THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Honorable James R. Barber, III, Thirteenth Circuit Court Judge

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Appellate Case No.: 2016-001302

The State, Respondent

v.

James Damon Lanar White, Appellant.

APPELLANT'S FINAL BRIEF

[redacted]

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2. Did the court err in failing to exclude from evidence photographs that were not relevant to the case and their prejudicial effect vastly outweighed any probative value they offered?
3. Did the trial court err in its discretion when it denied Appellant's motion for a directed verdict when the State failed to provide direct evidence or substantial circumstantial evidence which tended to prove the guilt of Appellant?

STATEMENT OF THE FACTS

On January 20, 2014 at approximately 11:30 p.m., an armed African-American male robbed the Olive Garden Italian Restaurant located at 3290 N. Pleasantburg Drive in Greenville, South Carolina. (R. p. 480, lines 7-12). The robber entered through the restaurant's front doors and made his way through the closed restaurant and came upon employees Terrell Pugh and Appellant washing dishes. (R. p. 483, lines 21-25; p. 484, lines 1-7). The robber ordered Appellant and Pugh to get on the ground. (R. p. 452, lines 8-14). The robber then encountered the night manager, Aaron Kretzschmar, in the hallway on the way to the restaurant's office. (R. p. 306, lines 24-25; p. 307, lines 1-11). Kretzschmar was struck in the head before being led to the office to open the safe. (R. p. 306, line 24-25; p. 307, lines 1-11). The robber continued threatening and assaulting Kretzschmar while he opened the safe and emptied an indiscernible amount of the safe's $3,500 into a plastic bag. (R. p. 308, lines 23-25; p. 309, line 1). The robber exited through the front doors, leaving stray dollar bills in various amounts strewn throughout the restaurant and outdoors. (R. p. 482, lines 6-9). Kretzschmar remained in the office until police arrived. (R. p. 310, lines 24-25; p. 311 line 1; p. 483, lines 5-7).

Responding officers found a rock near the restaurant's entrance and a broken front door window. (R. p. 482, lines 10-12). A rag was also found in the doorway. (R. p. 482, lines 16-18). At the back of the restaurant, police found Pugh and Appellant still on the ground in the fetal position with their hands covering their heads. (R. p. 483, lines 22-25; p. 327, lines 1-6).

Kretzschmar, Pugh, and Appellant all gave the description of the robber as an African American male wearing a hooded brown and black camouflage sweatshirt. (R. p.

329, lines 7-25; p. 456, lines 1-21; p. 491, lines 23-25; p. 492, lines 1-3). Damion Riley, the last employee to leave the restaurant before the robbery, stated that upon leaving, a rag had not been in the doorway and the door had closed behind him. (R. p. 383, lines 2-4).

On January 22, 2014, Appellant arrived at the local law enforcement center to give a statement on the robbery. When he arrived, Appellant was initially questioned about whether he had driven himself to the station with a suspended license. (R. p. 7-8; p. 203, lines 4-24). After this questioning, Appellant wrote a statement and handed over two cellphones to the police to search. (R. p. 8; p. 61, lines 12-17; p. 62, lines 20-25; p. 63, lines 1-8). Appellant was subsequently arrested for driving under suspension. (R. p. 8; p. 200, lines 10-14). Police searched the two phones and found pictures of co-defendant Gadsden holding a large amount of cash. Appellant moved to suppress these photographs and all evidence found on the two cellphones. (R. p. 3). The court heard Appellant's motion on April 11, 2016. (R. p. 42). The court denied Appellant's motion to suppress the evidence found in the two cellphones. (R. p. 1).

At trial, Appellant again objected to the admission of the photographs found on the two cellphones. (R. p. 605, lines 6-18; p. 675, lines 1-6). Appellant argued that the photographs were being introduced to prejudice Appellant to the jury. (R. p. 758, lines 23-25; p. 604-605). The court allowed the evidence to be admitted subject to Appellant's previous objections. (R. p. 67, lines 1-6). Appellant was later found guilty of armed robbery, conspiracy to commit armed robbery, and two counts of kidnapping. (R. p. 969, lines 20-25; p. 811, lines 1-3).

STANDARD OF REVIEW

"[The Court of Appeals] review[s] factual findings underlying a motion to suppress for clear error and legal determinations *de novo*." *United States v. Gray,* 491 F.3d 138, 143–44 (4th Cir. 2007) (*citing Ornelas v. United States*, 517 U.S. 690, 699 (1996)). Generally, the burden of proof is on a defendant who seeks to suppress the evidence. *United States v. Dickerson*, 655 F.2d 559, 561 (4th Cir. 1981). Once the defendant establishes a basis for his motion to suppress, the burden shifts to the government to prove by a preponderance of the evidence that the challenged evidence is admissible. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *United States v. Matlock*, 415 U.S. 164, 178 (1974).

