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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAEKWON MALIK ELLERBE,

APPELLANT

APPELLATE CASE NO. 2023-001563

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in failing to direct a verdict of acquittal for murder, where murder required proof of malice aforethought, but the judge recognized Appellant was "clearly overcome with grief and emotion" at the time of the shooting, since a defendant is entitled to a directed verdict where the State has failed to present evidence of the offense charged?

STATEMENT OF THE CASE

On September 17, 2020, a Chesterfield County Grand Jury indicted Appellant, Raekwon Ellerbe, for murder, assault and battery of a high and aggravated nature (ABHAN), possession of a weapon during the commission of a violent crime, and two counts of discharging a firearm into a dwelling. R. 374 – 375. Appellant was tried before the Honorable Michael S. Holt and a jury, from September 18 – 21, 2023. Tonya Copeland Little represented Appellant. Kernard Redmond prosecuted the case. R. 1. Appellant was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment of thirty-three years, twenty years, five years, ten years, and ten years, respectively. R. 370, ll. 10-23.

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." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776. "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 in failing to direct a verdict of acquittal for murder, where murder required proof of malice aforethought, but the judge recognized Appellant was "clearly overcome with grief and emotion" at the time of the shooting, since a defendant is entitled to a directed verdict where the State has failed to present evidence of the offense charged.

Relevant facts

At approximately 4:00 a.m. on July 12, 2020, Quanecia Brown (Decedent) was struck by a bullet and killed as she slept in her home at Dizzy Gillespie Apartments in Cheraw. Decedent's infant, C.J., was also hit by gunfire. (The baby received medical treatment and recovered; he grew into a "handsome three-year-old boy.") Gunfire penetrated a second apartment, but those occupants were unharmed. R. 80, l. 19 – 81, l. 22; R. 90, l. 5 – 91, l. 21; R. 97, l. 7 – 105, l. 5; R. 108, l. 17 – 113, l. 3; R. 116, l. 8 – 117, l. 15.

Earlier, a group of friends which included John "Mike Mike" Cooks, Appellant, Kwondashian "Kwon" Johnson, and Bobby Griham were driving Johnson's car home from a club in Wallace, and they passed another car on the bridge. Christopher Green and two men, Jermaine Redfern or Redford and Jaleel Gordon, were in the other car. The other car caught back up with Johnson's car and Green and Gordon pointed guns at Johnson's car. When the cars got into town and stopped at a red light, Cooks noticed one of the gunmen was his cousin. "We rolled the windows down, and I had told him to stop playing like that." R. 237, l. 15 – 241, l. 20; R. 195, ll. 1-3; R. 261, ll. 10-23; R. 265, l. 19.

A little while later, both groups of people wound up at Dizzy Gillespie Apartments. Cooks confronted the gunmen about pointing guns at them and an argument ensued. Green went into his apartment. Appellant was not involved in the argument; he went over to a porch nearby

to get away from the argument. However, Green emerged from his apartment with an AK-47 rifle and shot Johnson in the head while Johnson sat in his (Johnson's) car. Green walked back into his apartment, firing a couple more shots in the air as he did so. R. 196, l. 13 – 201, l. 19; R. 212, l. 1 – 214, l. 18; R. 244, l. 23 – 245, l. 1; R. 219, l. 4 – 221, l. 1; R. 242, l. 3 – 244, l. 11.

Cooks ran and got Appellant and Griham. Appellant ran over and tried to help Johnson, but it was too late. According to Cooks, "Raekwon had pulled—he pulled Kwon up. He—give me a second." "He had pulled Kwon up and that's when—that's when all his remains had fell out in the car." The violence done to Johnson by Green's AK-47 was shocking: much of his head was blown off. (*See* Defense Exhibit #2, which is on file with this Court.) Johnson was Appellant's cousin and was "like a brother" to him. Both Cooks and Appellant were overcome by emotion when testifying about the state of Johnson's remains. Appellant pulled his own pistol and fired. Bullets traveled into Green's apartment striking Decedent and the baby. Appellant left the scene, but later turned himself in to the police. R. 95, ll. 6-8; R. 214, l. 20 – 217, l. 11; R. 244, l. 12 – 247, l. 15; R. 257, l. 6 – 259, l. 24; R. 266, l. 2 – 269, l. 17.

