THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Case No. 2012-GS-26-04016

The State ..... Respondent,

v.

Shelton Butler ..... Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in allowing the jury to hear testimony of the commission of Rico's murder by Passenger before establishing that Appellant was involved in a pre-arranged plan to commit a robbery with Driver and Passenger, pursuant to State v. Woomer.

II. The trial court erred in refusing to grant an acquittal of murder under the theory "the hand of one is the hand of all" when Appellant moved for a directed verdict at the close of the State's case on the basis that the State failed to present substantial evidence beyond a reasonable doubt that Appellant participated in a common plan or scheme.

STATEMENT OF THE CASE

On September 27, 2012, the Horry County Grand Jury indicted Appellant on the charge of murder under S.C. Code Ann §§ 16-3-10 and -20. (R. p. ____). This case was called to trial on June 2, 2014 before the Honorable Steven H. John in Horry County. J. Eric Fox, Esquire, was defense counsel. George H. DeBusk, Jr., Esquire and J. Stephen Grooms, Esquire were the assistant solicitors. The court submitted the case to the jury on June 5, 2014. After deliberation, the jury unanimously reached a verdict of "guilt" as to murder. The On that same day Judge John sentenced Appellant to thirty (30) year. Thereafter, Appellant filed his timely Notice of Appeal on June 11, 2014, appealing his conviction.

STATEMENT OF FACTS

On June 8, 2011, Donavan Johnson ("Passenger") and Shelton Butler ("Appellant") got into a car driven by a Charles Johnson ("Driver") to purchase marijuana from Jose Gutierrez ("Rico") and Travis Spivey ("Spivey"). (R. p.__, lines _____). Passenger was in the passenger seat and Shelton Appellant was in the back seat. (R. p. 92, lines 10-25). When the vehicle neared the designated pick up site, Driver called Rico. (R. p. 89, lines 12-19).

Spivey got a call from Rico to pick up a bag from Rico's house and bring it to Rico's girlfriend's house. (R. p. 85, line 25 –p.86, line2). Spivey went to Rico's picked up a bag a marijuana and a gun and went to Rico's girlfriend's house. (R. p. 86, lines 5 - 12). Once he got there, Spivey, Rico and their girlfriends smoked pot. (R. p. 85, lines 17-18; p. 127, lines 13-17). When Rico received a call on his cell phone that Driver was outside, Spivey and Rico walked out to Driver's car to make a drug deal, each armed with a gun. (R. p. 89, lines 16-25; p. 91, lines 8-10; p. 99, lines 10-11). Spivey testified that he was Rico's "lookout man" while Rico illegally sold marijuana to Driver. (R. p. 139, lines 14-16; p. 162, lines 6-13). The car was parked pointed away from the dead end. (R. p. 90, lines 2-5). Rico got into the car and negotiated the price of the pot with Driver and Passenger. (R. p. 93, lines 22-25; p. 94, lines 16-19). Spivey immediately recognized Appellant so he sat perched on the side of the backseat of the car talking to Appellant. Spivey testified that Appellant noted out loud "this would be the perfect place to body a person." (R. p. 93, lines14-18).

Things got heated and Passenger pulled out a gun, turned around and said, "you know what time it is," indicating someone was about to get shot. (R. p. 94, line 21 – p. 95, line 2; p.430, line 24 – p. 431, line 1). The car started to move forward, Spivey jumped out

of the car and shortly after Spivey witnessed Rico roll out of the car. (R. p. 95, 15-22; p. 96, lines 8-11). Spivey immediately began firing his gun in the direction of the car as the car drove away with Appellant still inside. (R. p. 94, line 21 – p. 95, line 2; p. 95, lines 18-22; p. 96, lines 14 – 19). Appellant did not have a weapon on him. (R. p. 95, lines 13-16).

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR TESTIMONY OF THE COMMISSION OF RICO'S MURDER BY PASSENGER BEFORE ESTABLISHING THAT APPELLANT WAS INVOLVED IN A PRE-ARRANGED PLAN TO COMMIT A ROBBERY WITH DRIVER AND PASSENGER, PURSUANT TO STATE V. WOOMER.

Under the theory "the hand of one is the hand of all," one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. 21 Am. Jur (2d) *Criminal Law* § 132, 22A C.J.S. *Criminal Law* §§ 754, 774. To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981); *citing* 22A C.J.S. *Criminal Law* §§ 755, 756.

In State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), the South Carolina Supreme Court held that the State was allowed to offer disturbing testimony concerning the condition of the rape victim's body only because the State had already presented "ample testimony" from which the trial judge could find that the co-defendants were partners in furtherance of illegal purposes. Woomer, 276 S.C. at _____, 277 S.E.2d at 264. The "ample evidence" present by the State included more than one eye-witness who positively identified the co-defendants and undisputed evidence that the co-defendants carried the victims away against their will. Since the State established the existence of the common plan, evidence of incidental acts committed by one defendant were admissible against the second defendant. Thus, until the State in Woomer established the existence of an underlying plan to

accomplish illegal activity, evidence of acts committed by one co-defendant was not admissible against the second co-defendant.

