

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2011-197146

THE STATE,

Respondent,

vs.

CHRISTOPHER MILLER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The directed verdict issue Appellant asserts on appeal is not preserved because he conceded that the State presented evidence of a conspiracy. Regardless, the trial judge properly denied Appellant's motion for a directed verdict because the State presented direct evidence that Appellant participated in a conspiracy.

II.

Appellant failed to preserve the issue on appeal because he never raised the issue to the trial judge. Further, the fact that the trial judge granted Appellant's co-defendant a directed verdict for the conspiracy charge did not negate the possibility of an agreement between Appellant and a co-conspirator.

STATEMENT OF THE CASE

On August 12, 2009, a Georgetown County Grand Jury indicted Appellant on one count of murder and one count of criminal conspiracy. The Georgetown County Grand Jury also indicted Keri Fore Pope ("Pope"), Appellant's co-defendant, on one count of murder and one count of criminal conspiracy.

On July 21, 2011, Appellant proceeded to trial. Appellant and Pope were tried together. Wesley Locklair represented Appellant. John H. Hilliard, III and Julia M. Bass represented Pope. Assistant Solicitor Scott R. Hixson represented the State.

On July 28, 2011, the Honorable Steven H. John directed a verdict in favor of Pope for the crimes of murder and criminal conspiracy. However, Judge John denied Appellant's request for a directed verdict for murder and criminal conspiracy.

On July 29, 2011, the jury convicted Appellant of criminal conspiracy but acquitted Appellant of murder. Judge John sentenced Appellant to five years of imprisonment for the criminal conspiracy conviction.

On August 5, 2011, Appellant served and filed a notice of appeal. On June 19, 2013, Appellant served his initial brief. This brief follows.

STATEMENT OF FACTS

Around 11:45 p.m. on May 27, 2003, members of the Georgetown police department and E.M.S. responded to a call regarding a shooting at the Pope residence. (July 21, 2011 R. pp. 3-4; R. p. 32; R. p. 44.) Joey Pope (“Victim”), Pope’s husband, was in bed and suffering from gunshot wounds, and the family’s dog, Raven, was lying in the hallway dead. (July 21, 2011 R. pp. 12-13; R. p. 19; R. p. 81.) Despite E.M.S.’s attempt to save Victim’s life, Victim died at the hospital from his gunshot wounds. (July 21, 2011 R. p. 26; R. p. 136; R. p. 192.) According to the forensic pathologist, Victim had four gunshot wounds: three shots to the head and one shot to the upper chest. (July 21, 2011 R. p. 136.)

Kerri Pope’s Statement

According to Sergeant Jimmy Burke, Pope stated that she took the trash out on the night of the murder around 10:40 p.m. (July 27, 2011 R. p. 366.) When she was outside, she saw Appellant and Nick Lambert drive by her house. (July 27, 2011 R. pp. 367-368.) Ten minutes later, Pope heard a knock on the door. (July 27, 2011 R. p. 369.) Pope assumed it was Appellant and Lambert knocking on the door; therefore, she opened the door and peeped out her head. (July 27, 2011 R. p. 370.) However, Pope claimed it was two unknown, unmasked black males at the door. (July 27, 2011 R. p. 370.) Pope claimed that the two individuals asked about Victim, pushed on the door, grabbed her necklace, and pushed her. (July 27, 2011 R. p. 374.) According to Pope, the men went to Victim’s bedroom. One of the men shot Victim in the stomach and in the head, and the other man shot the dog in the hallway. (July 27, 2011 R. p. 375.) Pope claimed that she offered the men money but they just walked straight out the door. (July 27, 2011 R. p.

376.) Pope admitted that she and Appellant had a physical relationship in the past. (July 28, 2011 R. p. 752.)

Appellant's Statement

According to Investigator David Altman, Appellant stated he drove past Victim's residence on the day of the murder, but Appellant did not go inside Victim's home that night. (July 28, 2011 R. p. 611.)

Tiffany Cooper's Testimony

According to Tiffany Cooper, a friend of Pope, Pope called her on the day of the murder and told her that "she didn't think it was going to work any more." (July 27, 2011 R. p. 502.) Cooper also testified that Pope and Victim had an abusive relationship, and Pope had a physical relationship with Appellant. (July 27, 2011 R. p. 496-499; R. p. 500.)

