ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ROSCOE SCOFIELD,

APPELLANT

APPELLATE CASE NO. 2012-213731

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for conspiracy to commit murder when the State failed to prove an agreement between Appellant and anyone to commit murder?

STATEMENT OF THE CASE

In September of 2011, the Abbeville County Grand Jury indicted Scofield for second degree criminal sexual conduct with a minor, contributing to the delinquency of a minor and conspiracy to commit murder, indictments #2011-GS-1-380, 381, 422. On August 28, 2012 Scofield proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. Attorney Carson Henderson represented Scofied at trial. Attorney Elizabeth White prosecuted the case on behalf of the State. The jury returned with verdicts of not guilty of second degree criminal sexual conduct with a minor and contributing to the delinquency of a minor. The jury found Scofield guilty of conspiracy to commit murder. On December 6, 2012, Judge Griffith sentenced Scofield pursuant to the youthful offender act and referred him for the shock incarceration program. A timely notice of intent to appeal was served on December 19, 2012. This appeal follows.

STATEMENT OF FACTS

In November of 2010, the fifteen year old female and nineteen year old Appellant, James "Ross" Scofield started dating. (Tr. pp. 82-83). In December of 2011, when the fifteen year old's mother discovered she was dating Appellant, the mother called the Appellant and told him she did not want him seeing her daughter. (Tr. p. 62, lines 13-16). Despite the mother's objection, the fifteen year old and Appellant continued to see one another. (Tr. p. 64, lines 3-6).

On the morning of May 28, 2011, the fifteen year old contacted the Appellant and later met him and Justin Fields at the square in Abbeville. (Tr. p. 84, lines 13-20; p. 91, lines 17-25). Lieutenant John Garner with the Abbeville Police Department testified that records from the cab company indicate that Appellant was dropped off at the square between 6:30 and 7:00 PM. (Tr. p. 119, lines 1-22). According to the trial testimony of the fifteen year old, she and Appellant had sex in the graveyard behind the Trinity church. The fifteen year old testified that later that evening the police picked them up and took them to the police station. (Tr. p. 85, line 16 – p. 86, lines 1-3). Appellant denied having sex with the fifteen year old. (Tr. p. 171, lines 15-18; p. 178, lines 16-19).

Kimberly Wagler, the mother of the fifteen year old, called the police between 5:30 and 6:00 PM after her daughter did not return from her bike ride that morning. (Tr. p. 62, line 21 – p. 63, lines 1-12). At about 9:00 PM Ms. Wagler received a phone call from the Abbeville Police Department that they found her daughter and she was at the police station. The mother went to the police station and took the fifteen year old straight to the hospital and asked that a rape test be done. (Tr. p. 63, line 16 – p. 64, lines 1-2). The mother

testified that a rape test was not done and she was asked to leave the room when the doctor examined her daughter. (Tr. p. 64, lines 3-7).

Dr. McQuown examined the fifteen year old at the hospital on the evening of May 28, 2011. (Tr. p. 144, line 10 – p. 146, lines 1-9). At trial the doctor testified that the fifteen year old denied any sexual contact. (Tr. p. 147, lines 3-6). The fifteen year old admitted that she initially denied having sexual intercourse with Appellant because she did not want her mother to know. (Tr. p. 87, lines 10-14). Contrary to the mother's testimony, the doctor testified that the mother was in the room with her daughter during the exam. (Tr. p. 148, lines 1-6). The doctor testified that he did a pelvic examination of the fifteen year old but was not asked to do a rape kit analysis. (Tr. p. 147, line 10 – p. 148, lines 1-11). Based on his examination of the fifteen year old, the doctor testified that there was no trauma to the vaginal area, no bruising or bleeding, no sign of semen, discharge or fluid and the hymen was intact. (Tr. p. 152, line 20 p. 153, p. 154, lines 1-7).

While the police were looking for the fifteen year old, they received a call about two white males, dressed in black running from the cemetery behind Trinity Church. Police investigated and found Justin Fields and John Dylan Calvert on the square. (Tr. p. 116, lines 2-14). Calvert had several large knives in his pocket and backpack. (Tr. p. 116, line 22 – p. 117, lines 1-15). Calvert and Fields told the police that Appellant and the fifteen year old were in the cemetery. (Tr. p. 116, lines 17-21).

In a written statement to police, marked as Defendant's Exhibit #1 at trial, Calvert told police, "Ross Scofield called me Saturday and wanted me to bring knives. I did not ask questions and did. I was going to give them to him and go back home. Last night he was talking about killing her [fifteen year old] mother. I don't know who is involved they would

not say. They was just talking. I tried to stay out of it." (Tr. pp. 102 – 106; Defendant's Exhibit #1, R. p. **). Calvert was charged and pled guilty to conspiracy in connection with this case. (Tr. p. 99, line 18 – 25) Calvert testified against Appellant Scofield at trial and received a probationary sentence. (Tr. p. 100, lines 1-2).

