

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Allendale County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIEL JOYNER,

APPELLANT

APPELLATE CASE NO. 2019-000622

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the charge of burglary in the first degree where there was no direct or substantial circumstantial evidence appellant knew or could have anticipated the victim would suffer personal injury or death during the burglary as required by S.C. Code § 16-11-311(A)(1)(b), and accomplice liability?

STATEMENT OF THE CASE

Appellant was indicted at the November 2016 term of the Allendale Grand Jury for the offense of burglary in the first degree. R. 442. Appellant was also indicted for murder and strong-armed robbery, but he was acquitted on those charges. All three charges arose from the same incident, involving the same victim. R. 411, l. 16 – 412, l. 3.

Appellant's case was called for trial on January 9, 2017 before the Honorable R. Lawton McIntosh, and a jury. R. 1. Robert Hughes represented appellant. Chief Deputy solicitor Sean Thornton and Assistant solicitor Brian Hollen represented the state. R. 2.

On January 11, 2017, the jury found appellant not guilty on the counts of murder and strong-armed robbery. However, the jury convicted appellant of burglary in the first-degree. R. 411, l. 16 – 412, l. 3.

Appellant was sixteen years old at the time the crime was committed. Consequently, a specialized sentencing hearing was held pursuant to Aiken v. Byers, 410 S.C. 534, 765 S.E.2d 572 (2014), on April 4, 2019. Robert Hughes again represented appellant. Deputy Solicitor Sean Thornton represented the state. R. 419. Judge McIntosh sentenced appellant to twenty-five years' imprisonment. R. 438, ll. 10-21.

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 court erred by refusing to direct a verdict on the charge of burglary in the first degree where there was no direct or substantial circumstantial evidence appellant knew or could have anticipated the victim would suffer personal injury or death during the burglary as required by S.C. Code § 16-11-311(A)(1)(b), and accomplice liability.

Relevant Facts

Detective Qutique Manor discovered the 85-year-old victim's dead body in the victim's home on the afternoon of June 19, 2014 in the town of Allendale, South Carolina. R. 180, l. 14 – 181, l. 13. Manor had been contacted by the victim's son, Willie Johnson, who had been unable to contact his father for a number of days. R. 181, ll. 6-13.

Just before Manor arrived, a member of the victim's church had come to check on the victim, saw his body on the floor of his living room, and immediately called 911. When Manor arrived, and entered the victim's house, that church member was waiting for him outside. Manor found the decedent inside "with his hands behind his back and tied with some type of string . . . [and] a black plastic bag over his head." Manor observed that the decedent's wallet was on the floor, and that his dentures had been partially knocked out. R. 189, ll. 2-19. Two of the victim's telephones were also off the hook, and one was "laying on the ground." R. 190, l. 18 – 191, l. 15.

When EMS responded, EMT John Johnson saw the decedent dead on the floor inside his home. "[T]here was something covering his head . . . His hands were behind his back in what appeared to be something that was restraining them, as well as his feet were together, and there was something down there that appeared to be restraining them, too." R. 199, l. 17 – 202, l. 24.

Kiawah Cave remembered the eighty-five year-old victim as her parents' neighbor. "The only thing [that] separated the two yards was some bushes." R. 207, ll. 3-11. Cave was leaving early for work, on what she thought was the morning of June 17, 2014 at around six a.m. As she drove past appellant's house, she noticed three young "black guys," one who had dreadlocks, coming out of appellant's yard. The young man with the dreadlocks "was closing the gate." R. 206, l. 7 – 211, l. 19. Cave said she was never shown a line-up of any of these young men because she told law enforcement "I didn't see their faces directly." R. 211, ll. 20-25.

SLED agent Natasha Merrell interviewed the sixteen-year-old appellant, who lived across the street from the decedent. Merrell said appellant initially told her he did not know anything about the murder of the decedent. R. 253, l. 16 – 255, l. 5.

Merrell talked to appellant a second time on June 24, 2014. R. 255, ll. 18-22. Appellant's mother was with him during this interview at the Allendale police station, but "[o]nce he started talking to us about the details of what happened, she exited the room, said that she could not listen to it." R. 256, ll. 5-10. Although appellant's statement was recorded, there were problems with the recording that made it hardly audible. It was nonetheless played for the jury. R. 257, ll. 6-13. SLED agent Merrell then read appellant's written statement to the jury:

I, Gabriel Joyner, request S.A., meaning Special Agent Merrell to write on my behalf. It says Kashan [Bynum] and his brother Rob [Miller, III.] showed up to my house, asking me did I want to hit a lick with them. So I was like, where. Kashan and Rob said across the street, and I told them no, that this side was already hot. And somehow Kashan talked me into it, and I said yeah. So we went across the street. While Kashan and Rob walked through the front gate, I jumped over the fence on the side of the house and waited by the air conditioner, while Rob and Kashan went and knocked on the door. When the man came to the door, Kashan and Rob rushed in, and I came behind them. While Rob was beating him, Kashan was tying him up, then Rob put the bag over his head. Then, me and Kashan was searching for things, and we found a safe, and we left with the safe, and threw it in the woods.

On the second page, there is a supplemental page where we did a question and answer, where I would ask a question, and then ask for a response. The first question says:

Where did the bag come from?

His answer was: Rob came with the bag. It was a black bag.
Did anyone leave with a gun?

I left with a pellet gun, was his answer.

The next question was: Where did you go when you left?

His answer was: We went to put the safe in the woods.

Question: Who got the safe out the room?

Answer: I dragged it out into the living room.

The next question was: Where was the safe?

His answer was: In the room by the kitchen.

The last question was: What color was it?

His answer was: Like gray-ish.

