

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Cherokee County

Honorable J. Mark Hayes, Circuit Court Judge

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APR 03 2020

THE STATE,

RESPONDENT

99 Court of Appeals

V.

RICHARD DOUGLAS WALDRUP,

APPELLANT

APPELLATE CASE NO. 2019-000438

ANDERS BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by denying appellant's motion for directed verdict where there was no evidence of injury as alleged in the burglary indictment?

STATEMENT OF THE CASE

On June 22, 2017, a Cherokee County grand jury indicted appellant for burglary, first degree. R. 171. Appellant's case was called to trial on March 5, 2019, before the Honorable J. Mark Hayes, II, and a jury. R. 1. Travis Moore represented appellant. Assistant solicitor Adrienne Barry and deputy solicitor Kim Leskanic represented the state. R. 1.

On March 6, 2019, the jury found appellant guilty of burglary, first degree. R 163. Judge Hayes sentenced appellant to twenty years' imprisonment. R. 169.

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, this 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 by denying appellant's motion for a directed verdict where there was no evidence of injury as alleged in the burglary indictment.

Relevant facts

The state presented no physical evidence of the burglary. Instead the state relied on testimony of complainant, Teresa Smith, Smith's son, Billy Austin, Officer Brent Heflin, and York County Clerk of Court, Teresa Scoggins. Appellant testified in his defense.

At trial, appellant and complainant, Teresa Smith, gave conflicting testimony about what happened on the day of the incident. Appellant testified that he went to Smith's address looking for his friend, Tony Young, who appellant assumed still lived at the address. R. 122, ll. 16-23. When no one came to the door appellant began to walk away but turned around when he heard Smith yelling. Appellant told Smith he was looking for a friend. Smith responded, no one named Tony Young lived there. When appellant tried to leave Smith asked again why he was there and appellant told her. Smith accused appellant of stealing her belongings and tried to physically restrain him from leaving. R. 122, l. 20-123, l. 17. Smith's son, Billy Austin, heard the commotion from his bedroom and went to find out what was going on. When Austin saw appellant and his mother engaged in a physical altercation he intervened and began hitting appellant and held him down to prevent him from leaving. R. 101-02. During the struggle Austin reached in appellant's pocket and removed his pocket-knife and his wallet. R. 124, ll. 7-16.

Smith testified she heard a knock on the door. R. 61, ll. 23-25. She did not recognize the person at the door and went upstairs to put clothes on before answering the door. Smith alleged that when she returned to open the door, she saw appellant standing in her garage holding one of

her saws. Smith claimed appellant dropped the saw and tried to run away but she “grabbed him with [her] left arm around [appellant’s] neck” and yelled for her son, Austin. R. 62-63. Smith maintained she was injured when appellant dug his nails into her arm as she held him. Austin separated Smith and appellant and tried to restrain him. R. 73, ll. 4-13. Smith testified appellant pulled out an open knife during the altercation with Austin, and Austin wrestled the knife away from appellant and held him until law enforcement arrived. R. 62, ll. 1-10. When police arrived at Smith’s address, they interviewed Smith and Austin and arrested appellant without further investigation. R. 59, ll. 1-8.

Discussion

A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial circumstantial* evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

First degree burglary is defined, in part, as follows:

- (A) 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, and either:
 - (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (a) is armed with a deadly weapon or explosive; or (b) *causes physical injury to a person who is not a participant in the crime*; or (c) uses or threatens the use of a dangerous instrument; or (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
- (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311. (Emphasis added). The state is required to prove all the elements of first-degree burglary beyond a reasonable doubt. *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000).

In this case where there was minimal circumstantial evidence and no direct evidence of appellant's guilt the trial court erred in denying appellant's motion for a directed verdict. Appellant admitted he was at Smith's address that day looking for his friend. He denied pulling out his pocketknife or attempting to take anything from the garage. The state's entire case consisted of Smith's and Austin's recollections of the incident and their claim that appellant was seen holding a saw in their garage. Smith also alleged at trial that she was injured when appellant "left his fingernail imprinted" on her arm. Assuming a fingernail imprint would be considered an injury, the state failed to present any photographic evidence or medical bills to corroborate Smith's injury allegation. The trial court erred when it failed to grant appellant's motion for a directed verdict.

CONCLUSION

By reason of the foregoing argument, this Court should issue an order of acquittal.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of April, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard Douglas Waldrup states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge J. Mark Hayes, which was held on March 5 - 6, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Richard Douglas Waldrup.

Respectfully Submitted,

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of April, 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 and sentencing sheet;
- (2) Entire trial transcript dated March 5 - 6, 2019

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

April 2, 2020

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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."

April 2, 2020.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

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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, Jr., 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 Richard Douglas Waldrup, 360887, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of April, 2020.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: December 31, 2029.