STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BREON JACOBY MAYERS,

APPELLANT

APPELLATE CASE NO, 2012-213003

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it allowed the State to amend the indictment after the close of the evidence to add factual circumstances that were never presented to a grand jury?

STATEMENT OF THE CASE

In February 2012, a Lexington County grand jury indicted appellant Breon Jacoby Mayers for murder, armed robbery, first degree burglary, and a related firearms offense. R.1061. On August 6 – 10, 2012, appellant was tried before the Honorable Roger M. Young and a jury. R. 1. David Shawn Graham and Christopher Dale Scott represented the State. R. 1. Robert T. Williams represented appellant. R. 1. The jury convicted appellant on all charges. R. 1039, ll. 4 – 17. Judge Young sentenced appellant to life imprisonment without the possibility of parole on the murder and burglary charges. R. 1058, ll. 4 – 8. Judge Young sentenced him to thirty years' imprisonment for armed robbery and five years' imprisonment on the weapons charge. R. 1058, ll. 4 – 8. Appellant timely served and filed a notice of appeal and this appeal follows.

ARGUMENT

The trial court erred when it allowed the State to amend the indictment after the close of the evidence to add factual circumstances that were never presented to a grand jury.

Relevant Facts

The decedent, David Cannon ("Cannon"), was a drug dealer. R. 108, ll. 4 – 21; R. 188, ll. 13 – 16. He sold marijuana to his niece, co-defendant Jasmine Bowers. R. 108, ll. 17 – 21; R. 379, ll. 5 - 6. Jasmine Bowers previously robbed Cannon and once used a ten-year-old child to rob him. R. 404, ll. 1 – 10. Cannon also sold drugs to co-defendant Jermaine Caughman ("Caughman"). R. 282, l. 25 – 283, l. 6. Cannon kept a lot of cash, had a handgun, and kept his marijuana in a cooler in his closet. R. 119, ll. 9 – 11. R. 120, ll. 21 – 24. R. 125, ll. 1 – 14.

Appellant's cousin, Cedric Mayers ("Cedric") knew Jasmine Bowers, Caughman, and Cannon "from the neighborhood." R. 162, ll. 6 – 7. R. 161, l. 12 – 162, l. 18. Cedric and Jasmine Bowers had a sexual relationship. R. 175, ll. 6 – 9. The morning of the murder, Cedric noticed a gold car in Jasmine Bowers' yard. R. 164, ll. 19 – 25. Cedric said that appellant had a gold car. R. 164, ll. 22 – 25.

Cedric saw Mayers that morning with Caughman and another man unknown to Cedric. R. 166, ll. 7 – 19. Cedric later saw Jasmine Bowers join the men. R. 166, ll. 23 – 25. Cedric asked them what they were doing and Caughman said, "Rob Dave." R. 168, l. 16 – 169, l. 5. R. 184, l. 17 – 185, l. 8.

Cedric later heard two gunshots. R. 169, ll. 14 – 19. Cedric looked outside and saw Jasmine Bowers walking quickly towards her house. R. 170, l. 4 – 171, l. 1. He then

saw appellant, Caughman, and the unknown male running. R. 171, l. 2 – 173, l. 1. Caughman had a rifle in his hands. R. 173, ll. 7 – 11. Cedric did not see anything in appellant's hands. R. 173, ll. 12 – 13. Cedric never saw appellant in Cannon's yard. R. 179, ll. 10 – 13. He never saw anyone with anything that appeared to be marijuana. R. 181, ll. 16 – 21.

Jackie Boyd also saw Jasmine Bowers running. R. 196, ll. 18 – 23. After a conversation with Cedric "that made [her] nervous," Boyd went outside and saw someone dressed in white clothes. R. 200, ll. 1 – 8. She did not recognize the person dressed in white. R. 201, ll. 8 – 12. Boyd then saw a silver car driving through her yard. R. 283, ll. 11 – 19. She did not recognize the car. R. 23, ll. 11 – 19. She then saw a man she did not recognize coming towards her house with a rifle. R. 283, l. 20 – 204, l. 6. She also saw Caughman running through her yard with a bag of marijuana. R. 204, ll. 7 – 206, l. 7. Boyd saw appellant earlier that morning, but denied seeing appellant during the commotion after the gunshots. R. 206, l. 8 – 207, l. 6. The State impeached Boyd with prior statements made to law enforcement that she had seen appellant running past her house with Caughman and the other man. R. 206, l. 11 – 218, l. 7.

Appellant's co-defendants, who were all charged with murder, all claimed that appellant planned the robbery and murder of Cannon. Caughman claimed that he loaned his gun, a .38 Colt, to Tyrome Brennan ("Brennan"). R. 285, ll. 13 – 21. Appellant had a black 9 mm pistol. R. 286, l. 23 – 287, l. 14. According to Caughman, he, appellant, Brennan, and Jasmine Bowers went to the back of Cannon's house and saw Cannon on the back deck. R. 293, ll. 7 – 294, l. 13. Appellant shot Cannon twice and Brennan fired his pistol into the air. R. 294, ll. 12 – 19. Jasmine Bowers claimed she took Cannon's

wallet, appellant took the marijuana, and Caughman said Brennan took a .357 pistol which he gave to appellant. R. 423, ll. 10 – 25. R. 297, l. 10 – 299, l. 12.

Appellant supposedly told Jasmine Bowers to knock on Cannon's door for him. R. 387, ll. 7 – 14. However, appellant replied that he planned to shoot Cannon. R. 388, ll. 18 – 19. Despite this, she continued to participate in the robbery of her uncle. R. 394, ll. 16 – 22. On cross-examination, she admitted that she lied to the police. R. 402, l. 21 – 406, l. 9. She also admitted that she was hoping for leniency in exchange for her testimony. R. 402, ll. 3 – 9.

Co-defendant Brennan testified that appellant wanted to kill and rob Cannon because Cannon "was racist" and would not sell him marijuana. R. 441, ll. 2 – 17. Brennan later contradicted himself and said the plan had changed and was for Caughman to grab Cannon while the other members of the group robbed his house. R. 451, ll. 22 – 25. Once again though, Brennan claimed the plan changed and appellant said he was "going to have to kill" Cannon to which his co-defendants replied they were not "down with it." R. 453, l. 17 – 454, l. 3. Brennan claimed that when they encountered Cannon, he saw appellant shoot him. R. 455, l. 16 – 456, l. 3. Brennan also admitted lying to the police. R. 494, l. 1 – 497, l. 24.

After both the State and the defense rested and during the charge conference, the solicitor asked to amend the burglary and armed robbery indictments "to conform to the evidence." R. 954, ll. 7 – 18. The original indictment read in relevant part:

> That [appellant]... did... knowingly and willfully while armed with a deadly weapon, to wit: a 9 mm Handgun did feloniously take from the person or presence of David Cannon, by means of force, threats or intimidation goods or monies **being described as follows: US Currency** with intent to deprive the owner of the use of such property, in violation of section 16 – one – 330 (A) of the South Carolina Code of Laws.

R. 1066 (emphasis added). The solicitor asked to amend the indictment to include a .357 handgun and marijuana as property taken during the robbery. R. 954, ll. 7 – 18. Appellant opposed the amendment stating he was "concerned about it being brought at this time after the case has closed." R. 954, ll. 19 – 20. Appellant also objected on the basis that the court had already heard directed verdict motions. R. 957, ll. 10 – 13. The trial judge initially expressed his concern and asked the solicitor for authority allowing amendment of an indictment "this late in the game." R. 955, ll. 12 – 13. The trial court ultimately allowed the amendment, adding an asterisk after "Currency" and hand writing "and/or a .357 handgun and/or marijuana" on the bottom of the indictment. R. 1066.

Discussion

Appellant had no notice before trial that he could be convicted for stealing a handgun or marijuana. He was only on notice that he would be called upon to defend himself from a charge of stealing "US Currency." R. 1066. While an indictment is "a notice document," it must state the offense "with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer." State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005). The indictment must also apprise "the defendant of the elements of the offense that is intended to be charged." Id. at 103, 610 S.E.2d at 500.

In this case, the only specificity in the indictment concerning what was alleged to have been stolen was "US Currency." R. 1066. The State's late motion to amend the indictment should not have been granted because it changed the nature of the offense. See State v. Riddle, 301 S.C. 211, 212, 391 S.E.2d 253, 253 (1990); Hope v. State, 328 S.C. 78, 80, 492 S.E.2d 76, 78 (1997). In Riddle, this Court reversed because the trial judge

allowed the State to amend an indictment during trial to increase the charge from third-degree criminal sexual conduct to assault with intent to commit first-degree criminal sexual conduct. Riddle at 212, 391 S.E.2d at 253. In Hope, a similar amendment was disallowed. Hope at 80, 492 S.E.2d at 78.

While the charge in this case was not changed by the amendment, substantive factual changes to an indictment that substitute one offense for another trigger procedural protections for a defendant. State v. Lynch, 344 S.C. 635, 639, 545 S.E.2d 511, 513-14 (2001) *overruled on subject matter jurisdiction grounds by* Gentry, at 106, 610 S.E.2d at 501. In Lynch, the trial court allowed the State to amend a first degree burglary indictment at the outset of trial. Id. at 637-38, 545 S.E.2d at 513. The amendment deleted the phrase "did enter during the hours of darkness" and added the phrase "did cause physical injury... while defendant was effecting entry or while in the dwelling or in immediate flight." Id. at 638, 545 S.E.2d at 513. Despite the fact that the amendment only changed an aggravating circumstance for first degree burglary and did not alter the underlying charge or the defendant's sentencing exposure, the Court reversed. Id. at 640-41, 545 S.E.2d at 514. The court reasoned that the aggravating circumstances were "quite distinct from one another, and thus, the proof required for each aggravating circumstance is materially different from one another." Id. See also State v. Guthrie, 352 S.C. 103, 109-12, 572 S.E.2d 309, 312-14 (Ct. App. 2002) (reversing because trial court's ruling granting amendment of aggravating factor of a first degree burglary indictment improperly allowed introduction of otherwise inadmissible evidence); State v. Bryson, 357 S.C. 106, 112-13, 591 S.E.2d 637, 640-41 (Ct. App. 2003) (holding amendment of indictment to change the name of the victim was improper).

When the State seeks to amend the factual circumstances of an indictment at trial and such amendment would change the nature of the offense, the trial judge "is obligated to inform the parties of the necessity of reindictment or obtain a waiver of presentment from the defendant." Cutner v. State, 354 S.C. 151, 155, 580 S.E.2d 120, 122-23 (2003) *overruled on subject matter jurisdiction grounds* by Gentry at 105, 610 S.E.2d at 501. In this case, the trial judge failed to discuss the necessity of reindictment with the parties. The defendant did not waive presentment. The trial court therefore committed an error in how it handled the State's motion to amend.

The erroneous amendment of the indictment prejudiced appellant because it created a variance between the factual theory alleged in the indictment and the charges and evidence presented to the jury. Bailey v. State, 392 S.C. 422, 435-36, 709 S.E.2d 671, 678-79 (2011). The Bailey indictment contained a specific "to wit" just like the indictment in appellant's case. Id. at n.4. The Bailey homicide by child abuse indictment alleged that the defendant inflicted physical injuries on the child's abdomen. Id. During deliberations, the jury told the court they saw no evidence the defendant struck the child and wanted to know whether that meant they must acquit the defendant because of the specific language in the "to wit" portion of the indictment. Id. at 429, 709 S.E.2d at 675. This Court held that the trial judge's supplemental instructions constituted a constructive amendment to the indictment, created a variance, and reversed. Id. at 436-37, 709 S.E.2d at 678-79.

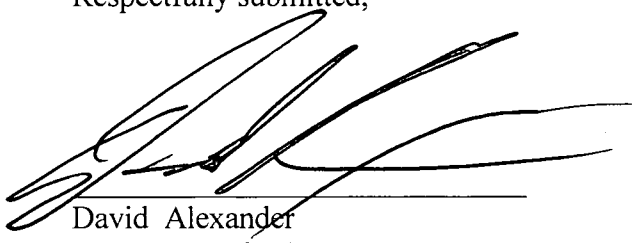
Just as in Bailey, the improper amendment in appellant's case allowed the jury to convict him for conduct not properly charged. The improper amendment created a variance. Through jury selection, opening statements, trial, and directed verdict,

appellant believed he was only defending himself against a charge of stealing money. Only after the presentation of the evidence was concluded did appellant know that he could be convicted for stealing a gun or marijuana. It is impossible in this case to know whether the jury believed appellant stole money as the jury could have convicted him solely based on stealing marijuana or a firearm. Caughman testified that he did not have any personal knowledge of money being taken from Cannon's house. R. 333, l. 25 – 334, l. 6. R. 337, ll. 9 – 13. This creates a variance like in Bailey. Therefore, appellant is entitled to a new trial.

CONCLUSION

For the foregoing reasons, appellant's armed robbery and burglary convictions should be reversed and appellant granted a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Breon Jacoby Mayers states:

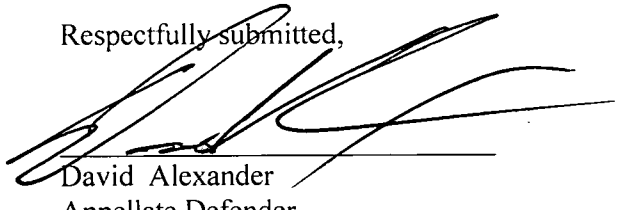
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on August 6-10, 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 Breon Jacoby Mayers.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2013.

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APPELLATE CASE NO, 2012-213003

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(s);
(2) Trial transcript.

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

October 30th, 2013

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
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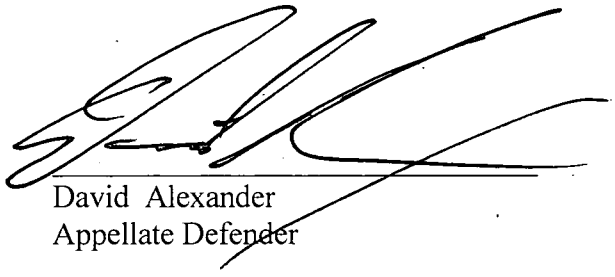
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 30th 2013



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APPELLATE CASE NO, 2012-213003

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 Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Breon Jacoby Mayers, 351910 at Lieber Correctional Institution, this 30th day of October, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2013.

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