ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY LEROY SIMMONS,

APPELLANT

Appellate Case No. 2012-212560

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to grant a directed verdict of acquittal where the State failed to prove the Persephone-Moultrie Community Center constituted a school or park under S.C. Code Ann. § 44-53-445 (Supp. 2010)?

STATEMENT OF THE CASE

On October 3, 2011, the Charleston County Grand Jury indicted Appellant Jeffrey Simmons for: (1) distribution of marijuana; (2) distribution of marijuana within proximity of a school; (3) possession with intent to distribute (PWID) cocaine base; and (4) PWID cocaine base within proximity of a school. R. 271 – 276.

On April 19–20, 2012, Appellant proceeded to trial before the Honorable Stephanie McDonald and a jury. R. 1. Charles Cochran and Luke Mallow represented Appellant, while Assistant Solicitors E. Spencer Compton and Burns Wetmore represented the State. The jury found Appellant guilty of the marijuana charges and the lesser-included offense of possession of cocaine base. R. 258, ll. 16-25; R. 277 – 278. The trial court sentenced Appellant to: (1) ten years imprisonment on the distribution of marijuana conviction; (2) eight years imprisonment on the distribution of marijuana within the proximity of a school conviction; and (3) eight years imprisonment on the possession of cocaine base conviction. R. 268, l. 21 – 269, l. 3; R. 279 – 281. The trial court ordered that the sentences were to run concurrently. R. 269, ll. 3-5.

ARGUMENT

The trial court erred in refusing to grant a directed verdict of acquittal because the State failed to prove the Persephone-Moultrie Community Center constituted a school or park under S.C. Code Ann. § 44-53-445 (Supp. 2010).

Relevant Facts

Officer Keith Elmore, formerly of the North Charleston Police Department, stated that he observed Officer Deangelo Dean, as an undercover police officer, conduct a drug transaction with Appellant at "the Persephone Moultrie Community Center[.]" R. 82, l. 4 – 86, l. 10. Assistant Solicitor Wetmore asked Officer Elmore, "Was . . . that park, I'm not real familiar with it. But it's - - obviously, it's public. It's open to anybody, right?" Officer Elmore replied, "Correct." R. 87, ll. 1-4. Assistant Solicitor Wetmore then asked Officer Elmore, "Was there anybody out there using the park playground?" In response, Officer Elmore recalled:

> It was several children out there playing basketball. And I'm not [one] hundred percent sure. There may be even some type of little daycare there because I remember some parents coming to pick their kids up. But it was definitely being occupied by children and some adults at the time.

R. 87, ll. 5-12.

Furthermore, Officer Dean claimed that Appellant referred to the Community Center as a park. R. 141, ll. 12-15; Tr. 150, ll. 4-8. Assistant Solicitor Compton then asked Officer Dean, "I think you've already testified about this. But this [Community Center] is open to the public, correct?" and Officer Dean responded, "Yes, Ma'am." R. 141, ll. 16-18. The trial court admitted an aerial photograph of the Community Center into evidence after Officer Dean indicated that the photograph fairly and accurately depicted the Community Center at the time of the drug transaction. R. 141, l. 22 – 142, l. 20.

At the close of the State's case, defense counsel moved for a directed verdict of acquittal on the distribution of marijuana within the proximity of a school charge. R. 200, ll. 12-14. Specifically, defense counsel argued, "[T]here is no evidence . . . that the Moultrie Community Center is something that fits within the proximity statute." R. 200, ll. 14-17. The trial court inquired, "What about Elmore's testimony that there were parents coming there to pick kids up from the daycare? Would you submit that's not enough? Defense counsel replied, "[Officer Elmore] said, I think . . . there might have been a daycare there. I don't think that . . . would arise to the level of some evidence." R. 201, ll. 8-9. The State noted that Appellant referred to the Community Center as a park and that the aerial photograph "shows basketball courts, playing fields." R. 201, ll. 20-22. The trial court then denied defense counsel's motion for a direct verdict: "I'm going to deny the motion, respectfully, . . . But it's a good argument." R. 201, ll. 23-25.

During deliberations, the jury sent out a note asking, "Does the community center meet the criteria to be considered a school or park?" R. 283. The trial court decided to re-charge the jury on the "proximity statute" and to inform the jury "that as the judge of the law, [he] cannot comment on the facts, that the jury is the fact-finder and [is] limited to the evidence that was presented from the witness stand and the documents that they have in evidence." R. 254, ll. 7-19. Assistant Solicitor Wetmore essentially conceded that the Community Center does not satisfy the school requirement by stating, "Judge, one thought I had, do you think we need to read through all the stuff about the schools?" R. 255, ll. 2-4. In contrast, defense counsel requested "that the entire charge be read" and the trial court agreed. R. 255, ll. 13-17. Without objection, the trial court re-charged the jury on the proximity statute and told the jury, "I'm not allowed to answer the question for you, but you

reach your factual finding based on what you heard here from the witnesses." R. 256, l. 1 – 257, l. 3; R. 284 – 294.

