ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

RECEIVED
MAY 13 2015
SC Court of Appeals

Appellate Case No. 2013-002665
Criminal Case No. 2011-GS-10-2074

State of South Carolina.....Respondent,

vs.

Jarret Graddick.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

Steven Edward Buckingham
S.C. Bar No. 75089
PERKINS LAW FIRM
200 North Main Street / Suite 301
Greenville, South Carolina 29601
864.908.3900
SBuckingham@JohnPerkinsLaw.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
803.734.1343
RDudek@sccid.sc.gov

Attorneys for Appellant Jarret Graddick

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The State did not prove what it pleaded in the indictment, and as a consequence, the trial judge should have granted Appellant's motion for a directed verdict.... 1

A. The indictment against Appellant charges that he, acting alone, committed the armed robbery at issue. 1

B. The State's case against Appellant depended on establishing Appellant's concerted action with Coakley and Smalls. 2

C. Since the State's case against Appellant was necessarily rooted in conspiratorial conduct, the existence of the conspiracy was a material fact that should have been alleged in the indictment. 4

D. As a consequence of the State's failure to allege the existence of a conspiracy in the indictment, the trial judge should have evaluated Appellant's directed verdict motion in light of the evidence against Appellant only. 8

II. The admission of Coakley's incriminatory statement was a violation of Appellant's Sixth Amendment right to confront adverse witnesses, and it was not harmless error beyond a reasonable doubt..... 11

A. Coakley's statement was reasonably self-incriminating..... 11

B. Coakley's statement was imputed against Appellant..... 12

C. The fact that Coakley's statement was not induced by law enforcement is immaterial..... 12

D. The right of confrontation requires that Appellant have had the ability to cross-examine Coakley on his statement. 13

E. The standard of review is harmless error beyond a reasonable doubt, not abuse of discretion..... 14

III. The procedural irregularities regarding the consolidation of Appellant's case with Coakley's and Smalls' merit further review, and under recent precedent, appear inherently prejudicial. 15

CONCLUSION..... 19

TABLE OF AUTHORITIES

South Carolina Rules of Criminal Procedure

Rule 19(a) 9
Rule 4(a) 16

South Carolina Rules of Evidence

Rule 801(d)(2)(E) 5, 12

United States Supreme Court Decisions

Crawford v. Washington, 541 U.S. 36 (2004) 13

South Carolina Appellate Decisions

Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) 1, 7, 9
Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005) 5
State v. Baker, Op. No. 27497 (S.C. Feb. 11, 2015) 5, 18
State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) 5
State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) 6
State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994) 13
State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) 14
State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010) 14
State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) 16
State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 8
State v. Sheriff, 118 S.C. 327, 110 S.E. 807 (1922) 7

I. THE STATE DID NOT PROVE WHAT IT PLEADED IN THE INDICTMENT, AND AS A CONSEQUENCE, THE TRIAL JUDGE SHOULD HAVE GRANTED APPELLANT'S MOTION FOR A DIRECTED VERDICT.

Judging by its response, the State seems bewildered by the proposition that, in order to get a conviction, the evidence at trial must meet the factual allegations of the indictment. This should not be controversial. As explained by the Supreme Court in Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011):

> It is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. . . . A material variance between charge and proof entitles the defendant to a directed verdict . . . . While a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged. . . . A conviction under the latter circumstance violates principles of due process because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged.

Id., 392 S.C. at 433–34, 709 S.E.2d at 677 (emphasis added) (alterations and citations omitted).

A. The indictment against Appellant charges that he, acting alone, committed the armed robbery at issue.

Appellant has already given a significant amount of attention to the allegations of his indictment, and so incorporates that discussion here by reference. (Appellant's Init. Br. 7–12.) However, it bears repeating that the State did not allege that Appellant participated in the commission of an armed robbery; the State alleged that Appellant committed an armed robbery, and the indictment is absolutely silent as to whether Appellant had accomplices or participated in concerted action to commit the crime at issue. This matter is not in dispute.

B. The State's case against Appellant depended on establishing Appellant's concerted action with Coakley and Smalls.

Despite the fact that the indictment alleges Appellant, acting alone, committed the armed robbery at issue, the evidence presented at trial did not meet these allegations. The State did not place Appellant at the scene of the crime—not through any direct evidence, and not through any physical evidence; the State did not provide any evidence that Appellant personally took any property from the victims of the robbery; the State did not provide any evidence that Appellant personally used force, threats, or intimidation against any victim; and the State did not provide any evidence that Appellant was armed with a deadly weapon while doing so. Whether the State wants to concede the point or not, the simple fact remains: the State did not connect Appellant personally to the crime with which he was charged.

