ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

I.

Did the trial err by refusing to grant a directed verdict acquitting Appellant of armed robbery where there was no substantial circumstantial evidence that money was stolen from the restaurant and where there was no substantial circumstantial evidence that money belonging to the restaurant was forcibly taken from Devin Johnson as alleged in the armed robbery indictment?

II.

Did the trial court err by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges?

STATEMENT OF THE CASE

On January 9, 2014, the Aiken County Grand Jury indicted Appellant, John Upson, for one count of armed robbery and two counts of kidnapping. R. * (Indictments). On April 15, 2014, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury. Tr. 1.

Andrew Smith and De Grant Gibbons represented Appellant. Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony represented the State. The jury found Appellant guilty as charged. Tr. 258, ll. 16 – Tr. 259, ll. 3. The trial court sentenced Appellant to twenty years imprisonment with all three counts to run concurrent. Tr. 269, ll. 1-5.

STATEMENT OF FACTS

On November 27, 2013 at 10 p.m., Scott Hall was taking out the trash at the rear entrance of of the Captain D's Seafood restaurant in Aiken, South Carolina when two masked men approached him. Tr. 79, ll. 4-24. One of the men held a gun to his head and forced him back into the restaurant. Tr. 80, ll. 1-25.

Two other employees, manager Devin Johnson and cashier Jameshia Alston, were also at the restaurant during the incident. Alston was counting a cash drawer when the masked men entered and ordered her into the walk-in refrigerator. Tr. 54, ll. 14-23. Hall led the gunman to the cash register area while the second masked man stood at the door of the refrigerator. Tr. 81, ll. 1-15. Hall was then told to lay face down on the ground by the safe. Tr. 85, ll. 11-23.

Amazingly, Johnson was near the restaurant safe during the incident, but, his actions during this time are unknown as he was not called to testify at trial. Hall allegedly overheard the gunman telling Johnson to "'give me the money, I don't want the damn coins." Tr. 85, ll. 19-23. Hall and Johnson were then taken to the refrigerator and the two masked men fled. Alston and Hall believed the incident lasted about two to three minutes. Tr. 91, ll. 19-23. Johnson called 911 once he left the refrigerator. Tr. 92, ll. 1-10.

Armed Robbery Indictment

Appellant was indicted for armed robbery on January 9, 2014. The indictment specifically alleged that Appellant "along with another, did . . . while armed with a deadly weapon . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's, such goods of monies being described as follows: U.S. currency. . ." R.* (Armed Robbery Indictment).

Devin Johnson

Despite being named as the individual who had money "feloniously taken from" him by force in the armed robbery indictment and being subpoenaed by the State, Johnson was never called to testify. In addition, the State withdrew Appellant's kidnapping indictment for Johnson before trial. Tr. 119, ll. 3-8. Johnson was the only employee who claimed that he had a good look at the gunman and the only employee who believed that he would be able to identify the gunman. Tr. 117, ll. 5-24.

During the investigation of the robbery, Johnson was questioned concerning an individual named Ishmael Norid-Deen, whom the police identified was a mutual acquaintance of Appellant and Johnson. Tr. 108, ll. 4-8. Norid-Deen had worked at that Captain D's location. Tr. 117, ll. 22-25. Johnson was shown a photograph of Norid-Deen. Unsurprisingly, Johnson denied that Norid-Deen was the gunman. *Id.* at ll. 14-21. A subsequent police search of Johnson's phone records divulged that Johnson called Norid-Deen several times on the night of the incident from his cell phone and from the restaurant phone. Tr. 122, ll. 21 – Tr. 123, ll. 6. Johnson allegedly explained to law enforcement that he was simply calling Norid-Deen to get a ride home from work as they both lived in the same neighborhood. *Id.* For reasons unknown, Johnson was the only employee shown Norid-Deen's photograph. Tr. 117, ll. 14-21.

At trial, lead detective William Royster reluctantly exposed on cross-examination that Johnson was interviewed by law enforcement as recently as the day before Appellant's trial about his suspected role in the incident. Tr. 122, ll. 19-24. Nevertheless, Royster adamantly denied that he thought Johnson may have been involved in the alleged robbery. Tr. 121, ll. 16 – Tr. 122, ll. 8. Curiously, despite rigorously investigating and interrogating Johnson, Royster was never able to determine whether any money was taken from the restaurant. *Id.* This is especially odd given that

Johnson was the manager and presumably responsible for making final count of receipts and reconciling sales with revenue.

