STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lee County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge
Appellate Case No. 2019-000969

The State, Respondent,

vs.

Kevin Herriott, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Because Respondent lacked subject matter jurisdiction, the lower court act were void to pronounce judgment to illegal and invalid indictments that was held faulty on its face.

II. Because Respondent did not have sufficient evidence to constitute a(n) triable issue of the defense, the court erred failing to charge the jury of a(n) affirmative defense of duress and self-preservance.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial court had subject matter jurisdiction over Appellant's case and properly denied his motion to quash the indictments.

II. The trial court properly denied Appellant's motion for directed verdict and any remaining issues are not properly before the Court and should be raised in Post-Conviction Relief.

STATEMENT OF THE CASE

Appellant was an inmate incarcerated at Lee Correctional Institute. The Lee County Grand Jury returned indictments for assault and battery of a high and aggravated nature (ABHAN), attempted armed robbery, and possession of a weapon by an inmate. (Indictments). Appellant proceeded to trial before the Honorable R. Ferrell Cothran, Jr., and a jury. Judge Cothran directed a verdict as to the ABHAN charge, but allowed the lesser-included offense of assault and battery first degree to proceed to the jury. (T.57-58; R.49-50). The jury acquitted Appellant of the assault and battery charge, but convicted him of the attempted armed robbery and the possession of a weapon charges. (T.92-93; R.84-85). Judge Cothran sentenced Appellant to six years for attempted armed robbery with the sentence consecutive to his current sentence for voluntary manslaughter. He was sentenced to five years for the possession of a weapon charge to run concurrent to the attempted armed robbery. (Sentencing Sheets; R.90-91). Appellant filed a Notice of Appeal and subsequently moved to relieve appellate counsel and proceed pro se. The Court granted the motion to proceed *pro se*. Appellant filed his Initial Brief of Appellant on or about November 7, 2019. This brief follows.

STATEMENT OF FACTS

On May 10, 2018, Appellant, an inmate at Lee Correctional Institute, got into an altercation and tried to stab his roommate with a shank—or handmade knife—which was tied around his hand. (T.32-33; R.22-23). Lieutenant Bethea arrived at the cell and, through the window of the cell door, saw Appellant trying to stab his roommate. He called for assistance and then asked Appellant to slide him the shank. (T.33; R.23). Bethea asked Appellant to slide the shank to him and, after a while, he did. Bethea ordered both inmates to get on their knees. Instead, Appellant climbed to the light fixture and retrieved two more hidden shanks. (T.34-35; R.24-25).

Lieutenant Lucky arrived to assist along with a couple other officers and a nurse. (T.35-36; R.25-26). After the officers decided to open the door to the cell to remove Appellant, he pushed Lucky in the back, knocking him to the floor. When he did, Appellant climbed on top of Lucky and attempted to obtain Lieutenant Lucky's chemical munition. (T.42-43; R.32-33). Sergeant Coaxum had to use the chemical munition to gas Appellant to get him off of Lieutenant Lucky. (T. 43; R.33). During this time, Appellant still had the two shanks in his hands that he had retrieved from the light fixture. The prison's video system captured much of the incident outside the prison cell. (Video State's Exhibit 1).

ARGUMENT

I. The trial court had subject matter jurisdiction over Appellant's case and properly denied his motion to quash the indictments.

Appellant contends the trial court erred in refusing to quash the indictments of his charges; failed find it lacked subject matter jurisdiction to hear the case; and raised other issues related to the indictments, terms of court, federal rules, disclosure of evidence, and the deliberations of the grand jury. Appellant's issues should not be considered because they were improperly raised in hybrid representation. The trial court properly found the indictments valid and that it had subject matter jurisdiction to consider Appellant's case.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. Id.

HYBRID REPRESENTATION

Initially, there is no right to hybrid representation, and because Appellant was represented by trial counsel, his motions and complaints should not have been heard or considered by the trial court and should not be considered on appeal because they were a nullity. See Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially pro se and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless

submitted by counsel.") (citing State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)); State v. Devore, 416 S.C. 115, 120–21, 784 S.E.2d 690, 693 (Ct. App. 2016) (observing there is no right to hybrid representation under either the United States or South Carolina constitution and explaining substantive documents submitted pro se by litigants who are represented by counsel should not be accepted by the clerk of court for filing). Additionally, counsel cannot act as a mere conduit for Appellants various arguments and complaints. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517–18 (2002) (holding "counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client"). As the Supreme Court explained: "[t]ails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by experts in an area where he himself possesses no expertise." Id. (quoting Commonwealth v. Ellis, 534 Pa. 176, 626 A.2d 1137, 1140 (1993)).

