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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORTEZ JAVAR WHITENER,

APPELLANT

APPELLATE CASE NO. 2024-000164

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial for breach of peace of a high and aggravated nature and unlawful carrying of a pistol, both based on shooting a pistol at a block party, did the trial judge err in refusing to direct a verdict of acquittal when the State failed to prove the *corpus delicti* of both charges from a source other than Appellant's statements?

STATEMENT OF THE CASE

In August of 2023, the Fairfield County Grand Jury indicted Appellant, Cortez Javar Whitener, for breach of peace aggravated in nature, indictment #2023-GS-20-00470. (R. p. **). In January of 2024, the Fairfield County Grand Jury indicted Appellant for unlawful carrying of a pistol, indictment #2024-GS-20-00003. (R. p. **). On January 29, 2024, Appellant proceeded to jury trial before the Honorable Bentley Price. William Frick and Bob Fitzsimons represented Appellant at trial. Ashley McMahan and Riley Maxwell prosecuted the case. The jury returned verdicts of guilty. Judge Price sentenced Appellant to ten (10) years provided that upon the service of five (5) years the balance is suspended. (R. p. **). Judge Price found that Appellant should receive credit for 244 days served. (R. p. **). Judge Price refused to give Appellant credit for the 702 days Appellant served on GPS monitoring with house arrest. (Tr. p. 150, lines 19-25). A timely notice of intent to appeal was served on January 31, 2024. This appeal follows.

STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged." Id. "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the [S]tate." Id. " 'If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.' " State v. Bailey, 368 S.C. 39, 45, 626 S.E.2d 898, 901 (Ct.App.2006) (quoting State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). "The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law." State v. Branham, 392 S.C. 225, 228, 708 S.E.2d 806, 808 (Ct.App.2011) (citing City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007)).

State v. Abraham, 408 S.C. 589, 591–92, 759 S.E.2d 440, 441 (Ct. App. 2014).

ARGUMENT

In this trial for breach of peace of a high and aggravated nature and unlawful carrying of a pistol, both based on shooting a pistol at a block party, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove the *corpus delicti* of both charges from a source other than Appellant's statements.

On August 1, 2020, Shontal Wright hosted a 90's themed party for her birthday. Wright posted an invitation to the party on Facebook. (See State's Exhibits #1, #2). Over one hundred people showed up for the party. (Tr. p. 50, lines 15-17). As the party was ending, gunfire broke out. (Tr. p. 53, lines 2-13). Two cars were damaged and two people were shot, one fatally. (Tr. p. 64, line 3 – p. 65, lines 1-16; p. 70, line 13 – p. 71, lines 1-8).

At trial the State called five witnesses: the host of the birthday party, Ms. Wright; Cierra Barefoot and Brianna Gallman who were in one of the cars that was shot; and two investigators with the Fairfield County Sheriff's office. None of the witnesses saw who was shooting that night. Wright testified that she did not see who was shooting. (Tr. p. 53, lines 20-21). The other two witnesses testified that they did not see who was shooting. (Tr. p. 61, lines 5-12; p. 71, line 25 – p. 72, lines 1-11).

Investigator Michael Autrey, a retired investigator with the Fairfield County Sheriff's Office testified that he recovered a bullet and numerous shell casings from the scene. (Tr. p. 78, lines 3-21). Investigator Autrey testified that the bullet was analyzed by the South Carolina Law Enforcement Division [SLED] who determined that the bullet was fired by a 7.62 millimeter rifle described as a Draco, which is a miniature AK-47. (Tr. p. 78, lines 8-15). The investigator also testified, "I recovered 15, 7.62 millimeter shell casings; 11, 9 -millimeter shell casings, and .22 shell casings all in that area where the "X" is on the map." (Tr. p. 78, lines 18-21).

Investigator Autrey interviewed Appellant on November 13, 2020. The waiver of rights form signed by Appellant was admitted in evidence, without objection, as State's exhibit #3.[1] (Tr. p. 73, lines 10-25). The video recording of the interview was admitted in evidence, without objection, as State's exhibit #13. (Tr. p. 74, lines 3-15). Appellant initially denied being at the block party. During the interview the investigator claimed that Appellant's cell phone records place him at the block party. Although the State did not question the investigator about the cell phone records or introduce the cell phone records at trial, defense counsel questioned the investigator about the records and the State followed up with the investigator on re-direct.[2] (Tr. p. 90, line 25 – p. 91, 92, 93, lines 1-4; p. 94, lines 12-15).