James Goude, Jr.'s Testimony

At trial, James Goude testified he saw Appellant and another individual, who he believed to be Lambert, walk inside Victim's home on the night of the murder around 9:30 or 9:45 p.m. (July 21, 2011 R. pp. 229-230.)

Angel Goude's Testimony

At the hospital, Angel Goude, James Goude's wife, overheard Appellant say he was the one who found Victim and called 911. (July 21, 2011 R. p. 283.) Although she did not see Appellant at Victim's home on the night of the murder, she admitted that she saw a car at Victim's home but only glanced at the car. (July 21, 2011 R. pp. 280-281.)

Tabitha H.'s Testimony

At trial, Tabitha H., a friend of the Popes, testified that she stopped by the Pope residence between 9:45 and 10:15 p.m. on the day of the murder. (July 27, 2011 R. pp. 474-475.) Normally, when Tabitha H. knocked on the door, she would hear the dog bark.

(July 27, 2011 R. p. 475.) But she did not hear the dog bark on the day of the murder.

(July 27, 2011 R. p. 475.)

Bruce Richardson's Testimony

At trial, Bruce Richardson testified Appellant told him that Lambert drove Appellant to Victim's house on the day of the murder. (July 27, 2011 R. p. 534.) Appellant "*was supposed to go* in and shoot [Victim]." (July 27, 2011 R. p. 534) (emphasis added). But "when [Appellant] got inside he saw [Victim] lying bed asleep, and he couldn't shoot [Victim]." (July 27, 2011 R. p. 534.) Additionally, Appellant told Richardson that he "backed down and shots were fired, and as a result of that the dog charged him from the bed, and he shot and killed the dog." (July 27, 2011 R. p. 534.) Appellant stated he "couldn't be guilty of murder" because "he only shot and killed the dog." (July 27, 2011 R. p. 534.)

Bruce Taylor's Testimony

According to Bruce Taylor, Appellant told him that the State did not have any evidence; there was no evidence left behind. (July 28, 2011 R. p. 732.)

ARGUMENT

I.

The directed verdict issue Appellant asserts on appeal is not preserved because he conceded that the State presented evidence of a conspiracy. Regardless, the trial judge properly denied Appellant's motion for a directed verdict because the State presented direct evidence that Appellant participated in a conspiracy.

Appellant's directed verdict argument fails for two reasons: First, at trial, Appellant conceded that the State presented evidence Appellant participated in a conspiracy; therefore, the issue is not preserved. Second, even if Appellant had not conceded the issue, Richardson's testimony was direct evidence that Appellant participated in a conspiracy. Thus, the trial judge properly denied Appellant's motion for a directed verdict with respect to the conspiracy charge.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling

upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

Analysis

A. Preservation

First, Appellant’s directed verdict argument on appeal fails because he conceded the issue at trial; therefore, the issue is not preserved for appellate review.

An issue conceded at trial cannot be argued on appeal. TNS Mills, Inc. v. South Carolina Dep’t of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998); see State v. Benton, 338 S.C. 151,156-157, 526 S.E.2d 228, 230 (2000) (holding that the issue was not preserved for review because the defendant conceded the issue at trial, and the defendant cannot argue one ground at trial and another ground on appeal).

At trial, Appellant admitted that Richardson’s testimony established a conspiracy but claimed he was entitled to a directed verdict because he withdrew from the conspiracy. (July 28, 2011 R. pp. 814-816.) Appellant stated: “There was evidence through Bruce Richardson that [Appellant] planned to go in and kill [Victim] in a conspiracy, but he withdrew from that. So that obviously is a separate thing.” (July 28, 2011 R. p. 816.) Further, Appellant argued: “[A]s far as conspiracy, there’s no **competent** evidence to prove it.” (July 28, 2011 R. p. 816) (emphasis added).

Notably, on appeal, Appellant does not make any argument that he withdrew from the conspiracy; therefore, Appellant abandoned that argument on appeal. See Jinks v. Richland Cnty., 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal); see also State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995) (a party may not argue one ground at trial and another on appeal); State v. Bray, 342 S.C. 23, 28, 535

S.E.2d 636, 639, n.2 (2000) (it is error for an appellate court to consider an issue which is not properly before it). Regardless, the record is devoid of any evidence suggesting that Appellant communicated to his co-conspirators an intent to withdraw from the conspiracy. See State v. Crocker, 366 S.C. 394, 407-408, 621 S.E.2d 890, 897 (Ct. App. 2005) (noting that the crime of conspiracy is complete at the time the agreement is made and a conspirator must communicate his or her intention to withdraw from the conspiracy to all co-conspirators).