Appellant argues that under Woomer, the trial court erred in allowing the jury to hear evidence that Passenger murdered Rico prior to the State offering evidence to establish that Appellant was part of a pre-arranged plan with Passenger. In fact, the evidence the State eventually offered to prove Appellant was part of a prearranged plan to commit a robbery with Driver and Passenger, as set forth in the "Statement of Facts", was merely circumstantial evidence and insufficient to establish the existence of a common scheme.

In overruling Appellant's objection based on Woomer, the trial court heavily relies on the fact that Appellant was present in the car, the car was pointed in the opposite direction of the dead-end road, and Appellant did not visibly react when Passenger said "you know what time it is." (R. p .431, line 14 – p. 432, line 11). The trial court's focus on those facts is tenuous for several reasons. First, Appellant was in the back seat of Driver's car and had no control over the direction in which the car was pointed. Second, Appellant likely knew the meaning of the phrase "you know what time it is", just as Spivey knew the meaning of that term, and feared for his life when Passenger made the comment. Since the State's evidence was not substantial enough to prove Appellant's participation in a common scheme, the trial court erred in allowing the State to present testimony concerning Appellant's co-defendant's act of murder. Further, because there was no proof of Appellant's involvement in a common scheme with Driver and Passenger, the trial court erred by charging the jury with murder on the theory of "the hand of one is the hand of all." The trial court's error was substantial in that the jury was tainted by hearing about this murder and ultimately it affected the Defendant's ability to have a fair trial after that point.

II. THE TRIAL COURT ERRED IN REFUSING TO ACQUIT APPELLANT OF MURDER UNDER THE THEORY "THE HAND OF ONE IS THE HAND OF ALL" WHEN APPELLANT MOVED FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE ON THE BASIS THAT THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE BEYOND A REASONABLE DOUBT THAT APPELLANT PARTICIPATED IN A COMMON PLAN OR SCHEME.

The State's presentation of circumstantial evidence of the pre-existing plan to rob Rico included Spivey's testimony about the incidents that took place on June 8th. Spivey testified that Rico received a phone call from someone notifying Rico that he was outside, after which Rico and Spivey walked up to the car to conduct a drug deal. (R. p. 89, lines 12-19). Rico got in the car, things escalated and Spivey heard Passenger turned around said, "you know what time it is." (R. p. 94, line 21 – p. 95, line 2). At that point, the State contends someone in the car stole the marijuana from Rico. (R. p.430, line 24 – p. 431, line 1). Then Spivey testified he jumped out of the car while the car drove off. (R. p. 95, lines 3-5). Spivey heard a gunshot and then saw Rico's body fall out of the car. (R. p. 95, lines 17-22). Spivey noted that he saw Passenger with a gun but that he and Rico were armed with guns as well. (R. p. 95, lines 8-14). However, it should be noted that Spivey undercut his own testimony by stating that, at one point he thought it was just a drug deal gone bad, indicating he was not certain himself that Appellant was part of a pre-arranged plan.

At the conclusion of the State's case, defense counsel moved for a directed verdict because the State failed to prove Appellant participated in a common plan or scheme. (R. p. 432, lines 12-16). The trial court denied the motion. (R. p. 436, lines 4-6). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the

existence of every element of the offence." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be 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. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence from which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974).

The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert denied, 420 U.S. 945 (1974). The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v.

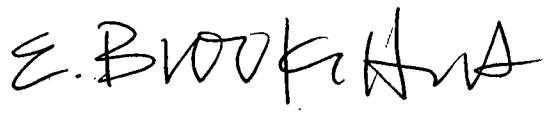
Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). The trial judge should grant a directed verdict, when the evidence merely raises a suspicion that the accused is guilty. State v. Martin, supra.

In this case, the State failed to show proof of Appellant's participation in a common pre-arranged plan to commit illegal activity with Driver and Passenger. Viewing the evidence in the light most favorable to the State, Spivey's testimony establishes that Appellant was in the car with Driver and Passenger on June 8, 2013 at the same time Rico got in Driver's car to sell marijuana. The fact that Appellant was in the car at the time Rico was murdered and that Appellant mentioned to Spivey that "this would be the perfect place to body a person" only raises a suspicion of guilt but is not evidence that Appellant was part of a prearranged plan to rob and actually kill Rico. (R. p. 93, lines 14-18). The State's witness testimony only proves that Appellant was present at the scene. Since the evidence is not substantial enough to prove Appellant's participation in a scheme to rob Rico, Passenger's act of killing Rico cannot be imputed to Appellant under the theory "the hand of one is the hand of all." In failing to establish such evidence, the illegal acts of Passenger are not admissible as to Appellant. Without any way to impute Appellant's co-defendant's act of murder on Appellant, at the close of the State's case, the trial judge committed an error by not acquitting Appellant at that point in the case.

CONCLUSION

In the State's presentation of evidence, the State failed to produce evidence showing the existence of a common plan to rob Rico during a drug deal and Appellant's participation in that plan. As a result of the State's failure to do so, the trial judge erred in failing to grant Appellant's motion for a directed verdict and further, the trial court erred in charging the jury with the ability to convict Appellant of murder under the theory "the hand of one is the hand of all." For the foregoing reasons, Appellant requests that this Court reverse and remand for a new trial.

Respectfully submitted,



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This 7th day of January 2015