According to Lieutenant John Gray with the Abbeville Police Department Appellant told him that the knives were going to be used to hurt the fifteen year old and her mother. This alleged statement was not recorded or reduced to writing. (Tr. p. 126, lines 5-12). In a written statement to police, however, Appellant stated that he intended to hurt himself with the knives. Appellant wrote, "I went up there to see [fifteen year old] for a few. When up there she was in tears and ready to hurt herself. I was mad and upset from everything that was told to me by Justin Fields. So I asked Dylan Calvert to bring a couple of knives and he did so I can hurt myself. Also [fifteen year old] said before I was there that she left a note saying that she would be back in a few. Also Dylan Calvert did not know what the knives for." (Tr. p. 125, lines 6-14; State's Exhibit #3, R. p. **).

At trial Appellant testified that he and Justin Fields met the fifteen year old at the Rough House restaurant in Abbeville between 6:30 and 7:00 PM. (Tr. p. 167, line 16 – p.168, p. 169, lines 1-6). Appellant testified that they ate dinner and then the three of them played games – jumping creeks, climbing trees, and trying to scare one another. (Tr. p. 169, line 11 – p. 170, lines 1-8). Appellant testified that Dylan Calvert called him and "He told me he was bored and I asked him to come up to play some games, to play with me, Justin and [fifteen year old] and to bring some knives to cut some briars and bushes and stuff because [fifteen year old] cut her legs up pretty bad and we needed them so she wouldn't get hurt any more or me or none of us would." (Tr. p. 172, lines 3-8).

When asked about the written statement Appellant provided to police where he indicated he wanted to hurt himself with the knives, Appellant explained, "I wrote that – the officer was persistent and adamant of me giving a statement that I was going to hurt [fifteen year old] and Kim and I told him, 'No', and finally he said, 'Hey, did you even want to hurt yourself?' I said, 'Well, if it makes you happy, I wanted to hurt myself." (Tr. p. 177, lines 18-23).

The jury found Appellant not guilty of second degree criminal sexual conduct with a minor and contributing to the delinquency of a minor. The jury found Appellant guilty of conspiracy to commit murder.

ARGUMENT

The trial judge erred in refusing to direct a verdict of acquittal for conspiracy to commit murder when the State failed to prove an agreement between Appellant and anyone to commit murder.

At the close of the State's case Appellant moved for a directed verdict on the charge of conspiracy to commit murder. (Tr. pp. 136-142). Appellant argued, "Your Honor, in this case, even assuming that all the evidence that the government introduced in their case in chief is accurate, assuming that Mr. Scofield did all this bad stuff they are accusing him of, Mr. Calvert has testified that he was not aware of any malicious intent of Mr. Scofield getting those knives or asking for those knives. And again, that is coming out of the government's own witness' mouth, so there was no agreement, there was no meeting of the minds, ergo, there can be no conspiracy." (Tr. p. 137, lines 9-17). Appellant also argued that the State failed to prove a benefit to Mr. Calvert. (Tr. p. 137, line 18 – p. 138, lines 1-17). Appellant further argued, "Now, you can have a conspiracy that's got multiple or single criminal objectives, but here in the case at hand, the government has alleged that Mr. Scofield and Mr. Calvert had one single criminal objective and that was to kill Mrs. Kimberly Wagler. And again, Your honor, Mr. Calvert did not testify to that. He said he had no idea about that until---" (Tr. p. 141, lines 12-19).

The judge denied the directed verdict motion stating, "I agree with you, it got different. It's clear to you, it's not clear to me. I mean, yeah, you went back and cleaned up. That's what lawyers are supposed to do. You're a good advocate, I'll give you that, but he testified a certain way on direct and I think that's in the evidence. I think that's a jury question. I would be doing the same thing if I were in your shoes, but I think there's enough there that that's a jury question, not a directed verdict." (Tr. p. 142, line 23, - p. 143, lines 1-6). While Calvert did testify one way on

direct, his testimony was clarified on cross examination and the clarification confirmed on re-direct. The judge erred in refusing to direct a verdict of acquittal for conspiracy to commit murder.

