STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL T. COLLINS,

APPELLANT

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO 2017-002221

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. **Did the trial judge err in permitting the State to introduce text messages allegedly sent from Appellant's phone where the State failed to authenticate the messages?**

II. **Did the trial judge err in failing to direct a verdict in Appellant's favor on the charges of murder and possession of a weapon during the commission of a violent crime, where the evidence at trial only showed Appellant's wife driving around the home where the decedent was shot, where Appellant's DNA was found on the shotgun, and where no evidence was presented linking Appellant to the actual shooting?**

STATEMENT OF THE CASE

In April 2016, a Beaufort County grand jury indicted Appellant for murder and possession of a weapon during a violent crime. R. 340 The State, represented by Kimberly L. Smith and Hunter Phelan Swanson, called Appellant's case for trial before the Honorable Brooks P. Goldsmith and a jury on October 16, 2017. R. 1. Mitchell Edward Farley represented Appellant. R. 1. At the conclusion of the trial, the jury found Appellant guilty as charged. R. 326, ll. 18 – 25.

Judge Goldsmith sentenced Appellant to five years on the possession of a weapon charge and fifty years on the murder charge. R. 334, l. 20 – R. 335, l. 2. The sentences were crafted to run concurrently. Id.

This brief follows.

STANDARDS OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused 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) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

I. The trial judge erred in permitting the State to introduce text messages allegedly sent from Appellant's phone where the State failed to authenticate the messages.

Appellant's indictments arose after video evidence supposedly showed his wife, Colette Collins, driving around the home where the decedent was shot. Following the admission of circumstantial evidence through expert witnesses, Appellant was found guilty of murder and possession of a weapon during a violent crime.

Relevant facts

Robert Vaux lived at the home where Jon Cherol was shot and killed in October 2015. R. 71, l. 15 – R. 72, l. 23. Cherol was living with Vaux following a falling-out with his business partner. R. 72, ll. 10 – 20. Vaux recalled waking up shortly after midnight on or about October 28, 2015 and hearing Cherol speaking with one of his friends, Joe Rueby, on the back porch. R. 72, l. 21 – R. 77, l. 14.

Vaux spoke with Cherol and Rueby before going back to sleep. Id. He testified that he heard two shotgun reports around 12:45 a.m. Id. Law enforcement arrived and bagged the hands of Vaux and Rueby. Id. Cherol's body was discovered on the couch of the back patio. R. 70, ll. 2 – 19. Prior to trial, Vaux had never before seen Appellant. R. 88, ll. 24 – 25. Furthermore, he did not see anyone else at his home that night. R. 89, ll. 1 – 2.

Law enforcement recovered two shotgun shells in Vaux's backyard. R. 94, ll. 7 – 11. Without providing much explanation, Baker Odom, an officer with the Bluffton Police Department, indicated that he interviewed Colette Collins, Appellant's wife. R. 98, l. 24 – R. 99,

l. 25. Law enforcement obtained a search warrant for the Collins' address. R. 102, ll. 5 – 12. Multiple cell phones, a gun, and some ammunition was located. Id.

Appellant was also interviewed. Notably, during the interview Appellant never incriminated himself. R. 107, ll. 16 – 18. He denied responsibility repeatedly. R. 107, ll. 19 – 21. He offered some insight into a prior robbery attempt at his house: "two individuals came to his house to attempt to rob him." R. 189, ll. 14 – 23.

As a result of the robbery attempt, Cody Brown lent Appellant a shotgun in September 2015. R. 154, ll. 13 – 25. Brown originally met Appellant in 2010 or 2011 through a construction job. R. 152, l. 21 – R. 153, l. 2. Over the objection of defense counsel, Brown testified that Appellant requested the shotgun for self-defense. R. 155, ll. 6 – 18. Specifically, Appellant informed Brown "that some people owed him money and ... they retaliated back at him and were threatening him." R. 155, ll. 20 – 23.

Brown indicated that the shotgun was returned to him on or about October 28, 2015, although he could not recall the exact date. R. 155, l. 24 – R. 156, l. 3. The State sought to elicit details of a text message received by Brown, supposedly sent from Appellant. Following multiple objections by defense counsel, the trial judge excused the jury and heard from counsel:

> Clearly, a text message is hearsay. I don't think that there is any doubt. And the State has argued that the exception is a statement against self-interest, statement by party opponent.
>
> First of all, they need to show that the message came from the device in question. Just because the number is on there, a number associated with Sam Collins is on there, they haven't shown that that message actually came from that phone. They have no one to say that this phone, they have not introduced any evidence to say this phone sent that message.
>
> So the crux of the matter is, is that if they're going to argue that the exception is statement by a party opponent, they have to show that the party opponent has made that statement. And just because that phone - - just because that phone has a number associated with Mr. Collins doesn't, A, mean that Mr. Collins sent it,

> and they still have not shown that Mr. Collins's phone sent it. They can only say that Mr. Brown's phone received it. So clearly, it's hearsay. That's without a doubt the exception I don't think applies because they've not laid the proper foundation and set that up. For that reason, we would object to the testimony.

R. 159, l. 5 – R. 160, l. 3. In response, the State indicated that the challenge to this evidence "goes to the weight of the evidence, not the admissibility of it." R. 160, ll. 12 – 14. The State also contended that the proper foundation was laid. R. 160, ll. 16 – 25. The trial court "agree[d] with the argument in the position taken by the State in this case, and therefore denie[d] the motion, overrule[d] the objection." R. 161, ll. 1 – 3.

The jury was brought back into the courtroom and heard from Brown about the text messages allegedly sent by Appellant. R. 161, l. 12 – R. 252, l. 21. The first text message received by Brown said "I returned your shotgun... I put it in the back of your truck and just riding around tonight." Id. Brown discovered the shotgun in the back of his truck covered in a camouflage jacket. Id. The shotgun was loaded and the safety was off. Id.

Brown ejected the shells—there was a fired shell and two others—and returned the gun to his safe. Id. Brown testified about another text message he received, and he again alleged that it was from Appellant. R. 164, ll. 10 – 21. This one read "You haven't seen me." Id.

On cross-examination, Brown admitted that he had "no way of saying whether or not that message was written or came from [Appellant], if it came from Colette Collins or if it came from somebody else." R. 166, ll. 3 – 16.

Counsel for Appellant renewed the motion to suppress the text messages:

> The text messages cannot be verified that they actually came from him. The text messages could have come from anybody, from one of four to five phones that he used. So the text messages, should not, in the first place, come in, but they .... are not significant, substantial enough circumstantial evidence to justify this going to the jury.

R. 290, ll. 1 – 7.

Discussion

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015)(citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Another way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009)(finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A statement is not hearsay if ... [t]he statement is offered against a party and is ... the party's own statement in either an individual or representative capacity." Rule 801(d)(2)(A), SCRE. "As a general rule, statements or declarations made by one accused of a crime are admissible against him." State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000)

(quoting State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980)). "Of course, such evidence must meet the threshold test of admissibility, i.e., relevance." Beck at 134, 536 S.E.2d at 682.

Generally, all relevant evidence is admissible. Rule 402, SCRE; State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. Relevant evidence may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice." Saltz 346 S.C. at 127, 551 S.E.2d at 247 (quoting Rule 403, SCRE).

Defense counsel attempted on multiple occasions to prevent admission of these text messages. Counsel introduced the text messages:

> The first one is (as read): I hope you don't wake up from this text. Put gun back in the truck. Was going to wrap it in that camo. Gloves in there too. Had a late night ride. Just been us. No [ ] JT crew in the morning. Just let me. See you soon. Thanks.
>
> And then there's another text message that says (as read): You haven't seen me. I haven't [ ] seen you.
>
> The State has to prove that the messages came from the devise in question.

R. 131, l. 20 – R. 132, l. 4. Defense counsel explained that "the State needs to authenticate that the message came from the device in question. The State has to overcome the hearsay." R. 132, l. 7 – R. 133, l. 6. Counsel further posited that "it's impossible for [the State] to authenticate that the person who owned that phone actually sent the text message" and therefore the State could not authenticate that the printout is an accurate representation of the text messages. Id.

After the State responded that Brown would be available to testify, defense counsel opined that a witness cannot authenticate where the messages came from or how they were

obtained. R. 134, ll. 17 – 22. There existed printouts from a cell phone carrier, but a records custodian was not brought in to authenticate them. R. 134, l. 24 – R. 135, l. 5. Regarding the printout of the text message data, defense counsel moved to suppress:

> Judge, there's clearly a break in the chain, you know. How did they obtain these records? By a search warrant. Where did the - - do we have someone from Verizon to say this is how we keep our records in the regular course of business? I have no question about the honesty of the solicitor's department, but there is just too much middle ground in there, spoliation of evidence, you know, that can go on. And someone's got to say that this is the record we have, you know.

R. 136, ll. 9 – 17. The trial court agreed and ruled the cell phone data printouts inadmissible. R. 137, ll. 8 – 12.

The State failed to authenticate the text messages purportedly between Appellant and Brown. No other witnesses were parties to the conversations, and Brown never heard Appellant's voice.

As evident by the State's closing argument, the text messages were critical to the State's case:

> Mr. Brown didn't hear anything about the gun until he received a text message at about 2 a.m. on October 28, 2015. And he said, 'I returned your gun. It's in the back of your truck.' The next morning, Mr. Brown goes out to the truck, clearly he was asleep during that time, and finds the gun loosely wrapped, camouflage jacket and pants, and there's a hat that was also found out there. Took the gun inside, unloaded it, because it was loaded, the safety was off, like I said, and leaves everything in the garage.
> The next time he hears from Mr. Collins is two days later. 'You haven't seen me,' is the text that he receives. The next thing he knows, he's talking to the police and telling them all of that. And they collect all of this evidence from his garage that Samuel Collins brought back to this house after he murdered Jon Cherol.

R. 299, ll. 4 – 19.

The prejudice deriving from the improper admission of those messages cannot be overstated. The State used the text messages to allege that Appellant returned the shotgun to

Brown the morning of the shooting and then attempted to cover his tracks a few days later. The judge's improper admission of the text messages constituted reversible error.

Though evidence may be evaluated to determine its admissibility on various different grounds, it still must meet the requirement of authenticity in order to be admissible. See State v. Anderson, 386 S.C. 120, 127, 687 S.E.2d 35, 38 (2009) (noting, even though evidence may generally be considered not to violate the prohibition against various rules of evidence, "the proponent of the evidence must still comply with authentication requirements" in order for it to be admissible).

The content of the text messages was not prepared in the administration of an entity's affairs. Rather, it was prepared by parties not acting in the regular course of any business. These text messages constituted inadmissible hearsay not subject to any applicable exception. The first text message goes to the truth of the matter asserted, namely the contention that Appellant returned the shotgun to Brown the night of the shooting. They are not cumulative to other unobjected testimony.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103, SCRE. In other words, to warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

To establish prejudice, the appellant must convince this Court that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence. Fields, 363 S.C. at 26, 609 S.E.2d at 509. Interpreting the text messages as offered by the State, they appear to

indicate that Appellant, who walked with a noticeable limp, returned the shotgun to Brown on the night of the shooting. R. 110, ll. 17 – 21. Without that information, the jury would have been left with the remaining scant circumstantial evidence.

Appellant's wife could have commandeered his cell phone and texted Brown, posing as Appellant. There are a number of potential explanations for the receipt of these messages, which is why the State should have been required to authenticate these messages. Because they were admitted without being authenticated, the jury attributed these statements to Appellant and convicted him.

II. The trial judge erred in failing to direct a verdict in Appellant's favor on the charges of murder and possession of a weapon during the commission of a violent crime, where the evidence at trial only showed Appellant's wife driving around the home where the decedent was shot, where Appellant's DNA was found on the shotgun, and where no evidence was presented linking Appellant to the actual shooting.

The State only proved that Colette Collins was driving around near the home where the decedent was. According to the State's expert witnesses, Appellant's DNA was found on the shotgun. There was no evidence he fired it. Brown's testimony appeared to indicate that Appellant borrowed the gun and returned it. In between, the State offered no evidence, circumstantial or direct, that Appellant was the one who pulled the trigger.

At the conclusion of the State's case-in-chief, counsel for Appellant moved for a directed verdict:

> When you take all the evidence in the totality in the light most favorable to the State, I don't believe that they have proven every single element of the crime charged. I think that the evidence that they've put in just raises a mere suspicion that he may have committed the crime. There is no direct evidence in this case linking the defendant to the crime, so we move to circumstantial evidence.
>
> The circumstantial evidence is scant. There is - - I would hardly call it firm circumstantial evidence. It's certainly not substantial. There is DNA. His DNA is there. There's many alternatives. There is the DNA and the text messages. The text messages cannot be verified that they actually came from him. The text messages could have come from anybody, from one of four to five phones that he used. So the text messages should not, in the first place, come in, but they should - - they are not significant, substantial enough circumstantial evidence to justify this going to the jury.
>
> The ... DNA evidence, there's no actual physical link to the defendant being there. The DNA evidence is from an obscure object far away from the scene and it's easily, as the State, I think, would say, could easily have been transmitted via the clothing that it was wrapped in.
>
> For those reasons in the light most favorable to the State, the State has presented no direct evidence with regards to this defendant, and any circumstantial evidence doesn't rise to the level of substantial as the law requires.

R. 289, l. 14 – R. 290, l. 18.

In response, the State alluded to the video of Colette Collins driving around and the DNA evidence located on the shotgun and shotgun shells. R. 290, l. 21 – R. 291, l. 11. The trial court denied the motion. R. 291, ll. 14 – 17. Defense counsel renewed this motion following closing arguments, and it was again denied. R. 315, l. 20 – R. 316, l. 7. Counsel would later renew these motions following the jury's verdict. R. 330, ll. 13 – 17.

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.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 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.

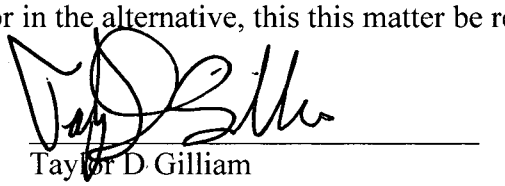
Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the South Carolina Supreme 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.

The prosecution failed to present substantial circumstantial evidence that Appellant murdered Jonathan Cherol. Additionally, the prosecution failed to present substantial circumstantial evidence that Appellant was in possession of a weapon during the commission of a violent crime.

CONCLUSION

For the foregoing reasons, Appellant requests that his convictions and sentences be reversed, that a verdict be directed in his favor, or in the alternative, this this matter be remanded.



Taylor D Gilliam
Appellate Defender

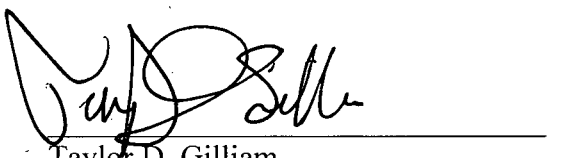
ATTORNEY FOR APPELLANT

This 18th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 18, 2018



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