STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

The Honorable Perry H. Gravely, Circuit Court Judge,
and
The Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFERY KEYON TIMOTHY GRIFFIN,

APPELLANT

APPELLATE CASE NO. 2022-001311

INITIAL BRIEF OF APPELLANT

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[1] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

STATEMENT OF THE CASE

On April 6, 2021, Appellant Jeffery Keyon Timothy Griffin was indicted by the Greenville County Grand Jury for armed robbery, possession of a weapon during the commission of a violent crime, pointing and presenting a firearm, and resisting arrest. Tr. * (Indictments). On July 22, 2022, a pre-trial hearing to relieve trial counsel was held before the Honorable Perry H. Gravely. Tr. I 1; Tr. I 3, ll. 3-25. Appellant was represented by Teal Johnson, and the State was represented by William Douglas Richardson, Jr. Tr I. 1.

Appellant's case proceeded to a jury trial before the Honorable G.D. Morgan, Jr., from September 6th through 8th, 2022. Tr. II 1. Appellant was still represented by Teal Johnson, and the State was represented by William Douglas Richardson, Jr. Tr. II, 1. Appellant was found guilty on all counts and sentenced to concurrent terms of incarceration as follows: 20 years for armed robbery; five (5) years for possession of a weapon during the commission of a violent crime; five (5) years for pointing and presenting a firearm; and one (1) year for resisting arrest. Tr. II 209, ll. 2-19; Tr. II 216, ln. 13—Tr. II 217, ln. 1.

STATEMENT OF THE FACTS

On the morning of November 24, 2018, Greenville County Sheriff's Office deputies responded to a robbery in progress at the 7-Eleven on Buncombe Road. A description of the suspect was likewise radioed by dispatch, as was his possible direction of travel. Tr. II 45, ll. 8-25; Tr. II 88, ln. 21–Tr. II 90, ln. 25; Tr. II 119, ln. 16–Tr. II 120, ln. 21. While Master Deputy Javier Ochoa collected statements and video evidence at 7-Eleven, Deputies Corey Chadwick (Dep. Chadwick) and Jarred Greer (Dep. Greer) were enroute in separate vehicles with lights and sirens on; they saw a person—Appellant—walking on the roadside similar in description and direction of travel as the suspect, and turned their vehicles to approach him. Dep. Chadwick got out and chased on foot, while Dep. Greer continued in his vehicle. Tr. II 46, ln. 24—Tr. II 51, ln. 4; Tr. II 90, ln.18—Tr. II 93, ln. 6; Tr. II 120, ln. 24–Tr. II 122, ln. 19.

Appellant saw the police cars coming at him and ran from the roadside into the nearby wood line. Tr. II 163, ll. 4-11. Dep. Chadwick followed about 25 to 50 meters behind with his gun drawn and shouting commands, "sheriff's office, stop, you're under arrest." Tr. II 127, ln. 14–Tr. II 128, ln. 9. Meanwhile, Dep. Greer moved to the opposite side of the wood line, exited his vehicle, and entered the woods. When Dep. Greer heard and saw Appellant approaching approximately ten yards away, he ordered Appellant to the ground with his flashlight on and firearm drawn. Appellant immediately complied by laying face down on the ground, heeded commands thereafter and was placed into handcuffs without incident. Tr. II 92, ln. 24–Tr. II 95, ln. 2; Tr. II 128, ln. –Tr. II 129, ln. 1.

Inside the pillowcase found in Appellant's possession was $156.06 in small bills and change, and a silver revolver. The sum of money matched the amount purportedly stolen from the nearby 7-Eleven, as did the silver handgun. Tr. II 55, ll. 1-15; Tr. II 67, ln. 11—Tr. II 68, ln.

7; Tr. II 69, ll. 12-15; Tr. II 95, ln. 20—Tr. II 96, ln. 4. Appellant was questioned in the back of the police cruiser and then taken to jail. Tr. II 95, ll. 1-5; Tr. II 130, ln. 1–Tr. II 136, ln. 24.