However, in retrospect, it is obvious from the State's trial strategy that it did not intend to connect Appellant to the robbery personally. From the outset of trial, the State proceeded under a theory that Appellant, Coakley, and Smalls participated in concerted action to commit the crime at issue. On Pages 9 and 10 of its Initial Brief, the State has helpfully laid out what it perceives to be the material facts of its case, and the facts on which it believes Appellant was convicted.[1]

---

[1] Incredibly, the State's list of material facts omits one of the most damning pieces of testimonial evidence in the case. When law enforcement officers initiated at traffic stop of Smalls' vehicle shortly after the robbery was reported, Coakley—not Appellant—pointed the gun at Smalls and instructed him to "Drive," that he was "not going back to jail." The admission of this statement provides its own basis for relief for Appellant. However, the testimony is notable for another reason. The State made a big deal out of the fact that Appellant's DNA was found on the gun, and that Appellant's Co-Defendants were excluded as possible DNA contributors. However, the only time there was any affirmative evidence about anyone holding the gun was when Mazyck testified that Coakley—not Appellant—pointed the gun at Smalls. Yet

Paragraph 1: "Two men" enter the scene of the armed robbery. Neither one was ever identified as Appellant. "One of the men had a gun." The person in possession of the gun was never identified as Appellant.

Paragraph 4: "Two people on foot" emerged from woods on a dead-end road. Neither of those was identified as Appellant. "One of them" threw a cashbox from the scene of the robbery on the ground. The person who possessed and abandoned the cashbox was not identified as Appellant.

Paragraph 5: Co-Defendant *cum* State's Witness Mazyck saw "one of them [Coakley and Appellant]" throw the cashbox on the ground. Mazyck did not identify the person who possessed and abandoned the cashbox as Appellant. Mazyck saw that "one of them" had a gun. He did not identify the person who had the gun as Appellant.

Paragraph 7: Officers recovered a Glock handgun from Co-Defendant Smalls' vehicle. The gun was never identified as the weapon used during the armed robbery.

Even now, the State must concede that the evidence fails to establish any individual Defendant committed each element necessary to render him culpable for armed robbery. At best, the State can argue only that the elements of armed robbery were met by the concerted criminal action of Appellant, Coakley, and Smalls.

Assuming for the sake of argument only that the State could prove Appellant participated in the perpetration of the robbery at issue, the State's case is still problematic. The State has no idea who was in possession of the firearm at the time

---

Coakley—for reasons ostensibly known only to forensic science—was excluded as a possible DNA contributor.

of the robbery; nor does the State have any idea who took the cashbox from the scene. If the State is correct that Appellant and Coakley perpetrated the robbery, the best the State can do is say that together, Appellant and Coakley engaged in conduct that constituted the crime of armed robbery; the State cannot prove that either of them individually met the elements of the crime.

Not surprisingly, this was the very theory that the State pursued at trial. And so, for the State to take any position at this point discounting the importance of conspiracy to its case against Appellant would be downright disingenuous.

C. Since the State's case against Appellant was necessarily rooted in conspiratorial conduct, the existence of the conspiracy was a material fact that should have been alleged in the indictment.

The State claims that "Appellant apparently does not understand accomplice liability[] and confuses it with conspiracy liability." (Resp.'s Br. 8.) Let me assure the State that I understand both accomplice and conspiracy liability, and if I may be so bold, I would suggest it is the State that's confused.

When it comes to conspiracies, there is the theory of culpability and there is the crime. As the State correctly notes, the crime of conspiracy is complete upon the agreement of two or more persons to engage in unlawful conduct and the execution of an overt act in furtherance thereof. (Resp.'s Br. 8.) By contrast, the theory of conspiratorial culpability allows the criminal statements and conduct of one person to be imputed to all members of the scheme, regardless of whether the scheme is successful, and regardless of whether the crime of conspiracy is charged. The imputation of statements and conduct among all participants to a conspiracy is the philosophical basis of accomplice liability—*i.e.* "the hand of one is the hand of all."

