence, she also admitted that she told the officers on November 17 that she was planning on moving out. R. 227, l. 11 – 229, l. 11.

Defense counsel again requested the judge to instruct the jury on the lesser-included offense of burglary in the second degree as to the November 17 incident. R. 235, ll. 1 – 10. Counsel argued that because Singleton made statements to the officers on November 17 that she had moved most of her things out of the house along with stating that "the guy that's coming with the key is the guy that's going to be staying there," it was a jury question as to whether the structure was a "dwelling" or not. R. 233, l. 21 – 234, l. 6. Counsel cited to State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988), and State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979), and State v. Evans, 76 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008) for support. R. 232, l. 7 – 234, l. 13.

The assistant solicitor argued that there was no evidence in the record to support a lesser charge and that all the evidence pointed to the residence being a dwelling. R. 235, ll. 11 – 237, l. 16. The judge denied defense counsel's request for a lesser included instruction as to the November 17 burglary:

> I'm not charging the lesser included on the second charge. I'm convinced there is sufficient evidence in the record that it is a dwelling and it is only a dwelling and only being used as a dwelling, that she had an intention to return.
>
> Her belongings were still there, and the statements that she made at 3 o-clock in the morning after being – learned that her house had been burglarized for a second time in two weeks, I don't find its so much that, you know – *I guess part of the problem with it is a lot of it is that it's Officer Blackwell, and I don't mean anything negative against him, but he's just making assumptions at 3 o'clock in the morning based upon somebody he doesn't know.*
>
> *I mean, he's taking information that he's learning in a vacuum and making assumptions* and I just don't find that there's any evidence in the record at this point that the house is anything but a dwelling.

R. 238, l. 18 – 239, l. 10 (emphasis added). In response to these comments by the judge, defense counsel argued that the judge was improperly engaging in weighing of the testimony instead of

whether the lesser included charge should be given. The judge responded: "I know what the test for what a charge is . . . [c]losing arguments in 10 minutes."

Discussion

Burglary in the first degree is defined, in part, as the entering of a "dwelling" without consent and with the intent to commit a crime therein, when the entering occurs "in the nighttime." S.C. Code Ann. § 16-11-311 (A)(3). Burglary in the second degree is defined, in part, as the entering of a "building" without consent and with the intent to commit a crime, when the entering occurs "in the nighttime." S.C. Code Ann. § 16-11-312 (B)(3).

For purposes of the burglary offenses: "'Building' means any structure . . . [w]here any person lodges or lives; or . . . where goods are stored." S.C. Code Ann. § 16-11-310(1). "Dwelling," on the other hand, "means its definition found in Section 16-11-10 and also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person." S.C. Code Ann. § 16-11-310(2). Under Section 16-11-10, "dwelling" is further defined 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.

In State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979), the Supreme Court ruled that "[S.C. Code Ann. §] 16-11-10 requires that an apartment have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house." The Court went on to recognize that "[w]hile authorities agree that the temporary absence of occupants will not prevent a residence from becoming the subject of a burglary, it is required that such occupants leave with the purpose of returning in order for a breaking and entering during their absence to constitute a burglary." Id.

The rationale for such a rule is that burglary is "an offense against habitation rather than against property." Id. Ferebee dealt with a vacant apartment that was for rent and the Court ultimately found that the defendant's conviction for burglary in the first degree could not be sustained because the former tenant of the residence "had permanently abandoned the premises without the intention of returning." Id. In analyzing Ferebee, the Supreme Court stated in State v. Glenn, 297 S.C. 29, 31, 374 S.E.2d 671, 672 (1988) that "the test of whether a building is a dwelling house turns on whether the occupant has left with the intention to return."

In this case, there was evidence in the record to support a jury finding that the structure which was burglarized on November 17 was in fact not a "dwelling." Most significantly were Singleton's statements to law enforcement that she was moving out of the house and currently living with her mother in Ridgeland. These statements give rise to an inference that her intention was not to return to the residence. Even Officer Blackwell testified that his understanding was that Singleton was moving out and staying at her mother's house in Ridgeland. R. 219, ll. 6 – 12.

Furthermore, when Singleton arrived on the scene the night of November 17, she did not have a key with her. Instead, she had to call her friend Kelvin to request that he bring a key. Furthermore, Singleton told Blackwell that Kelvin "is the guy who's going to stay here." Defense Ex. 1, part 2 (body camera footage). Based on this evidence a jury could have concluded that Singleton left the residence after the November 7 burglary without the intention of returning. If a jury believed this evidence, it could have concluded that Singleton's absence was more than temporary thereby making the structure a "building" instead of "dwelling."

Instead of applying the proper standard and instructing the jury on the lesser-included offense when there is evidence in the record to support it, the judge weighed the evidence

presented by defense counsel and then rejected it. The judge suggested that he did not believe Blackwell's testimony, or that Blackwell was incorrect in his interpretation of statements made to him by Singleton on November 17. As defense counsel pointed out to the judge after he made these comments, it was improper for the judge to weigh the credibility of the evidence. This is the province of the jury and the jury should have been permitted to determine whether Singleton left with the intention of returning to the residence or not.

This Court has also dealt with the definition of "dwelling" in burglary cases in the context of a defense motion for a directed verdict. In State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008), this Court found that the trial judge did not err in denying the defendant's motion for a directed verdict on a first-degree burglary. In Evans, the structure at issue was a secondary residence of the victim. The victim in Evans testified that, in the last three years, he was no longer able to spend significant amounts of time at his secondary residence due to his wife's medical condition. Id. at 423, 656 S.E.2d at 783. The Evans Court found denial of the defendant's motion for a directed verdict proper because there was evidence in the record on the victim's intent to return to the property, including that he visited the home every two weeks or month and that the home was ready to be lived in. Id.

More recently, this Court in State v. Davis, 422 S.C. 472, 812 S.E.2d 423 (Ct. App. 2018) found that there was sufficient evidence in the record for the jury to consider the first-degree burglary charge. In Davis, the occupant had lived in the home for almost forty years before moving into a nursing home. Her son, who was her attorney in fact, put the home on the market but testified that he hoped his mother would be able to return to the home at some point in the future. Id. at 479, 812 S.E.2d at 427. The Davis Court found that this was sufficient circumstantial evidence of the occupant's intent to return such that it created "a factual dispute as

to what type of structure Davis entered," and for that reason, the denial of the defendant's directed verdict motion was proper. Id. at 488, 812 S.E.2d at 432.

Here, while there was certainly sufficient evidence for the jury to consider the charge of first-degree burglary, there was also evidence presented by the defense which created "a factual dispute as to what type of structure" Appellant entered. Davis, 422 S.C. at 488, 812 S.E.2d at 432. This was a factual dispute that should have been answered by the jury.

The judge recognized the ambiguity in the testimony surrounding whether or not a gun was stolen in the November 7 burglary and acknowledged that a jury could have concluded that Appellant was not "armed." Therefore, the judge gave the lesser-included instruction as to the November 7 burglary. Strangely, the judge did not also recognize the ambiguity in the testimony regarding whether or not Singleton had moved out of the residence which would have enabled the jury to conclude that the structure was a "building" rather than a "dwelling."

The judge erred in refusing to instruct the jury on the lesser-included offense of second-degree burglary because there was a genuine factual dispute as to Singleton's intentions when she left the residence after the November 7 burglary. If the jury believed that Singleton did not intend to return after the first burglary, then it could have found that the residence was a "building" rather than a "dwelling." Therefore, Appellant's conviction for first-degree burglary should be reversed. See S.C. Code Ann. § 16-11-310; State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction for first-degree burglary should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of March, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

March 16, 2020

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