ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON EDWARD KINLOCH,

APPELLANT

APPELLATE CASE NO. 2014-002332

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for the offenses of murder, armed robbery, and criminal conspiracy. R. *. His case was called to trial on October 27, 2014, before the Honorable W. Jeffrey Young, and a jury. James Falk represented appellant. Matthew Ozment and Mason West were the assistant solicitors. Tr. 1.

The jury ultimately found appellant guilty on all three counts. Tr. 384, ll. 17-25. Judge Young sentenced appellant to thirty-five years' imprisonment for murder, thirty years' imprisonment for armed robbery, and five years' imprisonment for criminal conspiracy. Tr. 399, ll. 4-22.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to direct a verdict of acquittal where the state failed to present evidence of appellant's guilt beyond his extra-judicial statements, since a directed verdict was required under these circumstances.

Directed verdict issue

Francis Kinloch was a distant relative of appellant. Francis remembered that on the morning of September 12, 2012, he had finished working, and he was driving home when he noticed "there was an SUV pulled up inside of the woods." Francis walked towards the SUV, and he noticed the body of someone was "laying across the back seat to the front seat." Francis immediately called the police. Tr. 125, l. 17 – 127, l. 20. The decedent was a black male. He was slumped "over in the fetal position in the back seat, behind the passenger seat." Tr. 129, ll. 7-19.

When forensics tested the vehicle for fingerprints and DNA, none of the prints on the vehicle where the victim was found matched appellant. Further, none of the DNA samples taken could be attributed to appellant. Tr. 150, l. 8 – 153, l. 4; tr. 157, l. 2 – 159, l. 16. The bullet removed from the victim's head was "most consistent with being a .40 caliber Smith & Wesson bullet. Tr. 169, ll. 4-9. Such a gun was never found.

Maurice Lincoln was a friend of the victim. Maurice acknowledged that he had gone to the house of Christopher Tiller on two or three past occasions where the victim bought cocaine from Tiller. Tr. 175, l. 7 – 179, l. 7. Maurice did not know anything about the time of the victim's death other than the victim told him Tiller was having a party, and he wanted Maurice to go with him. Maurice declined the invitation. That was the last time Maurice heard from the victim. Tr. 179, l. 14 – 184, l. 1.

Captain Bobby Shuler admitted there was no DNA evidence, fingerprint evidence, or other evidence specifically linking appellant to the crime "as opposed to anyone else in that house." Captain Shuler essentially admitted the only evidence against appellant in this murder case was his own statements to the police, and the fact that appellant was staying at Tiller's house. Defense counsel would correctly argue that evidence appellant stayed with Tiller was not evidence he participated in an armed robbery and murder. Tr. 221, ll. 7-22.

The closest the state could tie appellant to the crime was the vague testimony of distant relative Malcolm Kinloch. Malcolm testified he was putting up a new mailbox on the afternoon the police thought the fatal shooting occurred. Malcolm noticed the SUV, and four men around the SUV. Malcolm "thought" one of the men was appellant. Tr. 229, l. 21 – 231, l. 18.

Malcolm remembered everything from there happened "real quick, very quick." He heard one of the men say: "Where's the money?" and then he heard a gunshot. Tr. 232, l. 13 – 233, l. 16. Malcolm "kind of froze," and he continued working on his mailbox so no one would think he heard or saw anything incriminating. Malcolm would repeatedly explain his lack of concern and attention to the solicitor: "It's none of my business, you know. Didn't want to. Didn't want nothing to do with it." Tr. 233, l. 20 – 234, l. 14.

Malcolm remembered a few days later the police came to his job to inquire if he had seen anything. Malcolm again repeated that he "really didn't want to talk about it. I didn't have nothing to do with it." Tr. 238, l. 4 – 239, l. 4. As for his neighbor, Chris Tiller, being a drug dealer, Malcolm would only admit that Tiller had a lot of cars coming and going from his house. Tr. 239, l. 10 – 243, l. 18.

The victim died from a single gunshot wound to the chest. The pathologist opined that the weapon was consistent with the deadly weapon being a pistol or a handgun. Tr. 268, ll. 1-17; tr. 271, ll. 9-13.