R. 270, l. 16 – 272, l. 7.

Merrell remembered finding a safe inside the decedent's home, and the police discovered a second safe "behind Mr. Johnson's house in a drainage ditch." R. 266, ll. 10-21.¹

As for physical evidence, Robert Miller III's fingerprints were found inside the decedent's home. R. 315, ll. 10-16. None of appellant's fingerprints or DNA were found at the

¹ Dr. Janice Ross testified that the decedent suffered fractured ribs and had blunt force injuries, but he died from being smothered or from asphyxiation. R. 240, l. 5 – 245, l. 8. The solicitor would later argue to the jury that the robbers, Robert Miller III, Kashon Bynum, and appellant could have saved the decedent by turning him over on his back so that he would have been able to breathe.

scene, leaving appellant's statement as the only evidence introduced against him at trial. R. 340, ll. 6-11.

Directed Verdict Motion

Defense counsel moved for a directed verdict on the burglary in the first degree count, noting that appellant could not have foreseen that the decedent would be attacked, physically harmed, or killed since the sixteen-year-old appellant only reluctantly agreed to help to steal from his neighbor. That physical injury to a non-participant in the burglary was an element of the first-degree burglary statute, and alleged in the indictment. R. 341, l. 8 – 344, l. 15; app. 442. The judge denied the directed verdict motion. R. 344, ll. 17-21; r. 353, ll. 5-8.

Discussion

There was no evidence appellant harmed anyone during the burglary for purposes of the burglary indictment, and that element of burglary in the first-degree. App. 442. See S.C. Code §16-11-311(A)(1)(b). Consequently, for the state to produce the any direct or substantial circumstantial evidence necessary for overcoming the motion for a direct verdict, it had to rely on the doctrine of accomplice liability which made appellant responsible for the foreseeable acts of his co-participants during the crime. See State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct.App. 2007)(prior knowledge of a crime and mere presence are insufficient to establish guilt); State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017)(violence was foreseeable while taking back a television); State v. Odems, 305 S.C. 582, 586, 720 S.E.2d 48, 50 (2011)(defendant was entitled to a directed verdict), State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). (trial court considers all of the evidence when ascertaining intent or foreseeability in a first degree burglary case).

Here, however, since the state failed to produce any direct or substantial circumstantial evidence of appellant's guilt of first-degree burglary pursuant to S.C. Code §16-11-311(A)(1)(b), by way of accomplice liability, appellant was entitled to a directed verdict. State v. McHoney, 344 S.C. 85, 87, 544 S.E.2d 30, 36 (2001).

In State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017), the Supreme Court affirmed the opinion of this Court that the trial judge properly denied a directed verdict motion where the defense argued the murder was not the natural and foreseeable result of the crime the defendant intended to commit. "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct.App. 2007). The defendant must be present at the scene by prearrangement and aiding, encouraging, or abetting in the perpetration of the crime. State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

In State v. Harry, the state presented evidence that Harry had a history of violence and that Harry and the victim were both drug dealers. Further, the victim had slept with Harry's girlfriend, and he had taken a television and drugs in the past from Harry without paying for them. Moreover, the state produced evidence that just before the shooting, Harry went sixteen miles out of his way to recruit a confederate, who was known to carry a gun, to serve as a backup when he confronted the victim about the television. Further, the evidence showed that the television set Harry said he only wanted to retrieve from the victim was not so large or heavy that it required more than one person to carry it. State v. Harry, 420 S.C. 290, 299-300, 803 S.E.2d 272, 300 (2017).

In dissent in State v. Harry, now Chief Justice Beatty and Justice Hearn wrote that Harry's conviction could not stand under the "hand of one is a hand of all" theory. To be guilty

based on the theory of accomplice liability, the commission of the murder by the principal must be *a reasonably foreseeable consequence* of the defendant's actions. State v. Harry, 420 S.C. 290, 302, 803 S.E.2d 272, 278 (2017).

None of the aggravating circumstantial evidence present in State v. Harry existed here. Appellant was a sixteen-year-old teenager, who lived across the street from the elderly victim. The only evidence of appellant's guilt, his statement to the police, showed he reluctantly finally agreed to participate in stealing money from the decedent. There was no evidence that appellant intended for the victim to be harmed or that he reasonably could have anticipated Robert Miller, III and Kashan Bynum would go rogue, beat the victim, tie him up, and leave him with a trash bag tied around his head. The elderly victim tragically died after suffering blunt force trauma and asphyxiation. There was no evidence that Miller or Bynum brought a weapon to the crime, and they apparently used a shoestring and objects already in the victim's home to unexpectedly beat him and tie him up inside his home.

The state chose to indict appellant for burglary in the first-degree, rather than burglary in the second-degree, as defense counsel argued was the correct charge in this case. R. 429, l. 19 – 430, l. 24. Consequently, the judge should have directed a verdict on the burglary on the first-degree indictment since the state failed to prove appellant caused physical injury or death to the victim or that the acts of the other participants, Miller and Bynum, were *reasonably foreseeable* during the agreed upon robbery. See State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017); State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct.App. 2007). The judge abused his discretion by refusing to direct a verdict under these circumstances. See State v. Odems; State v. Pinckney, *supra*.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction of burglary in the first-degree should be vacated, and an order of acquittal issued.

Respectfully submitted,

s/ Robert M. Dudek

Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gabriel Joyner states:

1. He is Chief 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 R. Lawton McIntosh, which was held on January 9 - 11, 2017, 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 Gabriel Joyner.

Respectfully Submitted,

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

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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 January 9-11, 2017
- (3) Entire sentencing hearing transcript dated April 4, 2019

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

May 29, 2020

s/ Robert M. Dudek
Robert M. Dudek
Chief 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.”

May 29, 2020.

s/ Robert M. Dudek
Robert M. Dudek
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