A warrantless search violates the Fourth Amendment if the Government cannot prove that it falls under an established exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). A suspect's voluntariness must be determined by the totality of the circumstances when voluntary consent is used to justify a warrantless search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 218 (1973). A suspect's consent to search property he owns or controls may not be deemed voluntary consent if officers engage in any type of hostile, coercive or intimidating behavior. *Schneckloth*, 412 U.S. at 233. Unless an exception to the warrant and probable cause requirements applies, "[e]vidence seized in violation of the Fourth Amendment is subject to suppression under the exclusionary rule . . . the overarching purpose of which is 'to deter future unlawful police conduct.'" *United States v. Andrews*, 577 F.3d 231, 235 (4th Cir.2009) (*quoting United States v. Calandra*, 414 U.S. 338, 347–48 (1974)).

The South Carolina Rules of Evidence state that irrelevant evidence is inadmissible. *See* Rule 402, SCRE. In *State v. Wiles*, the South Carolina Supreme Court stated, "Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009) (*citing* Rule 401, SCRE and Rule 402, SCRE)). Where the evidence is shown to be relevant, the evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis. *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009).

When the State fails to produce substantial circumstantial evidence that a defendant committed a particular crime, the defendant is entitled to a directed verdict. *State v. Rothschild*, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984). The court shall direct a verdict in Appellant's favor if there is a failure of competent evidence tending to prove the charge in the indictment. Rule 19(a), SCRCrimP.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE WHEN THE EVIDENCE WAS OBTAINED THROUGH A WRONGFUL SEARCH AND SEIZURE OF CELLPHONES BECAUSE APPELLANT ONLY GAVE CONSENT TO SEARCH THE CELLPHONES AFTER HE HAD BEEN THREATENED WITH ARREST FOR UNRELATED ACTS.

The Fourth Amendment of the United States Constitution provides protection against unreasonable searches and seizures. U.S. Const. amend. IV. Searches absent a warrant based upon probable cause are *per se* unreasonable and are limited to defined exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent to search is one exception to the warrant and probable cause requirement; however, the consent is invalid if it is not voluntarily given. *Id.* at 222. "Whether the consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances.'" *State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) *(citing Bustamonte*, 412 U.S. at 219, 225-26). The totality of the circumstances analysis turns on the characteristics of the accused and the manner of the questioning. *Bustamonte*, 412 U.S. at 226. Moreover, characteristics of the accused include the vulnerable subjective state of the consenter. *Id.* at 228. The prosecution carries the burden of proving that the consent to search was voluntarily made. *Id.* at 222.

In the present case, Appellant did not voluntarily give consent to search the cellphones in his possession. On January 22, 2014, police requested that Appellant come to the law enforcement center (LEC) for an interview regarding the robbery. (R. p. 3-6; p. 55, lines 15-20). Investigators Ricky Motes and David Weiner knew that Appellant's driver's license had been suspended when they requested he come to the LEC. (R. p. 7,

lines 4-11). The investigators first asked Appellant how he traveled to the LEC. (R. p. 79-80, lines 12-18). The investigators informed Appellant that they have cameras in the parking lot and knew he had been driving. (R. p. 122, lines 19-24). Appellant was arrested for driving under suspension (DUS) after the interview. (R. p. 118; 124-125)

The United States Supreme Court has found consent to search involuntary when that consent was induced by deceptive practices by law enforcement that were presented as requests for submission to a lawful authority. *Bustamonte*, 412 U.S. at 233 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921)). In *Bumper*, police searched a woman's house without a warrant after gaining her consent by informing her that they had obtained a warrant to search. 391 U.S. at 550. The Supreme Court held the woman's consent invalid because "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Id.* at 548.

Although some of the facts in *Bumper* are distinguishable from the case at hand, the spirit of the Court's reasoning is applicable to Appellant's case. The investigators requested that Appellant come to the station under the guise that the encounter would merely be a routine formal witness statement. However, the investigators' immediate questioning concerning DUS, and Appellant's eventual arrest for DUS, suggest that the investigators were not merely seeking a routine formal witness statement as they suggested. These facts, like *Bumper*, indicate that Appellant's consent to search was induced by deceptive practices by law enforcement, and therefore, Appellant's consent was involuntarily given.

Seizure or detainment is also a factor considered in determining whether consent to search is voluntary. *Bustamonte*, 412 U.S. at 226. A seizure occurs when a reasonable man in the person's position would not feel that he was free to leave. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). In the present case, a reasonable person would not have felt free to leave in Appellant's situation because the investigators first confronted Appellant about driving with a suspended license.

Ultimately, the officer's immediate confrontation about DUS rendered Appellant to reasonably feel that he did not have the right to refuse consent. Therefore, Appellant did not give voluntary consent to search the cellphones.

II. THE COURT ERRED IN FAILING TO EXCLUDE FROM EVIDENCE PHOTOGRAPHS THAT WERE NOT RELEVANT TO THE CASE AND THEIR PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE THEY OFFERED.

The court erred when it allowed the State to introduce into evidence, over Appellant's objections, photographs which depicted cash and co-defendant Gadsden holding cash. (R. pp. 987-997). The photographs were not relevant to the case, and therefore were not admissible. *See* Rule 402, SCRE. Even if the photographs were relevant, their probative value was substantially outweighed by the danger of unfair prejudice to Appellant. Rule 403 of the South Carolina Rules of Evidence states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The court improperly failed to exclude the photographs based upon their relevancy and their prejudicial effect.

1. The photographs admitted into evidence were not relevant to the case and should have been excluded.

The State failed to establish the relevance of the photographs offered into evidence that depicted a large amount cash and co-defendant Gadsden holding the cash. The State failed to show any connection between the photographs and the robbery in question. The best evidence that the State could offer to connect the two was that the pictures were taken shortly after the robbery. However, the State failed to show that the cash in the photographs was connected to the robbery. Additionally, the State failed to demonstrate how the pictures are in any way probative of Appellant's involvement in the crime. The photographs were not connected to the robbery, and therefore did not tend to show that Appellant was involved in the crime.

The South Carolina Supreme Court stated, "[e]vidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." *State v.* Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009) (*citing* Rule 401, SCRE; Rule 402, SCRE)). In this case, the State failed to show evidence connecting the photographs to the robbery. Therefore, the photographs were not relevant and consequently not admissible, and the court should have excluded them. *See* Rule 402, SCRE.

2. The photographs' prejudicial effect substantially outweighed their probative value, and they should have been excluded.

Even if the photographs were relevant to the case, the court should have excluded them based on their minor probative value and substantial prejudicial effect against Appellant. According to the rules of evidence, the court may exclude evidence when its prejudicial effect substantially outweighs its probative value. *See* Rule 403, SCRE.

The State failed to establish that the photographs were connected to the crime. Additionally, the State's photographs failed to demonstrate the guilt of Appellant or his co-defendant. The State failed to show that the photographs tended to establish or make more or less probable the matter in controversy. Therefore, even if the photographs were somehow relevant to the case, their probative value was very low.

More importantly, the photographs had a prejudicial effect against Appellant. Several of the photographs showed Gadsden, a young black male, holding a stack of money. These photographs were unnecessarily inflammatory in a trial which involved stolen cash and a black suspect. The Court allowed the State to introduce these

photographs over Appellant's objectuons that the State was introducing the photographs to prejudice the jury against him. (R. p. 605, lines 3-5).

In fact, the photographs were highly prejudicial to Appellant despite their insignificant or even nonexistent probative value. The prejudicial effect of the photographs substantially outweighed their probative value and therefore, they should have been excluded from evidence at trial.

III. THE TRIAL COURT ERRED IN ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE FAILED TO PROVIDE DIRECT EVIDENCE OR SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE WHICH TENDED TO PROVE THE GUILT OF APPELLANT.

According to *State v. Rothschild*, a defendant is entitled to a directed verdict when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime. 351 S.C. 238, 243, 569 S.E.2d 346, 348. Additionally, a defendant is entitled to a directed verdict when the evidence merely raises a suspicion that the defendant is guilty. *State v. Schrock,* 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984). In this case, the State failed to produce direct or substantial circumstantial evidence which indicated the guilt of Appellant. At best the State's evidence portrayed Appellant's behavior as suspicious. According to *State v. Logan,* proof involving circumstantial evidence has failed if it merely portrays Appellant's behavior as suspicious. 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). Therefore, the evidence against Appellant did not tend to prove his guilt, and the Court should have directed the verdict in favor of Appellant.

