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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001241

THE STATE,

Respondent,

v.

DEVIN LAVAR OUTEN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court correctly refused to grant a directed verdict when there was evidence support a finding that Outen attempted to unlawfully enter Ms. Grice's home with the intent to commit a crime therein.

- II. Whether the trial court committed an error related to trial counsel's alleged sympathetic statement toward the victim when no objection was raised to the trial court.

- III. Whether the trial court erred by finding during a pretrial hearing that Outen's statement to police was voluntary where the State never sought to introduce the statements during trial.

STATEMENT OF THE CASE

An Horry County grand jury indicted Appellant Devin Outen for Attempted First Degree Burglary. The State called the case for jury trial on February 5, 2020, before the Honorable Steven H. John. Outen did not show up for trial. He was tried in his absence and convicted as charged. Judge John sentenced Outen to 20 years' incarceration and sealed the sentence. Outen was arrested on a bench warrant and brought before Judge John for sentencing on October 13, 2021, where Judge John unsealed the sentence in Outen's presence. This direct appeal follows.

STATEMENT OF FACTS

At about 3:45 a.m. on July 6, 2018, Phyllis Grice was asleep in the living room of her home in Conway, having dozed off in her recliner watching the 700 Club. (Feb 5 Tr.p.79). She woke to her dog barking and growling at some noise coming from her back porch. (Feb 5 Tr.p.80). She heard someone "messaging with the door knob" then observed "a piece of metal . . . coming through [her] back door" so that "the door was opening." (Feb 5 Tr.p.80). She saw a man who was "in a frenzy" and "trying to get in." (Feb 5 Tr.p.81). She saw the tool in the person's hand and thought, "he can get in here and take that tool and just smash my skull with it." (Tr.p.81). The person was "jacking and ripping the door." (Feb 5 Tr.p.82). Ms. Grice called 911, retrieved her .38 Special, and ran out the front door. (Feb 5 Tr.pp.74, 83).

Ms. Grice's dog "went after" the intruder in the back yard. The man then ran around to the front yard and "started coming toward" Ms. Grice with his arms outstretched like "he was gonna grab" her. (Feb 5 Tr.p.86). Ms. Grice shot at the man. He stopped momentarily and then started coming at Ms. Grice again. (Feb 5 Tr.p.86). She shot again and the man retreated. (Feb 5 Tr.p.87). The man ran through the woods to an empty lot next door and got into a car. The man tried to drive away but got his car stuck in a ditch. (Feb 5 Tr.p.88). Ms. Grice was on the phone with 911 this entire time and the recorded call was admitted as State's Exhibit #4.

Police arrived to secure the scene. They ran the tags on the car that was stuck in the ditch and an officer went to the address associated with the owner. The

officer met with Rashena Rhule at her home, where Outen also lived. (Feb 6 Tr.p.165). She appeared "frantic" and was on the phone with Outen at the time. (Feb 6 Tr.pp.136-37). The officer offered to help Ms. Rhule get medical attention for Outen. Rhule accompanied the officer to find Outen, and they made contact with him as he was "coming out from behind some bushes at a Plants Direct." (Feb 6 Tr.pp.137-38). Upon seeing police, Outen was upset and stated, "just take me to jail, I don't need to go to the hospital." (Feb 6 Tr.p.138). The officer observed a gunshot wound to Outen's abdomen. (Feb 6 Tr.p.138). Another officer had seen Outen a few minutes earlier by the side of the road. (Feb 6 Tr.p.143). Upon seeing that officer, Outen had run in the woods. (Feb 6 Tr.p.143).

Police transported Outen to the hospital for treatment. His wound was a "through and through," meaning the bullet went straight through Outen's abdomen, and did not cause serious damage. (Feb 6 Tr.p.171). Outen was treated and released after about two hours. (Feb 6 Tr.p.172). Ms. Grice testified she observed Outen at his bond hearing and identified him as the man who tried to break into her home. (Feb 5 Tr.p.110).

