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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Appellate Case No. 2018-001745

The Honorable R. Keith Kelly, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Jaden Imarion Gary.....Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

Cases

State Statutes

Constitutional Provisions

TABLE OF CONTENTS

STATEMENT OF THE CASE

Jaden Gary was indicted by the Spartanburg County grand jury for Burglary 1st degree, possession of a weapon during the commission of a violent crime, and grand larceny during its September 2019 term. Indictment Nos. 2019-GS-42-5573 and 2019-GS-42-5574. He was tried before the Honorable R. Keith Kelly and a jury between August 31 and September 1, 2021. Gary was represented by Joshua Schultz. The State was represented by Spenser Smith. Gary was convicted and sentenced to 20 years in prison.

This appeal timely follows.

STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in refusing to charge the jury with Burglary 2rd degree when there was sufficient evidence at trial to support the jury charge and when Gary's defense was that he did not know anyone lived at the incident location.

II. The trial court erred in not disavowing the solicitor's argument during sentencing that Gary should not receive a minimum sentence in this case, despite having no criminal record, because he exercised his Constitutional right to a jury trial, and by imposing an additional 5 year "trial tax" because Gary did not accept the State's plea offer.

RELEVANT FACTS

Jaden Gary, who was then 17 years old, Tr. 35, and his two co-defendants entered into Jason Williams's residence on or about July 22, 2019 in the Startex community of Spartanburg County when Mr. Williams was not there. Gary's co-

defendants were Tyquez McKinney and Zion Miller. Tr. 170. Multiple weapons were stolen from Mr. Williams who is a military veteran. Tr. 121. This was the second time Mr. Williams's residence had been broken into. Tr. 107. After the first incident, Mr. Williams had cameras installed around the property which provided visual evidence that Gary was one of the intruders. Tr. 107. Jaden's biological father had been murdered shortly before these events. Tr. 70. He had no prior criminal record. Tr. 147-48, 157-158.

An officer with the Spartanburg County Sheriff's Office, Officer Trevor Shue, was able to identify Jaden Gary from the video obtained from Mr. Williams's camera. T. 145-46. He testified he recognized Gary from an earlier traffic stop incident that occurred earlier but did not result in any criminal charges. Tr. 149. In the video, Gary could be seen carrying a firearm. Tr. 156. Without objection, Gary's statement to law enforcement, wherein he explained that he entered the house but believed no one lived there, was moved into evidence. Tr. 180.

ARGUMENTS

I. The trial court erred in refusing to charge the jury with Burglary 2rd degree when there was sufficient evidence at trial to support the jury charge and when Gary's defense was that he did not know anyone lived at the incident location.

Gary's defense at trial was that he did not realize anyone actually resided at the house he and his co-defendants entered. In his statement to law enforcement, which was entered into evidence, Gary indicated that a girl had informed him that a man was moving out of a house and that he had left a number of guns. See State's

Exhibit #3. On cross-examination, defense counsel additionally elicited facts to support that defense.

Q: All right. Now, in, in the back of your house you had—you noted that you had what is known as an elevated porch?

A: Uh-huh (affirmative).

Q: Is that covered in kudzu and vines?

A: No.

Q: No, it's not?

A: The porch itself is not, no.

Q: Okay. What about the back of your home?

A: There is some vegetation, some trees boarding the side of the property but not—it's clearly a house, a house back there.

Q: Could you—approaching your, your house from not Church Street, there's, there's—you're at the corner of --?

A: I think it's Elm and Church, yes…

Q: Look—looking at your house not from Church but from Elm, could a, a reasonable person suspect that—that that was not a house or not?

A: No, it's clearly a house.

Q: Okay. I understand that but can you—I guess from Elm Street, from the back of the residence, could you—could a reasonable person suspect, because of all the foliage and all the vines and all the trees and everything like that, could they see—could, could a person clearly see your house?

Tr. 129, l. 10- 130, l. 14.

Q: Okay. Now, that—just looking at that, no offense, it looks messy.

A: Sure.

Q: Okay. There's garbage around. There's garbage on the floor, things like that.

A: Like I had previously stated, that was pushed against the door awaiting for me to take it to a recycling place.

Tr. 133, ll. 4-8.

Q: Okay. And, again, kind of messy, right? No offense.

A: I—by definition, yes.

Q: Okay, and this is your bedroom, sir?

A: Yes.

Q: Okay. And, again, kind of messy, right?

Tr. 136, ll. 1-6.

The State realized the defense Gary was attempting to present to the jury because the solicitor responded to it on redirect examination:

Q: All right. Do you think, since it was asked multiple times, do you think it's remotely possible that somebody would not have known that this was a house?

A: Not—no.

Q: And that somebody not only that is in a house designed for somebody to live in but that somebody was actually living in it?

A: Yes, it was definitely clearly occupied and lived in since it was messy.

Tr. 138, ll. 8-16.