1. **The State failed to show any direct or substantial circumstantial evidence which reasonably proved the guilt of Appellant.**

The State did not produce any direct evidence which reasonably proves the guilt of Appellant. Additionally, the State failed to produce any substantial circumstantial evidence which proves the guilt of Appellant. According to *State v. Pinckney,* the State must produce direct or *substantial* circumstantial evidence showing the guilt of the accused in order to submit the case to the jury. 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). Otherwise, Appellant is entitled to a directed verdict in his favor from the court.

The State claimed that the robbery was an inside job planned and enacted by Appellant and his co-defendant Gadsden. However, the only evidence that supported this theory was a white and green washcloth caught in one of the front doors when the police arrived. (R. p. 383, lines 1-16). The State claimed that Appellant propped the door open with the washcloth so that the robber could gain entry to the building. (R. p. 934, lines 9-19, p. 935, lines 1-4). However, one windowpane on the front door had also been broken, suggesting that the robber broke in on his own. (R. p. 482, lines10-13). Additionally, Appellant was working in the kitchen when the robber arrived and had not left the kitchen for quite some time. (R. p. 483, lines 21-24). Grady Pugh, Appellant's co-worker, said that Appellant had been in the kitchen washing dishes with Pugh and had not left the kitchen area since the restaurant closed. (R. p. 311, line 9). When police arrived, Appellant was on the floor in the kitchen alongside Pugh, and neither of them had moved since the robber told them to get on the ground. (R. p. 491, lines 18-22). Thus, Pugh's testimony placed Appellant away from the entranceway before the robbery.

Therefore, the State's evidence failed to show that Appellant was guilty. The State was unable to show direct evidence that Appellant committed the crimes for which he was tried. Additionally, the State did not produce substantial circumstantial evidence which indicated Appellant's guilt.

2. The State's evidence only raised a suspicion that Appellant was guilty.

The State's evidence at best raised a suspicion that Appellant is guilty. The photographs that depict Gadsden holding a large sum of cash while wearing a brown camouflage jacket are suspicious, but nothing more. These photographs do not prove that Gadsden was in fact the robber. Furthermore, even if Gadsden is guilty of the crime, the

photographs do not in any way show that Appellant conspired with Gadsden. At best, these photographs raise a suspicion of possible guilt.

Furthermore, the text messages and calls made from Appellant's phone to Gerald Gadsden, the suspected robber, only demonstrate that Appellant and Gadsden knew one another. None of the text messages between Appellant and Gadsden or the text messages made to others about Gadsden indicate any planning of the robbery. It is entirely possible that Gadsden, if he did indeed rob the Olive Garden, robbed it without Appellant as an accomplice.

The State's evidence did not create anything more than a fleeting suspicion that Appellant was involved in this robbery. The rag stuck in the door could very reasonably have been placed there without Appellant's involvement, or merely by accident. Additionally, the rag stuck in the door does not prove that the robbery was an inside job at all. The robber would not have needed to break the window if he had planned on having somebody inside prop the door open. The rag found propped in the door is not substantial evidence and cannot be relied upon to establish the guilt of Appellant. *See Logan,*405 S.C. at 99, 747 S.E.2d at 452 (holding that proof involving circumstantial evidence has failed if it merely portrays Appellant's behavior as suspicious).

3. The Court should have directed the verdict in favor of Appellant.

The State failed to produce any evidence which pointed conclusively to the guilt of Appellant. The State did not show evidence to establish that Appellant conspired with Gadsden to commit the robbery. The State merely produced evidence that Appellant was acquainted with Gadsden. Finally, the State has not established the guilt of Gadsden in this matter. At best the State's evidence portrayed Appellant's behavior as suspicious.

Therefore, the evidence against Appellant did not tend to prove his guilt, and the Court should have directed a verdict in favor of Appellant.

CONCLUSION

The trial court erred in denying Appellant's motion to suppress evidence. The evidence was obtained after police performed a wrongful search and seizure of two cellphones. Appellant gave officers consent to search the cellphones, but his consent was not voluntarily given. Because Appellant's consent was invalid, the fruits of the search should have been suppressed.

Additionally, the court erred in failing to exclude certain photographs from evidence. These photographs were not relevant to the case and created a prejudicial effect against Appellant which vastly outweighed any probative value they offered. Therefore, the photographs should have been excluded, and the court erred by admitting them as evidence.

Finally, the trial court erred in its discretion when it denied Appellant's motion for a directed verdict. The State failed to provide either direct or substantial circumstantial evidence which tended to prove Appellant's guilt. Therefore, Appellant was entitled to a directed verdict in his favor.

As a result, the rulings of the trial court should be reversed.

RESPECTFULLY SUBMITTED THIS December 4, 2017.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR.

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