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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Keunte D. Cobbs, Appellant

Appellate Case № 2020-000095

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion № 2023-UP-130
Submitted January 1, 2023 - Filed March 29, 2023

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Keunte D. Cobbs, Appellant, hereby Petitions this Court to rehear this matter and correct the following errors or omissions in the opinion:

1. The Court erred in finding that “Cobbs exclaimed shortly before his fatal encounter with the victim that he intended to kill someone” Opinion at 2. The record in this case establishes two facts the Court apparently failed to consider. First, the alleged statement was not shortly before the shooting but was from one hour and fifteen minutes to two hours and fifteen minutes before the shooting. Rec. on App. at 499, ll 14-22. Second, nothing in the record indicates the comment was referring to either of the two people who were shot. If Mr. Cobbs made the statement about a third person, he still would have been able to assert self defense

against the two people who were shot in this case. No substantial circumstantial evidence establishes that the statement was made shortly before the shooting nor that the statement was directed at either of the two men who were shot.

2. The court erred in finding “neither the victim nor his companion drew a weapon at the time of the shooting.” Opinion at 2. This Court failed to consider that Mr. Cobbs had the right to act upon appearances and the known reputation of the two men. The record in this case established the reputation for violence of both men. Lt. Peters of the Dorchester County Sheriff’s office testified Braford Spells, the survivor, had a reputation in the community for violent and criminal behavior. Rec. at 521, ll 12-22. Mr. Cobbs himself testified as the reputation for violence of the two men. Rec. 495, l 18 to 497, l 2. The State never refuted any of this evidence. The undisputed evidence is that both men had a reputation for being violent. In concluding that neither person drew a weapon, this Court ignored the testimony of Mr. Cobbs that he saw a weapon on at least one of the men. Mr. Cobbs testified, “I saw the gun that Mack had first, seeing him first, because we made eye contact first and then Spells.” Rec. at 577, l 17-19. He further testified, “But they were in front of the door, so it was kind of hard for me to be, like excuse me when you’ve got two guys pulling out weapons like, they were looking for you.” Rec. at 578, ll 10-13. Thus, the conclusion by this Court that “neither the victim nor his companion drew a weapon” (opinion at 2) is simply not supported by the record.

In viewing the evidence in the light most favorable to the state, this court erred in concluding that the absence of evidence by the state is evidence. The ruling as to the directed verdict should be viewed from two perspectives. The first perspective is at the conclusion of the state’s case in chief. The second, perspective is at the conclusion of all the evidence. The

conclusion by this Court that neither person involved in the shooting with Mr. Cobb drew a weapon is made due to the lack of evidence, if that conclusion is based upon the directed verdict motion at the end of the State's case. At no point in the state's presentation was there any evidence that either man did or did not draw a weapon. While each man was found with a weapon, neither made a statement they drew their weapon or they did not draw their weapon. Thus, the conclusion by this court that neither drew a weapon is based upon the complete absence of the testimony as to whether either person drew a weapon or not.

Mr. Cobbs testified both drew weapons. Rec. at 577, l 17-19; Rec. at 578, ll 10-13. So, if the Court concluded neither drew a weapon based upon the fact the jury convicted Mr. Cobb, such a conclusion is not proper. As the South Carolina Supreme Court said, "The fact that Appellant testified, necessarily placing her credibility in issue, further does not operate to waive consideration of her testimony where the testimony does not present patent inconsistencies with the State's evidence." *State v. Hepburn*, 406 S.C. 416, 437, 753 S.E.2d 402, 413 n.19 (2013). No testimony by Mr. Cobbs presented any patent inconsistencies with the State's case. Thus, this Court cannot summarily reject his testimony under the guise of reviewing the evidence in the light most favorable to the state. Thus, based upon the testimony of Mr. Cobbs that was consistent with the State's case, this Court cannot conclude neither man drew a weapon.

In ruling on this matter the Court failed, or at least appeared not to consider, the holding of the South Carolina Supreme Court in *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989) where the court held a defendant could act upon reasonable appearances.

3. This Court erred in holding substantial circumstantial evidence supported a finding that Mr. Cobbs acted with express malice. For the reasons cited above, no facts support this

conclusion. Certainly the jury did not conclude Mr. Cobbs acted with express malice. A comment about killing someone over an hour before two armed men were shot, is not substantial circumstantial evidence of malice.

4. The Court further erred in concluding that circumstantial evidence existed to prove that “assuming Cobbs actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, a reasonable person of ordinary firmness and courage in the same situation would not have entertained the same belief.” Opinion at 2. What the court is, in essence, saying, is that an ordinary person would not have feared for their life had a person with a known reputation for violence entered a bathroom with only the ordinary person in it and started drawing a weapon. A person with even extraordinary firmness and courage would have felt threatened under those circumstances. This Court erred in its conclusion that substantial circumstantial evidence existed that Mr. Cobbs was not in imminent danger of losing his life or being seriously injured.

5. In discussing the three elements of self defense and not addressing the others, the logical conclusion is that this Court found no substantial circumstantial evidence to conclude that Mr. Cobbs was at fault in bringing on the difficulty. Substantial circumstantial evidence also did not exist to conclude that Mr. Cobbs had other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). If this Court made such a conclusion, the order should so state.

6. As requested by Mr. Cobbs in his brief, at page 15, this Court failed to define the meaning of substantial circumstantial evidence and therefore this Defendant is unable to determine if this Court applied a proper definition of substantial circumstantial evidence. Mr.

Cobbs recognizes that virtually no court in South Carolina has ever defined the term. As former Court of Appeals Judge Ralph King Anderson said, “A conundrum exists in the criminal case law of South Carolina: the term ‘substantial’- as it relates to the scope of review for directed verdict motions - has never been defined.” *State v. Cherry*, 348 S.C. 281, 295, 559 S.E.2d 297, 304 (Ct. App. 2001), *aff’d but criticized*, 361 S.C. 588, 606 S.E.2d 475 (2004)(Anderson, concurring in part and dissenting in part). This “conundrum” should not prevent this Court from defining what is substantial circumstantial evidence so that Mr. Cobbs and any reviewing court may be able to determine if this Court applied the proper standard of review.

For the foregoing reason this Court should rehear this matter and reverse the conviction of Keunte Cobbs. The Court should also define the term “substantial circumstantial evidence” so that Mr. Cobbs and any reviewing court could determine if the proper standard has been applied.

April 12, 2023

/s/ C. Rauch Wise

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