STATE OF SOUTH CAROLINA

IN THE 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 REPLY BRIEF OF APPELLANT

JOHN H. STROM
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ARGUMENT IN REPLY

I.

The trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson.

The State argues that Scott Hall's testimony provided substantial circumstantial evidence that money was forcibly taken in Devin Johnson's presence. Respondent's Brief at p. 10. Specifically, the State noted that Hall claimed the gunman left after he, "had gotten the money and everything." *Id.* Understandably, the State dismisses Hall's later clarification on cross-examination that: he could not see the safe, he could not see Johnson interact with the gunman, he could not see the registers, and he did not know if any money was taken. Tr. 94, ll. 17 – Tr. 95, ll. 4; Tr. 98, ll. 25 – Tr. 99, ll. 14.

Likewise Hall also explained that, while he counted the registers after the incident, he had no idea if any money had been taken because he did not know how much money was in the registers before the alleged robbery. *Id.* When looking at Hall's testimony as a cohesive whole, the only reasonable inference is that his reference to the gunman having "gotten the money and everything," was simply an assumption unsupported by his observations at the time of the incident. Hall unequivocally stated on cross and re-cross examination that he did not, in fact, witness any money being taken from the store safe. Tr. 94, ll. 17 – Tr. 95, ll. 4; Tr. 98, ll. 25 – Tr. 99, ll. 14; *see Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994)(no jury issue is created were the evidence, as a whole, is susceptible of only one reasonable inference).

The State further contends that Jameshia Alston's recalling that she did not complete her drawer count was relevant to proving that money was forcibly taken from the person or in the

presence of Devin Johnson. Respondent's Brief at p. 10. In actuality, her testimony had no bearing on the asportation element of robbery. Alston testified that she was counting down her draw in the restaurant's back office and that she was immediately led into the freezer. Tr. 59, ll. 1-14. She never finished counting her drawer and there is no evidence that her drawer was ever taken to the restaurant's safe located in the front of the service area. *Id.*

Alston never testified that any money was missing from her drawer – presumably still located in the back office – and she could not have seen Johnson's interactions with the gunman at the store safe. The State's comparison to *State v. Childs* is inapt. 299 S.C. 471, 385 S.E.2d 839 (1989); Respondent's Brief at p. 11. In *Childs*, the convenience store manager conducted a post-robbery accounting and determined that about one hundred dollars was missing. *Id.* at 478, 385 S.E.2d at 479. In the present case, neither Hall nor Alston conducted such a count, whether Johnson made a post-incident count, in his capacity as restaurant manager, is unknown because the State did not call him at trial.

Finally, the State contends that Devin Johnson's absence at trial is "immaterial". Respondent's Brief at p. 12. On the contrary, Johnson's failure to testify is material to whether the State presented substantial circumstantial evidence that Appellant did "feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's...." R.* (Indictment).

For this reason, the State's reliance on *State v. East*, is misplaced. 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003). In *East*, this Court affirmed the denial of a directed verdict motion on a kidnapping charge because there was testimony from other employees that the non-testifying employee was confined against his will in the hallway with them. *Id.* In the present case, there is no equivalent testimony. Hall stated that he did not see any money belonging to Captain D's being

forcibly taken from Johnson; neither did Alston. Tr. 94, ll. 17 – Tr. 95, ll. 4; Tr. 98, ll. 25 – Tr. 99, ll. 14.

Moreover, given the ambiguity of his involvement and the unexplained withdrawal of the indictment for his kidnapping, Johnson's participation in the incident was not adequately "illustrated" by his co-workers' testimony. Respondent's Brief at p. 12. Therefore, it cannot be assumed from Hall's, Alston's, or even Detective Royster's testimony that money was forcibly taken from Devin Johnson.

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 and the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery. *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

II.

Whether the trial court erred by refusing to grant a directed verdict on Appellant's indictments for the alleged, incidental kidnappings of Scott Hall and Jameshia Alston is preserved for appellate review.

Alston and Hall were restrained in the course of performing their duties as Captain D's employees. Any force used to restrain them was incidental to the force used to attempt the alleged armed robbery. The majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements *incidental to the commission of other felonies*. *State v. White,* 362 S.W.2d 559 (Tn. 2012); *see also Hurd v. State*, 22 P.3d 12 (Alas.App.2001); *People v. Powell*, 716 P.2d 1096 (Co. 1986); *Tyre v. State*, 412 A.2d 326 (Del.1980); *Delgado v. State*, 71 So.3d 54 (Fla.2011); *State v. Robinson*, 859 N.W.2d 464 (Ia. 2015) ; *State v. Cabral*, 619 P.2d 1163 (Kan. 1980); *State v. Estes*, 418 A.2d 1108 (Me.1980); *People v. Wesley*, 365 N.W.2d 692 (Mich. 1984); *Cuevas v. State*, 338 So.2d 1236 (Miss.1976); *Wright v. State*, 581 P.2d 442 (Nv.1978); *State v. Masino*, 466 A.2d 955 (N.J. 1983); *State v. Fulcher*, 243 S.E.2d 338 (N.C. 1978); *State v. Parker*, 768 S.E.2d 1 (NC Ct. App. 2014); *State v. Logan*, 397 N.E.2d 1345 (Oh. 1979); *State v. Garcia*, 605 P.2d 671 (Or. 1980); *State v. Innis*, 433 A.2d 646 (R.I. 1980); *State v. Curtis*, 298 N.W.2d 807 (S.D.1980); *State v. Green*, 616 P.2d 628 (Wa. 1980); *State v. Miller*, 336 S.E.2d 910 (W.Va.1985); *see also Model Penal Code § 212.1* (1980) (requiring movement over a substantial distance or confinement for a substantial period of time).

Further, the directed verdict motion on both kidnapping charges was sufficiently presented so as to be preserved for appellate review. Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004) With respect to criminal cases, appellate

courts should reach the merits when error preservation is doubtful. *See Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

At the close of the State's case, defense counsel, "moved for a directed verdict with regards to the kidnapping charges, both kidnapping charges, as well as the armed robbery." Tr. 163, ll. 13-17. The parties argued at length about Alston's and Hall's testimony regarding the events of the incident, including, whether Alston was able to put the money from her cash register drawer in the safe before the two masked men forced her into the restaurant's cooler. Tr. 163, ll. 18 – Tr. 170, ll. 18.

Before ruling, the trial court stated to defense counsel, "[n]ow anything specifically as it relates to the kidnapping charge? ***I know you've made a motion for directed verdict. And certainly you're protected on the record on that.*** Is there anything else specifically on that?" Tr. 169, ll. 13-22 (*emphasis added*). After again noting that Johnson was not called by the state and no post-incident accounting was conducted, the defense concluded its argument. Tr. 170, ll. 1-19. After the defense rested, counsel renewed his directed verdict motion with respect to both kidnapping charges and the armed robbery charge. Tr. 205, ll. 9-17.

In the present case, the trial court clearly stated that he considered the directed verdict motions on kidnapping charges and the armed robbery charge to have been sufficiently presented. Tr. 169, ll. 13-22. The court's decision was logical given that the alleged kidnappings were incidental to the alleged armed robbery. The court –exercising its discretion – felt that defense counsel's arguments were sufficiently presented to enable it to rule on all three indictments. Accordingly, this issue is preserved for appellate review. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) *citing Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E2d 881 (1980) (trial judge has broad discretion and inherent power to control the conduct of a trial).

CONCLUSION

For the reasons previously stated in Appellant's brief and for these additional 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 30th day of July, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant 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 30th day of July, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.