

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

ORIGINAL
RECEIVED
JUL 30 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NORMAN LANCE GARNER,

APPELLANT

APPELLATE CASE NO 2017-002268

ANDERS BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the charge of lewd act where the state failed to present any direct or substantial circumstantial evidence to support the charge.4

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL.....11

TABLE OF AUTHORITIES

Cases

<u>State v. Arnold</u> , 361 S.C. 386, 605 S.E.2d 529 (2004)	6
<u>State v. Bostick</u> , 392 S.C. 134, 708 S.E.2d 774 (2011)	3, 6, 7, 8
<u>State v. Bouye</u> , 325 S.C. 260, 484 S.E.2d 461 (1997)	8
<u>State v. Brown</u> , 103 S.C. 437, 88 S.E. 21 (1916)	6
<u>State v. Hardee</u> , 279 S.C. 409, 308 S.E.2d 521 (1983)	8, 9
<u>State v. Hepburn</u> , 406 S.C. 416 753 S.E.2d 402 (2013)	3
<u>State v. Hernandez</u> , 382 S.C. 620, 677 S.E.2d 603 (2009)	7
<u>State v. Hyder</u> , 242 S.C. 372, 131 S.E.2d 96 (1963)	6
<u>State v. Lollis</u> , 343 S.C. 580, 541 S.E.2d 254 (2001)	6, 7
<u>State v. Martin</u> , 340 S.C. 597, 533 S.E.2d 572 (2000)	6
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	6
<u>State v. Mitchell</u> , 341 S.C. 406, 535 S.E.2d 126 (2000)	3, 6
<u>State v. Muhammed</u> , 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999)	6
<u>State v. Odems</u> , 395 S.C. 582, 720 S.E.2d 48 (2012)	7
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000)	6
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984)	6
<u>State v. Weston</u> , 367 S.C. 279, 625 S.E.2d 641 (2006)	6

Other Authorities

Black's Law Dictionary 919 (7th ed. 1999)	8, 9
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal on the charge of lewd act where the state failed to present any direct or substantial circumstantial evidence to support the charge?

STATEMENT OF THE CASE

On June 14, 2012, a Spartanburg County grand jury indicted Appellant for committing or attempting to commit a lewd act on a minor under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the minor. R. 215-216. Initially, Petitioner was tried in August 2013. R. 195, ll. 23-24. A jury convicted him, and he appealed. R. 195, ll. 23-24. However, he subsequently withdrew his notice of appeal. Thereafter, he filed an application for post-conviction relief (PCR), alleging numerous errors by trial counsel. R. 118, ll. 5-9; R. 195, l. 24 – R. 196, l. 4. The judge granted him relief, finding trial counsel provided deficient performance prejudicial to Petitioner in numerous ways. R. 118, ll. 5-9; R. 195, ll. 24-25. Although the state initially sought to appeal this ruling, the state ultimately withdrew its notice of appeal. On October 18, 2017, the state, represented by Russell D. Ghent, called the case to trial before the Honorable Grace G. Knie and a jury. R. 1. Kenneth Shabel represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 190, ll. 3-9. Judge Knie sentenced Appellant to sixteen years imprisonment. R. 208, ll. 1-3; R. 217. Additionally, she ordered that Appellant receive 180 days of credit for time served on home detention. R. 208, ll. 5-7; R. 217.

On October 26, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

“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

The trial judge erred in failing to direct a verdict of acquittal on the charge of lewd act where the state failed to present any direct or substantial circumstantial evidence to support the charge.