Jameshia Alston

At trial, Alston testified that she feared for her life during the alleged robbery. Tr. 59, ll. 17-19. Alston claimed that after the robbery, on her own initiative, she visited co-worker William Keel's Facebook account and looked through his "friends list." Tr. 57, ll. 2-10. Keels was not working the night of the robbery. From that list she allegedly recognized Appellant as the masked and hooded suspect who guarded the refrigerator door during the two and an half minute robbery. Tr. 61, ll. 4-21.

Alston claimed that she began her investigation because she believed that she had previously seen Appellant in Captain D's the week before the robbery. During this alleged visit, Appellant ordered a Sprite and took a photograph of Keels. Tr. 56, ll. 15-24; Tr. 65, ll. 18-23. When questioned on her remarkable memory on cross-examination, Alston assured the court it was her job to "remember by my customers." Tr. 58, ll. 1-4. She also identified Appellant's bald head and his alleged lazy eye with the masked suspect's appearance. *Id.*

Alston initially denied that she had been shown a photographic lineup by police. Tr. 75, ll. 20 – Tr. 75, ll. 1. However, when pressed, she admitted that the police had provided her with a list of names, which included Appellant's, during the course of the investigation. *Id.* When asked about the alleged robbery, Alston also conceded that she never completed her count of the cash drawer and never deposited the money in the safe. Tr. 59, ll. 1-14. Alston testified that she did not know if any money was taken from the restaurant. *Id.* Like Johnson, Keels was never called to testify. Tr. 220, ll. 18 – Tr. 221, ll. 5.

With respect to Alston's identification, William Royster conceded on cross-examination, that it was made while she was still upset by the robbery and that he did not like having witnesses do independent work. Tr. 110, ll. 2 – Tr. 111, ll. 20; Tr. 117, ll. 2-4. Royster admitted that her identification was the key to his investigation. Tr. 109, ll. 6 – Tr. 110, ll. 6.

Scott Hall

On direct examination Hall testified that he was led to the front of the store by the gunman and asked him to lie on the ground. Tr. 91, ll. 1-12. Hall alleged that that he saw Johnson open the safe and the gunman grab a carry-out bag. Tr. 85, ll. 19-25. When prompted Hall claims that a photograph of the area around the restaurant safe is "where the money was taken." Tr. 91, ll. 6-7. However, Hall also claimed that he kept his head down, which prevented him from seeing the interaction between Johnson and the gunman. Tr. 81, ll. 4-15.

Under cross-examination, Hall conceded that he did not see any money change hands and that he could not see the safe during the alleged robbery. Tr. 94, ll. 13 – Tr. 95, ll. 25. Further, Hall admits that he did not know if any money had in fact been taken from the restaurant and that the safe was simply open when he left the refrigerator. *Id.* Hall confirmed that it was his responsibility to make a nightly count of the money left over at the end of the day, but that he simply did not know if any money had been taken that night. Tr. 99, ll. 2-14.

Hall was never shown a photographic lineup and did not believe that he would be able to recognize either of the masked men if he saw them again. *Id.* When addressing the relative sizes of the men, he believed that the gunman was shorter than the individual alleged to be Appellant. Tr. 87, ll. 5-10. Hall also believed that the suspect identified by Alston as Appellant was around six feet tall, as he recalled that the man was taller than he was. *Id.* Appellant is five feet seven inches tall. *Id.*

William Keels

As detailed above, Keels was a restaurant employee, but was not working when the robbery occurred. Keels did not testify. However, Keels' mother was a friend with Appellant's and Keels and Appellant were Facebook friends. Tr. 73, ll. 4 – Tr. 74, ll. 24. According to Alston, Keels was working several weeks prior to the incident when Alston claimed that Appellant allegedly visited the restaurant to buy a Sprite and took a picture of Keels. Tr. 56, ll. 15 – Tr. 57, ll. 10. During the course of the investigation Keels' mother was arrested on a charge of misprision of a felony. Tr. 107, ll. 3-18.

William Royster

As Johnson was never called to testify by the State, instead William Royster testified extensively on his investigation and the potential role Johnson may have played in the incident. Tr. 100, ll. 7-23. At trial, Royster testified that the Captain D's had no working video surveillance and that none of the surrounding buildings had cameras that captured the alleged robbery. Tr. 101, ll. 23 – Tr. 102, ll. 9. Both masked men were believed to be wearing gloves and no fingerprints of interest were recovered from the restaurant. Tr. 102, ll. 10-13.