When police searched Ms. Rhule's car, they discovered a tire iron on the front passenger's seat. (Feb 6 Tr.p.155). Police took pictures of shoe prints discovered on Ms. Grice's back deck. (Feb 6 Tr.p.166). Police also confiscated the shoes Outen was wearing. (Feb 6 Tr.pp.168). In closing, the solicitor argued the shoe prints matched up with the shoes Outen was wearing. (Feb 6 Tr.p.204-05).

ARGUMENT

- I. **The trial court correctly refused to grant a directed verdict because the facts in evidence support a finding that Outen attempted to unlawfully enter Ms. Grice's home with the intent to commit a crime therein.**

Outen claims the trial court erred by refusing to grant a directed verdict.

This claim is meritless. There is direct and circumstantial evidence in the record to support a finding that Outen attempted to enter Ms. Grice's home without her consent with the intent to commit a crime therein. This Court should affirm.

A. Standard of Review.

On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State. State v. Dinkins, 435 S.C. 541, 549, 868 S.E.2d 181, 184–85 (Ct. App. 2021). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” Id.

B. Discussion.

In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. State v. Phillips, 416 S.C. 184, 192–93, 785 S.E.2d 448, 452 (2016). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. Id. However, the trial court must submit the case to the jury 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.” Id.

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 another aggravating factor exists. S.C. Code Ann. § 16-11-311. One such factor is that the burglary is committed in the nighttime hours. Id. Although first-degree burglary is a statutory offense, an attempt to commit the crime is a common-law offense. State v. Wright, 354 S.C. 48, 53, 579 S.E.2d 538, 541 (Ct. App. 2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. The State must prove the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent." State v. Reid, 383 S.C. 285, 292–93, 679 S.E.2d 194, 198 (Ct. App. 2009) (internal citations and quotation marks omitted).

The State produced plentiful evidence that Outen was the person who tried to break into Ms. Grice's home. Ms. Grice shot the intruder. Outen was discovered hiding in the bushes at a nearby business with a gunshot wound to his abdomen. (Feb 6 Tr.p.138). Police discovered Outen's girlfriend's car at the scene, and an officer testified he had previously seen Outen driving a similar car. (Feb 6 Tr.p.148). Police discovered a tire iron on the front passenger's seat. (Feb 6 Tr.p.155). Outen's shoes were consistent with shoe prints found at the scene. (Feb

6 Tr.pp.166–68). Finally, Ms. Grice testified she observed Outen at his bond hearing and identified him as the person she saw breaking into her home. (Feb 5 Tr.p.110). Thus, there was direct and circumstantial evidence that Outen was the person who tried to break into Ms. Grice's home.

Likewise, there was evidence Outen attempted to enter the home with the intent to commit a crime once inside. The break-in took place at 3:45 a.m. Ms. Grice testified she "knew somebody was breaking in [her] home." (Feb 5 Tr.p.84). She testified the person was "in a frenzy trying to get that door open." (Feb 5 Tr.p.85). Ms. Grice even warned him that she was armed, and he persisted in trying to enter the home. (Feb 5 Tr.p.112). These facts support an inference that Outen had the intent to commit a crime inside Ms. Grice's home. As the solicitor argued in closing, a person does not break into someone's house with a tire iron at 3:45 a.m. unless he has the intent to commit some sort of crime. (Feb 6 Tr.p.203). Surely this raises more than a "mere suspicion" of guilt. Finally, it was undisputed that the crime occurred in the nighttime hours. The trial court correctly refused to grant a directed verdict. This Court should affirm.

II. Outen's complaint that his trial attorney's sympathetic statement towards the victim warrants reversal of his conviction is not preserved for review and fails to identify a judicial error.

Outen next complains that his trial attorney made "statements of sympathy" towards Ms. Grice during trial. Because no objection was made at trial, this issue is not preserved for review. This Court should affirm.

A. Standard of review.

In criminal cases, the appellate court sits to review errors of law only. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

B. Discussion.

Outen's complaint centers around his attorney's questioning of Ms. Grice, which he began by "recognizing [her] bravery" in defending herself from the intruder. (Feb 5 Tr.p.95). This claim is not preserved for review. As Outen recognizes in his brief, there was no objection made to the trial court pertaining to these statements. "An argument not raised and ruled on by the trial court is not preserved for appeal." State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997).