Discussion

The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also State v. Brown,* 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown,* 360 S.C. at 586, 602 S.E.2d at 395.

In this case, the State alleged in Appellant's distribution of marijuana within proximity of a school indictment that the "Persephone Moultrie Community Center" satisfied the school or park requirement under S.C. Code Ann. § 44-53-445 (Supp. 2010). R. 273 – 274. The statute criminalizing the distribution of a controlled substance within the proximity of a school or park provides, in pertinent part:

> It is a separate criminal offense for a person to distribute … or unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.

§ 44-53-445(A).

At trial, the State failed to prove that the Persephone-Moultrie Community Center constituted a school or park under § 44-53-445 for two reasons. First, the State failed to provide substantial circumstantial evidence that the Community Center is a primary school (i.e., first grade through twelfth grade), a vocational school/technical educational center, or a college/university. *See* § 44-53-445(A); *see also State v. Brown*, 343 S.C. 342, 349, 540 S.E.2d 846, 850 (2001) ("Looking at the clear and unambiguous terms of section 44-53-445, day care centers are not covered by the statute . . . We hold that section 44-53-445 does not apply to day care centers."), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Second, the officers' unsupported belief that the Community Center constitutes a public park is nothing more than mere speculation and does not satisfy the public park requirement. R. 87, ll. 1-4; R. 141, ll. 16-18. In *Brown*, 343 S.C. at 349, 540 S.E.2d at 850, *overruled on other grounds by Gentry*, 363 S.C. 93, 610 S.E.2d 494, our Supreme Court held, "We are similarly unpersuaded by the State's argument that day care centers include a playground or park." Likewise, the community center is not a public park simply because it has "basketball courts" and "playing fields." R. 201, ll. 20-22. If the South Carolina General Assembly had intended community centers to be covered under § 44-53-445, it would have amended the statute to include such facilities. *See Williams v. State*, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991) (noting penal statutes are construed strictly against the State and in favor of the defendant) (citations omitted).

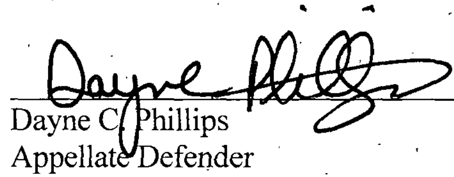
The jury note illustrates that the jury had "focused critical attention" on whether the Community Center qualified as a school or park under § 44-53-445(A), and the trial court's erroneous decision to deny defense counsel's motion for a direct verdict on the proximity

charges left the jury to rely solely on the unsupported statements that the Community Center was a public park. R. 283; *See State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978) ("[T]he jury requested additional instructions on the definitions of murder and manslaughter . . . It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of these two offenses . . . The additional words which the trial judge would relay to the jury would be given special consideration by the jury since they were in response to its own inquiry."). This gave undue credence to the officers' testimony. Accordingly, the trial court erred in refusing to grant a directed verdict of acquittal because the State failed to prove the Persephone-Moultrie Community Center constituted a school or park under S.C. Code Ann. § 44-53-445 (Supp. 2010). R. 201, ll. 23-25; *See In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1073.

CONCLUSION

Based on the foregoing reasons, Appellant Jeffrey Simmons respectfully requests that this Court issue an Order of Acquittal on his distribution of marijuana within proximity of a school conviction.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of March, 2013.

STATE OF SOUTH CAROLINA
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JEFFREY LEROY SIMMONS,

APPELLANT

Appellate Case No. 2012-212560

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey Leroy Simmons states:

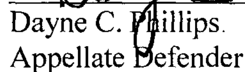
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Stephanie P. McDonald, which was held on April 20, 2012, 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 Jeffrey Leroy Simmons.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of March, 2013.

STATE OF SOUTH CAROLINA

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Pursuant to the new Anders procedure set forth by the Court, Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments;
(2) Sentencing sheets;
(3) Entire transcript of proceeding;
(4) State's Exhibit # 1 (Photograph);
(5) Court's Exhibit # 1 (Note from Jury);
(6) Court's Exhibit # 2 (Jury Charge).

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

March 21st, 2013

Dayne C. Phillips
Appellate Defender

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(803) 734-1343

Attorney for Appellant

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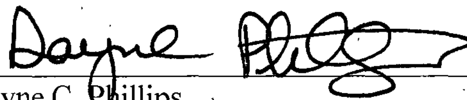
Appellate Case No. 2012-212560

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201; and on Mr. Jeffrey Leroy Simmons, #250532 at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 21st day of March, 2013.



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

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

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.