STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 100981 (Wood County No. 09-F-101)

Joseph Nelson,
Defendant Below, Petitioner

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Joseph Nelson files this timely appeal from a jury conviction for burglary and conspiracy. The circuit court sentenced petitioner to terms of imprisonment of one to fifteen years for burglary and one to five years for conspiracy, which were suspended and petitioner was placed on probation for three years. Petitioner argues that his convictions must be reversed because there was insufficient evidence that the house involved in this case constitutes a "dwelling house" under the relevant burglary statute and because the circuit court erred in answering a question raised by the jury during its deliberations. Respondent State of West Virginia has filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On April 16, 2008, the police were called to a Parkersburg house owned by Robert Cross due to a suspected burglary in process. Police officers arrested petitioner and his co-defendants who were inside the house. One of the co-defendants had tools in his possession that the State argued were to be used for removal of objects from the house. Petitioner and his co-defendants were indicted on two alternative counts of burglary and one count of conspiracy. The jury convicted petitioner and his co-defendants of nighttime entering without breaking of a dwelling house as charged in Count II of the indictment and conspiracy to commit burglary as charged in Count III of the indictment.

"Dwelling House" Issue

Petitioner asserts the house in question does not qualify as a "dwelling house" within the meaning of the relevant burglary statute. Under West Virginia Code § 61-3-11 (c), a "dwelling house" is defined as "includ[ing], but not be limited to, a mobile home, house trailer, modular home, factory-built home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time." In determining whether a structure qualifies as a "dwelling house" within the meaning of the burglary statute, this Court has held that a structure is no longer a "dwelling house" when its occupants leave it without any intention of returning. *See State v. Scarberry,* 187 W.Va. 251, 418 S.E. 2d 361 (1992) (per curiam).

The issue of owner Robert Cross's intent as to the house was strenuously contested at trial. At one time, Cross had lived in the house but had moved to another home approximately eight or nine years prior to the alleged burglary. After he moved out, his in-laws lived in the house for about four years, but moved out in the fall of 2006, about a year and a half before the alleged burglary. Cross testified during the State's case-in-chief that it was his intent to repair and rent the house, although his poor financial condition had limited his ability to proceed with this plan. Two or three weeks before the burglary, Cross testified that he made an oral agreement with a woman named Linda Smith in which he would waive a security deposit and rent in exchange for her services in fixing and cleaning the house. Cross testified that although Smith never moved into the house, she had begun the process of removing trash and painting the house at the time of the burglary.

At trial, petitioner challenged the owner's intent to return to the house by arguing that the house was heavily encumbered by liens and was uninhabitable. Petitioner introduced the testimony of the Parkersburg Code Enforcement Director as to the house's numerous code violations. He also introduced expert testimony that the house was subject to a significant number of liens far exceeding its worth.

At the close of the State's evidence, petitioner moved for judgment of acquittal. He argued that there was insufficient evidence of the statutory element that the house constitute a "dwelling house." The circuit court denied the motion, reasoning that "as it relates to the issue of whether it's a dwelling, it is the intention of the owner of the structure that really controls. Mr. Cross testified that he had every intention of renting it out, fixing it up, but that he was simply prevented from doing that. It is a jury issue as to the credibility of Mr. Cross, whether he really intended to do this or whether he did not intend to do this." Petitioner renewed his motion at the close of all the evidence and the circuit court again denied the motion based upon the same reasoning.

The jury returned its verdict finding petitioner guilty of burglary and conspiracy. Petitioner filed a motion for post-verdict judgment of acquittal, which was again denied by the circuit court. On appeal, petitioner challenges these rulings as error.

The State responds that there was sufficient evidence to allow the jury to determine that owner Robert Cross had the "intent to return" to the property as he was in the process of renting it. Although there were tax liens, the State argues that evidence showed that Cross had always redeemed this property in the past.

As this Court recognized in Syllabus Point 1, *State v. Scarberry*, 187 W.Va. 251, 418 S.E. 2d 361 (1992) (per curiam), "'In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.' Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Utilizing this standard, the Court concludes that the circuit court did not err in allowing the jury to decide this issue and in denying the petitioner's multiple motions for acquittal.

"Response to Jury Question" Issue

During its deliberations, the jury posed the following question to the circuit court: "Does Mr. Cross's reported verbal agreement to rent to Linda Smith equate to an intention of returning?" This was the jury's third question during its deliberations. Petitioner argues that the circuit court should have answered this question as it had answered the jury's two prior questions, by stating: "You have all of the evidence on which you should base your verdict."

Instead, following a lengthy discussion with all counsel present, the circuit court brought the jury back into the courtroom and gave them the following additional instruction:

> Now, in both the jury instructions regarding burglary there is a definition of "dwelling house," and I want to clarify something for you. I don't know whether this is a sticking point or not. Part of the definition of "dwelling house" says: "That thus a structure is no longer a dwelling house for the purpose of West Virginia's burglary statute, even though furnished as a dwelling house, when its occupants leave it without any intention of returning."
>
> And, of course, this goes along with your question. A rental unit, an apartment is considered or can be considered a dwelling under the burglary statute. So

> it's not the owner that has to occupy the structure. It can be, you know, a renter occupying a structure. And if they're occupying it as a dwelling, then it can be considered a dwelling house under the burglary statute.
>
> Now, concerning your specific question: "Does Mr. Cross' reported verbal agreement to rent to Linda Smith equate to an intention of returning?" That is an issue that you must decide under all the facts and circumstances of this case considering the evidence and the law that's been provided to you. So with that, we would ask that you retire to your jury room to consider your verdict.

The jury continued its deliberations and returned with a guilty verdict as to the burglary and conspiracy charges. Petitioner argues that the circuit court improperly answered the question by essentially instructing the jury to consider the intent of the purported tenant Linda Smith. Petitioner asserts that the determinative issue is the intent of the owner to return, not whether a structure is to be used as a rental or owner occupied residence and therefore, the circuit court's answer was an erroneous statement of law.

As this Court recognized in *State v. Allen*, 193 W.Va. 172, 176, 455 S.E. 2d 541, 545 (1994), "the proper method of responding to a written jury inquiry during the deliberations period in a criminal case ... is for the judge to reconvene the jury and to give further instructions, if necessary in the presence of the defendant and counsel in the courtroom." Here, the circuit court re-instructed the jury, as allowed by *Allen*. After considering the record and arguments of counsel, this Court concludes that there was no error in the circuit court's answer to the jury's third question given the particular facts and circumstances of this case. Accordingly, we affirm.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh