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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Anderson County

JAN 26 2016

R. Lawton McIntosh, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KYNDRA L. HOWELL,

APPELLANT

APPELLATE CASE NO. 2015-000722

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUE ON APPEAL..... 3

STATEMENT OF THE CASE 4

ARGUMENT..... 5

CONCLUSION..... 13

PETITION TO BE RELIEVED AS COUNSEL 14

TABLE OF AUTHORITIES

Cases

Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013) 10

Major v. S. Carolina Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 682 S.E.2d
795 (2009)..... 4

State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004)..... 10

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011)..... 10, 11

State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)..... 10

State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)..... 10

State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013)..... 9, 10

State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001)..... 10, 11

State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)..... 10

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)..... 9

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) 10

State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012) 11

State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014) 9

State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) 10

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984)..... 10

STATEMENT OF ISSUE ON APPEAL

Did the court err by failing to direct a verdict where the evidence established Appellant was merely present in her house where three men kidnapped, beat, and robbed the decedent in a separate room and was not an active participant since this evidence only raised a mere suspicion of Appellant's guilt that was insufficient to withstand a directed verdict motion?

STATEMENT OF THE CASE

An Anderson County Grand Jury indicted Appellant at the November 27, 2012 term of General Sessions for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. R. 347-352. Her case was called to trial on February 23, 2015 before the Honorable R. Lawton McIntosh, and a jury. R. 1. Assistant Solicitors Rame Campbell and Brantly Haigler represented the state, and Scott McElhannon represented Appellant. R. 1.

The jury acquitted Appellant of murder, but found her guilty of armed robbery, kidnapping, and the weapons offense. R. 328, l. 23 – 329, l. 22. Judge McIntosh sentenced Appellant to thirty years imprisonment for kidnapping, fifteen years consecutive for armed robbery, and five years consecutive for possession of a weapon during the commission of a violent crime. R. 339, ll. 17-22. The aggregate sentence handed down by the court was fifty years imprisonment.

On March 31, 2015, a hearing was held on Appellant's Motion for Resentencing. At the conclusion of the hearing, Judge McIntosh ordered Appellant's five year sentence for possession of a weapon during the commission of a violent crime be served concurrently as opposed to consecutively in order to comply with our Supreme Court's holding in Major v. S. Carolina Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 682 S.E.2d 795 (2009).¹ R. 340, l. 4 – 344, l. 11. This reduced Appellant's aggregate sentence to forty-five years imprisonment. This appeal follows.

¹ Shortly after Appellant was sentenced, Assistant Solicitor Campbell and Defense Counsel McElhannon received a memorandum from the South Carolina Department of Corrections. The Department of Corrections advised counsel that Appellant's sentence violated state law pursuant to our Supreme Court's holding in Major. As a result, defense counsel requested the court modify Appellant's sentence. R. 340, l. 4 – 341, l. 16.

ARGUMENT

The court erred by failing to direct a verdict where the evidence established Appellant was merely present in her house where three men kidnapped, beat, and robbed the decedent in a separate room and was not an active participant since this evidence only raised a mere suspicion of Appellant's guilt that was insufficient to withstand a directed verdict motion.

Relevant Facts

The state alleged at trial that Appellant, Zachary Gantt, Jeremiah Johnson, and Ezra Williams kidnapped, robbed, and murdered the decedent, Chandrakant ("C.J.") Patel. The state conceded at trial that Appellant was not present at the location where the decedent was shot and killed. It nonetheless proceeded under the hand of one is the hand of all theory of accomplice liability.

The decedent was reported missing by his son around midnight on the morning of July 2, 2012 after he had not been seen or heard from for several hours. R. 95, l. 23 – 96, l. 24. The Anderson County Sheriff's Office initially treated the case as a missing persons investigation. On July 3, 2012, the decedent's car was found on private land in a heavily wooded area in Fair Play, South Carolina. It appeared as if someone had attempted to hide the vehicle. R. 103, l. 10 – 104, l. 17.

Law enforcement obtained the decedent's telephone records from his son and discovered that shortly before the decedent was last seen, he had called Appellant. R. 180, l. 18 – 182, l. 14. Also, his telephone had last "pinged" in the area near Appellant's residence. R. 190, ll. 22-23. Consequently, an officer went to Appellant's house on July 3, 2012 and questioned her. Appellant told the officer that the decedent had called her multiple times on

the afternoon of July 1, 2012 and sought to have sex with her in exchange for money. Appellant said she declined the decedent's multiple offers and did not see him that day. R. 100, l. 5 – 101, l. 9.

Later on July 3, 2012, Kimberly Lomax, Appellant's friend, went to the Anderson County Sheriff's Office. She told investigators that Appellant had called her multiple times on the night of July 1, 2012 and told her "they were holding C.J. [the decedent] hostage in her bedroom." R. 186, l. 21 – 187, l. 11; See R. 118, l. 15 – 119, l. 6.