On direct examination Calvert testified, "He [Appellant] called me saying that he wanted me to help him try to murder, I think it's, [fifteen year old's] mom." (Tr. p. 97, lines 23-24). On cross examination Calvert was questioned about the written statement in which he told police, "Ross Scofield called me Saturday and wanted me to bring knives. I did not ask questions and did. I was going to give them to him and go back home. Last night he was talking about killing her [fifteen year old] mother. I don't know who is involved they would not say. They was just talking. I tried to stay out of it." (Tr. pp. 102 – 106; Defendant's Exhibit #1, R. p. **). The reference to last night and talking about killing the mother was after Calvert and Appellant had been arrested. Calvert was asked, "The first time you knew about those knives was when you were sitting in jail. Is that fair to say?" (Tr. p. 105, lines 2-3). Calvert answered, "Yes, sir." (Tr. p. 105, line 4). Calvert clarified that when Appellant asked him to bring knives, Calvert did not know why Appellant wanted him to bring knives. (Tr. p. 104, line 223 – p. 105, lines 1-5). On re-direct examination and consistent with his written statement to police, Calvert confirmed that he did not know what the weapons were for until after both he and Appellant had been arrested and were in jail. (Tr. p. 105, lines 11-16). On re-direct the State asked, "Mr. Calvert, when Mr. Scofield called you and asked you to bring weapons, as you testified earlier, did he tell you what the weapons were for?" (Tr. p. 105, lines 11-13). Calvert answered, "Not until I was in jail." (Tr. p. 105, line 14).

In State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) the South Carolina Supreme Court wrote:

> On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515

> S.E.2d 525, 531 (1999)). The 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). However, if there is any direct or *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. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

Viewing the evidence in the light most favorable to the State, the judge erred in refusing to direct a verdict of acquittal for the conspiracy to commit murder charge because the State failed to prove an agreement between Appellant and Calvert or anyone else to commit murder. While the request to bring knives may have been suspicious, it does not prove an agreement to commit murder. As Calvert testified, at the time of the request by Appellant, Calvert did not know why Appellant wanted him to bring knives.

In State v. Cope, 2013 WL 4553427, 15 (S.C. 2013) the South Carolina Supreme Court wrote:

> Criminal conspiracy is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means. S.C.Code Ann. § 16–17–410 (2003). The gravamen of conspiracy is an agreement or combination. State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993). "To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). The Court must exercise caution in its analysis, however, to ensure the proof is not obtained "by piling inference upon inference." Gunn, 313 S.C. at 134, 437 S.E.2d at 81.

The only evidence of a conspiracy presented by the State was testimony from Calvert that Appellant called him, asked him to bring weapons, and provided Calvert with the name of a cab company. (Tr. p. 98, lines 1-11). Calvert, with knives, took a cab to the square where he met Fields. (Tr. p. 98, lines 9-11). According to Calvert, Appellant sent Fields to the square with money to pay for the cab. (Tr. p. 98, lines 9-14).

In United States v. Falcone, 311 U.S. 205, 210-211, 61 S.Ct. 204, 207 (1940) the United States Supreme Court wrote:

> Those having no knowledge of the conspiracy are not conspirators, United States v. Hirsch, 100 U.S. 33, 34, 25 L.Ed. 539; Weniger v. United States, 9 Cir., 47 F.2d 692,693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

Calvert had no knowledge of the alleged conspiracy to kill the mother until after he was arrested. Calvert, like the sugar suppliers in Falcone, is not a conspirator. When Appellant moved for a directed verdict on the conspiracy charge, the State argued that Fields was also part of the conspiracy. (Tr. p. 139, lines 2-11). Fields did not testify at trial. There is no evidence that Fields conspired with appellant to murder the mother. The State failed to prove the existence of a conspiracy to commit murder.

In Direct Sales Co. v. United States, 319 U.S. 703, 714-715, 63 S.Ct. 1265, 1271 (1943) the United States Supreme court wrote:

> Conspiracies, in short, can be committed by mail and by mail-order houses. This is true, notwithstanding the overt acts consist solely of sales, which but for their volume, frequency and prolonged repetition, coupled with the seller's unlawful intent to further the buyer's project, would be wholly lawful transactions.

In Direct Sales the Court upheld the conspiracy conviction of a mail order supplier of vast quantities of morphine at a discounted rate to a physician in Calhoun Falls, South Carolina. Unlike the evidence in Direct Sales, there is no evidence that Calvert knew of some alleged plan to murder the mother when he brought the knives to the square and no evidence he would have benefited from such a plan.

In State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 80-81 (1993) the South Carolina Supreme Court in discussing conspiracy wrote, "What is needed is proof they intended to act *together* for their *shared mutual benefit* within the scope of the conspiracy charged. United States v. Evans, 970 F.2d 663 (10th Cir.1992) (emphasis in original)." The State offered no evidence that Calvert knew of an alleged plan to kill the mother and offered no evidence that Appellant and Calvert acted together for a shared benefit within the scope of a conspiracy to commit murder. The State failed to present evidence of a conspiracy. The judge should have directed a verdict of acquittal.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed.

Respectfully submitted,

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This 21st day of October, 2013.

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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 and sentencing sheet;
(2) August 28-30, 2012 Trial transcript pages 1-4; 34-43; 48 – 237;
(3) December 6, 2012 Trial transcript pages 1- 12;
(4) State's Exhibit #3 – Statement of Defendant;
(5) Defense Exhibit #1 – Statement of Dylan Calvert.

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

October 21st, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. James Roscoe Scofield, 107 Morningside Dr. Greenwood, SC 29649, this 21st day of October, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.