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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER CHAD DUNCAN,

APPELLANT

APPELLATE CASE NO. 2023-001988

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by not directing a verdict of acquittal where the state's case only raised a suspicion that appellant was responsible for drowning his friend, the decedent, because they were last together on the Broad River before the victim drowned and the pathologist determined the cause of death was a "homicide" since the state failed to present any direct or substantial circumstantial evidence that appellant killed the decedent by intentionally drowning him with malice aforethought?

STATEMENT OF THE CASE

Appellant was indicted at the February 20, 2020, term of the Cherokee county grand jury for the offense of murder. The indictment alleged that appellant killed the decedent with malice aforethought "by strangling and/or drowning the victim…" R. 470.

Appellant's case was called for trial on December 11, 2023, before the Honorable R. Kelly and a jury. Travis Moore represented appellant, and Kimberly Leskanic and Matthew Kendall were the deputy and assistant solicitors. R. 1.

On December 15, 2023, the jury found appellant guilty of murder. R. 463, ll. 6-10. Judge Kelly sentenced appellant to forty years' imprisonment. R. 467, ll. 23-25.

This appeal follows.

STANDARD OF REVIEW

"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

The court erred by not directing a verdict of acquittal where the state's case only raised a suspicion that appellant was responsible for drowning his friend, the decedent, because they were last together on the Broad River before the victim drowned and the pathologist determined the cause of death was a "homicide" since the state failed to present any direct or substantial circumstantial evidence that appellant killed the decedent by intentionally drowning him with malice aforethought.

Relevant facts

Dennis Gardner with Cherokee county 911 communications testified that a call came in on this case on June 14, 2019, at 1:12 p.m. -- "after lunch." R. 65, l. 4 - 67, l. 16. Edward Thornburg and his son were driving back from Rock Hill near the Broad River and Edward allowed appellant to use his cell phone at that time. "I seen somebody against a car, which I can't honestly say if he was waving at me or not. I just knew that he looked like he was in trouble or was upset. I didn't know if he had trouble or not. I just pulled back over there and asked him [appellant] if he need[ed] to use a phone or anything. He said he did need to use a phone because his buddy was missing. I let him use my phone to call 911." R. 68, l. 21 – 69, l. 16.

Edward said it appeared to him that appellant had been crying. Appellant was also damp or wet, and he was clearly upset. R. 69, ll. 17-21.

On cross-examination, Edward testified that appellant told him that he "and his buddy had went swimming or tubing or something, I don't remember exactly. His buddy went under. He couldn't find him. That's all I remember...he essentially looked like he had been crying, he was damp and wet." R. 73, ll. 3-20.

Cecil Bell was a Blacksburg volunteer fireman. He responded to a call at the Broad River about this potential drowning that June 14, 2019 afternoon. R. 74, l. 17 – 76, l. 15. Bell remembered that someone mentioned a ball field on the side of the river as a possible landmark. "There's a lot of thoughts go through your mind when you get a call like that." R. 76, l. 23 – 78, l. 18. Bell recalled that he learned that the victim's body was located in the early stages of his involvement, and the body was brought out at that time. R. 78, ll. 19-21.

Rannie Moss was also a volunteer with the Blacksburg fire department. He asked appellant if he was the one who called 911, and appellant verified that he had called 911. Appellant told Moss: "His buddy was in the river." R. 91, l. 16 – 93, l. 6.

Moss described how appellant rode on the back of his pickup truck while they looked for the part of the river where he had lost sight of the decedent. R. 93, l. 20 – 97, l. 19. Moss testified that appellant did not seem panicked to him, and Moss volunteered: 'If it was my friend in the river, I would have been screaming and hollering when the fire truck pulled up." R. 96, l. 22 – 97, l. 6.

Another fireman, Brian Mullinax, described appellant as being "frustrated" at trying to find the right direction to lead the volunteer firemen in along the river. R. 104, l. 24 – 106, l. 13. Mullinax remembered that the men went upstream from the firecracker plant and that is where the decedent's body was ultimately located. R. 106, ll. 16-18.

Sergeant Brent Heflin recalled being dispatched to a potential drowning call in the early afternoon hours of June 14, 2019. It was in Cherokee County at Highway 29 and Broad River. R. 115, ll. 22-25. Heflin remembered when he arrived, the fire department personnel and "most likely EMS" and DNR were already on the scene. R. 116, ll. 2-18. Heflin talked to appellant at to get information about what had occurred on the river. R. 116, l. 22 – 117, l. 1.

Brandon Gardner with the South Carolina Department of Natural Resources (DNR) was also called to the scene of the possible drowning that afternoon. R. 120, l. 19 – 121, l. 22. Gardner claimed "from the beginning of the investigation, things didn't make sense. It made us curious of what did happen and the possibility of foul play within the case." R. 122, ll. 12-17.