Additionally, whether or not Richardson's testimony was credible was a question for the jury, not the judge. See State v. Pitts, 256 S.C. 420, 427, 182 S.E.2d 738, 742 (1971) (noting that a motion for a directed verdict is properly refused where the determination of guilt is dependent upon the credibility of a witness, as that is a question that goes to the weight of evidence and is a determination for a jury).

In summary, Appellant conceded the directed verdict issue at trial; therefore, the issue is not preserved for appellate review.

B. Merits

Second, Appellant's directed verdict argument on appeal fails because the State presented direct evidence that Appellant participated in a conspiracy.

Criminal conspiracy is "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410. "The substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993). Notably, the State does not need to prove an express agreement or have direct evidence in

order to establish conspiracy. See State v. Cope, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). Further, “[i]n criminal conspiracy it is not necessary to prove an overt act.” State v. Crawford, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005). Although there must be at least two members of a conspiracy, the conspirators do not need to be indicted or named. Id. at 638, 608 S.E.2d at 892. In fact, the other conspirators can be unknown. See Id.

In this case, Richardson testified Appellant told him that Lambert drove Appellant to Victim’s house on the day of the murder. Appellant “*was supposed to go* in and shoot [Victim].” (July 27, 2011 R. p. 534) (emphasis added). But “when [Appellant] got inside he saw [Victim] lying in bed asleep, and he couldn’t shoot [Victim].” (July 27, 2011 R. p. 534.) Appellant claimed he “backed down and shots were fired, and as a result of that the dog charged him from the bed, and he shot and killed the dog.” (July 27, 2011 R. p. 534.) Richardson’s testimony alone established Appellant participated in a conspiracy. The fact Appellant’s co-conspirator is unknown is irrelevant. See Id. Further, Goude testified that on the day of the murder, around 9:45 p.m., he saw Appellant and another individual, who he believed to be Lambert, walk inside Victim’s home. (July 21, 2011 R. pp. 229-230.) Thus, the State presented evidence Appellant and another individual were inside the Victim’s home shortly before the murder and Appellant was “supposed” to kill Victim but killed the dog instead. Although the State was unable to identify the other member of the conspiracy, the State was not required to do so under South Carolina law. See Crawford, 362 S.C. at 638, 608 S.E.2d at 892.

In summary, not only did the State present sufficient evidence that Appellant participated in a conspiracy with an unknown individual, but Appellant conceded the issue at trial.

II.

Appellant failed to preserve the issue on appeal because he never raised the issue to the trial judge. Further, the fact that the trial judge granted Appellant's co-defendant a directed verdict for the conspiracy charge did not negate the possibility of an agreement between Appellant and a co-conspirator.

Appellant's argument fails for two reasons: First, Appellant never raised the issue he asserts on appeal to the trial judge; therefore, the issue is not preserved. Second, the fact the trial judge granted Appellant's co-defendant a directed verdict for the conspiracy charge did not negate the possibility of an agreement between Appellant and a co-conspirator.

A. Preservation

First, Appellant failed to preserve the issue he asserts on appeal because he never raised the issue to the trial judge.

Under South Carolina law, an issue must be raised and **ruled upon** in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In the case at hand, Appellant never argued to the trial judge that his conviction for conspiracy should be set aside in light of the fact that the trial judge directed a verdict

in favor of his co-defendant. Thus, the trial judge never had an opportunity to rule upon the issue.

Accordingly, the issue Appellant asserts on appeal is not preserved for review.

B. Merits

Second, Appellant's argument on appeal fails because the fact that the trial judge granted Appellant's co-defendant a directed verdict for the conspiracy charge did not negate the possibility of an agreement between Appellant and a co-conspirator.

As discussed above, the State does not have to indict all of the members of the conspiracy. See Crawford, 362 S.C. at 638, 608 S.E.2d 892. In fact, the identity of the other conspirators can be unknown. Id.; State v. Hightower, 221 S.C. 91, 94, 69 S.E.2d 363, 366 (1952) (holding that there was "ample evidence that the conspirators, though unknown, did exist.").