In his statement to law enforcement, Gary informed the police that he did not realize anyone stayed at that location. Additional testimony was offered to substantiate the point. Tr. 189-190; 192.

Q: Okay. Let me ask you this. He said a couple of times or Jaden said a couple of times in his statement that he wasn't sure if, if anybody was staying there or somebody moved out. Do you remember that?

A: I do.

Q: Okay. Do you also remember him saying they must be moving out?

A: Yes.

Q: Okay. Do you also remember him saying oh, there was stuff everywhere?

A: I do.

Q: Okay. Do you also remember there were trash bags everywhere?
A: I remember him saying that. I don't recall seeing that in the photographs.

Q: Well, that's fine but do you recall him saying that?

A: Yes.

Q: Okay. And he also said there was a bunch of junk everywhere, right?

A: He did. He said that…

Q: All right. What about in the, in the storage unit or the, the entry way into the kitchen? Sorry. Where there any pictures there of anybody?

A: Any pictures?

Q: Yeah, pictures of family or-- ?

A: I don't keep family pictures in my kitchen either.

Q: Right.

Tr. 192, l. 20- 194, l. 5.

Again, the State acknowledged that it realized Gary's defense to the crime was that he believed the residence was abandoned. On redirect, the solicitor asked the officer, "Mr. Schultz asked you if you thought it'd be reasonable to think that this house was abandoned and then you said no. Why do you think it's not reasonable?" Tr. 200, ll. 14-16. The officer then testified that he did not believe Gary when he said he thought the house was vacant or abandoned. Tr. 201.

During the charge conference, defense counsel asked the judge to charge the jury with Burglary 2nd degree because that statute criminalizes going into a "structure" as opposed to a "dwelling." Tr. 211-213.

The State opposed trial counsel's suggestion and, in doing so, once again highlighted that it understood Gary's defense to be that he believed the residence was abandoned:

> Dwelling defines, in 16-11-10, defines many different ways. I don't know exactly what this structure would be that a person lives in that would not be a dwelling but—and, in this case, it is a dwelling. That's—the only evidence is that it is. There may be an argument that Mr. Gary perceived it to, to not be a dwelling and that it was abandoned.

Tr. 214, ll. 3-9.

The judge denied Gary's request for the Burglary 2nd degree jury instruction. Tr. 216.

The trial court judge erred because Gary was entitled to a lesser-included jury instruction for Burglary 2rd degree based on the evidence adduced at trial that Gary did not realize someone actually lived in the residence.

S.C. Code Ann. §16-11-10 defines "dwelling house" as:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, 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 shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

S.C. Code Ann. §16-11-311, Burglary 1st degree states:

> (A) 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.
>
> (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
>
> (1) When in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with a deadly weapon or explosive; or
>
> (b) Causes physical injury to any 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. §16-11-312, Burglary 2nd degree states:

(A) 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.

(B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:

(1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with a deadly weapon or explosive; or

(b) Causes physical injury to any 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.

Had the trial court judge instructed the jury with Burglary 2nd degree as trial counsel requested, the jury could have considered Gary's defense that he did not realize someone was currently residing at the incident location at the time of his entry

into it. Instead, by failing to give that instruction, the trial court denied Gary's jury of the ability to consider the defense he presented at trial.

The prejudice was overwhelming. During closing arguments, it was clear that Gary's understanding of that structure as either a "dwelling" or a "building" was the key issue.

The State argued:

> So, what I think, and I don't know what the defense says, they don't have to say anything, but what I think the defense is, I guess in this case, is that, when he entered he did not intend to commit a crime. So, I want to highlight evidence that I think supports the idea that, that he did intend to commit a crime, and the, the basis ultimately of Mr. Gary's saying he wasn't intent on committing a crime is that because Bethany, the white girl on Snapchat that he had met a few weeks before, had a picture of a gun. He asked if he could buy it. She said no but there's a, there's a house where the guy's just moved out and he's got a bunch of guns in there and you can just go and take them.
>
> That is the basis of his belief that everything he's doing is, is on the up and up and that he's basically going to claim abandoned property. I think that's the only way that he can be found not guilty is if you believe that and these are the points that I think prove that that's not true."

Tr. 222, l. 10- 223, l. 3.

During his closing argument, Gary once again informed the jury of his defense to these charges. His lawyer argued to the jury, "[w]hen these kids went in there, oh my God, this, this is probably abandoned just [as] that person had said." Tr. 235, ll. 12-13.

And then:

> But it could be, I, I believe, and, and this is why we have ya'll here, it could be a reasonable assumption to make that this house was indeed abandoned. Somebody was moving out. And when you go back in your

> jury deliberation room, and you listen to the statement that my client said, and I'm, I'm quoting verbatim here, my notes, at least what I heard, "somebody moved out, they must be moving out, stuff everywhere, trash bags, a whole bunch of junk.
> Tr. 235, l. 25- p. 236, l. 7.
>
> That's a reasonable doubt number one that this house is not a dwelling, which is what they have to prove in order to find my client guilty of burglary first. So there's that.