Gardner offered that "marks" on the decedent's body concerned him. R. 122, ll. 21-22. Gardner further volunteered that after he talked with appellant, he did not think the decedent died from an accidental drowning, so he brought appellant back to his office to interview him. R. 131, ll. 8-24.

The tape of that interview, State's Exhibit 62, was played for the jury and is before this Court for review. R. 132, ll. 4-19. On the tape, appellant told Gardner that he and the decedent got on the river at about 1 a.m. after meeting there as planned around midnight. They ate some chicken before getting on the river.

Appellant told Gardner the decedent, who had been taking drugs, had trouble in the water. The decedent was floating on a separate device from appellant's raft. Appellant at one point threw him a rope while the decedent was on the rocks. He continuously attempted to try to get the decedent onto his raft once the decedent got in trouble with the water and rocks but was his attempts failed.

Appellant remembered going to a house on the bank of the river to try and get help, but no one answered the door. He also recalled the current on the river taking the decedent away as appellant tried to get to him.

Gardner offered on the tape that that he did not think appellant was telling him the truth. Appellant continued to try to explain to Gardner how he tried to help the decedent get onto his

"boat" and he grabbed the decedent by the shirt at one point to try and help get him get stabilized in the water.

Gardner left the interview room at one point. Gardner came back into the room, and he told appellant he was being arrested for not having a floatation device on his boat or raft. Gardner testified that appellant made a drawing of the river to show his recollection of where different things had occurred. Gardner opined that appellant was familiar with the rocks and the curvature of the river. R. 140, ll. 3-4.

Gardner described how the river flowed like a "lazy river" in most places and that the water was shallow. Gardner remembered appellant telling him that his fishing rods, his tent, "maybe sleeping bags and pillow" fell off of his raft into the water. The decedent tried to get on the raft at one point, but he slipped off. R. 144, l. 12 - 145, l. 4.

Gardner said appellant told him everything got knocked off the raft near the bridge. R. 145, l. 8 – 147, l. 11. Appellant told Gardner the decedent was on a rock at one point when appellant was able to actually grab him. R. 147, l. 12 – 152, l. 2.

Gardner remembered appellant describing how he tried his best to get to the decedent but "the current was so strong he was not able to use his paddle to paddle to just . . . he was not able to make it over to those islands." R. 155, ll. 1-21. Gardner also testified appellant told him he tried to use a big stick to "go back upriver. Since he wasn't strong enough I believe. And he manipulates a raft somehow to get it all the way back up the creek, to this area here (indicating) where he got off and started walking." R. 156, l. 22 – 157, l. 14.

Gardner testified on June 27, 2019, he invited the pathologist, Dr. Kelly Rose, to float down the river with him, which she agreed to do. R. 165, ll. 3-25.

Gardner talked again with appellant on August 9, 2019, at appellant's house. State's Exhibit 68 is that video interview which is on file with this court for viewing. Gardner confirmed that "GHB," commonly known as a "date rape drug", a strong sedative was found inside the decedent's automobile. R. 167, ll. 1-14. As will be seen infra, Dr. Rose testified that the decedent had GHB and meth in his bloodstream.

On cross-examination, Gardner admitted that the decedent bought a tent the day before he drowned at the Walmart. Gardner said no tent was found at the US-29 bridge or on the river. R. 194, ll. 2-18. Gardner saw appellant's raft tied to a limb, and he remembered seeing "an empty lamp and a rope and some type of tool off the top of my head [on the raft]." R. 196, ll. 1-23. Gardner also saw "a hammer. Towel. A pair of channel locks. I think there's a shirt. A stick, a large stick, rope..." that were also on the raft. R. 197, ll. 18-22.

Major Billy Anthony was a crime scene investigator at the time of the drowning on June 14, 2019. R. 277, l. 10 – 278, l .11. Anthony remembered finding the boat near the spot where the decedent's body was located. R. 282, l. 10-18. Te decedent had "several scratches and some small cuts, lacerations to his body." R. 283, ll. 11-17. In addition to some bruising on the decedent's arm, Major Anthony said he saw "some redness around the neck." R. 285, ll. 11-24.

Anthony testified that law enforcement was not able to locate the area where appellant told them he got off "the boat." Anthony offered that there were no foot impressions near the residence where appellant told the police he went for help. R. 288, l. 3 – 289, l. 16. This residence belonged to Mr. Keller, and Anthony said there was no sign "of any foot traffic other than small animals" coming off the river towards Keller's residence. R. 289, l. 21 – 291, l. 21.