Counsel specifically indicated he did not believe Appellant's complaints had merit and either admitted them as an improper conduit or they were improperly considered due to hybrid representation. (T.14; R.5). Appellant raised and argued the issues at the hearing. Counsel did not participate other than to indicate he did not believe they had merit and that he submitted discover requests pursuant to Rule 5 and Brady. (T.14-18; R.5-9). As a result, this Court should not consider any of the arguments made by Appellant and not properly raised through counsel.

MERITS

On the merits, the trial court did not abuse its discretion in proceeding to trial. The trial court properly refused to quash the indictments, found affidavits were not required, had subject

matter jurisdiction, found no discovery violation, and refused to turn over minutes of the grand jury. Appellant's convictions and sentences should be affirmed.

A motion to quash an indictment tests only the facial validity of the indictment. See S.C. Code Ann. § 17-19-90 (2014) ("Every objection to any indictment for any defect *apparent on the face thereof* shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." (emphasis added)). "A motion to quash does not test the sufficiency of the State's evidence . . . ." State v. Massey, 430 S.C. 349, 358, 844 S.E.2d 667, 671 (2020). Additionally, as our Supreme Court has stated: "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005).

In the instant case, there is no question the circuit court had subject matter jurisdiction to consider the charges against Appellant. He was charged with ABHAN, attempted armed robbery, and possession of a weapon by an inmate. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." Id. As a result, any complaints regarding subject matter jurisdiction of the court is without merit.

In regards to the indictments, Appellant has raised several issues. First, he asserts there is no affidavit with the indictment. There is no need for an affidavit with the indictment, instead the affidavit accompanies an arrest warrant as found by the trial court. See e.g., S.C. Code Ann. § 17-13-160 (Supp. 2019) (requiring arrest warrant to be in the form provided for by the South Carolina Attorney General which includes the requirement for an affidavit); S.C. Code Ann. § 22-3-710 (Supp. 2019) ("All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue."); Law v. S.C. Dep't of Corr., 368 S.C. 424, 441,

629 S.E.2d 642, 651 (2006) (finding warrant affidavit coupled with testimony presented to magistrate sufficient to demonstrate probable cause to issue valid arrest warrant). Additionally, an indictment is perfectly valid without an arrest or an arrest warrant. See State v. Walker, 232 S.C. 290, 296, 101 S.E.2d 826, 829 (1958) (quoting State v. Bowman, 43 S.C. 108, 20 S.E. 1010. State v. Bullock, 54 S.C. 300, 32 S.E. 424.) ("We quote the respective syllabi of these decisions: State v. Bowman: 'The State's solicitor may present a bill of indictment to the grant jury without previous affidavit and warrant, and a true bill being found, bench warrant issued, and defendant arrested, he is not entitled to his discharge under *habeas corpus*, the exercise of this power on the part of the solicitor not having been abused.' State v. Bullock: 'Solicitor may hand out an indictment without previous arrest of defendant on warrant issued by magistrate, supported by affidavit.'").

Next he seems to argue the indictment were invalid because they were not properly presented. However, the multi-count indictment was presented to the Lee County Grand Jury and properly true-billed. (Indictment). See S.C. Const. Art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed ..."); S.C.Code Ann. § 17–19–10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...."). It is clear Appellant had a copy of the true-billed indictment as he referenced it and argued regarding the indictment during his pre-trial arguments.

Appellant has not challenged the regularity of the indictment or the validity of the indictment on its face. A quick reading of the indictment indicates that it charges all three counts very much in the language of their applicable statutes. See S.C. Code Ann. § 17-19-20 (2014)

("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.") The counts of the indictment provide the requisite notice to Appellant and are valid on their face. See Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 ("The sufficiency of an indictment is to be assessed by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce[ ] and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) [the indictment] apprises the defendant of the elements of the offense that is intended to be charged.").