On July 22, 2022, Appellant's motion to relieve trial counsel (Counsel) was heard remotely by the Honorable Perry H. Gravely. Tr. I 1. After expressing several challenges experienced over the course of Appellant's case to that point, Counsel informed the court that she was in agreement with Appellant's motion to relieve her as his counsel: "Your Honor, I normally wouldn't do this but this is now the second motion of Mr. Griffin's. He is not happy with me. And I would join in his motion to be relieved, Your Honor." Tr. I 12, ll. 11-14. Appellant likewise informed the court of his desire not only to dismiss Counsel, but also to represent himself in his case:

> So I'm here, you know, to—to let you know that *I would like to take the next step and as a self-representative* because I wasn't assisted as I felt like I should have been to get the help that I needed to really have a fighting chance with my case. . . . I didn't get the assistance like I felt like she should have filed for me as being her client. And to really just help to me get in a better situation to really fight my case.

Tr. I 13, ll. 10-21 (emphasis added). The court responded as follows:

> All right. I mean, it sounds like a lot of your issues that you are presenting to the court, deal with almost like sentencing mitigation issues. And those types of things. *I don't see any basis that you have really presented that makes The Court think that I should grant your motion.* Further, you got an excellent attorney and somebody that can use the issues you just raised to help you work something out or if you don't then you're going to have to go to trial. So I'm going to deny your motion. And you may have to get some serious discussions with Ms. Johnson about, like she said, some of the issues that are being present with you. Because this case is on the trial roster for a couple weeks down the road. So I'm going to deny your motion.

Tr. I 13, ln. 22—Tr. I 14, ln. 12 (emphasis added).

Appellant's case proceeded to trial from April 6th to 8th, 2022, before the Honorable G.D. Morgan, Jr., and a jury. Before a jury was drawn, Dr. Donna Maddox (Dr. Maddox) testified at Appellant's competency hearing. After meeting with him on three occasions, Dr. Maddox found that Appellant was very high functioning and worked at the sanitation department prior to being hit in the head and falling off a truck on the job resulting in a closed-head injury. Although he did have mental health issues, he was under medication and had the capacity to assist in his defense. Tr. II 6, ln. 15–Tr. II 8, ln. 23; Tr. II 9, ll. 8-12. Although not representing Appellant in any capacity, Dr. Maddox further cautioned about Appellant's thoughts concerning representation: "Now, the last time I spoke with him, he did not want Ms. Johnson representing him, but today he said he would. He said at this point that he would." Tr. II 8, ln. 24—Tr. II 9, ln. 1. No follow-up questioning of Appellant regarding competency or self-representation was done by the trial court.

At the end of the State's case-in-chief, Counsel moved for a directed verdict. Tr. II 151, ll. 3-5. The trial court dismissed the motion as follows: "I find there is the existence of evidence that would show that the defendant is guilty of the crime. Obviously, the standard is whether there is the existence or nonexistence of evidence, and I certainly find there is." Tr. II 151, ll. 7-11. Similarly, after the defense rested its case, Counsel renewed all previous motions; the trial court noted and denied them. Tr. II 170, ll. 12-15.

During deliberations, the jury sent a note asking the following: "What exactly resisting arrest? Is it noncompliance to an order? Was the defendant immediately told he was under arrest? Tr. II 203, ln. 21—Tr. II 204, ln. 2; Tr. * (Court's Ex. #2—Jury Note). Without objection, the court sent the jury a copy of its original instruction on resisting arrest along with a note indicating that the jury must determine the fact in question based on the evidence presented.