At the conclusion of the State's case, Appellant moved for a directed verdict of acquittal. The court denied the motion, ruling that in the light most favorable to the State, the evidence was sufficient to go to the jury. The defense renewed its motion at the close of the defense's case, and the court again denied the motion.[1] R. 228, ll. 15-17; R. 230, ll. 6-15; R. 286, ll. 2-12. However, at sentencing, the court recognized the lack of malice in the case: "I do have great sympathy for what you had to struggle with that night. You did not cause any problems, You looked like you were away from all of this. And then you witnessed your friend murdered,

[1] Although defense counsel did not specifically mention malice during her directed verdict motion, the court had a duty under Rule 19, SCRCrimP, to consider the existence or non-existence of malice, an element of the offense.

which is why I charged the jury with voluntary manslaughter because *you were clearly overcome with grief and emotion at the time*." R. 369, ll. 7-12 (emphasis added).

As seen, Appellant was sentenced to thirty-three years for murder.

Discussion

The court erred by failing to direct a verdict of acquittal on murder where there was a complete failure of proof regarding malice. Murder requires proof of malice. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). Malice signifies "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957) (quoting *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941)). "Malice is defined as being hatred or ill-will. Malice is wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong. Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) (citations omitted). "There are no degrees of malice—it either exists, or it does not." *State v. Heyward*, 441 S.C. 484, 509, 895 S.E.2d 658, 671 (2023) (Kittredge, J., concurring).

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). *E.g.*, *State v. Heath*, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006) (We "reverse Appellant's conviction

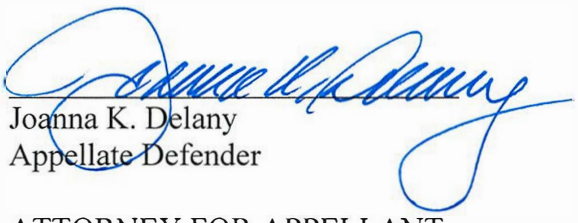
because the State failed to establish an essential element of the crime charged."). "[W]hen there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). If the State failed to present any direct evidence 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. *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the State's evidence "merely raises a suspicion that the accused is guilty," the court must direct a verdict in his favor. *State v. Schrock*, 238 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). *See also* Rule 19, SCRCrimP ("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 charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight.").

Appellant had just seen Green shoot Johnson, who was Appellant's cousin and close friend, with an AK-47 while Johnson was sitting in his own car. Appellant ran to help Johnson, but he was dead and his remains fell apart. Appellant fired shots, and shots went into Green's apartment, killing Green's girlfriend, Decedent. Appellant did not formulate malice. The court recognized that there was no malice: "you were clearly overcome with grief and emotion at the time." R. 369, ll. 7-12. Due to the State's failure of proof, Appellant was entitled to a directed verdict on the murder. *E.g.*, *State v. McHoney*, 344 S.C. at 97, 544 S.E.2d at 36 (defendant entitled to directed verdict when State fails to produce evidence of the offense). The shooting of Decedent should have solely gone to the jury on the charge of voluntary manslaughter. *See* S.C.

Code Ann. § 16-3-50 (defining manslaughter as the "unlawful killing of another without malice, express or implied).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence for murder and remand for entry of a directed verdict of acquittal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of October, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Raekwon Malik Ellerbe states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Michael S. Holt, which was held on September 18 – 21, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Raekwon Malik Ellerbe.

Respectfully submitted,

This 9th day of October, 2024

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

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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."

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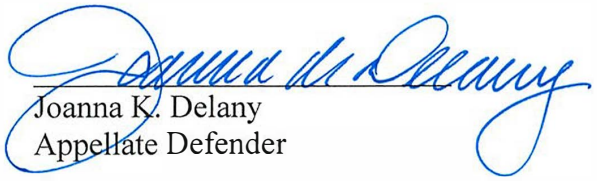
CERTIFICATE OF SERVICE

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 Record on Appeal 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), this 9th day of October, 2024.



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