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Sep 29 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEAVION JAHQUWAN BURGESS,

APPELLANT

APPELLATE CASE NO. 2022-001092

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by allowing the state to question appellant about not telling the police where he threw the gun since this was an impermissible comment on appellant's right to remain silent after his arrest, and it was it was highly prejudicial?

2.

Whether court erred by refusing to direct verdict of acquittal on the attempted murder charge since there was no evidence appellant had a specific intent to kill Zachary Wilkerson who was a backseat passenger in the car where the evidence showed appellant shot the decedent in the front seat of that car, and it was clear the decedent was the intended target, whether in self-defense or otherwise, and a directed verdict should therefore have been issued on the attempted murder count?

STATEMENT OF THE CASE

Appellant was indicted at the December 2020 term of the Beaufort County grand jury for the offenses of murder, attempted murder, and possession of a weapon during a violent crime. R. 847. His case was called to trial on March 21, 2022, before the Honorable Robert Bonds, and a jury. Scott Lee represented appellant. Traci Campbell was the assistant solicitor. Tr. 1.

On March 24, 2022, the jury found the appellant guilty on all three counts. Tr. 763, ll. 13-23. Judge Bonds sentenced appellant to life imprisonment for murder, thirty years imprisonment for attempted murder, and five years imprisonment for possession of a weapon during a violent crime. The sentences were concurrent. Tr. 781, l. 20 – Tr. 782, l. 12.

After a hearing on a motion for a new trial and to reconsider the sentence on May 12, 2022, Judge Bonds reduced appellant's sentence for murder to fifty years imprisonment. He denied the motion for a new trial based on prosecutorial misconduct given the alleged improper questioning of appellant by the solicitor and because of improprieties in the state's closing argument. Supp. Tr. 60, ll. 2-12.

This appeal follows.

STANDARD OF REVIEW

Issue one – Right to remain silent: The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Issue two – Directed verdict: "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

1.

The court erred by allowing the state to question appellant about not telling the police where he threw the gun since this was an impermissible comment on appellant's right to remain silent after he was arrested, and it was it was highly prejudicial.

Relevant facts

The shooting in this case occurred in the parking lot of the Tiger Express Gas Station and Convenience Store on St. Helena Island during the afternoon of April 3, 2020. Devin Pope, the driver of the car, went inside the store to get cigarettes. Quinton, the decedent, waited in the *front passenger seat*, listening to music and smoking marijuana. Zachary Wilkerson, the back seat passenger on the *driver's side*, got out of the back seat "to stretch his legs." He got back inside and shared a "blunt" with the decedent.

Wilkerson remembered that "a dark shadow" passed by the car, and this man fired shots which hit the decedent in the front passenger's seat. Wilkerson, in the back seat on the opposite side of the car, was not hit. Tr. 205, l. 13 – 207, l. 8. Although the decedent was unresponsive at first, EMS personnel were able to get "his lungs working." Tr. 207, ll. 9-11. The decedent was transported to the local hospital, and he was later flown to MUSC for treatment. He died at MUSC days later.

Meet Patel was the owner of the Tiger Express convenience and gas station. Tr. 215, ll. 16-19. Patel identified State's Exhibit #20(a) which included several surveillance videos of the shooting. Tr. 218, ll. 5-8. State's Exhibit #20(a), the surveillance tapes, are on file with this Court for viewing.

Deputy Craig Garcia interviewed Devin Pope, the driver of the car, after the shooting. However, Pope was not called as a witness by the state during appellant's trial. Tr. 223, l. 20 –

228, l. 12. The defense pointed out that Pope went into the car after the shooting and he disappeared from the surveillance tape for a time. Defense counsel thought Pope retrieved a gun from inside the car and disposed of it.

Deputy Michael Perkins also responded to the shooting at the Tiger Express. Tr. 231, ll. 6-21. Perkins interviewed Wilkerson and he described Wilkerson as being in "a little bit of shock." Tr. 237, ll. 11-21.