Tr. II 205, ln. 19—Tr. II 206, ln. 5; Tr. * (Court's Ex. #2); Tr. * (Court's Ex. #4—Resisting Arrest Instruction). The jury ultimately found Appellant guilty on all counts. The trial court sentenced him to concurrent terms of incarceration as follows: 20 years for armed robbery; five (5) years for possession of a weapon during the commission of a violent crime; five (5) years for pointing and presenting a firearm; and one (1) year for resisting arrest. Tr. II 209, ll. 2-19; Tr. II 216, ln. 13—Tr. II 217, ln. 1.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by denying Appellant his right to self-representation at a hearing over six weeks prior to trial where Counsel joined Appellant's motion to remove her from his case, where Appellant expressed his dissatisfaction with his attorney and indicated he would like to represent himself, yet where the court denied Appellant's motion without even discussing Faretta warnings.

The trial court erred by violating Appellant's right to self-representation under the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, section 14 of the Constitution of South Carolina. On Appellant's motion to relieve his appointed attorney over six weeks before trial, he informed the court in no uncertain terms that he wanted to remove his attorney and represent himself. Interestingly, Counsel agreed and joined Appellant's motion to be relieved from the case. Rather than engaging in the necessary colloquy of Faretta warnings, the court simply stated it found no basis to remove counsel and denied Appellant's motion. Thus, the trial court erred by failing to even consider Appellant's request to represent himself, and instead foisted unwanted counsel upon him for trial. Further, Appellant was prejudiced as such an error is structural in nature. Accordingly, Appellant's case should be reversed and remanded.

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (citing United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2000)). "Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo." Id. (citing United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005)). "In doing so, this Court must consider the defendant's testimony, history, and

the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request. Id. (citing United States v. Singleton, 107 F.3d 1091, 1097 (4th Cir. 1997)).

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)). As the United States Supreme Court explained in Faretta v. California, the Sixth Amendment right to defend against accusations is personal to the accused, and grants him the right to make his own defense:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, *the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused*; for it is he who suffers the consequences if the defense fails.

Id. 422 U.S. 806, 819–20, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975) (emphasis added). This remains so even though having the assistance of counsel may very well be in the best interest of the defendant:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834, 95 S.Ct. at 2540–41, 45 L.Ed.2d 562 (quoting Illinois v. Allen, 397 U.S. 337, 350—351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring). In other words, the right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (citing State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)); see also Samuel, 422 S.C. at 602-03, 813 S.E.2d at 491.

"[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." Faretta, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d 562 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). While the skill, knowledge, and experience of an attorney is not needed for a defendant to "competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)). Simply stated, the court must warn the defendant of the dangers inherent in self-representation. Barnes, 407 S.C. at 36, 753 S.E.2d at 550 (citing State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel."). "Whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation." Id. (citing Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)). Rather, "the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the

court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." Samuel, 422 S.C. at 603, 813 S.E.2d at 491 (citing State v. Reed, 332 S.C. at 41, 503 S.E.2d at 750). "A circuit judge's denial of a defendant's knowing and voluntary request to proceed *pro se* is a structural error requiring automatic reversal and a new trial." Id. (citing State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013)).

An example of a Faretta violation in South Carolina is State v. Fuller. In Fuller, the defendant expressed to the court "his escalating dissatisfaction with his attorney" prior to trial. Id. 337 S.C. at 242, 523 S.E.2d at 171. It was not done for the purpose of delay, but "to address his growing concerns about his attorney." Id. Because the trial court failed to make the proper inquiries on the record, the omission required reversal. Id.

In the present case, the circuit court held a hearing on July 22, 2022, wherein Appellant sought to have his attorney relieved as counsel. Tr. I 3, ln. 21—Tr. I 4, ln. 1; Tr. I 5, ll. 16-19. Up to that point, his case had "been passed around from different public defenders" in their office until landing on the current attorney's desk in March 2021. Tr. I 7, ll. 7-11. Appellant expressed his exasperation and displeasure at Counsel's failure to advocate the way he believed was needed for his defense, and sought her removal from his case. Tr. I 5, ll. 6-19; Tr. I 13, ll. 17-21. Interestingly, Counsel acknowledge Appellant's repeated requests to remove her from his defense, and actually joined in Appellant's motion: "Your Honor, I do believe that our relationship is broken. . . . Your honor, I normally wouldn't do this but this is now the second motion of [Appellant]'s. He is not happy with me. And I would join in his motion to be relieved, Your Honor." Tr. I 12, ll. 4-14. In other words, Appellant expressed "his escalating dissatisfaction with his attorney," and his trial attorney agreed. Fuller, 337 S.C. at 242, 523