Appellant's reliance on State v. Abraham, 780 A.2d 223 (Conn. App. Ct. 2001), is misplaced. In Abraham, the prosecution **only presented evidence** of a conspiracy between the defendant and **only one alleged conspirator**. Id. at 232. The prosecution only charged one person as a co-conspirator and never alleged or introduced evidence to establish that another person entered into the conspiracy. Id. The defendant's co-defendant was acquitted of conspiracy. Id. Because the prosecution failed to present evidence that someone other than defendant's co-defendant entered into a conspiracy with the defendant, the Appellate Court of Connecticut concluded that the defendant's conviction for conspiracy must be set aside. Id. at 233.

Notably, in United States v. Thomas, the Fourth Circuit rejected the defendant's argument that his conviction should be set aside because his sole co-conspirator was

acquitted. United States v. Thomas, 900 F.2d 37, 40 (4th Cir. 1990). In rejecting the defendant's "rule of consistency" argument, the court explained that the United States Supreme Court has held that consistency in the verdict is not necessary. Id. According to the Fourth Circuit, a jury could reach inconsistent verdicts for a number of reasons, including mistake, compromise, lenity, or inconsistent conclusion on a lesser offense. Id. Further, the court pointed out that there was enough evidence of a conspiracy between the defendant and co-defendant to uphold the jury's verdict. Id.

Approximately fifteen years later, in United States v. Collins, the Fourth Circuit revisited the "rule of consistency." United States v. Collins, 412 F.3d 515, 519-520 (4th Cir. 2005). Once again, the Fourth Circuit held that the acquittal of the sole co-conspirator did not require the court to set aside the defendant's conviction for conspiracy. Id. In the same trial, the jury acquitted the defendant's sole co-conspirator but found the defendant guilty of conspiracy. Id. at 519. In reaching its holding, the court explained that "a defendant is not entitled to a new trial when a jury reaches an inconsistent verdict." Id. at 520.

Further, our Supreme Court abolished the rule prohibiting inconsistent verdicts. State v. Alexander, 303 S.C. 377, 384, 401 S.E.2d 146, 150 (1991); State v. Mitchell, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012) (recognizing that our Supreme Court abolished the rule prohibiting inconsistent verdicts).

In the case at hand, the State indicted Appellant as follows: "[Appellant] did . . . on or about May 27, 2003 combine with Kerri F. Pope, **and/or with other persons**, for the purpose of accomplishing a criminal or unlawful object" (**Indictment**) (emphasis added). Unlike the prosecution in Abraham, the prosecution in this case presented evidence that Appellant conspired with someone, even though the other

conspirator was unknown. Although the solicitor made references regarding Appellant conspiring with Pope in his closing argument, he also argued the following: “At the time the blow was struck did [Appellant], at the time that blow was struck **or someone affiliated with [Appellant]**, did they have malice in their hearts” (July 29, 2011 R. p. 849) (emphasis added). Thus, neither the indictment nor the solicitor limited the members of the conspiracy to just Appellant and Pope.

More importantly, the evidence at trial did not limit the members of the conspiracy to just Appellant and Pope. At trial, the State presented evidence through Richardson’s testimony that proved Appellant entered into a conspiracy with someone to kill Victim. But the co-conspirator was simply unknown. Notably, the trial judge directed a verdict in favor of Pope for conspiracy because the evidence the State presented did not implicate Pope in the conspiracy. However, the evidence also did not exclude Pope as a member of the conspiracy. In other words, Pope’s acquittal did not necessarily mean she was innocent. See United States v. Straach, 987 F.2d, 232, 241 (5th Cir. 1993) (“An acquittal does not necessarily equate with a finding that the defendant was innocent.”).

In summary, the State presented evidence at trial that Appellant entered into a conspiracy with someone to kill Victim. Although the State was unable to identify the other member of the conspiracy, the State was not required to identify the co-conspirator under South Carolina law. Accordingly, this Court should affirm Appellant’s sentence and conviction.


CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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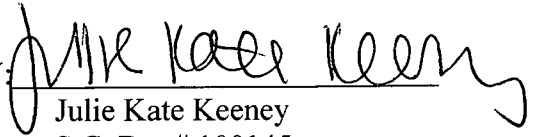
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 11th day of December, 2013.

Ellen R. DuBois

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