Based on the information obtained from Lomax and the decedent's telephone records, law enforcement obtained a search warrant for Appellant's residence. The officers did not discover anything of evidentiary value inside the house. However, they did notice that the house had three security cameras mounted to the front. Consequently, law enforcement contacted the landlord who owned the residence and learned that the cameras recorded to a "DVR box" that was stored in a closet inside the home. R. 191, l. 3 – 193, l. 23.

Investigators ultimately obtained a second search warrant for Appellant's residence and seized the DVR box that contained the recorded surveillance footage. R. 193, l. 24 – 194, l. 15. Investigator Danny Barton reviewed the footage in his office and claimed it showed Appellant and the decedent entering Appellant's house on the afternoon of July 1, 2012. R. 194, l. 16 – 195, l. 6. In addition to the decedent and Appellant, two black males were also seen on the footage. They were later identified as Zachary Gantt and Jeremiah Johnson. R. 195, ll. 9-19. Based on this evidence, Appellant, Gantt, and Johnson were all arrested and charged with kidnapping. R. 196, ll. 4-8.

Upon his arrest, Gantt gave two statements to law enforcement confessing to his role in the kidnapping, armed robbery, and murder of the decedent. He also implicated Appellant, Johnson, and Ezra Williams. R. 201, ll. 8-14. As a result of Gantt's statements, Appellant, Gantt, and Johnson were served with additional warrants for armed robbery, murder, and possession of a weapon during the commission of a violent crime. Williams was also arrested and charged with all four offenses. R. 208, ll. 3-12.

Gantt led law enforcement to the decedent's body on July 11, 2012, eight days after his car was found. It was located in a heavily wooded area approximately one hundred yards from the roadway and a few miles from the Georgia border. R. 108, ll. 1-24. The body was severely decomposed. The forensic pathologist testified that the decedent died from a single gunshot wound to the head. The decedent also had several burns on his abdomen and numerous lacerations on his legs. R. 80, l. 1 – 88, l. 6.

Gantt testified against Appellant at trial. He had already pled guilty, but his sentencing was deferred until after he testified against Appellant, Johnson, and Williams. Gantt told the jury that he was incarcerated for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. When asked by the solicitor, Gantt claimed that none of his charges had been reduced.² R. 130, ll. 9-23.

On the afternoon of July 1, 2012, Gantt was at Appellant's house playing videogames. At some point, Appellant arrived at the residence with the decedent and, shortly thereafter, Johnson also arrived at the house. Gantt alleged that after the decedent went inside the house, Appellant and Johnson called Gantt over to the carport where they

² In fact, this statement was false. This Court may take judicial notice that Gantt pled guilty to voluntary manslaughter and was sentenced to only twenty-two years imprisonment. For whatever reason, the state failed to correct Gantt's false testimony.

were standing. He claimed Appellant told them “that the man [the decedent] had some money” and that Johnson suggested they rob him. R. 138, l. 2 – 141, l. 9.

After this conversation, the three entered the house and Appellant went into the kitchen while Johnson and Gantt went to the bedroom where the decedent was located. Gantt testified that Johnson “grabbed” the decedent “and pulled him to the ground.” Gantt held the decedent down while Johnson tied his hands behind his back with a telephone cord. According to Gantt, Johnson then took the decedent’s wallet from his pocket and removed about seventy dollars in cash and several bank cards. R. 141, l. 20 – 143, l. 22. For the next several hours, Johnson and Gantt continued to hold the decedent in the bedroom and beat him in effort to obtain the “PIN numbers” for his bank cards. At some point, the decedent told the men his “PIN numbers” and Johnson left the home in the decedent’s car to verify that the numbers were correct. When Johnson returned from the store, he told Gantt “that the man [the decedent] had given some wrong numbers.” The men then resumed beating the decedent, but he continued to state the same numbers. R. 144, l. 9 – 146, l. 13.

Gantt testified that Appellant remained in the kitchen while all this occurred and that she never entered the bedroom. R. 146, ll. 14-16.

Several hours later, Ezra Williams showed up at the house and became involved. Williams began to beat the decedent as well and when “he didn’t get [anywhere] with” his fists, Williams sprayed the decedent with bug spray. Williams later heated a knife on the stove and placed the hot blade on the decedent’s stomach multiple times. Eventually, Johnson decided he wanted to kill the decedent. The three men walked the decedent through the side door of the house, put him in the backseat of his own car, and drove out to a wooded area a few miles from the Georgia border. After the three men took the decedent

into the woods, Williams shot him in the head. R. 1148, l. 9 – 158, l. 14. They allegedly returned to Appellant's house in the decedent's car and hours later, just before daybreak on the morning on July 2, 2012, disposed of the decedent's car in Fair Play, twenty-two miles from where his body was found. R. 158, l. 16 – 160, l. 16.