S.E.2d at 171. Finally, Appellant told the court in no uncertain terms that he wanted to represent himself based upon his view that Counsel had not fully assisted him in his case:

> So I'm here, you know, to—*to let you know that I would like to take the next step and as a self-representative* [sic] because I wasn't assisted as I felt like I should have been to get the help that I needed to really have a fighting chance with my case.

Tr. I 13, ll. 10-14 (emphasis added). In so doing, Appellant readily expressed his desire to represent himself. See, e.g., Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Yet the circuit court refused to even acknowledge Appellant's assertion of his right to self-representation, let alone engage in the necessary colloquy. Rather, the court responded as follows:

> All right. I mean, it sounds like a lot of your issues that you are presenting to the court, deal with almost like sentencing mitigation issues. And those types of things. *I don't see any basis that you have really presented that makes The Court think that I should grant your motion.* Further, you got an excellent attorney and somebody that can use the issues you just raised to help you work something out or if you don't then you're going to have to go to trial. So I'm going to deny your motion. And you may have to get some serious discussions with Ms. Johnson about, like she said, some of the issues that are being present with you. Because this case is on the trial roster for a couple weeks down the road. So I'm going to deny your motion.

Tr. I 13, ln. 22—Tr. I 14, ln. 12 (emphasis added). This was error.

As in State v. Fuller, Appellant's "request to proceed *pro se* was made in an atmosphere of his escalating dissatisfaction with his attorney." Id. Likewise, Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." Id. Yet, the hearing court here failed to even conduct the necessary inquiry once Appellant requested to represent himself. Accordingly, "[t]his omission by the [hearing] court requires reversal." Id.

Moreover, any potential concerns regarding Appellant's mental competency to waive his right to counsel are illusory; if a defendant is competent to stand trial, then the matter is foreclosed—he has the capacity to waive his rights. In State v. Barnes, the defendant moved to represent himself the Friday prior to the beginning of his trial on Monday. Id. 407 S.C. at 31, 753 S.E.2d at 547. Although he expressed his desire to represent himself and answered questions in the Faretta warnings colloquy with the court, the decision to grant self-representation was withheld till the start of trial. Id. 407 S.C. at 31-32, 753 S.E.2d at 547-48. However, before the court resumed the defendant's Faretta hearing, it instead heard from the defendant's trial counsel and their expert regarding the defendant's competency to even waive his right to counsel. Id. 407 S.C. at 32-33, 753 S.E.2d at 548. After testimony from the psychologist who previously evaluated the defendant, the court denied the defendant's motion to represent himself "based upon a finding that [the defendant] did not meet the heightened Edwards[2] standard for competency to represent himself at trial," even though he was competent to stand trial. Id. 407 S.C. at 33-35, 753 S.E.2d at 548-49. However, the Barnes Court rejected the use of two standards for waiving constitutional rights in South Carolina:

> We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty.

Id. 407 S.C. at 36, 753 S.E.2d at 550 (internal citations omitted). As such, if a defendant is competent to stand trial, then he is likewise competent to waive his right to counsel and proceed *pro se*.

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[2] Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

In the present case, Appellant was undoubtedly competent. Well before the July 22, 2022, hearing wherein he asserted his right to represent himself, Appellant was evaluated at the South Carolina Department of Mental Health on April 29, 2019, specifically for the purpose of determining whether he was competent to stand trial. Tr. * (Court's Ex. #1—DMH Evaluation). In the subsequent report, two evaluating mental health professionals opined that "the defendant . . . is currently ***competent to proceed*** with the legal process in his case." Tr. * (Court's Ex. #1—DMH Evaluation) (emphasis in original). As such, if Appellant was indeed competent to proceed to trial, then it must follow that he was likewise competent to waive his rights. Thus, Appellant was competent to waive his right to counsel and proceed *pro se*.

