ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or Mouzon malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was indicted by the Clarendon County Grand Jury for the offenses of murder and burglary in the first degree. His case was called to trial on January 6, 2015 before the Honorable W. Jeffery Young, and a jury. Appellant was tried with co-defendant Letroy Samuels. Eleazer Carter represented appellant. Harry Devoe represented co-defendant Samuels. R. 1.

At the conclusion of the trial on January 9, 2015 the jury found appellant guilty on both charges. The jury acquitted co-defendant Samuels of both charges. R. 496, ll. 1-13. Judge Young sentenced appellant to thirty-five years for murder, and thirty years, concurrent, for burglary in the first degree. R. 505, l. 22 – 506, l. 5.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or *Mouzon* malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein.

Relevant Facts

Appellant was only nineteen-years-old at the time the decedent tragically died from a punch to his head two months after he was hit. R. 313, ll. 2-6. The decedent was fifty-years-old, he was only 5'9 and he weighed 191 lbs. He died of a closed head injury two months after he was hit in the head. The decedent was able to open his eyes in the hospital in response to some stimulus, but he never regained consciousness in those two months. The state stressed during the trial of the fact that no one attempted to assist the decedent after he was injured during the party because they did not "want to get involved." While the morality of that attitude is certainly subject to question, it did not, as will be seen infra, provide evidence that the injury to the decedent was caused by the *mens rea* of malice aforethought. R. 195, l. 9 – 199. l. 14.

Appellant remembered that there was a lot of drinking going on during the party at the duplex that fatal day. Appellant remembered that a woman, Barbara, wanted him to get her another beer. Appellant said he was not able to get Barbara another beer because the decedent "stepped outside and I guess he got mad with me talking to Barbara, he was kind of drunk, told me he did not want any white people around his house." Appellant said: "I really did not know how to respond to what he said so I just sat there and tried to process it for a second . . .then I heard her [Barbara] in there saying 'you do not go out there with that gun.'" R. 325, l. 20 – 326,

l. 19. Appellant said he heard this statement because the doors "are not thick . . . my heart dropped sir, I stepped off of the porch and got to an area in the yard where if he did come outside with a gun I could run." R. 326, l. 14 – 327, l. 4.

Appellant remembered that Montag Webb, who pled guilty to voluntary manslaughter and burglary in this case, became angry with the decedent's statement that: "I do not want no white people at my house." Montag had a white father, and appellant testified that it was Montag who punched the decedent. R. 333, l. 21 – 334, l. 12.

Appellant remembered that co-defendant Samuels and Kevin Slater immediately ran when Montag hit the decedent. Appellant was in shock at the time, and he recalled that Montag dragged the decedent by his arms back into the house. Appellant remembered the door to the other side of the duplex was open but he did not enter. Appellant testified that he never touched the decedent during the party that evening. R. 335, l. 6 – 348, l. 1.

The testimony of Montag Webb, who pled guilty to voluntary manslaughter and burglary in the decedent's death, was incredible in its inconsistency, its admissions of lies to the police, and Montag's admission that he went into his "thief mode" when the decedent was knocked out by the punch. Montag admitted he ransacked the decedent's apartment looking for things to steal. In the light of his incredible testimony, Montag would find time to deny the he hit the decedent even though he pled guilty to voluntary manslaughter and burglary. App. 57, ll. 9-21.

Montag testified that appellant's nickname was "J White." He said he was "cool" with appellant. R. 76, ll. 7-23. Co-defendant Samuels' nickname was "Sin." R. 56, l. 22 – 57, l. 4. Montag admitted that he never saw appellant hit the decedent. However, he claimed appellant was in the duplex at the time the decedent fell to the floor. R. 68, l. 18 – 72, l. 24. Montag saw blood on the decedent's face but "I did not see what happened to him." R. 73, ll. 6-15.

Montag did admit that he looked through the decedent's wallet and went through his pockets as he lay helpless on the floor. R. 73, ll. 6-15. Montag then went into his "thief mode." He wanted to steal whatever he could as he ransacked the duplex -- flipping over mattresses and looking in dresser drawers. Most of all Montag remembered: "I was looking for a gun that they said he [the decedent] had and money." However, Montag said he never hit the decedent and He maintained: "I did not touch his body" while going through the decedent's pocket. R. 101, l. 10 – 103, l. 17. Montag wanted the decedent's gun once he heard the decedent was armed. R. 130, l. 23- 131, l. 21.

Montag claimed appellant said in advance that he was going to hit the decedent. However, he told defense counsel for appellant on cross-examination that appellant liked to brag and lie about being tough. R. 112, l. 19 – 113, l. 15.

Kevin Slater was also at the party on May 26, 2013 where people were drinking heavily, and were "in and out of the duplex." They also were making "beer" and liquor runs during the party. R. 150, l. 13 – 155. l, 10.

Slater remembered that the decedent was keeping to himself during the party. "He did not really mingle with us." Slater admitted the decedent got upset with the noise from the party, and told the people partying to keep the noise down. R. 155, l. 5 – 157, l. 18.

Slater maintained that Montag sat down on the steps beside him, and that appellant came up onto the porch. Slater claimed: "I heard a smacking noise . . . I looked back and the guy was laid out." Slater testified that he left immediately when he saw the decedent on the floor. He acknowledged no one assisted the decedent, and that the decedent died two months later. R. 162, ll. 1-25; R. 182, l. 2 – 184, l. 17. Slater repeatedly said he just "did not want to be

involved," and that was also the reason no one tried to help the decedent. R. 183, l. 7 – 184, l. 25.