See, e.g., State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, ___ (Ct. App. 2002). It is also the philosophical basis for the proposition that "the mouth of one is the mouth of all," see Rule 801(d)(2)(E), SCRE, despite the State's assertion that such a proposition is "nonsense," (Resp.'s Br. 12).

In any event, it is beyond serious dispute that the existence of a conspiracy—not the crime of conspiracy—was essential to the State's case against Appellant. This conclusion begs the question: *Did the State have an obligation to allege the existence of a conspiracy in the indictment?* The answer is unequivocally yes. In a recent opinion, Chief Justice Toal expounded on the role that indictments play in the criminal justice system:

> The indictment is a notice document. . . . As such, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated 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 and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

State v. Baker, Op. No. 27497, *8 (S.C. Feb. 11, 2015) (Toal, C.J., dissenting) (emphasis added) (citations and alterations omitted).

A similar statement of law is found in Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005):

> The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial . . . .

Id., 363 S.C. at 508, 611 S.E.2d at 517 (emphasis added).

In other words, the indictment must contain an amount of information sufficient to enable the defendant and his lawyer to make an informed decision about how to proceed and which course of action may be in the defendant's best interests. This requires information not only about the charge, its circumstances, the place where the crime allegedly occurred, and the time it was committed, it also requires the disclosure of the extent to which a defendant may be liable for another's statements and conduct.

The State denies the truthfulness of this proposition. Citing State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000), and its antecedents, the State contends that an indictment which charges an accomplice as a principal in the commission of a criminal offense is sufficient regardless of whether the defendant's accomplices are jointly indicted or even mentioned in the defendant's indictment. Id., 341 S.C. at 295, 534 S.E.2d at ___. But this is only somewhat accurate.

Depending on the procedural stage of a criminal matter, the court may be evaluating the legal sufficiency of an indictment, or it may be evaluating the factual sufficiency of an indictment. When the court is evaluating the legal sufficiency of an indictment, it is examining the instrument to ascertain whether the minimally necessary legal elements of an indictment have been met. By contrast, when the court is evaluating the factual sufficiency of an indictment—as it is required to do upon the presentment of a motion for directed verdict, the court is expressly required to evaluate the sufficiency of the evidence of guilt in light of the allegations of the indictment. Consequently, an indictment, although legally sufficient, may be

dismissed at the directed verdict stage if it is found to be factually insufficient. See, e.g., Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011).

A common way in which legally sufficient indictments may be dismissed for factual insufficiency arises when the State's theory of criminal culpability at trial varies in a material way from the State's theory as set out in the indictment. Bailey is particularly instructive on this matter. In Bailey, the defendant was indicted for homicide by child abuse for having engaged in acts of inflicting physical injuries on the victim. Id., 392 S.C. at 431, 709 S.E.2d at 676. However, at trial, the defendant was convicted of neglect—of having failed to take action, resulting in the death of the child. Id., 392 S.C. at 435–36, 709 S.E.2d at 678. On PCR review, the Supreme Court held that there was a material variance between the allegations of the indictment, indicating the State would be proceeding under one theory of culpability at trial, and the State's actual theory at trial, upon which defendant's conviction was ultimately secured. The Supreme Court's position on the factual sufficiency of indictments was unequivocal: "a defendant may only be tried and convicted of the crimes alleged in the indictment and the State is bound by the theory alleged in the indictment." Id., 392 S.C. at 435, 709 S.E.2d at 678 (emphasis added) (citation omitted). If the indictment facially charges a complete offense—*i.e.*, if the indictment is legally sufficient—and the State presents evidence at trial which convicts under a different theory than that alleged, any resultant conviction cannot be sustained. Id., 392 S.C. at 433, 709 S.E.2d at 677 (citation omitted); see also State v. Sheriff, 118 S.C. 327, 110 S.E. 807 (1922).

In sum, the test for the factual sufficiency of indictments is whether the charging instrument sufficiently apprised the defendant of the theory the State intended to pursue at trial, and did pursue at trial, to secure a conviction, such that the defendant could make an informed decision with his counsel about how to proceed in his best interests in the litigation.