Additionally, over six weeks after the hearing, Dr. Maddox testified before the trial court confirming that Appellant's competency. Tr. II 9, ll. 8-12. Regardless of the fact that Appellant was on mental health medication for approximately two years, at no time did Dr. Maddox state Appellant was incompetent. Tr. II 6, ln. 11—Tr. II 10, ln. 7. Further, her observations of Appellant's mistrust of the judicial system should be at least partly indicative of Appellant's treatment by the prior hearing court's decision: despite his stated dissatisfaction with his Counsel, and his request to begin self-representation, the court nonetheless denied Appellant's assertion of his rights. In so doing, it supplied the basis of mistrust in the system about which the Faretta cautioned: "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." Id. 422 U.S. at 834, 95 S.Ct. at 2540–41, 45 L.Ed.2d 562.

Further, Dr. Maddox's statements regarding Appellant's desires regarding self-representation the day of trial are irrelevant to Appellant's assertions of his right to represent himself. Tr. II 8, ln. 24—Tr. II 9, ln. 1. First and foremost, Appellant asserted his right to self-representation over six weeks beforehand and was wrongly denied by the hearing court. Second,

Dr. Maddox did not represent Appellant in any capacity. In other words, she held no standing to speak on Appellant's behalf as to whether he asserted or waived any of his rights—including his right to self-representation. To the contrary, as long as Appellant was competent to stand trial—a fact that was established as far back as the April 29, 2019, DMH Evaluation and subsequent report on May 2, 2019—then the only person able to make such an assertion was Appellant. In sum, Appellant was competent, he made his motion to the hearing court, the hearing court made its ruling, and he abided by the court's ruling; nothing Dr. Maddox said changed that reality.[3]

Finally, Appellant was prejudiced by the hearing court's denial of his right to self-representation. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review." McCoy v. Louisiana, 200 L. Ed. 2d 821, 138 S. Ct. 1500, 1511 (2018). "Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is "simply an error in the trial process itself." Id. (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Therefore, "[a] circuit judge's denial of a defendant's knowing and voluntary request to proceed *pro se* is a structural error requiring automatic reversal and a new trial." Samuel, 422 S.C. at 603, 813 S.E.2d at 491 (citing State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013).

As discussed above, Appellant requested to represent himself. Tr. I 13, ll. 10-14. Rather than making the required inquiries triggered by Appellant's assertion, the hearing court indicated it did not "see any basis" presented "that makes [it] think that [it] should grant [Appellant's] motion." Tr. I 13, ln. 25—Tr. I 14, ln. 2. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 ("So

[3] If anything, Appellant's conduct at trial shows that he would have been able to adhere to court rulings had he represented himself at trial. See, e.g., Rules 4(b) and 18, SCRCrimP (West, Westlaw current through 2022).

long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta."). In so doing, the trial court committed the structural error of denying Appellant his right to self-representation. Accordingly, the matter must be reversed. See Barnes, 407 S.C. at 37, 753 S.E.2d at 550.

II. The trial court reversibly erred by failing to direct a verdict of acquittal for resisting arrest where the only evidence produced and argued by the State was that Appellant ran away when police ordered him to stop, yet where Appellant ultimately stopped, laid on the ground, and did not resist once police placed their hands upon him.

The trial court erred by failing to direct a verdict of acquittal for Appellant's charge of resisting arrest. The only evidence of resisting arrest produced by the State was that Appellant failed to stop running when police identified themselves and ordered Appellant to stop. This was the theory advocated by the State. However, the State failed to meet the requirements of South Carolina law regarding the element of "arrest" in such circumstances, which requires both an intent by officers to arrest *and* an intent by the suspect to submit. Accordingly, the trial court erred in failing to direct a verdict of acquittal for Appellant's charge of resisting arrest.

