

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-000709

THE STATE,RESPONDENT

v.

WAYNE COUEY, JR.APPELLANT.

INITIAL BRIEF OF RESPONDENT

RECEIVED
MAY 08 2018
SC Court of Appeals

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the trial court erred in denying his motion for a directed verdict upon concluding the State sufficiently established his prior conviction for failure to register as a sex offender as an element of his charged offense of failure to register as a sex offender, second offense, is preserved for appellate review where it was not raised in Appellant's initial motion for a directed verdict. Furthermore, even if preserved, whether the trial court properly denied Appellant's motion for a directed verdict where: (1) the prior conviction is not an element of the statutory offense for which Appellant was on trial and (2) even if it were an element of the offense, the State presented substantial circumstantial evidence from which the jury could fairly and logically find Appellant had a prior conviction for failure to register as a sex offender.

STATEMENT OF THE CASE

Wayne Couey, Jr. (Appellant) was indicted at the January 23, 2017 term of the grand jury for Spartanburg County for “violation of sex offender registry” (2016-GS-42-5351). He was represented by Assistant Public Defender Paul K. Neely of the Seventh Circuit Public Defender’s Office. Respondent (the State) was represented by Solicitor Barry J. Barnette and Assistant Solicitors Sara B. Bozarth and Megan L. Moricle of the Seventh Circuit Solicitor’s Office. On March 14, 2017, Appellant proceeded to a bench trial before the Honorable R. Keith Kelly where he was convicted as indicted. He was sentenced by Judge Kelly for failure to register, second offense, to three hundred and sixty-six (366) days’ imprisonment. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant was charged with a violation of the sex offender registry based on an allegation that “[he] did in Spartanburg County on or about January 30, 2015, after having been convicted of sexual assault in New Jersey on April 22, 1999, fail to register annually as a sex offender with the Spartanburg County Sheriff’s Office (SCSO) in Spartanburg, South Carolina, as required by law.” (Indictment). Appellant requested a bench trial. His case was called for trial on March 14, 2017, before the Honorable R. Keith Kelly. After the court heard pretrial motions, the State called its one and only witness, Master Deputy Debra Blanton of the SCSO, to the stand. (Tr.p.1-p.7).

Deputy Blanton testified she was the sex offender registry coordinator for the SCSO and explained her job was to oversee the 648 registered sex offenders in Spartanburg County. She testified her responsibilities included trying to ensure the sex offenders registered and continued to re-register as required by state law and federal guidelines. Deputy Blanton testified she knows

Appellant and then identified him in the courtroom. She noted Appellant was required to re-register quarterly and explained that each time an offender comes in to register she goes over the rules and regulations that are set forth in the sex offender registry contract or what the SCSO calls the "Offender Information Form." Deputy Blanton then identified the contract that was initialed and signed by Appellant and noted it included a requirement that he notify the SCSO if he changed his address. The Form was admitted into evidence as a business record. (State's Exhibit No. 1).¹ Deputy Blanton testified Appellant would have had the rules explained to him four times a year, every year, since 2009, yet he failed to re-register in January of 2015 as required and as a result a warrant was issued for his arrest. She said Appellant failed to return to her office to re-register until October of 2016, a year and a half after missing the January, 2015, re-registration deadline. (Tr.p.7-p.18).

Following cross-examination and brief questioning on redirect, the State rested. (Tr.p.18-p.24). Appellant moved for a directed verdict on two grounds. First, he argued pursuant to *State v. Latimore*, 390 S.C. 88, 700 S.E.2d 456 (Ct. App. 2010), that he was entitled to a directed verdict because the State failed to present sufficient evidence it had provided Appellant reasonable notice of the registration requirements under the statute. Second, he argued he was entitled to a directed verdict "on a constitutional ground that the State of South Carolina has no personal jurisdiction to attach its laws to a resident of New Jersey." Appellant did not make any argument in regard to the absence of evidence of a prior conviction for failure to register and did not move for a directed verdict on this basis. (Tr.p.24-p.26). After hearing from the State in response to the arguments Appellant did raise, the trial court denied the motion. (Tr.p.26-p.28).

¹ The Offender Information Form indicates Appellant had a prior conviction for failure to register which resulted in a sentence of thirty (30) days' imprisonment. (State's Exhibit #1, p. 3 of 14).

Next, Appellant testified in his own defense. He explained he is originally from New Jersey and briefly described the New Jersey conviction which resulted in him having to register as a sex offender in South Carolina after he moved to Spartanburg. Appellant claimed he has problems reading and writing, that he took special education classes growing up, and that he was diagnosed with a learning disability, all of which made it hard to understand the registration requirements on the form given to him by Deputy Blanton. He testified he went back to New Jersey in January of 2015 to attend a court proceeding regarding custody of his children, who lived in New Jersey. Appellant claimed he called Deputy Blanton that month to tell her he needed to stay in New Jersey longer because he had still not gone to court and she claimed she did not want to hear it and had obtained a warrant for his arrest. (Tr.p.30-p.37).

On cross-examination, Appellant admitted the first time he registered in South Carolina an officer with SCSO read the offender information form to him; however, he claimed Deputy Blanton did not. He did however acknowledge Deputy Blanton had given him a copy of the form each time he came in to register. (Tr.p.37-p.40). Appellant then testified that he first registered as a sex offender in South Carolina in 2008. He explained that when he moved to South Carolina and tried to get an ID “they locked me up” for failing to register even though he “aint [sic] know I had to register down here.” (Tr.p.40, line 24-p.41, line 13). Appellant then acknowledged he knew he had to re-register four times a year in South Carolina because the piece of paper given to him by Deputy Blanton reminded him to do so. (Tr.p.41-51). Appellant called one other witness in his defense, his fiancée Virginia Ann Johnson. (Tr.p.56-p.61). He did not renew or mention his previous motion for a directed verdict at the close of his case.

Next, the State re-called Deputy Blanton in reply. She testified she did not remember Appellant calling her in January of 2015 to say he was still in New Jersey and would not be

coming in to re-register; however, she said she tells all of the sex offenders that if they will be out of state for more than ten days they must file a temporary change of address with her office. (Tr.p.62-p.64). At the conclusion of Deputy Blanton's testimony, Appellant said: "Your Honor, uh, I'm gonna renew my motion for directed verdict **this time based on the grounds Mr. Couey is charged with domestic, with the failure to register second offense, the State hasn't provided evidence of a first offense** so I'm gonna move for directed verdict on those grounds" (Tr.p.64, lines 18-23) (emphasis added). In addition to raising this new ground, Appellant again argued the claim that he was entitled to a directed verdict because the State failed to present sufficient evidence it had provided him reasonable notice of the registration requirements under the statute. The trial court denied the motions. In regard to the new ground, the court ruled: "Uh, as to the elements of the offense, uh, your client actually testified to the, uh, uh, element that that you talkin' about, I think you're tryin' to say the State never offered his prior convictions on the first offense but he testified that he was convicted, uh, of the first offense did he not?" (Tr.p.66-p.67). Appellant's counsel said he did not remember that testimony; however, the trial court found: "the ruling a the Court is he testified to, I wrote it down, he, I'm makin' notes up here, I'm not, I'm not workin' the crossword puzzle, he he testified that he had a prior conviction, uh, four of those and somewhere here, I've got the day that occurred." (Tr.p.67, line 25-p.68, line 4). The trial court then found Appellant guilty beyond a reasonable doubt of failing to register and sentenced him for failure to register, second offense, to three hundred and sixty-six days' imprisonment. (Tr.p.68-p.69; Sentencing Sheet).

ARGUMENT

I.

Appellant's argument that the trial court erred in denying his motion for a directed verdict upon concluding the State sufficiently established his prior conviction for failure to register as a sex offender as an element of his charged offense of failure to register as a sex offender, second offense, is not preserved for appellate review because it was not raised in Appellant's initial motion for a directed verdict. Furthermore, even if preserved, the trial court properly denied Appellant's motion for a directed verdict where: (1) the prior conviction is not an element of the statutory offense for which Appellant was on trial and (2) even if it were an element of the offense, the State presented substantial circumstantial evidence from which the jury could fairly and logically find Appellant had a prior conviction for failure to register as a sex offender.

Appellant argues the trial court erred in concluding the State established a prior conviction for his failure to register, second offense, where no testimony was presented by the State regarding a prior conviction. He contends: "Therefore, Appellant could not have been convicted of a second offense and should have been entitled to a directed verdict." (Brief of Appellant, p.8). The State disagrees and submits Appellant's argument is both unpreserved and entirely without merit.

Issue is not Preserved for Appellate Review

Appellant's argument is not preserved for appellate review because it was not raised in Appellant's initial motion for a directed verdict and instead was first argued after the defense presented its case and after the State presented a witness in reply. *See State v. Wakefield*, 323 S.C. 189, 196, 473 S.E.2d 831, 835 (Ct. App. 1996) (finding issues not timely raised to and ruled upon by the trial court will not be addressed on appeal); *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) ("To preserve an issue for appellate review, an appellant must object at his first opportunity."); *Creech v. S.C. Wildlife & Marine Res. Dept.*, 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997) (holding the appellant's failure to raise a particular issue in its directed verdict

motion precludes appellate review of that issue). Appellant's first opportunity to argue he was entitled to a directed verdict because the State failed to present evidence of a prior conviction was when he made his initial motion for a directed verdict. However, he first argued this ground after the defense presented its case and after the State presented a witness in reply. By electing NOT to raise this particular issue in his directed verdict motion, Appellant waived any right he would otherwise have had to raise the issue on appeal. Additionally, Appellant has failed to preserve any of his original grounds for directed verdict for review because he did not renew his initial directed verdict motion at the close of the defense's presentation of evidence. *See State v. Adams*, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (recognizing a directed verdict argument is not preserved for appellate review unless it is renewed at the close of all the evidence). Appellant's argument is not preserved for appellate review; therefore, his conviction should be affirmed.

A Directed Verdict was Properly Denied

Even if Appellant's argument is preserved, the trial court properly denied Appellant's motion for a directed verdict because the State presented direct and substantial circumstantial evidence from which the jury could find Appellant guilty of each element of failure to register based on the natural and logical inferences to be drawn from the evidence. This is because: (1) the prior conviction for failure to register is not an element of the statutory offense for which Appellant was on trial and therefore the State was not required to present evidence of the prior conviction except for purposes of sentencing; and (2) even if it were an element of the offense, the State presented direct testimonial evidence and documentary evidence from which the jury could fairly and logically find Appellant had a prior conviction for failure to register as a sex offender.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648; *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); *State v. Dantonio*, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." *State v. Nix*, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Condrey*, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the court must find the case was properly submitted to the jury. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648; *Latimore*, 390 S.C. at 95, 700 S.E.2d at 460. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements of the crime beyond a reasonable

doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The task of the trial court is to simply determine “whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.” *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, “the evidence could induce a reasonable juror to find [the defendant] guilty.” See *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); see also *State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) (“When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.”).

Discussion / Analysis

Appellant appears to conflate the concept of a sentence being enhanced at sentencing due to the existence of a prior conviction, see, e.g., S.C. Code Ann. § 44-53-370(b) (various drug offenses), with the concept of a prior conviction serving as a substantive element of the crime itself. See, e.g., S.C. Code Ann. § 16-11-311(A)(2) (first-degree burglary) & 16-3-655(A)(2)(first-degree criminal sexual conduct with a minor). He argues he was entitled to a directed verdict on the charge of failure to register, second offense, because evidence of the prior conviction for failure to register was not presented as substantive evidence during the State’s case during trial. Yet, the prior conviction is not an element of failure to register simply because Appellant was ultimately sentenced for a second offense. Thus, even if there had been a lack of such evidence, the trial court could not have granted a directed verdict on this basis.

Section 23-3-470 of the South Carolina Code establishes the crime of failure to register or provide required notifications. It provides in part that: “If an offender fails to register, provide notification of change of address, or notification of permanent or temporary change in employment, or attendance, enrollment, employment, volunteer status, intern status, or vocation status at any private school, as required by this article, he must be punished as provide in subsection (B).” S.C. Code Ann. § 23-3-470(A). This substantive offense does not include language suggesting a prior conviction must exist before a conviction will lie. Instead, the conviction exists independent of the number of priors, and the statute merely provides for increased punishment for “a person convicted for a second offense.” S.C. Code Ann. § 23-3-470(B)(2). As recognized by our supreme court, “**other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *State v. Rice*, 401 S.C. 330, 333-34, 737 S.E.2d 485, 487 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (emphasis added). Here, the “element” alleged by Appellant is the fact of a prior conviction. It did not need to be submitted to the jury, and as a result, the alleged lack of evidence of that fact in the State’s case in chief could not warrant the grant of a directed verdict. Appellant’s conviction should be affirmed.

Alternatively, even if this Court determines a prior conviction is an element of the substantive offense, the State presented direct testimonial evidence and documentary evidence from which the jury could fairly and logically find Appellant had a prior conviction for failure to register as a sex offender. Thus, the trial court properly denied Appellant’s motion for a directed verdict. There was no dispute that Appellant failed to register in January of 2015 as required by statute. The State then presented evidence that Appellant was given notice of the registration

requirements both orally and in writing by Deputy Blanton. It also introduced the “Offender Information Form” which listed Appellant’s prior conviction and sentence for failure to register. Finally, Appellant testified under cross-examination that when he moved to South Carolina and tried to get an ID “they locked me up” for failing to register even though he “aint [sic] know I had to register down here.” (Tr.p.40, line 24-p.41, line 13). When viewed in a light most favorable to the State, this testimony was, as recognized by the trial judge, an admission by Appellant that he had a prior conviction. (Tr.p.67-p.68).

In reviewing the propriety of a trial court denying a motion for a directed verdict, this Court found that when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone. *State v. Harry*, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996). Our supreme court later “expressly adopted the reasoning in *Harry* and the waiver rule propounded therein.” *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). Thus, the trial court’s consideration of Appellant’s admission was entirely appropriate. Appellant was indicted for failure to register or provide required notifications under the sex offender registry, and was convicted as indicted. During Appellant’s trial, the State presented direct and substantial circumstantial evidence establishing Appellant’s guilt for each element of failure to register beyond a reasonable doubt. This evidence created factual questions regarding Appellant’s guilt that could only be properly resolved by the judge acting as the ultimate finder of fact. This is true regardless of whether the prior conviction was an element of the offense, because the State presented evidence of that prior conviction at trial. Based on the existence of the evidence in this case along with the logical inferences of guilt to be drawn from that evidence, the trial court properly denied Appellant’s directed verdict motion.

CONCLUSION

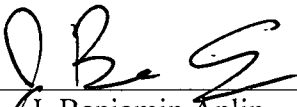
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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WAYNE COUEY, JR.APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated May 8, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 8th day of May, 2018.



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Re: The State v. Wayne Couey, Jr.
Appellate Case No. 2017-000709

Dear Mr. Gilliam:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
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JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Advocacy Division