Investigator Autrey also testified about a recorded telephone conversation between Appellant and his mother while Appellant was in the Fairfield County Jail. (Tr. pp. 79-80). The recording was admitted, without objection, as State's exhibit #14. (Tr. p. 80, lines 6-10). The investigator testified that during the phone call Appellant admitted to having a gun at the party and shooting. (Tr. p. 80, lines 17-21).

Investigator William Dove with the Fairfield County Sheriff's Office also interviewed Appellant on November 13, 2020. The video recording of the interview was admitted in evidence, without objection, as State's exhibit #15. (Tr. p. 98, lines 10-25). Appellant provided a written statement that was admitted in evidence, without objection, as State's exhibit #4. (Tr. p. 101, lines 10-25). In the written statement Appellant admitted having a 9 mm gun at the block

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[1] Although the video recorded interviews with Appellant were redacted to remove any reference to the fact that Appellant was arrested for murder, (Tr. p. 5, line 13 – p. 6, lines 1-24), the waiver appears to include a notation that Appellant was being questioned about a murder.

[2] This issue may need to be addressed in post-conviction relief if the convictions are not reversed on direct appeal.

party. (R. p. **, Written statement p. 2). Appellant wrote that he shot the gun in self-defense when others started shooting. (R. p. **, Written statement p. 2).

At the close of the State's case Appellant moved for a directed verdict of acquittal because the State failed to corroborate Appellant's statements by proof *aliunde* of the *corpus delicti*. (Tr. p. 111, line 17 – p. 112, lines 1-24). Counsel acknowledged that the State introduced evidence of shell casings at the scene and bullet holes but argued that evidence was not sufficient to corroborate Appellant's statements as to both the breach of peace and the unlawful carrying charge. Counsel argued that Appellant's statements alone that he had a gun and fired it was not sufficient to allow the case to go to the jury. The State argued, "Well, we have the phone call to his mom where he says he had the gun, shoots it off. We have witnesses that say they heard gunshots, multiple gunshots, from different directions, but they couldn't dictate where they came from. We have two cars that were hit near the location where Mr. Whitener himself says he was running up the hill to be there. So I think there is enough corroborating evidence to put it to the jury." (Tr. p. 116, lines 14-23).

The judge ruled, "All right. I find it is matter of facts for the jury to consider. They can give the statement whatever weight they would like to give it, so I'll deny the motion at this time. (Tr. p. 116, line 24 – p. 117, lines 1-2). The trial judge erred. The judge should have determined the existence or nonexistence of State's evidence to corroborate Appellant's statements to law enforcement and to his mother. It was not a matter of weighing the evidentiary value of the statement. The State failed to present evidence to corroborate the statements of Appellant, requiring a directed verdict of acquittal. The shell casings and bullet holes do not corroborate that Appellant shot a gun, unlawfully carried a pistol or breached the peace. The testimony about

the cell phone records does not corroborate that Appellant shot a gun, unlawfully carried a gun or breached the peace. The trial judge erred in refusing to direct a verdict of acquittal.

"It is well-settled law that a conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof *aliunde* of the *corpus delicti.*" State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999) (footnote omitted). Both the statements to law enforcement and the statement to his mother in the jail call required corroboration. In Hill v. State, 415 S.C. 421, 434, 782 S.E.2d 414, 421 (Ct. App. 2016), this Court wrote:

> We note that at trial and during the PCR hearing, the State maintained Petitioner's alleged statements to Brown and Wright were sufficient evidence to corroborate Petitioner's confession to Paden. However, the State concedes in its brief to this court, and we agree, that Petitioner's alleged statements to Brown and Wright were also confessions requiring corroboration. See Osborne, 335 S.C. at 178, 516 S.E.2d at 204 ("We think that an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required."); State v. Saltz, 346 S.C. 114, 137, 551 S.E.2d 240, 253 (2001) ("The State must produce proof of the *corpus delicti* from a source other than the out-of-court confession of a defendant.").