Royster issued an arrest warrant for Appellant after receiving an email from Alston about her investigation on Facebook. *Id.* at ll. 14-25. Royster recalled speaking with Appellant over the phone, where Appellant stated that he was at a comedy show in downtown Aiken during at the time of the robbery. Tr. 104, ll.13-24. At Appellant's suggestion, Royster obtained Appellant's phone records and also confirmed that there was a comedy show on the night in question. Tr. 105, ll. 9 – Tr. 106, ll. 15. The comedy show was scheduled to end around 11 p.m. with an after-party at the Hotel Aiken. Tr. 106, ll. 2-18.

Royster admitted that the State had no suspects as to who the actual gunman might have been. *Id.*at ll. 19-24. Incongruously, Royster emphatically denied that Johnson, the Captain D's manager who did not testify at trial, but was listed as the victim on the indictment, was a suspect. *Id.* at ll. 19-25. Royster testified that there was a substantial amount of money left in the safe after the masked men fled. *Id.* at ll. 10-12. Royster admitted that as late as the day before Appellant's trial, he and other detectives had been interviewing Johnson about his possible involvement; including accusing him of having planned the robbery. Tr. 121, ll. 16 – Tr. 122, ll. 8.

Nevertheless, when confronted on cross-examination Royster maintained that he was absolutely sure Johnson was not involved. Tr. 118, ll. 22-24. In support of his determination of Johnson's innocence, Royster repeatedly stated that the safe at the restaurant had a lot of money in it after the robbery. Tr. 119, ll. 10-12; Tr. 122, ll. 6-8. Royster never testified that any of the employees told him money was missing from the register or the safe and there was never an accounting done to determine if any money was actually taken. Finally, Royster was unable to explain why the indictment for kidnapping Johnson had been pulled. *Id.*

Directed Verdict Motion

At the close of the State's case, the defense moved for a directed verdict on the grounds that the State presented no credible evidence that Appellant was guilty of either the kidnapping or the robbery. Tr. 163, ll. 14-24. With regards to the armed robbery, the defense argued that there was no testimony that money had been taken from the restaurant. *Id.* The defense emphasized that the State never called Devin Johnson to testify, despite the armed robbery indictment alleging Appellant "along with another did . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's". Tr. 164, ll. 1-4; R.* (Armed Robbery Indictment).

The State countered that Hall's testimony about the gunman saying "put the money in the bag," was sufficient evidence of the robbery. *Id.* at ll. 11-14. The court noted that it "had some concern with the evidence related to the issue of money." Tr. 165, ll. 10-15. The court stated that Alston testified that she was in the process of counting her register, but that she did not say what happened to the money; simply that she did not count it. *Id.* at ll. 16-25.

The court continued, "***circumstantially money in the cash drawer goes into the safe. . . . [I]t's corroborated by Scott Hall's testimony.***" Tr. 166, ll. 18-22 (*emphasis added*). The defense interposed that Alston never stated that any money was missing from her drawer. Tr. 167, ll. 2-7. Turning to Hall's testimony the court noted that he initially stated that he saw the gunman taking money out of the safe, but on cross-examination, he corrected his story and stated that he was face down on the floor and did not see the gunman take any money. *Id.* at ll. 9-24. The State then interjected that there was also testimony that the cash drawer from the register was on the floor after the robbery. *Id.*

The court concluded that sufficient circumstantial evidence of the robbery existed based on the gunman's alleged statement and the empty cash drawers to survive the directed verdict motion for armed robbery. Tr. 168, ll. 14 – Tr. 169, ll. 12. The court believed it was a close case, but the any contradictions went to the weight of Hall's testimony not whether any substantial circumstantial evidence of the armed robbery existed. Tr. 169, ll. 2-8.

Defense Alibi Witnesses

In its case in chief, the defense presented a series of witnesses that all testified that Appellant was at the comedy show and the after party. The witnesses ranged from family friends of the Appellant to an DSS employee and a veteran correctional officer who was also a criminal justice instructor at a community college. Tr.191, ll. 20 – Tr. 192, ll. 2; Tr. 200, ll. 5-24. All the witnesses

testified that the show was supposed to start at eight, but that it did not start until nine. Tr. 184, ll. 2 – Tr. 186, ll.16; Tr. 1. The show also ran late, lasting until about ten thirty or quarter to eleven. Tr. 195, ll. 1-11. The robbery took place around ten p.m. Tr. 53, ll. 9-21.