Outen cites Dial v. Niggel Assocs., Inc., 333 S.C. 253, 509 S.E.2d 269 (1998), for the proposition that "[u]nder certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear." Brief of Appellant at 5. However, Dial explains that the circumstances under which the court will excuse a party's failure to contemporaneously object are narrow, and they are not present in

this case. First, the improper comments must be "flagrant," "vicious," and "inflammatory," resulting in "clear prejudice." Dial, 333 S.C. at 256, 509 S.E.2d at 271. That is not true of the benign comment at issue here. Second, the Appellant must have raised an objection to the improper comments in a post-trial motion for a new trial. Dial, 333 S.C. at 257, 509 S.E.2d at 271. Outen made no post-trial motion for a new trial based on the alleged improper comment. Unlike in Dial, there is no trial court ruling for this Court to review.

An appellant "cannot complain of an error which his own conduct has induced." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). Outen's claim resembles a claim of ineffective assistance of counsel, which he can bring in a Post-conviction Relief action. It is not cognizable on direct review. This Court should affirm.

III. The trial court did not err by finding in a pretrial hearing that Outen's video-recorded statement to police was voluntary. While the record supports the trial court's finding, the State never sought to introduce Outen's interview during trial.

Outen claims the trial court erred by finding Outen's video-recorded statement to police was voluntary following a pretrial hearing. His claim is meritless because Outen's statement was not admitted at trial. Even if the statement was involuntary, Outen could not have suffered prejudice because the statement was not offered as evidence. This Court should affirm Outen's conviction.

A. Standard of review.

In criminal cases, the appellate court sits to review errors of law only. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

B. Discussion.

Outen claims the trial court erred by finding Outen's statement made during "custodial interrogation" during his interview with police was voluntary. He argues Outen was intoxicated and could not voluntarily give a statement. The finding of voluntariness was made during a pretrial Jackson v. Denno hearing. However, the State never actually offered the statement at trial.

"A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review." State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999).

Even though a pretrial hearing was held on the admissibility of the interview, the State never introduced the interview at trial. Nor did the State elicit testimony about Outen's statements during the interview from any of its witnesses. Accordingly, even if the pretrial ruling was erroneous, Outen could not have been prejudiced because the interview was not offered into evidence.¹

While the State did introduce evidence about a spontaneous statement Outen made upon first contact with police, Outen did not object to the introduction of this statement at trial and does not raise it in his brief. (Feb 6 Tr.p.138). Even if he had, there is absolutely no evidence that the statement was coerced in any way. Finally, even if this statement was inadmissible, Outen was not prejudiced because the isolated comment was not important compared to the other evidence in the case, which was

¹In any case, the record supports the trial court's finding that Outen's statements during his interview were voluntary. The trial court viewed the recording of Outen's interview with police during the pretrial hearing. He found that Outen appeared to be "in complete control" and did "not appear to be incapacitated . . . in any fashion." (Feb 5 Tr.p.56). The court explained: "In response to a basic question as to what happened, the defendant basically launches into a ten-minute story without interruption, explaining what, in his mind, occurred. To the court's clear indication that he understands what's going on, he is giving a coherent story Again, he doesn't have any problems relaying this story. He's not slurring his words; he's not stumbling over words. He basically launches into a lengthy statement without any problem whatsoever. . . . [T]here's no indication to the court at the time of the interview that he's under the influence of anything." (Feb 5 Tr.pp.56-57). The court concluded Outen's statement was voluntary and denied his motion to suppress. (Feb 5 Tr.p.58). See State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (explaining "proof of intoxication, short of rendering the accused unconscious of what he is saying, 'goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence'").

overwhelming. See State v. Davis, 371 S.C. 170, 181–82, 638 S.E.2d 57, 63 (2006) (explaining error is harmless when it could not reasonably have affected the result of the trial). This Court should affirm Outen's conviction.

CONCLUSION

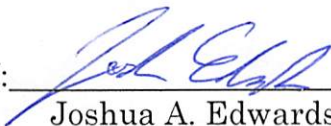
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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