Perkins remembered that while he was investigating the shooting at the Tiger Express that Devin Pope came outside of the convenience store to speak. Perkins described him as being in a state of "disbelief and shock as well." Tr. 233, ll. 12-25.

Henry Wright was pumping gas at the Tiger Express convenience store on April 3, 2020. A white car "pulled beside me, a young man got out, and finally I hear something go pop, pop. The young man jumped back in the car. I was pulling out. He almost hit me. And he went the other way..." Tr. 258, l. 14 – Tr. 259, l. 6. Wright said he made a U-turn and drove to the sheriff's department. He described the shooter, appellant, as a tall black person. The driver of the vehicle was "a heavy-set black female." Wright recalled that the shooter had a "hood over his head" and he could not identify him. Tr. 258, l. 23 – Tr. 261, l. 15.

Zachary Wilkerson viewed the surveillance tape as he testified during appellant's trial. He identified Devin Pope, the driver, going into the Tiger Express convenience store on the tape. Tr. 291, l. 11 – Tr. 292, l. 2.

Wilkerson remembered passing a blunt to the decedent from the backseat. Shortly thereafter, Wilkerson recalled "kind of dark shadow" walked by the car and "shots had fired off". Tr. 292, l. 18 – Tr. 293, l. 25. Wilkerson said that he knew the shots were coming from the front of the car "but I didn't know where they were going or who was firing." Tr. 294, ll. 1-5.

Wilkerson testified that he got out of the car when he realized that the decedent had been hit and Devin Pope came back outside and got his cell phone out of the car. Wilkerson said that he told Pope to call 911: "I'm in shock and all, checking on Quinton. He was hit. He was trying to talk, but he was mumbling, I couldn't make anything out." Tr. 296, ll. 12-16. Wilkerson stated that he helped the "two ladies" from EMS place Quinton on the gurney to take him to the local hospital. Tr. 296, ll. 8-25. He was airlifted to MUSC, and he died at MUSC several days later.

Carletha Benning was the driver of the white car on the Tiger Express surveillance tape. She remembered she had met appellant about two and a half weeks prior to April 3, 2020, at a "yard party." Tr. 318, l. 21 – Tr. 319, l. 21. Benning knew appellant only as "Ghost." Tr. 320, ll. 1-3. Benning remembered parking at the gas pump at the Tiger Express. and she "sent" appellant inside the convenience store "for a wrap." Tr. 320, ll. 18-21.

Benning listened to music on Facebook while appellant went towards the store. When appellant returned to her car, he had a gun in his hand. He "told me to hurry up and drive and go." Tr. 321, ll. 4-24.

Benning dropped appellant off at "Eddings Point." Tr. 324, ll. 3-4. Benning later her mother what happened, and her mother made her tell a police investigator. Benning was arrested. Tr. 325, ll. 10-24.

Benning admitted that she had been shot at because of her association with appellant. Tr. 348, l. 8 – Tr. 353, l. 24. The import of her testimony was that St. Helena Island was a very violent place, and Benning stated she did not know whether appellant was shot at earlier in same day that he shot the decedent. Tr. 353, ll. 2-11.

Inessa Bryan was appellant's second cousin. Tr. 365, ll. 10-15. Bryan said that someone had shot into the back of her mother's automobile which was apparently a white Nissan Sentra which was the car in the surveillance tape, or similar to that car. Tr. 367, l. 7 – Tr. 368, l. 8.

Investigator Robert Byrd testified that appellant's father, Lawrence Burgess, was murdered on June 10, 2020. No arrest had been made in that murder case as of the time of appellant's trial. Investigator Byrd said he was aware of the Tiger Express convenience store shooting. As to the Tiger Express in general, Byrd said that he had investigated thefts, credit card fraud, and "escorts" involving that establishment. Tr. 384, l. 24 – Tr. 385, l. 7.