As stated, appellant's raft was located tied to a limb. A hammer, pliers, fishing hooks, a cell phone charging block, and a rope were also located. R. 299, l. 7 – 306, l. 5.

Major Anthony was allowed to testify that he had never seen a drowning victim with injuries as significant as those sustained by the victim in this case. Tr. 317, ll. 12-16.

The pathologist, Dr. Kelly Rose, testified she conducted an autopsy on the decedent on June 17, 2019. R. 342, ll. 2-4. The decedent was a very tall man, six-foot-six or seventy-eight inches long. He was thin and in good shape. He had pants on when he was taken out of the body bag but no shirt. R. 342, l. 23 – 346, l.11. Doctor Rose pointed out bruises and abrasions from the photographs to the jury. R. 347, ll. 8-14.

Doctor Rose told the jury: "I've never seen that extensive amount of injuries with a straight forward drowning unless someone, you know – [I] have not actually ever seen that extensive [of] injuries. Usually with drownings you'll have some injuries, not that much. I remember thinking, was he beat up and thrown in the water? It was that much of a drastic change from what I am used to seeing with drownings." R. 342, ll. 14-23.

Doctor Rose admitted that the decedent did drown. R. 353, ll. 2-18. Doctor Rose noted that the decedent had a fractured right rib and a "broken hyoid bone." She opined it was "very hard to injure that bone, and it was fractured. And that was highly concerning." She said she had never seen such a fracture from a previous drowning, nor had she seen a fractured rib from another drowning. R. 353, l. 2- 354, l. 10.

Doctor Rose said she knew the decedent had methamphetamines and GHB in his bloodstream, but she opined that these drugs did not kill the decedent. R. 356, l. 7 – 357, l. 1,

Doctor Rose estimated it took forty pounds of pressure for the fracture of the decedent's hyoid bone to occur and that it could not happen from someone pulling or grabbing the decedent's shirt. R. 358, l. 23 – 359, l. 21.

Doctor Rose testified that the decedent died as the result of a "homicide." R. 360, ll. 5-18. Doctor Rose acknowledged that some of the decedent's injuries could have been caused by someone grabbing him, but she told the jurors that the decedent's injuries were "consistent with Justin being held facedown from behind." R. 382, ll. 2-6.

Directed verdict

After the state rested, the defense immediately rested. However, the trial court did not direct a verdict on its own motion as mandated by Rule 19, SCRCrimP even though there was a failure of "competent evidence tending to prove the charge in the indictment" – that appellant killed the decedent with malice aforethought by intentionally drowning him as the state alleged. Tr. 388, l. 2 – 389, l. 20.

Closing argument

Defense counsel reminded the jurors they were not bound to believe the opinion of the pathologist, Doctor Rose, that "the five-foot-eight, 130 pound man seen on that video forcibly held down a . . . *six-foot-five, 185 pound man* enough so that he had broke that bone. Enough so that these injuries were caused to his extremities from what she said would've been pushing or flailing against it with absolutely no injuries to Mr. Duncan. Think about that." Tr. 441, ll. 11-18.

Counsel added that while the state did not have to prove a motive for the crime that the state wanted them to believe that appellant killed his best friend with his bare hands – "and not with a weapon. No with a 12-inch steel hammer sitting on the raft. No. They want you to believe that somehow, at some point he gained control of someone almost a foot taller than him and 50 pounds heavier than him and held him under water against his will, without sustaining a single injury to himself." Tr. 445, l. 16 – 446, l. 1.

Discussion

While admittedly unusual, the trial judge has an independent obligation to assess whether a directed verdict should be granted at the close of the evidence in the case pursuant to Rule 19 (a), SCRCrimP. The rule states if there is a failure of "competent evidence tending to prove the charge in the indictment," the judge *shall direct a direct in the defendant's failure.* See Rule 19 (a), SCRCrimP.

There was no direct evidence in this case that appellant killed the decedent with malice aforethought. The evidence in this case also did not rise to the level of the "substantial circumstantial evidence" that was necessary for a trial court to submit the murder charge to the jury. See State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004).

The state's case against appellant was that he was the last person with the decedent when the decedent drowned in the Broad River, and the pathologist opined the drowning was a homicide. Dr. Rose opined the decedent probably had his head held under water while being strangled.

The state's case was if appellant did not kill the decedent, then who did? However, it was not appellant's obligation to answer that question. The trial court should not refuse to grant a motion for a directed verdict where the state's evidence, as here, merely raises a suspicion that the accused is guilty. See State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), the Supreme Court held the defendant was entitled to a directed verdict in that murder case. There was evidence a vehicle was seen on the night of the murder in the victim's apartment complex that was very similar to the car in which Martin and his co-defendant were traveling that night. Further, when Martin and his co-defendant were late picking up Martin's girlfriend the defendant 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.