Tr. 236, ll. 12-15. "These kids thought this was an abandoned house, okay, and you can see why they would think that." Tr. 237, ll. 11-12.

> What I'm asking you to consider this is that they did not know anybody was living in the house. If they did they probably wouldn't have gone over there. There was a lot of trash bags. There was a lot of garbage. They didn't know it was a dwelling and you have to find my—that it was a dwelling first. You have to find that.

Additionally, a conviction for Burglary 2nd degree, under the facts of this case, would have resulted in a punishment of not greater than 15 years. *See S.C. Code Ann.* §16-11-312 (2) with parole-eligibility after serving one-third of his sentence.

"The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (quoting *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007). In determining whether the evidence requires a charge on a lesser-included offense, this Court views the facts in the light most favorable to the defendant. *Id.* Second degree burglary is a lesser-included offense of first-degree burglary. *State v. Goldenbaum*, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988). There is no question but that Gary's defense at trial was that he believed the building he entered was abandoned; the

defense argued it and the solicitor argued against it. Gary's statement was entered into evidence and both defense counsel and the solicitor elicited testimony regarding the defense. The trial court judge erred in not charging the jury with the jury instruction that would have given effect to Gary's defense because evidence in the record supported giving the charge. Failing to do so denied Gary's right to due process because it resulted in the jury's being unable to consider his defense. The judge's failure to give the instruction is also contrary to well-established South Carolina state law.

Respectfully, this Court should reverse Gary's case and remand for a new trial.

II. The trial court erred in not disavowing the solicitor's argument during sentencing that Gary should not receive a minimum sentence in this case, despite having no criminal record, because he exercised his Constitutional right to a jury trial, and by imposing an additional 5 year "trial tax" because Gary did not accept the State's plea offer.

Jaden Gary had no criminal record prior to these events. At the time he and his co-defendants entered Mr. Williams's house, Gary had just recently lost his father to murder. Gary was 17 years old. No one was home when Gary and his co-defendants entered and stole Mr. Williams's firearms. Despite this, the solicitor argued to the trial court that Gary should not receive a minimum sentence because he exercised his right to trial.

> SOLICITOR SMITH: Your Honor, Mr. Williams had to go back to work and obviously this is the second time we've tried this case. He did state he wanted Your Honor and Mr. Gary to know that he believes he's lucky that he wasn't home cause he thinks Mr. Gary might be

> getting a life sentence but in a, in a different way and possibly all three of the young men that were involved.
>
> He asks Your Honor to impose the maximum sentence because Mr. Gary had a chance to do the right thing and to plead, and instead he chose to keep doing the wrong thing.

Tr. 275, l. 20- 276, l. 4.

The solicitor again argued Gary should be punished for exercising his right to a jury trial:

> … I don't think that the minimum sentence is appropriate because he did not admit responsibility. Although he did it to the investigator, made the State and Mr. Williams go through basically the last trial, we were one witness away from finishing, two different trials on a case where he confessed and is caught on video.
>
> So, he's not accepted responsibility. He could not just admit what he had done and take punishment.
>
> So, we do not think that the minimum sentence is appropriate.

Tr. 277, l. 20- 278, l. 5.

The judge did not respond and admonish the solicitor that imposing a "trial tax" due to a defendant's exercise of his Constitutional right to a jury trial was unconstitutional. Instead, it appears from his silence and his sentencing Gary to an additional 5 years over the plea offer that he acquiesced in the State's request.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State… U.S. Const. amend. VI. When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion. *See Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999) (holding counsel was ineffective

in failing to object when the trial judge indicated the reason he sentenced Davis more harshly than two similarly-situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt); *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995) (holding the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for sentencing under the Youthful Offender Act); *State v. Follin*, 352 S.C. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002) ("We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercises the right to a jury trial."). *See also State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (remand for a new sentencing hearing pursuant to *Hazel*, *supra*, stating, "Although the [trial judge] herein also stated it had never, and never would, 'punish someone for exercising their right to a jury trial,' we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

In this case, the State made it clear it had offered Gary a 15-year sentence if he pleaded guilty. Tr. 277. Then, at sentencing after Gary exercised its right to a trial, it demanded a longer sentence to punish Gary for exercising that right. The Court acquiesced in the State's demand and sentenced Gary to 20 years. Respectfully, the trial court judge abused his discretion in imposing an additional 5 years over the earlier recommendation based on Gary's exercise of his right to trial. Respectfully, this Court vacate Gary's sentence and remand for resentencing.

CONCLUSION

This Court should reverse Carpenter's convictions and remand for a new trial for Issue I, and it should remand for resentencing as to Issue 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel hereby certifies she has served a copy of this initial brief and designation of matter on William Blitch of the SC Attorney General's Office by sending it to him at wblitch@scag.gov on this date, March 7, 2022.

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