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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYAN CHRISTOPHER POWERS,

APPELLANT.

APPELLATE CASE NO. 2022-000226

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by refusing to direct a verdict for reckless vehicular homicide when the state failed to present any direct or substantial circumstantial evidence to support the charge?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant on February 10, 2020 for reckless vehicular homicide. R. 394-395. His case was called to trial on February 7, 2022 before the Honorable Debra McCaslin, and a jury. R. 1. Assistant Solicitors Todd Wagner and Jordan Cox represented the state. R. 1. Michael Atwater represented Appellant. R. 1.

On February 9, 2022, the jury found Appellant guilty as indictment. R. 361, ll. 11-24. He was sentenced to eight years imprisonment. R. 391, ll. 11-14.

This appeal follows.

STANDARD OF REVIEW

"In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). On appeal, when reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the state. Id. at 429, 753 S.E.2d at 409 (citing Cherry, 361 S.C. at 593, 606 S.E.2d at 478); See State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "If the state has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury." Id. (quoting Cherry, 361 S.C. at 593-94, 606 S.E.2d at 478) (internal quotation marks omitted).

ARGUMENT

The trial judge erred by refusing to direct a verdict for reckless vehicular homicide when the state failed to present any direct or substantial circumstantial evidence to support the charge.

Relevant Facts

During the month of June 2019, a private contractor, Blythe Construction, was repaving Highway 178 between Batesburg and Pelion. The construction required one lane to be closed during the day. Flaggers with Stay Alert Safety Services controlled traffic while the repaving was ongoing. The flaggers would allow traffic to proceed from one direction at a time in the open lane. R. 115, l. 4 – 116, l. 14. Stay Alert used "advanced warning signs" to notify oncoming traffic about the construction. R. 166, ll. 17-22. The South Carolina Department of Transportation (SCDOT) required "three rollup signs." R. 116, ll. 22-23. The first sign drivers saw when approaching the construction read "roadwork ahead." The second sign read "one lane road ahead." The third sign was a "symbolic flagman" (an image of a man holding a paddle). R. 116, l. 23 – 117, l. 2. Based on the speed limit for the road, fifty-five miles per hour, each sign was placed five hundred feet apart. R. 117, ll. 3-7. Additionally, since Highway 178 is known for speeding, Stay Alert placed a fourth sign five hundred feet before the first sign, which said "be prepared to stop." R. 117, ll. 8-13. Five hundred feet beyond the final sign was a flagger, a man wearing a vest with a slow/stop paddle who controlled traffic. R. 118, ll. 2-5. The signs were put out every morning between 7:00 and 7:30 while construction was ongoing and taken down every evening when roadwork ended for the day. R. 125, ll. 13-22.

Shortly before six o'clock on the evening of June 14, 2019, there was a three vehicle accident on Highway 178 where the flagger, Timothy Rainey, had stopped traffic. R. 82, l. 1 – 84, l. 9; R. 165, l. 19 – 166, l. 1. The first vehicle behind the flagger was a red 2006 Ford Ranger

driven by George Adams. R. 153, l. 24 – 154, l. 20. The second vehicle was a 1990 silver Chevy Colorado driven by Clinton Hoover. R. 94, l. 16 – 96, l. 22. Ginger Smith, Hoover's niece, was in the front passenger seat, while Mildred Smith, Hoover's sister, was in the backseat. R. 96, ll. 6-10. Both of these vehicles were stopped for about fifteen to twenty minutes before the accident. R. 84, ll. 10-11; R. 155, ll. 6-9. A third vehicle, a white Chevy Silverado, approached the two stopped vehicles from behind. It failed to stop and collided into the back of the truck driven by Hoover. R. 84, l. 12 – 85, l. 11. Mildred Smith, the backseat passenger in Hoover's pickup truck, died from injuries she sustained during the accident, including blunt force trauma to the chest. R. 108, l. 22 – 109, l. 15.

Appellant was the driver of the Chevy Silverado. While Appellant was sitting on the side of the road shortly after the accident, Deputy Ben Treaster with the Lexington County Sheriff's Department questioned him about what happened. Appellant explained that he came over the hill and "didn't have time to stop." He said that by the time he saw the cars stopped, "there was nothing [he] could do." R. 246, l. 14 – 250, l. 18; State's Exhibit No. 1 (CD – Body Camera Footage).

Trooper Jeremy Sisler, a member of the Multi-Disciplinary Accident Investigation Team (MAIT) of the Highway Patrol, was qualified as an expert in general collision reconstruction. R. 179, l. 7 – 181, l. 19. He examined Appellant's Silverado and maintained that "everything," including the steering and braking systems, "was in working order." The only damage to the vehicle was caused by the collision. R. 183, ll. 6-21. Sisler also created a computer aided drawing (CAD) of the accident scene. R. 183, l. 22 – 186, l. 18. He determined that because there were no markings on the road behind Appellant's Silverado "[t]here was no emergency braking done before impact." R. 197, ll. 9-13.

Calvin Rikard, also a member of the MAIT team, was qualified as an expert in collision reconstruction. R. 199, l. 25 – 203, l. 24. Rikard did a minimum speed calculation and determined the minimum speed Appellant's vehicle was traveling at impact was 63 miles per hour. R. 211, ll. 5-23.

After the state rested, Appellant moved for a directed verdict. Defense counsel argued that even in the light most favorable to the state, there was no evidence Appellant acted with a reckless intent as required by the statute for reckless homicide. R. 263, ll. 3-11.

The assistant solicitor asserted that evidence of the speed Appellant was traveling along with the visibility of the signs was evidence of recklessness. R. 263, ll. 14-25. He argued that all the circumstances tended to show Appellant had a reckless disregard for the safety of others and for the consequences of his actions. R. 263, l. 25 – 264, l. 8.

The judge denied the motion. She found the state presented sufficient evidence in the light most favorable to the state to submit the case to the jury. R. 267, l. 9 – 268, l.

Discussion

The trial judge erred by refusing to direct a verdict for reckless vehicular homicide when the state failed to present any direct or substantial circumstantial evidence to support the charge. The state did not present any evidence that Appellant operated his vehicle in a reckless disregard for the safety of others.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict.

State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant 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); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963). See also State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012) (using the traditional circumstantial evidence jury charge to explain how a trial judge should evaluate circumstantial evidence at the directed verdict stage); State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009) (same).

In State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), our Supreme Court held the trial court erred in failing to direct a verdict where the only evidence presented against Mitchell was his fingerprint at the scene of the burglary. Likewise, in State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001), the Court directed a verdict of acquittal where the state presented no direct evidence that Lollis was involved in setting fire to his home. The circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he

possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Id. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held Odems was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that Odems was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the Court concluded that the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51.

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), our Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the decedent in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The other evidence presented against Bostick was that (1) he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the decedent's home, and (2) DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the decedent. Id. at 142, 708 S.E.2d at 778.

The trial judge here should have directed a verdict for the offense of reckless vehicular homicide as there was no direct or substantial circumstantial evidence to support the charge. "To

convict an individual of reckless homicide, the State must prove the individual was driving a vehicle 'in reckless disregard of the safety of others.'" State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (citing S.C. Code Ann. § 56-5-2910). "Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." Id. (citing State v. Tucker, 273 S.C. 736, 259 S.E.2d 414 (1979)). The state failed to present any evidence that Appellant operated his vehicle "in a reckless disregard for the safety of others." Appellant told Deputy Ben Treaster after the accident that he came over the hill and "didn't have time to stop." He said that by the time he saw the cars stopped, "there was nothing [he] could do." R. 246, l. 14 – 250, l. 18; State's Exhibit No. 1 (CD – Body Camera Footage). Appellant's statement makes clear that this was simply a tragic accident. He did not see the stopped vehicles due to the hill and did not have time to stop before impact. Despite exercising due care, he struck the vehicle in front of him.

Respectfully, because there was no evidence to support the charge, this Court should direct a verdict for the offense of reckless vehicular homicide.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court grant a directed verdict for the offense of reckless vehicular homicide.

Respectfully submitted,

s/ Lara M. Caudy__________________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryan C. Powers states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial, which was held on February 7-9, 2022 before the Honorable Debra R. McCaslin, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Bryan Christopher Powers.

Respectfully Submitted,

s/ Lara M. Caudy__________________
Lara M. Caudy
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) Complete Trial Transcript Dated February 7-9, 2022;
(2) State's Exhibit No. 1 (CD – Body Camera Footage).
(3) Indictment;
(4) Sentence Sheet.

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

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

This 20th day of December, 2022.

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."

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

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