Appellant took the stand and testified in his own defense. He was only twenty-years old at the time of his trial, and he had been in college at Allen University in Columbia before this incident. Tr. 553, l. 22 – Tr. 554, l. 10. Appellant had grown up on St. Helena Island, he was married, and he had four children. Tr. 554, l. 17-23.

Appellant was staying with friends on the island at the time this incident occurred. Appellant said that he was aware that the decedent "Quinton Ventress shot up" the house that his friend, Anita Singleton, lived in. Tr. 561, ll. 8-21; Tr. 562, l. 20 – Tr. 563, l. 13. Appellant was also aware that the decedent shot at another woman's car. Tr. 563, ll. 23-25. These events were apparently only days before the April 3, 2020 Tiger Express shooting.[1] Tr. 564, ll. 20-21.

Appellant remembered that Benning picked him up around twelve o'clock that day and took him for a job interview. Tr. 565, l. 19 – Tr. 566, l. 24. Appellant recalled that Benning then stopped at the Tiger Express so that he could purchase cigars to use as wraps for the marijuana that they were going to smoke. Tr. 569, ll. 1-12. Appellant he did not recognize any of the vehicles in the Tiger Express parking lot that day. Tr. 569, l. 17 – Tr. 570, l. 7.

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[1] The solicitor repeatedly tried to sell all of this violence, and the shooting occurring at the Tiger Express, as being "street justice."

Appellant explained that he carried a gun with him "because I was getting shot at and getting threats for the last two weeks." He was worried about his safety, and for his life. Appellant was specifically concerned the decedent would shoot him if he saw him since "he done shot two times, so I didn't know - - I didn't know what was coming." Tr. 570, l. 12 – Tr. 571, l. 10.

Appellant described walking by the purple car on the surveillance tape, and hearing someone yell out from the car: "Bitch ass N." Appellant looked back to see who was yelling at him. Tr. 571, ll. 14-17. Appellant saw the decedent reaching around in the front seat of the vehicle. The decedent then told appellant that he "finally caught your bitch ass." Tr. 572, ll. 7-25. Appellant was frightened because the decedent was reaching for something at the same time he was threatening appellant. Appellant testified he had to shoot the decedent in self-defense. Tr. 573, l. 1 – Tr. 574, l. 18; Tr. 596, l. 16 – Tr. 598, l. 18. Appellant did not know Wilkerson, and he did not know Wilkerson was in the back seat of the car Tr. 574, l. 19 – Tr. 575, l. 2; Tr. 596, l. 16 – Tr. 598, l. 18.

Cross-examination of Appellant

Appellant told the solicitor on cross-examination that he threw his gun in the woods after the shooting. Appellant said he threw the gun as far as he could into the woods. The solicitor then asked appellant why in the two years following the shooting he did not tell the police officers where he threw the gun. Defense counsel objected that the solicitor was impermissibly impeaching appellant in violation of appellant's right to remain silent. Tr. 592, l. 15 – Tr. 593, l. 6. The solicitor admitted that appellant had turned himself in after the shooting, but she noted appellant refused to speak with the police. The judge overruled the objection, and the solicitor asked appellant why he wanted to the jury to believe at trial that he shot because he

feared for his life where he purposely disposed of the gun he used in self-defense by throwing it out of a car window into the woods. Tr. 593, l. 13 – Tr. 594, l. 7.

Discussion

In State v. McIntosh, 358 S.C 432, 595 S.E.2d 484 (2004), the defense objected to the prosecutor questioning McIntosh about his post-rest silence, his post-Miranda silence, and his failure to tell the police he was not in South Carolina when the crimes occurred.[2] McIntosh maintained this violated his right to remain silent.

Our Supreme Court, in State v. McIntosh, noted the United States Supreme Court had held that the Due process Clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining him about his post-arrest silence after he received Miranda warnings. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976). The Court in McIntosh also noted that the United States Supreme Court had rejected arguments that such cross-examination was necessary to show a defendant may have had concocted a false, exculpatory story after his arrest.