Co-defendant Samuels testified, and he claimed he saw appellant hit the decedent one time that evening. The decedent was knocked out with that one punch. Samuels allegedly did not see anyone drag the decedent inside the house after he was knocked out. R. 378, ll. 1-19.

Samuels testified: "I saw one punch and I left. And that is the truth." However, Samuels claimed he saw Montag and appellant later with a gun, a wallet and a cellphone. Samuels also maintained that appellant pointed a gun at him, and told him not to tell anyone what happened. R. 400, l. 24 – 402, l. 24.

On cross-examination Samuels admitted he was an alcoholic and a heavy drug user. He acknowledged that this "event" was "the saving grace to save your life." Samuels stuck to his story that "Jonathan struck Mr. Wimberly." R. 403, l. 4 – 409, l. 25.

Directed verdict motion

Defense counsel earlier moved for a directed verdict on the murder and burglary counts. Defense counsel argued *even if it was assumed appellant punched the decedent during the party there was no evidence the decedent was hit with malice aforethought.* At worst, the evidence showed appellant "punched the guy one time." Likewise, defense counsel argued there was no evidence appellant entered the home, and if he did enter the home that he did so with intent to commit a crime therein. The judge denied the directed verdict motions. R. 302, l. 15 – 311, l. 14.

Other issues that should be decided on appeal

Counsel would be remiss, for the sake of judicial economy, not to point out unpreserved errors that would have to be litigated in post-conviction relief if this Court does not reverse on

direct appeal. Witness Leon Coleman claimed that appellant said he was going to rush the decedent for money during the party. When defense counsel for appellant went to impeach Coleman for his bias against appellant -- based on the fact that appellant was having an affair with his girlfriend, and that they also had a child together -- the solicitor objected on the grounds of relevance. The judge sustained the objection and instructed Coleman not to answer the question. The answer was not proffered so the issue of this obviously relevant evidence of bias being excluded was not preserved. The fact that Montag was Coleman's brother-in-law also increased the reason for Coleman to lie about appellant being the perpetrator even though Montag had already pled guilty. R. 48, l. 5 – 51, l. 6.

On cross- examination of Montag defense counsel asked Montag to admit that the two teardrops tattoos -- and the "K" tattoo -- meant that he was a killer or a murderer. Montag lamely claimed the "K" tattoo stood for "his cousin," and the two teardrop tattoos: "They stand for my momma and daddy." The objection to the tattoos inquiry was sustained, and counsel again did not make a proffer, or otherwise attempt obvious impeachment on the teardrop tattoos at a minimum. R. 87, l. 13 – 88, l. 6.

On cross-examination by the solicitor of appellant he repeatedly pitted witnesses against appellant in the presence of the jury. He made appellant say that Leon Coleman was a liar and "Taggy" was also a liar. When the solicitor improperly asked appellant: "So everybody who came up here and said that you hit that old man is a liar?" Appellant correctly responded: "I do not think anybody [at that point during the trial before co-defendant Samuel's testimony] said that I hit him." R. 354, l. 10 – 355, l. 2.

Without objection, the solicitor also had appellant admit that he only made one statement to law enforcement, and that he refused to give another statement *because he had an attorney.*

The solicitor badgered appellant with the fact that he refused to talk to the police after he got an attorney, and he invoked his right to silence. R. 358, l. 9 – 359, l. 6.

Co-defendant Samuels also testified, without objection, that he had seen appellant *hit other people* in the past, and that "I know he [appellant] was a fighter." R. 382, l. 8 – 383, l. 19. For the sake of judicial economy these post-conviction issues should be considered when determining if appellant received anything approaching a fair trial.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "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 in the defendant's favor 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 appropriate 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); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). 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; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In this case the worst evidence against appellant was if the jury believed he punched the decedent a single time. Even if the jury believed that evidence, it did not provide any evidence appellant acted with malice aforethought, or even Mouzon[1] malice (such great recklessness and wantonness as to exhibit a total disregard for the lives of the decedent or others). There was no evidence appellant killed the decedent with malice aforethought, and he was entitled to a directed verdict on the murder charge.

Likewise, appellant was entitled to a directed verdict motion on the burglary charge because even if the jury believed appellant entered the duplex during the party without consent, there was no evidence he did so with the intent to commit a crime therein. See Pinckney v. State, 368 S.C. 502, 629 S.E.2d 367 (2006). In short, the state failed to provide any direct or substantial circumstantial evidence that appellant killed the decedent with malice aforethought, or that he entered the decedent's home without consent **and** with the intent to commit a crime therein. Even if the jury believed appellant hit the decedent because of his racially charged statement, or because the decedent was armed with a gun and appellant was scared, it did not provide any evidence this crime was murder: The killing of another human being with malice aforethought.

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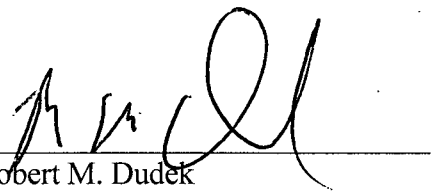
[1] State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

CONCLUSION

By reason of the foregoing arguments, this Court should issue verdicts of acquittal as to both charges.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

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IN THE COURT OF APPEALS

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THE STATE,

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APPELLATE CASE NO. 2015-000091

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Cody Newman states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on January 5-9, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, he asks the Court to relieve him as counsel for Jonathan Cody Newman.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

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APPELLATE CASE NO. 2015-000091

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment;
(2) Entire trial and pre-trial transcript.

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

May 27th, 2016

Robert M. Dudek
Chief Appellate Defender

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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."

May 27, 2016

Robert M. Dudek
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STATE OF SOUTH CAROLINA

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JONATHAN CODY NEWMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, 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 Jonathan Cody Newman, #362601 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of May, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.