

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Sumter County

Honorable Steven H. John, Circuit Court Judge

RECEIVED

MAY 18 2018

THE STATE,

RESPONDENT, SC Court of Appeals

V.

JAMES LEE BARNO,

APPELLANT

APPELLATE CASE NO 2017-002176

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's motion for a directed verdict on the pointing and presenting of a firearm charge because the state presented insufficient evidence that appellant offered a gun for viewing in a threatening manner as an element required under the statute.

STATEMENT OF THE CASE

Appellant James L. Barno was convicted of pointing and presenting a firearm during a jury trial held at the October 2017 term of the Sumter County General Sessions Court before Judge Ferrell S. Cothran, Junior. Appellant was sentenced to imprisonment for a period of forty (40) months, suspended upon probation for a period of two years. Attorney Jason E. Bridges represented appellant at trial and Assistant Solicitor R. Kirk Griffin appeared on behalf of the state.

Appellant appealed his trial court conviction and sentence. This brief follows.

STANDARD OF REVIEW

1. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, “[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” Id. at 593, 606 S.E.2d at 477-78 (citing State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); see also Rule 19(a), SCRCrP. The trial court should “grant the directed verdict motion when the evidence merely raised a suspicion that the accused is guilty as ‘[s]uspicion’ implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (citations omitted). On the other hand, “a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” Id. (emphasis removed).

2. 3. On appeal, “[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state.” Id. (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)); see also State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which that state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented “any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” this Court must affirm the trial court’s decision to submit the case to the jury. Cherry, 361 S.C. at 593-594, 606 S.E.2d at 478; cf. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127 (“The trial judge is required to submit the case to the jury if there is ‘any substantial evidence which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced.’”)

ARGUMENT

The trial judge erred in denying appellant's motion for a directed verdict on the pointing and presenting of a firearm charge because the state presented insufficient evidence that appellant offered a gun for viewing in a threatening manner as an element required under the statute.

The following events occurred on July 13, 2015. John A. McKnight testified at trial that he hired appellant to make repairs (roof and underpinnings) on a dwelling in Sumter that he owned, but when appellant did not complete the construction work for the amount of \$3,600.00 agreed upon within the time frame agreed upon (two-weeks maximum), he fired appellant while they were both standing on the property site. McKnight stated that he vowed to pay appellant the money owed in direct proportion to the work he (appellant) finished because six weeks had passed and the work had not been completed. Thereafter, appellant became angry and demanded full payment from McKnight. Then, according to McKnight's testimony, appellant went to his truck and produced a shotgun, which McKnight claimed he (appellant) pointed at him. This event occurred on July 13, 2015 at the property site. Tr. 57, l. 9 – p. 66, l. 17.

McKnight's sister, Rose Mickins, testified that she was present at the scene and stopped appellant from taking action with the gun by holding the end of the gun. Tr. 50 lines 4-5. Apparently, appellant never even lifted up the gun. Tr. 45, lines 24 – 25; Tr. 49 lines 15-19; App. 50, lines 6-8. In addition, Mickins stated that she and appellant both put the gun down by holding his gun down at the end. Tr. 45, l. 25 – p. 46, l. 1; Tr. 50, lines 4-5. Note, however, that Mickins stated that after appellant reached in his truck and pulled out a shotgun, then McKnight reacted by reaching back in the trunk presumably for a shotgun as well. Tr. 50, l. 3-4. Furthermore,

when all of this happened, i.e., when appellant allegedly reached for the gun, McKnight had already walked back inside the rental property. Tr. 45, lines 12-15.

After the state rested its case, defense counsel moved for a directed verdict in effect on the ground of insufficient evidence of guilt due to conflicting testimony regarding any "brandishing" of the gun. Tr. 112, l. 17 - Tr. 113, l. 1. The trial judge denied the motion. Tr. 113, l. 18 - p. 114, l. 22. Counsel renewed the directed verdict motion at close of the case for the defense and said motion was denied again. Tr. 171, l. 14 - p. 172, l. 4.

Appellant testified in his defense at trial and explained that he received \$600.00 from McKnight for the project (roof home improvement) on the property, and that on the date in question, McKnight fired him and wanted him off the property. Appellant stated that he responded by demanding payment from McKnight for the construction work accomplished at that time. Also, appellant stated that McKnight countered with "I got my gun," and appellant answered with "well [you] ain't (sic) the only one who got a gun... I have a gun too." Shortly thereafter, appellant explained that he walked to his truck, but more importantly added that he never really raised the gun up out of his truck. Tr. 130, l. 17 - Tr. 138, l. 22. Appellant claimed that he never pointed the gun at McKnight. Tr. 141, l. 1-6; Tr. 145, l. 2-8; Tr. 150, l. 5-9; Tr. 153, l. 12; Tr. 156, l. 16. Appellant told the police that McKnight had a gun and he reiterated that "when [McKnight] told [him] he had his gun, [then] I was going to pick mines (sic) up" Tr. 150, l. 5-23; Tr. 153, l. 10-11. Appellant insisted that he was threatened by McKnight's gun and reiterated that "if [McKnight] had brought his gun, [then] I was gonna do the same thing he was gonna do with his." Tr. 152, l. 7-15; Tr. 157, l. 7-11.

A relevant portion of appellant's testimony follows:

A: I called my sister...I told her [McKnight] threatened me...

Q: Threatened you with this gun that was in the house...?

A: I don't know where it was...[McKnight] said I got my gun...now get off my property. Tr. 157, lines 5-13.

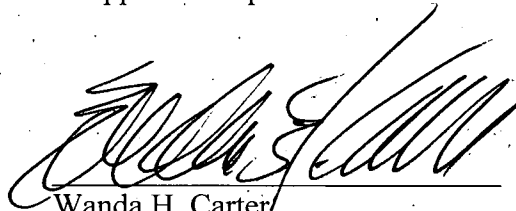
The elements of presenting or pointing a firearm at another person under S.C. Code Ann. §16-23-410 are 1.) presenting, 2.) a loaded or unloaded firearm, 3.) at another, and "presenting" has been interpreted to mean to offer to view in a threatening manner. In Re Spencer R., 387 S.C. 517, 692 S.E.2d 569 (2010). Here, there was insufficient evidence to establish that appellant "presented" a firearm at McKnight. Appellant was not threatening McKnight with a gun as he had not even lifted up his gun. Therefore, there was no offering made by appellant for McKnight to view a gun in a threatening manner. The element of presenting was not proved in the case at bar.

In the event the jury believed the state's witnesses, then mutual combat was applicable in the case because McKnight was the aggressor who boasted of a gun and threatened to use it. Appellant's reaction was to turn around and think of how to defend himself by walking to his vehicle to retrieve his gun, which he never got a chance to lift out and point or present. The offense of mutual combat includes a mutual and willingness to fight and this intent may be manifested by acts and conduct of the parties and circumstances leading up to the combat. State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). In Graham, mutual combat was charged where the defendant, who quarreled with the deceased and who knew the deceased was armed, placed himself in a position in the street where an encounter with the deceased could be expected and that both parties fired at each other.

Clearly, the state did not present sufficient evidence of proof beyond a reasonable doubt of all elements of the offense of presenting and pointing a firearm charged against appellant. See Jackson v. Virginia, 443 U.S. 307 (1979). A judge should grant a directed verdict motion when there is a mere suspicion that the accused is guilty. State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (2007).

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that his conviction and sentence be vacated.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of May, 2018.

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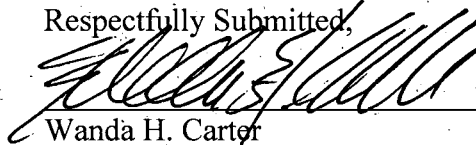
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Barno states that:

1. She is Deputy Chief 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 Judge Steven H. John, which was held on October 17, 2017, 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 James Barno.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 18th day of May, 2018.

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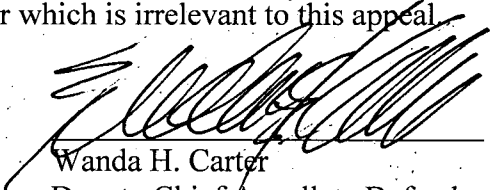
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire Trial Transcript dated October 16-17, 2017
- (2) True-billed indictment

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

May 18, 2018


Wanda H. Carter
Deputy Chief Appellate Defender

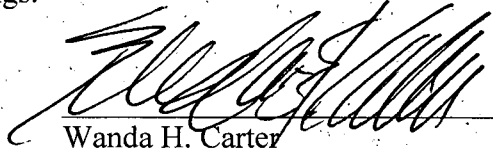
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CERTIFICATE OF COUNSEL

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 18, 2018.



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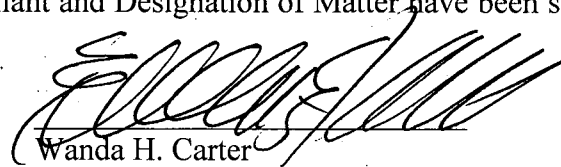
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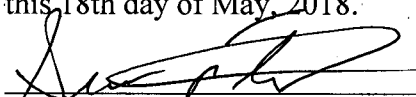
CERTIFICATE OF SERVICE

The undersigned 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 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 have been served on James Barno, this 18th day of May, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of May, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: 10/30/2022