In this case, the solicitor clearly, and repeatedly, signaled to or told the jury that appellant's claim of self-defense was scripted and a false narrative. She even asserted to the jury during her closing arguments that appellant was a liar. The defense argued in its post-trial motion for a new trial that this was prosecutorial misconduct. The trial judge cited defense counsel's failure to continue to object to the solicitor's questions or her closing argument as a reason for denying relief. Order denying motion for a new trial. R. 853.

However, Due process prohibits the government from commenting on an accused person's silence after he is given Miranda warnings. At the heart of Miranda, is the principle

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[2] 384 U.S. 436 (1966)

that a suspect should not be forced to implicate himself in a crime after he has been warned that anything he utters will be used against him.

In this case, the solicitor pointedly asked appellant why in the two years since his arrest he had not told the police where he had thrown the gun if he, in fact, shot the decedent in self-defense. Our appellate courts have reversed and granted a defendant a new trial when such a violation of the defendant's right to remain silent has occurred. See State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct.App. 1991); State v. Myers, 301 S.C 251, 391 S.E.2d 551 (1990); State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986).

The error here was especially egregious because of the central role appellant's refusal to talk to the police played in the solicitor's overall argument that appellant would have been forthcoming with the police if his self-defense case was real. Appellant should be granted a new trial.

2.

The court erred by refusing to direct verdict of acquittal on the attempted murder charge since there was no evidence appellant had a specific intent to kill Zachary Wilkerson who was a backseat passenger in the car where the evidence showed appellant shot the decedent in the front seat of that car, and it was clear the decedent was the intended target, whether in self-defense or otherwise, and a directed verdict should therefore have been issued on the attempted murder count.

Relevant Facts

It is clear that the attempted murder charge as to Zachary Wilkerson, the backseat passenger, was an after-thought in this case. Respectfully, the state did not even show that appellant knew of Wilkerson's presence in the backseat, that appellant shot at Wilkerson, much less that appellant shot at Wilkerson with the intent to kill him. None of that was shown to the jury in this case.

Further, although not dispositive, appellant testified that he did not know Wilkerson and he apparently was not even aware of Wilkerson's presence in the backseat at the time of the almost instantaneous altercation between appellant and the decedent who was in the front passenger's seat. Attempted murder is a specific intent crime. *See* State v. King, 422 S.C. 47, 63-63, 810 S.E.2d 18, 26-27 (2017); State v. Geter, 434 S.C 557, 864 S.E.2d 569 (Ct. App. 2021).[3]

Defense counsel correctly moved for a directed verdict on the attempted murder charge as to Wilkerson. Defense counsel also properly argued that there was no evidence in this case that Wilkerson was an intended target, or that appellant specifically intended to kill Wilkerson as

[3] Certiorari granted September 7, 2022.

mandated by the attempted murder statute. There was simply no evidence or substantial circumstantial evidence of that fact. Tr. 506, l. 2 – Tr. 510, l., 17.

The trial judge accepted the solicitor's argument that a state's witness, Carletha Benning, maintained appellant referred to "them boys," plural, on one occasion when talking about the shooting. The judge thought this was enough for the attempted murder charge to go to the jury. Tr. 510, l. 20 – 516, l. 25; Tr. 607, ll. 1-14.

However, that bare statement was not direct or substantial circumstantial evidence appellant shot at Wilkerson or that appellant had a specific intent to kill Wilkerson or anyone other than the decedent whom he testified he shot in self-defense. The judge said he was only looking for the existence of any evidence to send the case to the jury. However, there was not substantial circumstantial evidence appellant had a specific intent to kill Wilkerson, and a reference to "them boys" was not evidence appellant attempted to kill Wilkerson. Tr. 607, l. 16 – Tr. 608, l. 8.