Evidence tied to the murder scene in Martin was also found in trash cans surrounding the bar where Martin's girlfriend worked. This Court held that all of this evidence, while certainly raising a strong suspicion of Martin's guilt, was insufficient to withstand a directed verdict motion.

Further, in State v. Schrock, 288 S.C. 129, 322 S.E.2d 450 (1984), the Supreme Court held that evidence the defendant was in the area of the murder scene, and that footprints at the scene were similar to his and were found in the area where the suspect was walking were insufficient to take the case to the jury.

In State v. Schrock, there was also evidence that Marlboro cigarette butts were found at the murder scene, and the defendant admitted to the police that he smoked Marlboro cigarettes. Further, tests performed on an oil can did not supply any conclusive connection between the crime scene and the defendant. The Supreme Court held the defendant was entitled to a directed verdict under these circumstances.

In State v. Mitchell, supra, a burglary case, the victim testified that Mitchell had been over to his house on a couple of occasions, and that Mitchell had also attended a social gathering at the victim's home for about forty-five minutes to one hour. A police officer investigating the burglary found glass on the floor, and there was a screen from which law enforcement was able to get an identifiable fingerprint. That fingerprint matched Mitchell. The Supreme Court held that the state had failed to produce substantial circumstantial evidence reasonably tending to prove the guilt of the accused, and that a directed verdict should have been granted.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), our Supreme Court held the defendant was entitled to a directed verdict despite very strong evidence of his guilt. The decedent was killed in an arson on the Sunday after she brought home, as usual, the proceeds from the collection at Church for that Sunday. In a burn pile on Bostick's next door property, the victim's car keys, her calculator, and other items from her home were found. Further, Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire. Finally, Bostick was acting suspiciously as he watched the victim's house burn down while smoking a cigarette with no apparent interest for her wellbeing.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the Supreme Court held Odems was entitled to a directed verdict on the charges of first degree burglary, grand larceny, criminal conspiracy and malicious injury to personal property. The circumstantial evidence was that a brown car was stopped in the victim's driveway while it was being burglarized. That brown car was spotted by police about ninety minutes after the burglary, and pulled over. All of the occupants of the stopped vehicle, including Odems, fled after the car was pulled over leaving behind the proceeds of the burglary in the car.

Odems while fleeing knocked on the door of a nearby house after he fled, and he asked the woman who answered the door to identify him to the police as her boyfriend. The Supreme Court found this was not "substantial circumstantial evidence" Odems participated in the burglary, and it held a directed verdict should have been granted for Odems.

Here, numerous lay witnesses impermissibly opined that they did not believe appellant's version of events, or bluntly stated they thought he was lying. Appellant was much smaller man than the decedent and appellant suffered no injuries after encountering problems on the river with the decedent which resulted from appellant trying to assist the decedent as he struggled with

the river. The state harped on alleged inconsistencies in appellant's statements but produced no direct evidence or substantial circumstantial evidence that appellant murdered the decedent by intentionally drowning him while on the Broad River that day. However, appellant did not testify in this case, and even if there were true inconsistencies in appellant's various statements in this case, they could not be considered as substantive evidence of his guilt since he did not testify, and was not subject to cross-examination. See State v. Copeland, 278 S.C. 572, 581-582, 300 S.E.2d 63, 69 (1982).

If someone caused the decedent to drown on the Broad River that day by holding his head underwater or otherwise as Dr. Rose opined, it was not appellant's burden to prove it was not him. The state failed to introduce probative evidence proving appellant murdered the decedent on the Broad River, and since there was no direct evidence or substantial circumstantial evidence appellant killed the decedent with malice aforethought, the trial court was obligated to direct a verdict in his favor pursuant to Rule 19 (a), SCRCrimP. See, also, State v. Martin; State v. Bostick; State v. Schrock; State v. Odems; State v. Arnold, State v. Mitchell, supra.

CONCLUSION

By reason of the foregoing argument, a directed verdict of acquittal should be issued by this Court.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of October, 2024.

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APPELLATE CASE NO. 2023-001988

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Chad Duncan 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 R. Keith Kelly, which was held on December 11-17, 2023, 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 Christopher Chad Duncan.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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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 indictment:
(2) Entire trial transcript;
(3) State's exhibit 57 (RB Heflin)
(4) State's exhibit 58 (RB Heflin)
(5) State's exhibit 62 (interview)
(6) State's exhibit 68 (conversation with appellant)

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

Robert M. Dudek
Chief Appellate Defender

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Division of Appellate Defense
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This 1st day of October, 2024.

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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
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APPELLATE CASE NO. 2023-001988

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Christopher Chad Duncan, #382771, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 1st day of October, 2024.

Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT