

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT KEITH MOSS,

APPELLANT

APPELLATE CASE NO 2017-000277

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict on the charges of forgery where the state presented neither substantial circumstantial evidence that Appellant had knowledge that the two checks he cashed had been forged nor substantial circumstantial evidence that Appellant intended to deceive or defraud the drawer of the checks?

STATEMENT OF THE CASE

During its October 2016 term, a Spartanburg County Grand Jury indicted Appellant for two counts of forgery in an amount less than ten thousand dollars. R. 170 – 176. The prosecution, represented by Blythe Helen Waters and Russell D. Ghent, called the case for trial on February 8, 2017 before the Honorable R. Keith Kelly and a jury. R. 1. Daniel James McDonald, IC and Charles William Snyder, III represented Appellant. After a two-day trial, the jury found Appellant guilty. R. 158, l. 20 – R. 159, l. 6. Judge Kelly sentenced Appellant to five years' imprisonment on each charge, with the sentences to run concurrently. R. 164, ll. 3 – 6.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to direct a verdict on the charges of forgery where the state presented neither substantial circumstantial evidence that Appellant had knowledge that the two checks he cashed had been forged nor substantial circumstantial evidence that Appellant intended to deceive or defraud the drawer of the checks.

Relevant facts

According to testimony offered by the State's witnesses, Appellant cashed two checks at a convenience store in Spartanburg County in January 2016. The owner of the store, Jitendra Patel, recognized Appellant and indicated that he has known Appellant for approximately twenty years. R. 42, ll. 2 – 25. Appellant was well known by Mr. Patel—he always purchased gas and a black coffee. Id. Appellant was also known to cash checks in Mr. Patel's store. R. 43, ll. 1 – 9. Mr. Patel only cashed checks for people who he recognized. R. 48, ll. 17 – 21. Prior to the events leading up to Appellant's trial, Mr. Patel had never experienced any trouble with Appellant. R. 51, ll. 4 – 6. In fact, Mr. Patel testified that he would not have cashed Appellant's checks had he not been confident that they were valid checks. R. 51, ll. 7 – 24.

The two checks cashed in Mr. Patel's store appeared to have been written by Justin Boyce—both made out to Appellant. R. 22, ll. 2 – 24; R. 25, ll. 5 – 25; R. 45, l. 2 – R. 46, l. 22. The “for” line on each check suggested that the checks were payment for painting. Id. Appellant endorsed both checks. R. 45, ll. 23 – 25. Appellant provided his driver's license number and phone number with each check. R. 46, ll. 4 – 9.

Both checks were returned to Mr. Patel from his bank for insufficient funds. R. 48, ll. 11 – 13. Claims intake agents with Mr. Boyce's bank concluded that the signatures on the two checks did not match signatures on other checks allegedly written by Mr. Boyce. R. 30, ll. 1 –

16. However, the Wells Fargo Bank employee assigned Mr. Boyce's case, Lee Griffin, "absolutely" had "no idea" whether Appellant was given the authority to cash the checks written by Mr. Boyce. R. 33, ll. 2 – 4.

On the morning of January 20, 2016, Mr. Boyce reported that those two checks had been stolen and forged. R. 54, l. 11 – R. 55, l. 2. He informed law enforcement that he believed Shannon Skates was responsible for the theft and forgery. R. 60, ll. 9 – 21; R. 95, ll. 10 - 24. He indicated that his checkbook had been stolen from his car. R. 62, ll. 4 – 12; R. 87, l. 22 – 6. On cross-examination, Mr. Boyce confessed that he was not present at the time of the alleged theft. R. 91, ll. 6 – 8.

Inexplicably, law enforcement did not investigate Shannon Skates. R. 62, l. 22 – R. 63, l. 4; R. 100, ll. 19 – 22. In fact, no suspects were ever contacted prior to Appellant's arrest. R. 96, l. 20 – R. 99, l. 22; R. 100, l. 25 – R. 101, l. 1.

At the conclusion of the State's case, defense counsel sought a directed verdict, based on the fact that "the state was unable to prove several of the elements for forgery, first being that [Appellant] had no knowledge of a forgery" and that there was no proof "through testimony that [Appellant] had any intent to deceive or defraud Justin Boyce." R. 113, ll. 18 – 25.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.2d 1 (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 Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. 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 the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. 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 home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. 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. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In one of the Supreme Court's more recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of 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. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and

gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

"A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). Intent to defraud is an essential element of the crime of forgery; one possesses the intent required for a forgery conviction if he willingly acts or assists in any of the proscribed premises, with an intention to defraud any person. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41, (Ct. App. 2007) aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010).

The three important factors requisite to constitute forgery by uttering or publishing a forged instrument are (1) the instrument must be uttered or published as true or genuine, (2) it must be known by the party uttering or publishing it that it is false, forged, or counterfeited, and (3) there must be intent to prejudice, damage or defraud another person. State v. Wescott, 316 S.C. 473, 450 S.E.2d 598 (Ct. App. 1994).

In responding to the prosecution's argument at the directed verdict stage, defense counsel reiterated that Appellant had no knowledge that the check was forged; he was simply cashing the check. The trial judge denied the directed verdict motion:

I agree with the solicitor on the painting on the check. The Court has been concerned about the knowledge aspect, but the evidence before the jury is that no painting was done and none was authorized. None was done.

I'm not sure - - I may be sure that it's not - it's not in controversy that maybe the defendant didn't write the check. **And I don't know how all of that happened.** But certainly the victim's handwriting appears to be different.

But, nonetheless, it was a check that was negotiated allegedly, at least the evidence is, by the shopkeeper himself who personally knows the defendant over a 20-year

time period that the check was negotiated by him. **Whether or not he wrote it, I don't know, and that would be up for the jury to determine anyway.**

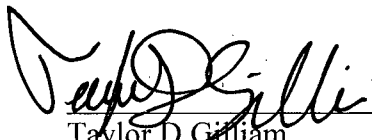
But, once again, this Court's concerned with the existence of evidence, not its weight.

R. 117, l. 16 – R. 118, l. 6 (emphasis added).

The prosecution failed to present substantial circumstantial evidence that Appellant either had knowledge that the checks were forged or intended to defraud Mr. Boyce, as required by Wescott, supra.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and direct verdicts of acquittal in his favor on both charges.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

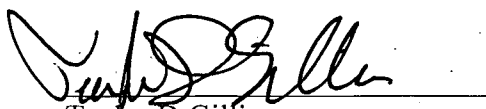
ATTORNEY FOR APPELLANT

This 7th day of December, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief 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."

December 7, 2017



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