Appellant's statements to the police were played for the jury. Investigator James Riser testified that he obtained an arrest warrant for appellant after the final interview. The tape is on file for this Court's consideration. Tr. 292, ll. 2-21. Christopher Tiller was also arrested for murder, armed robbery and conspiracy. Tr. 293, l. 22 – 294, l. 4. The state did not contend that appellant was the shooter in this case, but maintained he was involved. The defense argued that appellant did not think that Tiller and the other men were serious about robbing the victim, and that appellant withdrew from any possible agreement to rob the victim before the robbery occurred. Tr. 116, l. 4 – 117, l. 12; tr. 121, l. 24 – 123, l. 25; tr. 124, ll. 14-17.

In his closing argument, the solicitor told the jurors that appellant told different "stories" to the police about what occurred but he focused on appellant's statement that he said: "Give it up. Give it up," before the shooting. The solicitor said appellant "backed off" that statement, and said he put the shotgun down. The solicitor stated that what appellant admitted to the police made him guilty of murder under the theory of accomplice liablity. Tr. 327, l. 14 – 330, l. 10.

Directed verdict motion

Defense counsel Falk argued that the state had the obligation to provide corroborating evidence of appellant's guilt *other than his own statements*. Defense counsel argued that other than appellant's statements to the police, all the police had was a "half identification that came from Malcolm Kinloch." That identification was very tentative as Malcolm only said "it might have been" appellant but he could not recall. Counsel argued there was no probative corroborating

evidence of appellant's statement, and therefore the court was required to direct a verdict. Tr. 308, l. 20 – 310, l. 7.

The solicitor essentially argued that Malcolm's testimony was sufficient to corroborate appellant's statements for purposes of the directed verdict motion. Tr. 310, l. 10 – 311, l. 18. The judge denied the directed verdict motion. Tr. 313, ll. 6-16. State's exhibits 43 and 44 are the interviews of appellant and they are before this court for review.

The solicitor argued appellant's various "stories" to the police proved his guilt. Tr. 327, l. 14 – 331, l. 21. Defense counsel conversely argued the state had only proved that appellant was at Tiller's house the day the crime occurred, and that was insufficient. Tr. 343, l. 14 – 345, l. 14. Defense counsel also reminded the jury that Patrick Kinloch, as the solicitor told them, had pled guilty, and admitted he was the one who shot the victim. Tr. 345, l. 9 – 346, l. 8.

Discussion

The state in this case did not offer corroborating evidence that appellant was responsible for the decedent's death. In State v. Williams, 321 S.C. 381, 384, 468 S.E.2d 656, 657-658 (1996), the Supreme Court held that "a conviction cannot be had on the extra-judicial confession of a defendant unless it is corroborated by the proof aliunde of "*corpus delicti*." The state must produce proof of the *corpus delicti* aside from the defendant's extra-judicial confession or statement. State v. Townsend, 321 S.C. 55, 57, 467 S.E. 2nd 138, 140 (Ct.App. 1996).

A directed verdict must be issued in favor of the defendant unless the *corpus delecti* is proven where the sole other evidence of guilt is the defendant's confession. State v. Lowery, 332 S.C. 261, 265 n.2, 503 S.E.2d 794, 796 n.2 (Ct.App. 1998). In Brown v. State, 307 S.C. 465, 467, 415 S.E.2d 811, 812 (1992), the Court held that the *corpus delecti* of murder consists of the death of the human being, and the criminal act of another causing death.

Here, defense counsel correctly argued the state had failed in its duty to present evidence of appellant's guilt beyond his extra-judicial statements.

Further, defense counsel argued that the investigators **led appellant** in getting him to say what they believed happened. Defense counsel earlier had also argued that appellant was led to believe or promised that his telling the police that they wanted to hear would be his best interests. Although investigator Gino Alteri denied making promises to appellant, the police did acknowledge that they told the solicitor's office that appellant had been very cooperative or "honest" with them -- in their opinion. This is impossible to reconcile with the solicitor's statements that appellant was telling the police "various stories." Tr. 245, l. 3 – 247, l. 24.

Because there was not any corroborating evidence of appellant's guilt where it was undisputed he was **not** the shooter, and the police admitted there was *no forensic or other evidence against appellant*, and since Malcolm's vague testimony was insufficient to corroborate appellant's extra-judicial statements, the judge erred by refusing to direct a verdict of acquittal.

2.

The court erred by admitting a shotgun seized from alleged accomplice Tiller when Tiller was hiding in a closet at another location since this shotgun was irrelevant to appellant's guilt, and any relevance it had was substantially outweighed by its unduly prejudicial effect.