A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Rule 19(a), SCRCrimP (West, Westlaw current through 2022) ("[O]n motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged . . . if there is a failure of competent evidence tending to prove the charge in the indictment."). When considering a motion for directed verdict of acquittal, "the trial court is concerned the existence or non-existence of

evidence, not its weight." Brown, 360 S.C. at 586, 602 S.E.2d at 395. When reviewing a denial of a directed verdict, appellate courts "view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010).

The resisting arrest is defined by statute as follows:

> It is unlawful for a person to knowingly and wilfully oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process *or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer*, whether under process or not.

S.C. Code Ann. §16-9-320(A) (West, Westlaw current through 2022) (emphasis added).

The South Carolina Supreme Court interpreted the element of "arrest" in the context of the resisting arrest statute in State v. Brannon. Specifically, to establish the element of "arrest" in situations where officers do not manually touch the suspect, both an intent by the officer to arrest *and* an intent by the suspect to submit must be shown. See Brannon, 388 S.C. at 504-05, 697 S.E.2d at 597 (citing State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860-61 (1960)) (applying the common law of arrest to §16-9-320(A)). Where the required intentions are not both present, no "arrest" has been made. Id. This is especially pertinent in cases, like Brannon, where the defendant was initially not touched by police, but instead ran as soon as he saw them. Thus, South Carolina law runs contrary to the State's theory behind the charge of resisting arrest against Appellant.[4]

[4] The State's theory and proof for resisting arrest here was similar to that was rejected by the Brannon Court: "Also, [Appellant]'s charged with resisting arrest. Simply, if you're being placed under arrest and you resist in any form or fashion—in this particular case, we'll submit to you that [Appellant] ran from police—then that is resisting arrest." Tr. 39, ll. 11-15.

In the case at bar, police never placed their hands upon Appellant until he stopped in the woods and laid down, after which he was fully compliant with law enforcement. As such, he was not "arrested" until that moment. Both Dep. Chadwick and Dep. Greer testified that Appellant ran from police when they drove up. Dep. Chadwick further explained that, as he chased Appellant through the woods, he followed Appellant about 25 to 50 meters behind with his gun drawn and shouting commands, "sheriff's office, stop, you're under arrest." Tr. II 127, ln. 14–Tr. II 128, ln. 9. Meanwhile, after Dep. Greer went to the other side of the woods, he heard and saw Appellant approaching approximately ten yards away and ordered Appellant to the ground with his flashlight on and firearm drawn. Appellant immediately complied by laying face down on the ground, heeded commands thereafter, and was placed into handcuffs without incident. Tr. II 92, ln. 24–Tr. II 95, ln. 2; Tr. II 128, ln. –Tr. II 129, ln. 1. Under such circumstances, Appellant did not intend to "submit" to Dep. Chadwick's intent to arrest and commands to stop—he fled; rather, Appellant only intended to "submit" when Dep. Greer was in front of him with his gun and flashlight drawn and gave commands, as evinced by Appellant laying face down on the ground. In other words, Appellant was never "arrested" until the moment he submitted to Dep. Chadwick's and Dep. Greer's intention to arrest him, which was the moment he laid down on the ground. Additionally, once he did "submit" to arrest and was physically placed in custody, Appellant was fully compliant with law enforcement. Succinctly stated, the evidence in the case proves Appellant was "arrested" when he submitted to law enforcement by laying down, and he did not resist once he was "arrested." Accordingly, the trial court erred by failing to direct a verdict of acquittal on Appellant's charge of resisting arrest. Id. 388 S.C. at 505, 697 S.E.2d at 597-98.

CONCLUSION

For the foregoing reasons, Appellant Jeffery Keyon Timothy Griffin respectfully requests reversal of his convictions, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of February, 2023.