With regard to Appellant, the State presented a legally sufficient indictment that became factually insufficient at trial. The State's theory—as explicitly set out in the indictment—is that Appellant was guilty of having personally engaged in each and every element necessary to render him culpable for armed robbery. There is nothing in the indictment to suggest that the State ever intended to proceed under a theory of conspiratorial liability. However, at trial, the State elected to proceed under a theory that rendered Appellant culpable for the conduct and statements of putative co-conspirators.[2] This presented Appellant with a fundamentally different risk analysis. Appellant was entitled to notice, through the indictment, that the State would rely on a theory of conspiratorial liability to establish his guilt, and he was deprived of that right.

D. As a consequence of the State's failure to allege the existence of a conspiracy in the indictment, the trial judge should have evaluated Appellant's directed verdict motion in light of the evidence against Appellant only.

---

[2] In support of the proposition that indictments need not allege the existence of putative co-conspirators, the State cited State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). However, Mattison undercuts the State's position. As reflected in the footnotes, the defendant's indictment in Mattison specifically alleged that defendant aided, abetted, and assisted a third party in the commission of the crime. Id., 388 S.C. at ___, 697 S.E.2d at 580 n.1.

The State claims that the trial "court's focus at the directed verdict stage is the evidence presented at trial, not the allegations of the indictment." (Resp.'s Br. 7.) That's a bold statement of law, considering that Rule 19(a), SCRCrimP, states just the opposite:

> On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment.

Rule 19(a), SCRCrimP.

Consistent with Rule 19, when the trial court is presented with a motion for directed verdict, the court must evaluate the evidence of criminal culpability in light of the allegations of the indictment, not in spite of them. The trial court commits prejudicial error when it goes beyond the scope of the indictment to find evidence of culpability under a theory different than the theory charged by the State. See, e.g., Bailey v. State, 392 S.C. 422, 433–36, 709 S.E.2d 671, 677–78 (2011).

With regard to Appellant, the trial court denied Appellant's motion for directed verdict in reliance on the evidence presented through the theory of conspiratorial culpability. The existence of a conspiracy was not alleged in the indictment, and it could not be considered by the court at the directed verdict stage. Furthermore, had the court evaluated the evidence of Appellant's guilt at the directed verdict stage in light of the allegations of the indictment, for the reasons set out above, Appellant's motion should have been granted. The case against Appellant should not have been submitted to the jury under the plain allegations of the indictment through which he was convicted.

Appellant would like to be clear: we are not suggesting that the State engage in some Herculean ordeal to satisfy the factual sufficiency requirement. We are suggesting only that the State provide proper notice through the indictment of the material facts, circumstances, and theories through which it seeks to secure convictions.

In Appellant's case, there is no good reason why the State would omit from the indictment a material fact such as Appellant's alleged participation in a scheme to commit armed robbery.[3] From the outset of the investigation, the State was aware that more than one person was involved in the commission of the crime at issue. Consequently, the State could have easily avoided the issue of the factual insufficiency of its indictment at trial in any one of several ways. The State could have jointly indicted Appellant, Coakley, and Smalls; but it chose not to. The State could have alleged the existence of a conspiracy involving Appellant in the indictment; it chose not to. Before trial, the State could have filed a motion to consolidate the indictments against all three Defendants; it chose not to. Even at trial, the State could have filed a motion to amend the indictment to conform to the evidence; but it chose not to. Instead, Appellant was indicted separately without any notice whatsoever that he would be tried jointly, or that any conduct or statements attributable to Coakley and Smalls would be imputed against him. The State made the tactical decision to tie its own hands in establishing Appellant's guilt through his

---

[3] The State contends that Appellant's counsel "knew the State's theory of the case, and evidence the State intended to present, well before the cases were called for trial." (Resp.'s Br. 17.) But the State does not cite any support in the record for this assertion. The State also contends that Appellant's counsel "clearly knew the defendants were being tried jointly before the cases were called for trial on December 3, 2013." (Resp.'s Br. 18.) Again, the State has not cited any support in the record.

putative accomplices, and the State must live with the consequences of that limitation. It is incumbent on the State to plead in the indictment what it intends to prove at trial, and to prove at trial what it pleads. If the State fails to discharge this obligation, then a verdict must be directed in the defendant's favor, as it must in this case.

II. THE ADMISSION OF COAKLEY'S INCRIMINATORY STATEMENT WAS A VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES, AND IT WAS NOT HARMLESS ERROR BEYOND A REASONABLE DOUBT.

When law enforcement officers initiated a traffic stop of Smalls' vehicle, Coakley pointed a gun at Smalls and stated something to the effect of "Drive! I'm not going back to jail." Mazyck testified at trial to hearing this statement, and Coakley did not testify at all by virtue of invoking the Fifth Amendment.

A. Coakley's statement was reasonably self-incriminating.

The State's position on Coakley's statement is schizophrenic. On one hand, the State claims that Coakley's statement "was not a confession or admission regarding the armed robbery. While it could be construed as evidence Coakley feared he might go to jail for some reason, any inference to be drawn from the statement in relation to the armed robbery went to Coakley only, and was a matter for the jury." (Resp.'s Br. 13.) On the other hand, the State acknowledges "the statement had significant probative value." (Resp.'s Br. 13.) The State can't have it both ways. If the statement were merely an expression of Coakley's generalized desire to not go back to jail "for some reason," then it would have no probative value. If, however, the statement has significant probative value, it is because the statement—coupled with Coakley's pointing a gun at Smalls—is an admission of guilt.

The trial transcript betrays the State's true position. If the State honestly believed that Coakley's statement had no probative value, *then why did the State elicit the statement from Mazyck three times in front of the jury in the span of a few minutes?* The reason why is obvious. The State knew then, as it knows now, that Coakley's statement is self-incriminating, especially when coupled with his contemporaneous conduct.

B. Coakley's statement was imputed against Appellant.

As noted previously, the State believes it is "nonsense" to describe the theory of conspiratorial culpability as "the mouth of one being the mouth of all," despite the fact that this very expression is embodied by Rule 801(d)(2)(E), SCRE. In any event, it is well-established that the statements of a participant to a conspiracy, made during and in furtherance of the conspiracy, may be imputed against every other participant. In the instant case, the "significant probative value" of Coakley's statement was the tacit admission of guilt for having just committed the crime at issue. And since the State was explicitly pursing a theory that Appellant and Smalls were Coakley's co-conspirators, Coakley's admission of guilt incriminates Appellant and Smalls. The State may claim that "Coakley's statement had absolutely nothing to do with Appellant," (Resp.'s Br. 15), but the State's theory at trial, the rules of evidence, and common sense suggest otherwise.

C. The fact that Coakley's statement was not induced by law enforcement is immaterial.

The State contends that Bruton is not implicated by Coakley's statement because the statement was not induced by law enforcement officers. (Resp.'s Br. 13.) However, the State appears to have confused the Bruton Doctrine with Crawford v.

Washington, 541 U.S. 36 (2004). Crawford deals with Sixth Amendment Confrontation Clause issues when the government seeks to admit testimonial statements against a criminal defendant under circumstances where the declarant is not available to testify. A common scenario under which testimonial statements are created is when a witness makes a statement to law enforcement in furtherance of an investigation. That is not the issue in this case.

Here, the Bruton Doctrine is implicated because, in the course of a joint criminal trial, the State sought to introduce the incriminating statement of one defendant that implicates his co-defendant, and the declarant-defendant is not available to testify. Furthermore, the fact that the statement was made to someone other than law enforcement is immaterial. Bruton is implicated regardless of whether the statement was made to law enforcement or a third party. See, e.g., State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994).

D. The right of confrontation requires that Appellant have had the ability to cross-examine Coakley on his statement.

The State contends that there was no Confrontation Clause violation because Appellant had the ability to cross-examine Mazyck on Coakley's statement, and under those circumstances, it was not necessary or required for Appellant to cross-examine Coakley. This is an incorrect statement of law. Under the Sixth Amendment, criminal defendants have the right to confront each and every adverse witness. Confrontation, in this context, means cross-examination. The right of confrontation cannot be conveniently side-stepped through ordinary rules regarding the admissibility of hearsay testimony. When the State seeks to introduce an incriminating statement against the defendant through a witness who was not the

original declarant, the Confrontation Clause prohibits the admissibility of such statement unless the original declarant is available for cross-examination. A defendant's confrontation rights are not protected if he is merely able to cross-examine the witness to the original declarant, as opposed to the original declarant himself. See, e.g., State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010). Therefore, in the case at bar, Appellant's Sixth Amendment rights were not protected by the opportunity to cross-examine Mazyck on Coakley's incriminating statement.

E. The standard of review is harmless error beyond a reasonable doubt, not abuse of discretion.

The State contends that the Bruton analysis is subject to the abuse of discretion standard. This is not correct. Violations of the right of confrontation are subject to a harmless error analysis. See, e.g., State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (citation omitted). "A Confrontation Clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that [the Court] is persuaded, beyond a reasonable doubt, that the violation did not affect the verdict." Id. (internal citations, quotations, and alterations omitted).

Appellant has previously discussed the significant prejudicial effect that the admission of Coakley's statement had on his liberty interests, (Appellant's Init. Br. 22–26), and incorporates that discussion here by reference. The only comment to add to what has been previously argued is that both the State and the trial court knew how damaging Coakley's statement was. After Mazyck had testified *three times* about the statement, and during a conference outside the presence of the jury, the trial court expressed its incredulity at the State for knowingly eliciting such testimony. (R.

352:15–357:3; Tr. 537:15–542:3.) The State may try to whitewash its error, but its prejudicial stain cannot be removed.

III. THE PROCEDURAL IRREGULARITIES REGARDING THE CONSOLIDATION OF APPELLANT'S CASE WITH COAKLEY'S AND SMALLS' MERIT FURTHER REVIEW, AND UNDER RECENT PRECEDENT, APPEAR INHERENTLY PREJUDICIAL.

The State has asserted that the issues raised in this argument are not preserved for review. That is a frustrating argument because most of the issues involve matters that took place prior to trial, and as a consequence, are not reflected on the record. For example, the State contends that, "[p]rior to jury selection, the circuit court conducted a status conference with the State and counsel for all three defendants." (Resp.'s Br. 17.) However, the trial transcript does not contain a record of the status conference, and there is no way to determine what objections, if any, were raised at the status conference as to a consolidated trial.[4] Furthermore, it appears that the status conference was held on the day trial commenced. (R. 9:5–16; Tr. 14:5–16.) Upon the conclusion of the status conference, the case proceeded into jury selection, and the transcript began.

In any event, the most concerning issue regarding procedural irregularities arises in connection with when the cases were called for trial. For reasons known only to the State, each Defendant was indicted separately. Therefore, in the absence of a motion for consolidation, each case should have been tried separately. The State denies that a motion for consolidation is necessary procedurally, since there is no rule of procedure which requires such a motion. While it is true that South Carolina

[4] Regrettably, Appellant's lead trial counsel passed away rather unexpectedly in the fall of 2014.

appears to not have a procedural rule regarding consolidation, the case of State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996), proves that the motion is more than just a figment of Appellant's legal imagination.

Furthermore, and consistent with the foregoing discussion about notice of the mode and manner in which the State intends to proceed at trial, it seems that traditional notions of due process would require the State to advise defendants formally of its election to proceed in a consolidated fashion.

The State's position is that it "essentially moves to consolidate the cases when it notices and calls them for trial at the same time." (Resp.'s Br. 19.) However, the State's "constructive motion to consolidate" seems to be in contravention of Rule 4(a), SCRCrimP:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the ground therefor, and shall set forth the relief or order sought.

Rule 4(a), SCRCrimP.

Appellant presumes that, when the State calls separate cases for a consolidated trial, the State's constructive motion is not in writing and filed with the court; nor is the constructive motion made in open court with a court reporter present. If this assumption is incorrect, Appellant is not in possession of the State's motion or a transcript evidencing an oral motion.

Furthermore, in Appellant's experience, when a motion is submitted—constructively or otherwise, the motion is impotent unless and until granted by the court. Yet Appellant is not in possession of any record indicating that the State's motion to consolidate was granted.

The State suggests that, if Appellant wanted a separate trial, he could have filed a motion to sever. However, if it is true—as Appellant suspects—that the State never filed a motion for consolidation, as required by Rule 4(a), and the court never granted such a motion, *is it even procedurally appropriate for Appellant to file a motion to sever? When would the motion be filed? On the day of trial, after the cases have been noticed and a jury assembled?*

In the event the State wants to consolidate separate indictments for a joint trial, the appropriate procedure would seem to be for Appellant to have notice and an opportunity to be heard on the issue of consolidation, at which time the State would bear the burden of explaining the propriety of consolidation. After all, the State made the decision to issue separate indictments, not the defendants. In any event, it seems the State has inverted the burden; it constructively files its own motion for consolidation, ostensibly grants it, and then puts defendants in the position of bearing the burden of justifying severance. This procedure seems patently offensive to traditional notions of due process.