Relevant facts

Investigator James Riser testified he knew the residence of Christopher Tiller was a haven for narcotics. Tr. 280, l. 7 – 281, l. 15. Riser testified that he interviewed Chris Tiller, Joshua Pruitt, Gilbert Grant, Patrick Kinloch, appellant, and Malcolm Kinloch during his investigation. Tr. 282, l. 24 – 283, l. 19.

Riser also testified that he interviewed appellant on September 19, 2012 and October 24, 2012. Tr. 285, ll. 7-11. Riser said that after the second interview he obtained a warrant for appellant's arrest for murder. Tr. 292, ll. 18-21.

The solicitor then asked Riser about Christopher Tiller's arrest for murder, armed robbery and conspiracy to commit armed robbery. Tr. 293, ll. 19-25. Riser testified that Tiller was arrested on October 26, 2012.

Riser said the police went to a two-story house owned by Tiller's aunt. Tiller explained that the windows and doors were open, and they could hear a television set inside. Riser said the police announced themselves, and did "a protective sweep of the house." They found Christopher Tiller hiding in a closet with a twelve-gauge shotgun by his side. Defense counsel objected to the relevancy of the shotgun when the state moved to introduce it. Defense counsel noted that the shotgun was not relevant because it was found at another location on a different date. Tr. 294, l. 6 – 297, l. 6.

Defense counsel further argued that any relevance the shotgun had was outweighed by its unduly prejudicial effect. The judge interrupted defense counsel during his objection, and he called the attorneys aside for a bench conference. The judge then allowed the shotgun to be introduced over appellant's objection. Tr. 294, l. 6 – 297, l. 6.

Discussion

Defense counsel correctly argued that the shotgun was not properly connected with the shooting incident in this case, and that it therefore was not relevant. Further, counsel correctly argued, that any probative value this shotgun had was outweighed by its unduly prejudicial effect.

This case is sufficiently similar to State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986). In McConnell, the victim was killed with a .357 caliber pistol. Here, the pathologist also testified, as seen above, that the decedent was likely killed with a handgun or pistol.

Nonetheless, the trial judge here allowed the solicitor to introduce *a shotgun* that was not connected to the murder, and had absolutely nothing to do with appellant, over defense counsel's relevance, and Rule 403, SCRE objection.

In McConnell, the Supreme Court held that the .22 caliber pistol, the .22 caliber bullets and two .25 caliber bullets were not properly connected with the incident. Therefore, they were irrelevant, incompetent, and raised spurious inferences of prior bad acts.

The shotgun held by Christopher Tiller was more prejudicial than the items ruled irrelevant in McConnell because they had the spurious tendency to link appellant to the assertion that Tiller was considering ambushing and killing the police with the shotgun on the day they entered the house looking for him. From this, the jury could draw the spurious inference that appellant was an equally bad person for having any association with Tiller, and that appellant was a bad and dangerous person who should be convicted regardless of the evidence.

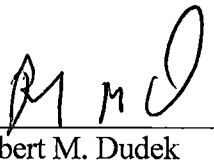
Our Supreme Court has held even the conduct of the **defendant** must be linked and have a nexus to be admissible to prove **his** intent and state of mind at the time of the murder. See, State v. Douglas, 308 S.C.508, 397 S.E.2d 98 (1990)(Defendant's actions the night before were not sufficient to show his state of mind the next day). See, also, State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001), (it was error to admit testimony the defendant had an argument on the evening before the murder, but the error was harmless).

Here, the unconnected evidence did not even involve appellant's bad actions but those of Christopher Tiller. Tiller's actions possibly may have been admissible – with a proper limiting instruction to consider only as to Tilleer -- if Tiller also was on trial, but here, it strained every extent of relevancy and probative value to attribute them to appellant during his trial. The incident involving Tiller hiding in a closet with a shotgun by his side was irrelevant, and highly prejudicial, and it should not have been admitted Cf. State v. Pagan, 389 S.C. 201, 631 S.E.2d 262 (2006). The shotgun being viewed by the jury when it was admitted into evidence was highly prejudicial in this strained "hand of one is the hand of all" case, and its admission cannot be viewed as harmless.

CONCLUSION

By reason of the foregoing arguments, an order of acquittal should be issued. In the alternative, appellant's conviction should be reversed and this case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of October, 2015.

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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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of October, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.