Gantt maintained that Appellant remained in the kitchen of her house throughout the entire event and never tried to intervene. R. 146, ll. 14-19; R. 151, l. 19 – 152, l. 2; R. 152, ll. 14-17; R. 154, ll. 15-17.

At the conclusion of the state's case, Appellant moved for a directed verdict on all counts. Defense counsel argued that Appellant was not responsible or involved in the kidnapping, armed robbery, or murder of the decedent. R. 244, ll. 16-25. The court denied the motion after finding there was direct and substantial circumstantial evidence of Appellant's guilt sufficient to warrant submitting all four indictments to the jury. R. 245, ll. 1-4.

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict where the evidence presented by the state only raised a mere suspicion of Appellant's guilt. The state's evidence established Appellant was merely present in the home where three others kidnapped, beat, and robbed the decedent and was not an active participant. Moreover, the state failed to present any direct or substantial circumstantial evidence of Appellant's guilt.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014) (*cert. granted* March 4, 2015) (citing State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013)); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)

(citing State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000).

When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict of acquittal unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is proper when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984). Our courts define suspicion as “a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)). The prosecution must prove the identity of the defendant as the person who committed the charged offense beyond a reasonable doubt. Lane, 406 S.C. at 121, 749 S.E.2d at 167 (citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

In Lollis, the Court directed a verdict of acquittal when the state failed to present any direct or substantial circumstantial evidence that Lollis was involved in setting fire to his home. The Court found the evidence that Lollis’ wife had admitted to the arson, that he had placed valuables in storage prior to the fire, that he possessed a key to the storage unit, and

that he allegedly had financial troubles was insufficient to withstand a directed verdict motion. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held Odems was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that he was involved in the burglary. The Court found that, although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the burglarized home claimed she saw two, not three as were found in the car. Moreover, fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car, and one of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51.

In Bostick, the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt finding instead that the state's evidence was capable of producing only a mere suspicion of his guilt. Id. at 141, 708 S.E.2d at 778. Although the police found items belonging to the decedent in a burn pile behind a house belonging to Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. In addition to this evidence, the state also presented evidence that gasoline was used to start the fire at the decedent's home and Bostick had a chemical pattern on his shoes that matched gasoline and, DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but could not be said to match the decedent. Id. at 142, 708 S.E.2d at 778.

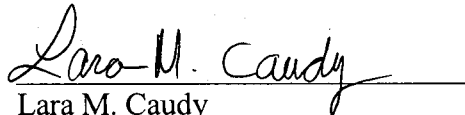
In this case, the state failed to present any direct evidence or substantial circumstantial evidence tending to prove Petitioner's guilt. The evidence presented at trial revealed that Appellant had telephone contact with the decedent on the day of his death regarding exchanging sex for money, was present with the decedent at her house that evening, allegedly told Johnson and Gantt that the decedent had money, and was present in the kitchen while the men kidnapped, beat, and robbed the decedent in a separate bedroom. However, this evidence merely raised a suspicion that Appellant was guilty.

At most, this evidence established that Appellant was merely present in the home where the kidnapping and robbery occurred. There was no evidence that Appellant was an active participant or had knowledge of what occurred in the bedroom. Thus, this evidence was insufficient to survive a directed verdict motion. Consequently, the trial court erred by failing to direct a verdict of acquittal in Appellant's favor.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal in her favor for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of January, 2016.

STATE OF SOUTH CAROLINA

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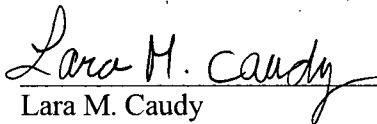
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kyndra L. Howell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before the Honorable R. Lawton McIntosh that was held on February 23-25, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Kyndra L. Howell.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of January, 2016.

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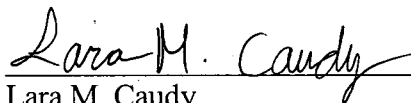
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-Billed Indictments;
- (2) Complete Trial Transcript dated February 23-25, 2015.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 26, 2016



Lara M. Caudy
Appellate Defender

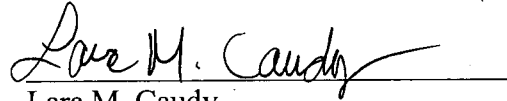
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 26, 2016

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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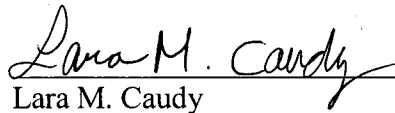
V.

KYNDRA L. HOWELL,

APPELLANT

CERTIFICATE OF SERVICE

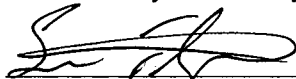
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Kyndra L. Howell, #342120 at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 26th day of January, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.