With specific regard to Appellant's case, there is an additional issue to address: *How long before trial did the State join the separate indictments for a consolidated trial? Was there a meaningful opportunity for Appellant to oppose consolidation?* The State's brief is conspicuously silent on this point.

In the initial brief, Appellant referred the Court to several cases from Florida which establish the proposition that an untimely motion for consolidation of separate indictments for a joint trial is presumptively prejudicial. In those cases, one motion had been filed the morning of trial, and the other had been filed two days before trial.

At that time, there were no South Carolina cases on point. In the interim, however, the Supreme Court has issued an instructive decision. In State v. Baker, the defendant was charged in several indictments with various felonies. Op. No. 27497 (S.C. Feb. 11, 2015). For more than a year, the defendant had prepared for trial based on the allegations of the indictments that alleged the time period at issue ranged between 2002 and 2004. Then, two weeks before trial, the State issued additional indictments for conduct ranging between 1998 and 2004, which the State sought to try on a consolidated basis with the original indictments. A majority of the Supreme Court expressed concern that the defendant would have had sufficient time to prepare a defense to the new indictments. To quote the Court, "notice and preparation are inextricably linked concepts as fairness and due process require that a criminal defendant receive sufficient notice of the charges against him to enable him to prepare a defense." Id., Op. No. 27497, *6 n.4 (internal quotation and citation omitted).

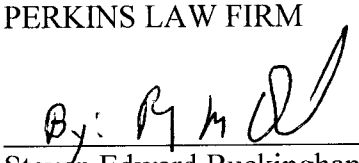
In any event, perhaps the State is correct that this issue is not preserved for review. However, without an appropriate transcript, without a record of motions, without a record of orders, without a record of notices, there is no reasonably practicable way for Appellant to determine whether an issue is preserved or whether his procedural rights have been compromised. The State is uniquely in control of those circumstances; it is Appellant's liberty interests at stake; and the State should not be the beneficiary of a preservation issue due to circumstances of its own making.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court issue an order which reverses the trial court's denial of Appellant's motion for a directed verdict, or alternatively, which vacates the conviction and sentence imposed by the court below and remands the case for a new trial, and which provides for any such other and further relief as the Court deems just and proper.

Respectfully submitted,

PERKINS LAW FIRM

By: 

Steven Edward Buckingham
S.C. Bar No. 75089
PERKINS LAW FIRM
200 North Main Street / Suite 301
Greenville, South Carolina 29601
864.908.3900
SBuckingham@JohnPerkinsLaw.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
803.734.1343
RDudek@sccid.sc.gov

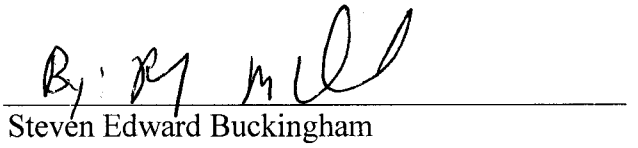
Attorneys for Appellant Jarret Graddick

Greenville, SC
May 13, 2015

CERTIFICATION OF COUNSEL

The undersigned counsel for Appellant hereby certifies that this final reply brief complies with Rule 211(b), SCACR.

I SO CERTIFY.



Steven Edward Buckingham

May 13, 2015

RECEIVED
MAY 13 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 13 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2013-002665
Criminal Case No. 2011-GS-10-2074

State of South Carolina.....Respondent,

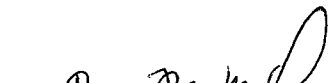
vs.

Jarret Graddick.....Appellant.

APPELLANT'S PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies that a true copy of the Appellant's Final Reply Brief for the above-referenced case has been served upon Deborah R.J. Shupe, Esq., at Rembert Dennis Building, Post Office Box 11549, Columbia, SC 29201, this 13th day of May, 2015.

[Signature Block Follows]

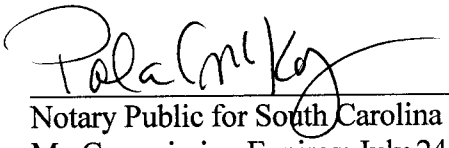


Steven Edward Buckingham
S.C. Bar No. 75089
PERKINS LAW FIRM
200 North Main Street / Suite 301
Greenville, South Carolina 29601
864.908.3900
SBuckingham@JohnPerkinsLaw.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
803.734.1343
RDudek@sccid.sc.gov

Attorneys for Appellant Jarret Graddick

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2015.



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