All of the witnesses testified that Appellant was acting normally. Appellant helped prepare the venue for the show and was in a good humor before and after the comedy show. Tr. 184, ll. 2 – Tr. 186, ll. 16. Specifically, Janet Williams, who had recently lost a relative, recalled that Appellant had comforted her and made jokes after the show in an attempt to lift her spirits. Tr. 198, ll. 1-3. On cross-examination, none of the witnesses could recall seeing Appellant during the show, but the overhead lights were off during the performances and the venue was at or over capacity. Tr. 194, ll. 14 – Tr. 196, ll. 21.

At the close of the case, the defense renewed its directed verdict motions, which were denied. Tr. 205, ll. 10-17. The jury was only charged on armed robbery, the trial court did not provide a jury instruction on attempted armed robbery. Tr. 246, ll. 16 – Tr. 248, ll. 9. Once the jury returned guilty verdicts on all the indictments, the defense again renewed its directed verdict and made a motion for a mistrial. Tr. 261, ll. 19-23. All three motions were denied. Tr. 262, ll. 1-2.

ARGUMENT

I.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal where: the evidence failed to prove an element of armed robbery as alleged in the Indictment; the evidence presented merely raised the suspicion of Appellant's guilt; and the State failed to present substantial circumstantial evidence that Appellant's was guilty of committing an armed robbery.

Discussion

Appellant was entitled to a directed verdict on the indictment for armed robbery as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from the person or presence of Devin Johnson.

Our Supreme Court has held that when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, that it is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *See, also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

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. "When the State fails to produce ***substantial circumstantial evidence*** that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). In *Odems*, the Court cited *State*

v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Appellant was indicted for armed robbery under S.C. Code Ann. § 16-11-330. South Carolina's statutory scheme specifies that the definition of robbery is to be provided by common law. *See* S.C.Code Ann. § 16–11–325 (2003). At common law, robbery is defined as larceny with force. *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) *citing Broom v. State*. 351 S.C. 219, 220-211, 569 S.E.2d 336, 337 (2002). Larceny is the felonious taking and carrying away of good of another against the owner's will and without the owner's consent. *Id.* The requisite elements of larceny are met at the point ***when a thief possesses an item of stolen property***. *See State v. Keith,* 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985) ("asportation is an element of robbery and armed robbery.")(*emphasis added*).

Accordingly, "[t]he gravamen of a robbery charge is a ***taking from the person or immediate presence of another by violence or intimidation***." *State v. Rosemond,* 356 S.C. 426, 430, 589

S.E.2d 757, 758–59 (2003) (citing *State v. Hiott,* 276 S.C. 72, 276 S.E.2d 163 (1981))(*emphasis added*). It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. *See Scipio* 283 S.C. at 126, 322 S.E.2d at 16.

"When determining whether the robbery was committed with intimidation, the trial court should determine **whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts**." *Rosemond,* 356 S.C. at 430, 589 S.E.2d at 759 (*emphasis added*). Therefore, in order to survive a directed verdict motion, the State must present direct or substantial circumstantial evidence that Appellant carried away the money or goods of another against the owner's will while armed or while alleging to be armed. *State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002).

The evidence presented by the State merely raised the suspicion of Appellant's guilt, as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from Devin Johnson. The indictment for armed robbery specifically stated:

> [Appellant] along with another, did in Aiken County on or about November 27, 2013, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a handgun, ***feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's***....

R.* (Armed Robbery Indictment)(*emphasis added*). Devin Johnson never testified as to whether money or goods were taken from him by force because the State never called him to testify. He was subpoenaed to testify and had even been interviewed by Royster and his partner the day before trial. Tr. 119, ll. 2-19. Instead of Johnson, Detective Royster had to explain his investigation of Johnson

and to try to justify why the individual named as the victim in the armed robbery indictment was not testifying. Tr. 117, ll. 5 – Tr. 120, ll. 21.

While adamantly affirming that Johnson was not suspected of involvement in the alleged robbery, Royster admitted that the kidnapping indictment related to Johnson had been withdrawn and that police had interrogated Johnson as recently as the day before Appellant's trial. Tr. 119, ll. 3-8. Royster also claimed that he did not consider Johnson a suspect because the gunman had left a substantial amount of money in the safe. *Id.* at, ll. 10-12. Royster did not elaborate on why he thought this particular detail was important or how it led him to determine that Johnson was not involved in the robbery. Royster was unable to state whether any money was taken from the restaurant and there was no testimony as to whether any money was forcibly taken from Johnson or in his presence.