Relevant facts

In February 2012, Tashma Garner and her mother, Nolita Davis, were not getting along. R. 45, ll. 15-19; R. 45, l. 25 – R. 46, l. 2; R. 80, ll. 15-17; R. 88, ll. 14-17. As a result, Tashma began spending a significant amount of time with her paternal aunt, Marva Renee Dawkins. R. 45, ll. 7-10; R. 46, ll. 3-24; R. 51, ll. 3-6; R. 80, ll. 11-12; R. 135, ll. 16-18. Tashma and Renee grew very close during this time. R. 46, ll. 14-19; R. 134, l. 22 – R. 135, l. 18. On Friday, February 24, 2012, Tashma spent the night with Renee. R. 50, ll. 7-10; R. 52, ll. 7-9; R. 52, ll. 22-23; R. 134, ll. 15-16. During that evening, Appellant, who was Tashma's uncle and Renee's brother, stopped by to visit. R. 41, ll. 20-22; R. 50, ll. 7-18; R. 127, ll. 7-9; R. 132, ll. 20-25; R. 135, ll. 22-24.

The following morning, Renee left her young son, Christian D., in Tashma's care while Renee went to McCormick to visit a friend. R. 52, l. 24 – R. 53, l. 23; R. 122, l. 18 – R. 123, l. 18; R. 133, ll. 15-19; R. 136, ll. 2-20. Appellant arrived with breakfast for Tashma and Christian. R. 55, ll. 15-19; R. 124, ll. 22-23. When Tashma told Appellant that she had a cold, Appellant offered to get her some medicine. R. 55, ll. 20-24. Appellant left and returned shortly with some medicine. R. 55, l. 25 – R. 56, l. 6. Tashma was asleep when Appellant returned, but he woke her up to make sure she got the medicine. R. 56, ll. 10-18.

Tashma claimed that along with the cold medicine Appellant also had cocoa scented baby oil. R. 56, ll. 4-6. According to Tashma, Appellant told her to turn over for a massage. R. 56, ll. 19-21. Tashma turned over so that she was lying on her stomach. R. 56, ll. 21-23. At the trial, Tashma claimed Appellant pulled her shirt up, but she told the police two days after the alleged

incident that she pulled her shirt up at Appellant's instruction. R. 56, l. 25; 5; R. 68, ll. 11-22; R. 211. Tashma further claimed that while Appellant was massaging her back, he "started to go down the side of her breasts." R. 57, ll. 4-7.

Then, according to Tashma, Appellant rolled down the top of her shorts, exposing the top of her rear end. R. 57, ll. 11-16. She claimed Appellant massaged the exposed portion of her rear end. R. 57, ll. 11-16. Appellant left when Tasha began to cry. R. 57, l. 24.; R. 58, ll. 2-4; R. 59, l. 18. Unlike her in-court testimony, Tashma told the police there were two massages. R. 68, l. 16 – R. 69, l. 2; R. 211.

Shortly after Appellant left, Tashma called her brother, Markel Davis. R. 58, ll. 7-25; R. 75, ll. 2-13. Markel and Nolita picked up Tashma and Christian. R. 59, ll. 2-3; R. 60, ll. 2-7; R. 76, l. 2 – R. 77, l. 20; R. 84, ll. 16-21; R. 85, ll. 2-6; R. 128, ll. 8-15. Tashma claimed she told her mother and Renee what Appellant allegedly did, but she did not go to the police right away. Instead, she waited two days. R. 61, ll. 18-19; R. 60, ll. 22-23; R. 61, ll. 18-24; R. 87, ll. 1-3; R. 90, ll. 9-25; R. 107, ll. 3-22; R. 110, ll. 4-8.

At the conclusion of the state's presentation of evidence, defense counsel moved for a directed verdict of acquittal on the lewd act charge. R. 141, l. 19 – R. 142, l. 3. Defense counsel argued that the state had failed to present evidence to support "the elements of lewd act on a minor." R. 141, ll. 21-24. As defense counsel explained, there was "no possible way a jury [could] convict [Appellant] based on the evidence presented." R. 141, l. 24 – R. 142, l. 1. The evidence presented by the state was "all ... very speculative and not any concrete evidence of any kind." R. 142, ll. 1-2. The state argued that Tashma gave "first-hand testimony," and "a string of witnesses afterwards ... corroborate[d] the fact that she just happened to be very upset and other matters that [were]

consistent with what she said.” R. 142, ll. 8-12. With no explanation, the judge denied the motion.

R. 142, 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, 103 S.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 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. The 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 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 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 state charged Appellant with committing or attempting to commit a lewd act upon an individual under the age of sixteen years. R. 215-216. According to the state, on February 25, 2012, Appellant "willfully and lewdly commit[ted] or attempt[ed] to commit a lewd or lascivious act upon or with the body of one Tashma Garner ... with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself... in violation of § 16-15-0140." R. 215-216. Thus, it was necessary for the state to present direct or substantial circumstantial evidence that Appellant committed the alleged offense. The state's evidence fell far short of the mark.

The Supreme Court has held that the terms, such as lewd and lascivious, used in the statute must "be given [their] plain and ordinary meaning." State v. Hardee, 279 S.C. 409, 412-413, 308 S.E.2d 521, 524 (1983). The Court explained the statute used "commonplace terms ... easily found in dictionaries and other source books." Id. Interpreting the word "lewd," as used in a different statute, the South Carolina Supreme Court relied upon multiple dictionaries to define it as the equivalent of lascivious and obscene. State v. Bouye, 325 S.C. 260, 266, 484 S.E.2d 461, 464 (1997). Likewise, Black's Dictionary defines lewd as "[o]bscene or indecent; tending to moral

impurity or wantonness.” Black’s Law Dictionary 919 (7th ed. 1999). Lascivious means “tending to excite lust; lewd; indecent; obscene.” Id. at 886.

The only evidence presented by the state was Tashma’s testimony. Tashma claimed Appellant massaged her back. She further claimed the massage included Appellant lightly touching her breasts and massaging the top of her exposed buttocks. There was no evidence that Appellant’s conduct was lewd. Tashma’s testimony was quite simple: Appellant rubbed her back and incidentally touched the side of her breast and the top of her buttocks. These incidental touches were in no way shown to be lewd or lascivious as those terms are commonly understood. Additionally, the state failed to present any evidence at all that the incidental touches were the intent of “arousing, appealing to, or gratifying the lust, passions, or sexual desires” of Appellant or Tashma. There was an absolute failure of evidence on the *mens rea* element of the offense. Further, the state presented no evidence that Appellant or Tashma was aroused by the massage.

In light of the failure by law enforcement to conduct any investigation, the state could not present any corroborating evidence. Although Tashma claimed Appellant delivered breakfast from McDonald’s, the state presented no evidence to support such a claim. Surely, evidence, such as the fast food bag or video from the restaurant, was available if the claim were true. Tashma claimed Appellant used a specific type of baby oil for the massage – cocoa scented. The state failed to present evidence, such as the oil itself or video footage from a store showing Appellant’s purchase of the item, to corroborate Tashma’s claim. Along the same lines, the state failed to present the cold medicine or video footage showing Appellant purchasing cold medicine, which would have supported Tashma’s claim if it were true. Quite simply, the state failed to present any direct or substantial circumstantial evidence tending to show Appellant’s guilt of lewd act upon a minor.

CONCLUSION

Appellant respectfully requests this Court grant a directed verdict of acquittal in his favor on the charge of lewd act based upon the state's failure to present any direct or substantial circumstantial evidence tending to show Appellant's guilt of the charged offense.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2018.

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IN THE COURT OF APPEALS

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Grace Gilchrist Knie, Circuit Court Judge

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APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Norman Lance Garner states:

1. She is an 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 Grace Gilchrist Knie, which was held on October 18 & 19, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Norman Lance Garner.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2018.

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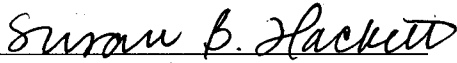
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire trial transcript;
- (2) Defendant's Exhibit #1 (written statement);
- (3) Court's Exhibit #2 (jury question);
- (4) True-billed indictment; and
- (5) Sentence sheet.

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

July 30, 2018


Susan B. Hackett
Appellate Defender
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ATTORNEY FOR APPELLANT

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."

July 30, 2018.

Susan B. Hackett

Susan B. Hackett
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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 Norman Lance Garner, at 311 Wardlaw Avenue, Spartanburg, SC 29302, this 30th day of July, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

Maik Mendel (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023