Recently in Anderson v. State, 442 S.C. 372, 378–79, 898 S.E.2d 218, 221 (Ct. App. 2024), this Court wrote:

> However, in Osborne, our supreme court followed the holding of the United States Supreme Court in Opper v. United States, 348 U.S. 84, 93, 75 S.Ct. 158, 99 L.Ed. 101 (1954), and applied the trustworthiness approach set forth there. Osborne, 335 S.C. at 179-80, 516 S.E.2d at 205; see also State v. Abraham, 408 S.C. 589, 592 n.1, 759 S.E.2d 440, 441 n.1 (Ct. App. 2014) ("Given our supreme court's holding in State v. Osborne, we find our state's law is consistent with the 'trustworthiness' approach delineated in Opper ...."). The Osborne court clarified that "the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred." 335 S.C. at 179-80, 516 S.E.2d at 205. Thus, "the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.*" Id. at 179, 516 S.E.2d at 204 (quoting Opper, 348 U.S. at 93, 75 S.Ct. 158). Instead, the State must "introduce substantial independent evidence

which would tend to establish the trustworthiness of the statement." Id. (quoting Opper, 348 U.S. at 93, 75 S.Ct. 158).

The State in the present case failed to introduce substantial independent evidence which would tend to establish the trustworthiness of Appellant's statements. In the Anderson case, a DUI case, this Court found that the State presented sufficient independent evidence to corroborate Anderson's statements to law enforcement. This Court discussed the *corpus delicti* of DUI writing, " 'The *corpus delicti* of DUI is: (1) driving a vehicle; (2) within this State; (3) while under the influence of intoxicating liquors, drugs, or any other substance of like character.' State v. Townsend, 321 S.C. 55, 58, 467 S.E.2d 138, 140 (Ct. App. 1996); *see also* S.C. Code Ann. § 56-5-2930(A) (2018) ("It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired ....")." Anderson, 442 S.C. at 379, 898 S.E.2d at 221. The State presented independent evidence that Anderson was driving in the form of testimony from the deputy who testified that she saw Anderson passed out in the front seat with his foot on the brake, while the car was on and the transmission was in drive at a private residence that was not Anderson's home. The deputy's further testimony also provided independent evidence that the driving was within the State and while under the influence. In the present case the State failed to introduce independent evidence of breach of the peace, aggravated in nature and unlawful carrying of a weapon.

The *corpus delicti* of breach of peace, aggravated in nature is unclear. In State v. Simms, 412 S.C. 590, 774 S.E.2d 445 (2015), the South Carolina Supreme Court affirmed the trial judge's refusal to direct a verdict of acquittal for aggravated breach of peace, noting that the offense was a common law offense and discussing the general historical concept of the breach of peace offense. The Simms case, however, did not involve a challenge to the State's failure to

introduce independent evidence of the offense from a source other than the defendant's statements, as in this case. The *corpus delicti* for unlawful carrying of a pistol under the former S.C. Code §16-23-20 is more straight forward. The State failed to present independent evidence of either offense.

The indictment for breach of peace, aggravated in nature in this case reads:

> The defendant, Cortez Javar Whitener, did on or about August 2, 2020 in Fairfield County, South Carolina, commit the crime of breach of peace of a high and aggravated nature in that defendant was an affrayer, rioter, disturber, and breaker of the peace or was dangerous and disorderly or went armed offensively, to the terror of the people; this offense was of a high and aggravated nature, to wit: defendant was armed with a pistol and did shoot the pistol while at a block party, all in violation of 17-25-0030 Code of Laws of South Carolina (1976, as amended)."

(R. p. **, {BOPHAN indictment}). The indictment for unlawful carrying of a pistol reads, "The defendant, Cortez Javar Whitener, did in Fairfield County, South Carolina, on or about August 2, 2020, unlawfully carry about his or her person a handgun, whether concealed or not, all in violation of Section 16-23-20, Code of Laws of South Carolina (1976, as amended)." (R. p. *{unlawful carrying indictment}).

The State failed to present independent evidence of any actions by Appellant that would constitute breach of peace, aggravated in nature or unlawful carrying of a pistol. Not one witness from the over one hundred people who attended the block party testified that they saw Appellant at the block party. Not one witness testified that Appellant carried a pistol, shot a pistol or did anything to breach the peace. The shell casings, bullet holes, and testimony about cell phone records, inexplicably elicited by defense counsel, do not corroborate Appellant's statements that he shot a gun, unlawfully carried a pistol or breached the peace. The trial judge erred in refusing to direct a verdict of acquittal.

CONCLUSION

Based on the above argument, this Court should reverse the convictions.

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This 30th day of July, 2024.