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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI - COA
APPEAL FROM DORCHESTER COUNTY
HON. DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

Appellate Case No. 2023-001160
Lower Case No. 2016GS1801267

State of South Carolina, ... Respondent,

vs.

Keunte D. Cobbs, ... Petitioner.

REPLY TO RETURN

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Argument

Did the trial court err in failing to direct a verdict in favor of Keunte Cobbs when the State failed to prove substantial circumstantial evidence of sudden heat or passion based upon sufficient legal provocation nor did they disprove any element of self-defense?

Issue preservation

At the close of all testimony defense counsel renewed his directed verdict motion based upon his previous argument. He then stated, "I don't think there's sufficient evidence to give to the jury for them to reach a verdict." App. at 611, l 24 to 612, l 1. At the close of State's case, defense counsel asked for a directed verdict saying the state had, "[F]ailed to present evidence to convict the Defendant on the basis of the case. It's entirely circumstantial, and I just don't think it rises to the necessary level." App. at 559, l 25 to 560, l 3. Defense counsel had the right to assume the trial judge knew the "necessary level" for circumstantial evidence cases.

Rule 19 of the South Carolina Rules of Criminal Procedure uses the mandatory word "shall." It provides, "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charges in the indictment." As the rule requires a judge to direct a verdict on their own motion, there is no need for counsel for the defendant to make a motion for a directed verdict. On the civil side, Rule 50a of the South Carolina Rules of Civil Procedure uses the word "may." The civil rule does not give a trial judge the right to direct a verdict. The motion must be made by the attorney for either party.

As the trial judge in a criminal case is required to make his own directed verdict motion,

then the issue as to the sufficiency of the evidence is always preserved. The reason for this conclusion is very simple. As the Alabama Supreme Court stated over 150 years ago, "The State has no interest in convicting an innocent person." *Lyman v. State*, 45 Ala. 72, 79 (1871). This court has stated, "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). If a defendant is entitled to a directed verdict and the Rule requires the trial judge to grant it on his own motion, then the issue is preserved. The United States Supreme Court has also expressed this same sentiment when it stated, "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). *State v. Cashen*, 789 N.W.2d 400, 407–08 (Iowa 2010) ("Because of the importance of the public interest in not convicting an innocent person of a crime, any standard should resolve doubts in favor of disclosure."). As concern about convicting the innocent is at the core of our criminal justice system, this court should hold the failure of a trial judge to address the issue of actual innocence should preserve the issue for appellate purposes.

As to the importance of protecting the innocent from a wrongful conviction, the Fifth Circuit Court of Appeals said, "While it is the general rule that unless a motion to direct a verdict was made, an appellate court will not consider the evidence in a criminal case, nevertheless, where there is not sufficient evidence to support the conviction and error is apparent, then it becomes the duty of the court to reverse the judgment." *Strickland v. United States*, 155 F.2d 167, 168 (5th Cir. 1946). If it is the duty of the appellate court to reverse the conviction, it is also the duty of the trial court to prevent the conviction. *See also*, *Wiborg v. United States*, 163

U.S. 632, 658 (1896)("And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.") Under Rule 19 of the Rules of Criminal Procedure, this court should find the issues as to a directed verdict based upon the failure of the state to disprove self defense is preserved.

State failed to present evidence that is sufficient to convict

The State appears to take the position that a case should be submitted to the jury is there is any theory presented by the evidence that would be sufficient to convict. This is not the law in South Carolina. If this were true, virtually no case would ever be reversed on the lack of the sufficiency of the evidence. The courts of our state have reversed many cases for lack of the sufficiency of the evidence. *See, e.g., State v. Bostick,* 392 S.C. 134, 708 S.E.2d 774 (2011)(murder); *State v. Dickey,* 394 S.C. 491, 716 S.E.2d 97 (2011)(voluntary manslaughter); *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009)(trafficking drugs); *State v. Arnold,* 361 S.C. 386, 605 S.E.2d 529 (2004)(murder); *State v. Hendrix,* 270 S.C. 653, 244 S.E.2d 503 (1978)(voluntary manslaughter); *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)(murder). In each case, the evidence did produce a theory by which the defendant could have been found guilty. Thus, there was some evidence to convict but not sufficient evidence.

In *Dickey*, this court said, "The State certainly did not rebut these elements of self-defense beyond a reasonable doubt, as the law requires. Therefore, we find that as a matter of law, Petitioner actually believed he was in imminent danger of losing his life, or sustaining serious bodily injury, and that a reasonable person would have entertained the same belief." *Id.* at 502, 716 S.E.2d at 102. As noted in the opening brief, the court of appeals improperly found Mr. Cobbs did not have a fear of being killed or seriously injured. Pet. for Cert. at 10.

The State, in its return, places emphasis on the fact that Mr. Cobbs fired his weapon six times. In *Hendrix*, this court rejected a similar argument when Mr. Hendrix fired his shotgun four times. This court said, "In the light most favorable to the State, appellant fired four times in rapid succession and the deceased did not hit the ground until after the last shot was fired. Under these circumstances the force used was not excessive." *Id.* at 661, 244 S.E.2d at 507. In *Hendrix* person shot did not fire his weapon. In this case, the shooting occurred in the confines of a small bathroom. After the shooting, all three people left the bathroom. Mr. Cobbs had no basis for determining how seriously anyone was injured.

The State further argued as Mr. Cobbs fled the scene that is evidence of guilt by which the jury could conclude Mr. Cobbs was not acting in self defense. Under the facts of this case, such a conclusion is incorrect. The testimony shows that Mr. Cobbs was confronted by two armed men in the bathroom. He fired his weapon six times in just a few seconds. All three men left the bathroom immediately after the shooting. The law does not require Mr. Cobbs to wait at the IHOP where the other two armed men were. His immediately leaving the premises is simply the logical and proper thing to do. Had he remained and had another confrontation with the two men, the state would have argued he had a duty to retreat and leave the premises after the shooting.

In *State v. Fowler,* 921 So.2d 708 (2006) the Florida Supreme Court rejected the State's position that flight was evidence of guilty. The court said, "While flight can evidence consciousness of guilt, it is not inconsistent with Fowler's hypothesis that he fled because he was panicked, scared, and not using good judgment." *Id.* at 712. In this case, the prudent thing for Mr. Cobbs to do is to immediately leave the scene. He had no need to have further contact with

the two men. He was arrested some 22 days later at a local motel. He did not flee the state or even the area. The record contains no evidence he was aware an arrested warrant had been issued and he further attempted to evade arrest. He was simply arrested at a motel in North Charleston. App. at 523, ll 15-20. Interestingly, neither person who was shot ever identified Mr. Cobbs. App. at 548, ll 3-25. This Court has also said, "Evidence of flight is evidence of guilt, but we have been hesitant to assign it high probative value." *Smalls v. State*, 422 S.C. 174, 192, 810 S.E.2d 836, 845 (2018). Under the facts of this case, the alleged flight would have no probative value.

The State further argues that the recording of Mr. Cobbs at the jail refutes self defense. This is simply not correct. In the recording Mr. Cobbs can be heard saying he did not shoot anybody. Obviously, if a person is claiming he did not shoot anyone, there is no need for a self defense claim. In the recording his saying he did not shoot anyone is consistent with his saying he was not claiming self defense. The fact that Mr. Cobbs while being held in jail, says he did not shoot anyone, does not negate his right to claim self defense when he does in fact admit he shot someone at trial. He made no statement in that recoding that negated his right to assert self defense.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the Petition and reverse the conviction of Keunte Cobbs.

September 28, 2022

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