Appellant also seems to suggest the indictment against him should be quashed because they were not turned over in his discovery requests under Rule 5, SCCrimP and Brady v. Maryland, 373 U.S. 83 (1963) and because other information exists which should have been turned over. He fails to demonstrate any information which has not been turned over which was required to be turned over under Rule 5 or Brady. As a result, there was no reason to suppress any evidence and certainly no reason to dismiss his case or quash the indictment against him.

Finally, he sought "the minutes of the proceeding" of the Lee County Grand Jury. It would be inappropriate to turn over any transcript, recording, or minutes of the proceedings of the Grand Jury. "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at

424. In this case, there is no allegation the Lee County Grand Jury which indicted Appellant was a nullity, comprised of improper members, or was selected in a discriminatory or unconstitutional manner. See Evans v. State, 363 S.C. 495, 512, 611 S.E.2d 510, 519 (2005) ("the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity or proves the disqualification of an individual juror."). As a result, there was no basis to quash Appellant's indictment, and certainly no entitlement to the "minutes" of the Grand Jury even if ones were taken.

Finally, Appellant makes other arguments including arguments about the Federal Rules of Court. None of the remaining arguments were raised to the trial court and, therefore, are not properly preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Accordingly, the trial court's decisions and Appellant's convictions and sentences should be affirmed.

II. The trial court properly denied Appellant's motion for directed verdict and any remaining issues are not properly before the Court and should be raised in Post-Conviction Relief.

Appellant maintains the trial court erred in denying his motion for a directed verdict. Further, he asserts his counsel failed to properly raise several defenses and additional evidence could have been presented. The trial court properly denied the directed verdict as to Appellant's attempted armed robbery and possession of a weapon charges. Any other claims regarding the failure of his counsel to present defenses or evidence are not properly preserved, not properly raised in direct appeal, and should be addressed in Post-Conviction Relief.

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and 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."' State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)).

"Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding "any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt" in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

MERITS

The trial court did not err in denying Appellant's motion for directed verdict as it relates to his attempted armed robbery and possession of a weapon by an inmate charges.[1] The motion failed to properly preserve the issue, but in any event, there was sufficient evidence to warrant sending the charges to the jury.

Initially, Appellant did not raise any specific grounds for his motion for directed verdict. As a result, any arguments raised on appeal are not preserved. "In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998).

Nonetheless, there was sufficient evidence to submit the charges to the jury. The testimony by Lieutenant Lucky and Lieutenant Bethea establish that Appellant, after knocking Lieutenant Lucky to the floor, climbed on top of him and attempted to remove his canister of chemical munitions. At the time he did this, Appellant was armed with the shanks—a deadly weapon—that

[1] The trial court granted Appellant's motion for a directed verdict as it relates to the ABHAN charge. He proceeded to the jury on a charge of assault and battery first degree, but was acquitted. As a result, this charge is not before this Court.

he recovered from the light fixture of his cell. The video further provides evidence sufficient to warrant sending the charge of attempted armed robbery to the jury. See S.C. Code Ann. § 16-11-330(B) (Supp. 2019) ("A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.").

Additionally, because the testimony and video evidence established Appellant was clearly an inmate in Lee Correctional Institute and on multiple occasions was in possession of shanks—handmade knives which are deadly weapons—there was reason to believe he violated section 24-13-440 of the South Carolina Code and submit the charge to the jury and deny his motion for directed verdict. See S.C. Code Ann. § 24-13-440 (Supp. 2019) ("It is unlawful for an inmate of a state correctional facility or of a local detention facility to carry on his person or to have in his possession a dirk, slingshot, metal knuckles, razor, firearm, or an object, homemade or otherwise, that may be used for the infliction of personal injury upon another person, or to wilfully conceal any weapon within any Department of Corrections facility or other place of confinement.").

Finally, Appellant seems to argue that his counsel erred in failing to raise several alleged defenses and in failing to present additional evidence. This issues were never raised to the trial court and are not preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court). Further, the issues are not appropriate for direct appeal, but are better considered in a Post-Conviction Relief action. See e.g., S.C. Code Ann. § 17-27-20 (Supp. 2019) (setting forth grounds for post-conviction relief).

Accordingly, this Court should not address Appellant's remaining issues, should affirm the trial court's denial of Appellant's motion for directed verdict, and affirm Appellant's convictions and sentences.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 6, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed September 6, 2022, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 6th day of September, 2022.

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608