With respect to Scott Hall's testimony, the trial court overstated the discrepancy in his testimony. On direct examination Hall testified that he saw Johnson open the safe and the gunman grab a carry-out bag. Tr. 85, ll. 19-25. However, Hall also stated that he was ordered to keep his head down, which prevented him from seeing the interaction between Johnson and the gunman. Tr. 81, ll. 4-15. On cross-examination, Hall simply clarified the contradiction in his earlier testimony by affirming that he was "on all fours. ***Like [in] a crawling position as well with my head, like, down***" Tr. 94, ll. 18-19 (*emphasis added*).

When asked by defense counsel if his head was "tucked down", Hall responded affirmatively. *Id.* at ll. 20-21. When asked if he could not see the safe, Hall responded that he could not. *Id.* at ll. When asked if he saw any of the money supposedly being taken from Johnson, he said that he did not. Tr. 94, ll. 22 – Tr. 95, ll. 4. On re-direct examination, Hall affirmed that the incident happened in two to three minutes and that he only had a few seconds to view the two masked men.

Tr. 98, ll. 2-18. Moreover, whether on direct or cross-examination, Hall never testified that he saw money forcibly taken from Johnson. Finally, the only other witness to the alleged armed robbery, Jameshia Alston, testified that she never saw the gunman take any money and never claimed that she knew any money was missing after the masked suspects fled. Tr. 59, ll. 1-14.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. Therefore, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that money or goods from Captain D's restaurant were taken by force from or in the presence of store manager Devin Johnson.

II.

The trial court erred by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges.

Appellant was indicted by the Aiken County Grand Jury two counts of kidnapping. R. * (Kidnapping Indictments). The body of the kidnapping indictments are identical:

> That [Appellant] did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away [Jameshia Alston/ Scott Hall] without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Id. As previously discussed, the evidence presented by the State at trial alleged that Appellant along with an unknown gunman committed an armed robbery at a restaurant while Alston, Hall, and Johnson were working. Tr. 79, ll. 4-24.

In the course of the armed robbery, the gunman restrained Alston and Hall at gunpoint and directed them into the standup refrigerator. Tr. 54, ll. 14-23. The entire incident lasted only a few minutes. Tr. 91, ll. 19-23. Alston's implausible identification of Appellant, when viewed in a light most favorable to the State, placed Appellant unarmed at the door of the refrigerator. Tr. 81, ll. 1-15A. As detailed at length, Johnson's behavior and actions during the alleged robbery are unknown and the indictment charging Appellant in his kidnapping, was withdrawn by the State. . Tr. 119, ll. 3-8.

The joinder of Appellant's charges into a single trial was proper *State v. Carter,* 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) (joinder of offenses in one trial is "proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof").

However, as Appellant is entitled to direct verdict with respect to the armed robbery indictment based on the State's failure to present substantial circumstantial evidence that money belonging to Captain D's was forcibly taken from Devan Johnson; Appellant is likewise entitled to a directed verdict on the kidnapping indictments as the force used to confine Hall and Alston was incidental to the alleged armed robbery of their employer.

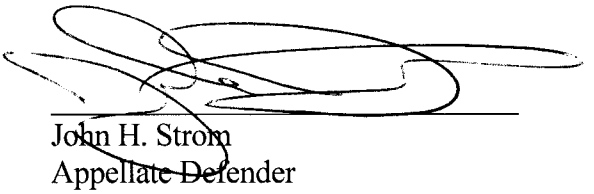
This case is distinguishable from *State v. Porter*, 389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010), as Hall and Alston were employees of Captain D's, who were confined in the course of their employment. Consequently, the force used to confine Hall and Alston is inextricably tied to the force used to feloniously take money belonging to Captain D's. In *Porter* several of the indictments involved the confinement of customers. 389 S.C. at 40, 698 S.E.2d at 224. This Court concluded, the "act of confining the customers would support the kidnapping conviction independently of the confinement required to commit the armed robbery." *Id.*

Accordingly, as the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery, Appellant is also entitled to directed verdict on the kidnapping indictments because the confinement of Hall and Alston was incidental to the armed robbery of their employer.

CONCLUSION

Based on the foregoing reasons, Appellant John Upson respectfully requests that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of March, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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MAR 23 2015
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THE STATE,

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V.

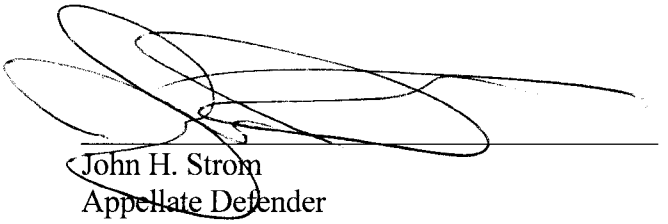
JOHN UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of March, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .