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Jan 12 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH TYRONNE WHERRY,

APPELLANT.

APPELLATE CASE NO. 2022-000453

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict of acquittal where there was no direct or substantial circumstantial evidence appellant killed the decedent, particularly where eyewitness Elizabeth Muckenfuss testified appellant's cousin, Von, probably shot the victim, and not appellant as originally suspected?

STATEMENT OF THE CASE

Appellant was indicted at the May 25, 2021 term of the Chester county grand jury for the offenses of murder and possession or display of a firearm during the commission of a violent crime. R. *. His case was called to trial on April 4, 2022, before the Honorable Paul Burch. The assistant solicitor was Candace Lively. Kay Boulware and William Frick represented appellant. Tr. 1.

On April 7, 2022, the jury found appellant guilty. Tr. 438, ll. 2-7. Judge Burch sentenced appellant to forty-five years' imprisonment for murder, and he imposed a five-year concurrent sentence on the firearms charge. Tr. 444, ll. 5-7.

This appeal follows.

STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘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. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” Id. at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409.

ARGUMENT

The court erred by refusing to direct a verdict of acquittal where there was no direct or substantial circumstantial evidence appellant killed the decedent, particularly where eyewitness Elizabeth Muckenfuss testified appellant's cousin, Von, probably shot the victim, and not appellant as originally suspected.

Relevant Facts

As defense counsel would argue in closing, the state's evidence in this case was inconsistent, contradictory, and based on suspicion. Rikki Burch was an investigator with the Chester County Sheriffs Office. Tr. 58, l. 10- 59, l. 4. Burch remembered receiving a call from his supervisor, Sergeant Telly Crockett, telling him a female wanted to talk to police about a murder she allegedly witnessed. Tr. 59, ll. 9-24. Burch said he thought this female, Elizabeth Muckenfuss, "was crazy." Nonetheless, he added, "we still had to investigate." Tr. 60, ll. 7-8.

Muckenfuss was a crack addict and a prostitute. Burch remembered that she was upset and crying when he met with her. Tr. 63, ll. 20-24.

Muckenfuss told Burch she was at a crack house, and then she went back to the Executive Inn where she stayed at times. The essence of her claim was that she was in a vehicle with the victim, Antonio Thompson, appellant, and Lavondia "Von" Wherry while they gave Thompson a ride back to his car which was broken down along the highway. Von later testified that Thompson gave her \$30.00 to give him a ride to his car. Von picked up jumper cables from her house to help Thompson get his car started. Tr. 65 l. 3- 69, l. 9.

Muckenfuss testified that during this drive to Thompson's car, he was shot. She gave conflicting stories as to who actually shot Thompson. She claimed at one point that appellant

told her to duck, and then she heard a gunshot. Muckenfuss was in the back seat with appellant, and Thompson was in the front passenger seat with Von driving. Tr. 65 l. 3- 69, l. 9.

While Muckenfuss did not claim to have seen appellant shoot Thompson, the state argued that was a fair inference from her testimony. Investigator Burch conversely said that Von told him appellant shot Thompson by accident while she was driving that morning. Tr. 88 l. 23- 89, l. 22.

Von Wherry changed her story after she was charged with murder, and she now claimed that appellant shot the decedent in the neck “unnecessarily.” Von said that she helped appellant drag Thompson’s dead body into the woods after appellant shot him. Tr. 167, l. 12- 169, l. 24.

Elizabeth Muckenfuss testified that she was scared of “Von and Ken [appellant]” Tr. 226, ll. 15-18. Muckenfuss admitted she initially told the police she did not know who shot Thompson during their ride that morning. The Toyota truck they were riding in was owned by Von, and Muckenfuss essentially said that Von was a very controlling figure. Tr. 233, ll. 4-7.

Muckenfuss testified that Von told the decedent Thompson: “You’re going to give me my money, motherfucker” right before Thompson was shot. Tr. 237, l. 24- 238, l. 3. Muckenfuss added that she had been told that Von had robbed other people in the past. Tr. 238, ll. 12-18.

Muckenfuss claimed that while she is also scared of appellant, she admitted that appellant had never threatened her in the same manner as Von had threatened her. Tr. 239, ll. 4-23.

Muckenfuss admitted she told the police at one point that she thought appellant shot the decedent Thompson. However, Muckenfuss said at trial that appellant being the shooter did not make any sense to her. Tr. 242, l. 23- 243, l. 7.

Interestingly, the DNA found on the .357 gun that belonged to Von excluded appellant as a contributor to that DNA. Von could not be similarly excluded. Tr. 263, l. 7- 264, l. 10. Appellant also did not admit to any involvement in the shooting, and he always maintained his innocence.

At the conclusion of the state's case, defense counsel moved for a directed verdict, noting the inconsistent and contradictory evidence, and arguing there was no direct or sufficient circumstantial evidence to take the case to the jury. Tr. 368, ll. 11-19.

The solicitor argued there was sufficient evidence to withstand the directed verdict motion, and the judge denied the motion for directed verdict. Tr. 368, l. 21- 369, l. 13. Defense counsel renewed her motion for a directed verdict after the state rested without the defense presenting any evidence. Tr. 372, ll. 21-25.

Discussion

“Mere suspicion” of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). See, also, State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). Here, the conflicting and contradictory testimony only raised a suspicion of appellant's guilt, and that was not enough to withstand the directed verdict motion. See State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

In Mitchell, the victim testified that Mitchell had been over to his house on a couple of occasions, and that Mitchell had also attended a social gathering at the victim's home for about forty-five minutes to one hour. A police officer investigating the burglary found glass on the floor, and there was a screen from which the officer was able to get an identifiable fingerprint. That fingerprint matched Mitchell. Our Supreme Court held that the state had failed to produce

substantial circumstantial evidence reasonably tending to prove the guilt of the accused, and that a directed verdict should have been issued.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) our Supreme Court also held the defendant was entitled to a directed verdict in that murder case. There was evidence a vehicle was seen on the night of the murder in the victim's apartment complex that was very similar to the car in which Martin and his co-defendant were traveling that night. Further, when Martin and his co-defendant were late picking up Martin's girlfriend the defendant made a damning statement when he told her that "some shit happened," and his co-defendant added, "somebody may have died tonight." State v. Martin, 340 S.C. at 600, 533 S.E.2d at 601.

Evidence tied to the murder scene in Martin was also found in trash cans surrounding the bar where Martin's girlfriend worked. This Court held that all of this evidence, while certainly raising a strong suspicion of Martin's guilt, was insufficient to withstand a directed verdict motion.

In State v. Schrock, 288 S.C. 129, 322 S.E.2d 450 (1984), our Supreme Court held that evidence the defendant was in the area of the murder scene, and that footprints at the scene were similar to his and were found in the area where the defendant was walking were insufficient to take the case to the jury. In State v. Schrock, there was also evidence that Marlboro cigarette butts were found at the murder scene, and the defendant admitted to the police that he smoked Marlboro cigarettes. Further, tests performed on an oil can did not supply any conclusive connection between the crime scene and the defendant. Our Supreme Court held the defendant was entitled to a directed verdict given this evidence.

Finally, in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), our Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church

and always brought the collection proceeds home on Sunday afternoon. The state presented evidence that investigators found personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

In addition, Bostick had a pattern of gasoline on his shoes and gasoline was the accelerant used to start the fire at the Polite home. The Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Muckenfuss essentially testified at one point that Von Wherry was the more likely shooter than appellant. She did not witness the shooting because her head was down in the backseat when the gun was fired but her testimony was circumstantial evidence. At another point, the circumstantial evidence from Muckenfuss appeared to point to appellant as the shooter because she said appellant told her "duck," and then she heard the gunshot.

There also was, as seen, evidence that Von was the controlling person, including control over appellant. The inconsistent and contradictory evidence in this case was not sufficient to overcome the directed verdict motion, and the judge therefore erred by denying appellant's motion for a directed verdict of acquittal.

CONCLUSION

By reason of the foregoing argument, a directed verdict of acquittal should be issued.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of January, 2023.

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THE STATE,

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V.

KENNETH TYRONNE WHERRY,

APPELLANT.

APPELLATE CASE NO. 2022-000453

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Tyronne Wherry states:

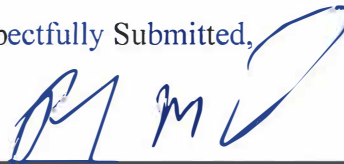
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Paul M. Burch, which was held on April 4-, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Kenneth Tyronne Wherry.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of January, 2023.

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APPELLATE CASE NO. 2022-000453

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments:
- (2) Entire trial transcript.

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


Robert M. Dudek
Chief Appellate Defender

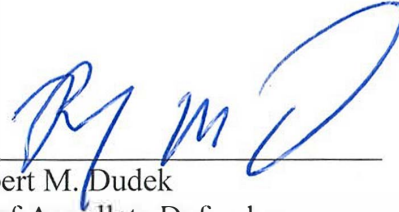
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ATTORNEY FOR APPELLANT

This 11th day of January, 2023.

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."



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ATTORNEY FOR APPELLANT

This 12th day of January, 2023.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Chester County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

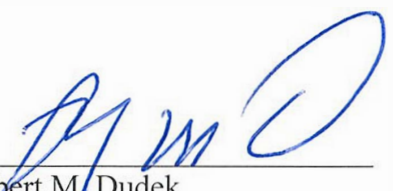
KENNETH TYRONNE WHERRY,

APPELLANT.

APPELLATE CASE NO. 2022-000453

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Kenneth Tyrone Wherry, #267919, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 12th day of January, 2023.


Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

From: [Warren, Kaylynn](#)
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Subject: 2022-000453 The State v. Kenneth Tyrone Wherry
Date: Thursday, January 12, 2023 1:11:00 PM
Attachments: [2022-000453 The State v. Kenneth Tyrone Wherry Anders Brief of Appellant and COS.pdf](#)
[2022-000453 The State v. Kenneth Tyrone Wherry Record on Appeal.pdf](#)

Good Afternoon,

Attached for service in the above-referenced case are the Anders Brief of Appellant and Record on Appeal which will be filed today, January 12, 2023, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren

Administrative Assistant
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