Defense counsel correctly renewed his motion for a directed verdict, again arguing that there had been no evidence of any specific intent to kill Wilkerson to justify the attempted murder charge. Wilkerson just happened to be there, and no one intended to harm him, much less kill him. Tr. 605, l. 1 – Tr. 606, l. 24. The judge again denied the directed verdict motion on the same basis that appellant allegedly had mentioned shooting "them boys." Tr. 607, l. 22 – Tr. 608, l. 8.

There was no direct or "substantial circumstantial evidence" appellant had a specific intent to kill Wilkerson. *See* State v. Arnold, 361 S.C. 386, 605 S.E2d 529 (2004). The evidence in this case barely even raised a suspicion that appellant was guilty of attempted murder as to Wilkerson. The court should not refuse to grant the motion for a directed verdict where the

evidence merely raises a suspicion the accused is guilty. *See* State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

Our Supreme Court has ordered that a directed verdict should have been granted in cases where the circumstantial evidence of guilt appeared much stronger than in this case. For example, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), our Supreme Court held that the defendant was entitled to a directed verdict in that murder case. There was evidence that the vehicle seen on the night of the murder in the victim's apartment complex was very similar to the car in which Martin and his co-defendant were traveling that night. When Martin and his co-defendant were late picking up Martin's girlfriend, Martin told her "some shit happened" and the co-defendant added, "somebody may have died tonight". State v. Martin, 340 S.C at 600, 533 S.E.2d at 601.

Similarly, in State v. Schrock, 288 S.C. 129, 322 S.E.2d 450 (1984), the Supreme Court found that evidence the defendant was in the area of the murder, that footprints at the scene were similar to appellant's footprints, and Marlboro cigarette butts, such as the cigarettes that appellant admitted he smoked, were also found at the crime scene was not sufficient to constitute substantial evidence of Schrock's guilt.

The same was true in State v. Bostick, 392 S.C 134, 708 S.E.2d 774 (2011), where the Supreme Court held that a directed verdict should have been issued even though the arson victims' effects were found in a burn pile behind the defendant's mother's property. In addition, Bostick had blood on his pants after the murder, and gasoline was on his pants where an accelerant had been used to start the fire on the victim's house.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), that the defendant was found guilty of first-degree burglary, grand larceny, criminal conspiracy, and malicious injury to an

electronic utility meter. The state's evidence showed that an automobile was spotted at the scene of the burglary and an eyewitness alerted the police to the type of vehicle, a brown Cadillac, the burglars were driving around in. A nearby sheriff's deputy spotted the brown Cadillac that the eyewitness had alerted the authorities about. That deputy sheriff pulled the car over, and the reported burglars all fled after the car stopped. Odems knocked at the door of a woman and informed her that he needed to call for a ride. Odems also told this woman that if the police arrived, she should tell them Odems was her boyfriend. The proceeds of the burglary were also found in the car.

Despite all this circumstantial evidence of guilt as to the burglary charge, our Supreme Court found that the evidence was not the substantial circumstantial evidence necessary to survive a directed verdict motion.

There simply was not "substantial circumstantial evidence" or direct evidence that appellant had a specific intent to kill Wilkerson in this case. The judge therefore abused his discretion by refusing to direct a verdict on the attempted murder count. This Court should therefore issue an order of acquittal as to the attempted murder charge.

CONCLUSION

By reason of argument two, a directed verdict of acquittal should be issued on the charge of attempted murder. As to argument one, appellant's convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 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."

Robert M. Dudek
Chief Appellate Defender

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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) True-billed indictments:
(2) Entire trial transcript;
(3) State's Exhibit 20(a), surveillance tape videos;
(4) Order denying motion for a new trial.

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

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Chief Appellate Defender

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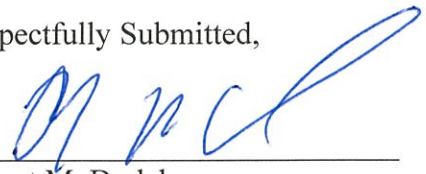
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deavion Jahquwan Burgess 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 Robert J. Bonds, which was held on March 21 - 24, 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 Deavion Jahquwan Burgess.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 2023.