STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TITO HARRIS,

APPELLANT

Appellate Case No. 2011-190108

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by refusing to direct a verdict on the charge of murder since the evidence showed that appellant killed his wife in the heat of passion over her affair with his uncle, and the confrontation over the affair came immediately before the shooting providing the adequate legal provocation, and the killing was therefore voluntary manslaughter, without malice, and not murder as a matter of law?

STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for the offense of murder. R. 459. His case was called to trial on March 14, 2011 before the Honorable Deadra L. Jefferson, and a jury. Guy Vitetta represented appellant. Bryan Alfaro and Anne Williams were the Assistant Solicitors. R. 1.

At the conclusion of the trial, the jury found appellant guilty of murder rather than the verdict option of voluntary manslaughter. R. 440, ll. 3-8. Judge Jefferson sentenced appellant to life imprisonment. R. 457, ll. 6-8.

This appeal follows.

ARGUMENT

The court abused its discretion by refusing to direct a verdict on the charge of murder since the evidence showed that appellant killed his wife in the heat of passion over her affair with his uncle, and the confrontation over the affair came immediately before the shooting providing the adequate legal provocation, and the killing was therefore voluntary manslaughter, without malice, and not murder as a matter of law

Relevant Facts

In his opening statement, defense counsel argued appellant killed his wife in the heat of passion without malice. The shooting occurred over marital struggles [the confrontation over the affair came immediately before the shooting] and the shooting was spontaneous and impulsive. R. 128, l. 1 – 129, l. 9.

Tonia Watkins, the sister of appellant's wife, testified in the days before her sister was shot appellant called her several times. There was evidence his wife was avoiding talking to him. Appellant was very angry because his wife and his children had stayed at his Uncle Marcus' house over the weekend. Appellant's Uncle Marcus was strongly suspected of having an affair with appellant's wife and led to the fatal confrontation. R. 138, l. 17 – 139, l. 10.

Appellant and his wife were separated at the time. Tonia said that appellant's wife was packed to move again. Tonia confirmed that appellant was very upset about her move and upset that his wife had made an appointment to see a lawyer. R. 139, l. 14 – 140, l. 18.

Tonia testified that after appellant shot his wife he walked by her and said "She's gone." R. 157, ll. 3-16. Tonia confirmed appellant did not threaten or hurt anyone else in the house that fatal night. R. 157, ll. 3-10.

Appellant's son, Elijah Harris, also testified that he was awakened at about four o'clock in the morning where he was sleeping beside his mother. Elijah acknowledged appellant was incensed upon finding his Uncle Marcus' phone number in his wife's cell phone. Appellant asked his wife -- and Elijah's mother -- what she was doing with his Uncle Marcus. Elijah said his wife began crying during the confrontation, and appellant shot her. R. 167, l. 21 – 173, l. 25.

Moncks Corner police officer Michael Roach responded to the decedent's house at five-thirty or five-forty a.m. He encountered appellant there and said appellant did not appear to be under the influence of alcohol or drugs and he did not request an attorney. R. 248, l. 15 – 253, l. 16. Officer Roach said that appellant, who knew him before the shooting, told him that he and his wife had been arguing about an affair she was having with his uncle. Appellant admitted he was very mad and he ended up shooting his wife over the affair. R. 253, l. 24 – 254, l. 11. The victim died from a single gunshot wound to the head that was probably fired from within three feet. R. 317, l. 15 – 323, l. 15.

Appellant chose not to testify and to hold the state to its burden of proof. Defense counsel Vitetta argued there was insufficient evidence to send the case to the jury on the charge of murder. R. 354, ll. 13-18. The solicitor argued: "There is adequate evidence of malice aforethought. He used a weapon. He shot [her] in front of his child, and he shot her in the head." R. 354, l. 24 – 355, l. 10.

The judge ruled there was evidence for the jury to consider the murder charge. R. 355, l. 15 – 356, l. 8. Once the directed verdict motion was denied, the judge agreed that voluntary manslaughter should be a verdict option. Defense counsel Vitetta was left to argue to the jury that the shooting was without malice and was voluntary manslaughter. R. 408, l.

21 – 410, l. 8. Vitetta told the jury the shooting "happened spontaneously and impulsively and without malice." R. 412, ll. 17-19.

Discussion

The circuit court judge should only deny a motion for a directed verdict if there is direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused to the crime charged. Here, the crime charged was murder.

A circuit judge should also direct a verdict where the evidence merely raises a suspicion the accused is guilty. See State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450-451, 452 (1984). Here, the evidence showed appellant shot his wife in the heat of passion upon the sufficient legal provocation during the confrontation of her having an affair with his uncle. The crime here was voluntary manslaughter and not murder.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) the Supreme Court ruled a directed verdict should have been issued despite evidence that the victim's personal effects were found in a burn pile located on Bostick's nearby family property. Also, Bostick's shoes contained a pattern that matched gasoline and gasoline was the accelerant used to start the house fire after the victim had been killed inside. Blood was also found on clothes Bostick was wearing on the day of the murder.

The Court in Bostick noted the state never introduced a motive for the murder, and it noted its opinion in State v. Lollis, 343 S.C. 480, 541 S.E.2d 254 (2001) in which it held the evidence was insufficient to submit an arson charge to the jury. The Court noted the defendant in Lollis had alleged financial problems, and the fact he placed his personal

belongings in storage one day before the fire. As in Bostick the Court determined that the evidence in Lollis was insufficient to withstand the motion for a directed verdict.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the Supreme Court held that the circuit court judge should have directed a verdict of acquittal on the charges of first degree burglary, grand larceny, criminal conspiracy and malicious injury to an electric utility system. Odems was riding in a car with the admitted burglars when they were pulled over by the police. All of the men in the car fled, and Odems asked a nearby woman to lie for him to the police, and tell them that she was his wife. The Court noted that the stolen property from the burglary was found inside the car.

The Supreme Court held that the evidence of flight and Odems being in the same car with the stolen property from the burglary was insufficient to submit the case to the jury since it only established a suspicion of his guilt. Further, there was evidence that the defendant's flight may have been based on the mistaken belief that all riding in the car were criminally liable because the driver had a suspended license.

In State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), the victim testified Mitchell had been over to his house on a couple of occasions. The police officer investigating the burglary found glass on the floor, and was able to identify a fingerprint from the screen. It was later matched to Mitchell. The Supreme Court held this did not constitute substantial circumstantial evidence reasonably tending to prove the guilt of the accused for the crime of burglary, and it held a directed verdict should have been issued.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), the Supreme Court also held the defendant was entitled to a direct verdict on the charge of murder. In Martin

there was strong circumstantial evidence of guilt, but the Supreme Court held it was not substantial circumstantial evidence of guilt.

A vehicle seen on the night of the murder in the victim's apartment complex was very similar to the car in which Martin and his co-defendant were driving that night. When Martin and his co-defendant were late picking up Martin's girlfriend that night, Martin told her "some shit happened" and the co-defendant added "somebody may have died tonight." State v. Martin, 340 S.C. at 600, 533 S.E.2d at 601. Incriminating items that could have been used in the murder were also found in a trash can near the bar where Martin's girlfriend worked.

Finally, in State v. Schrock, the Supreme Court held that evidence that Schrock was in the area of the murder scene, including prints that were similar to Martin's prints, as well as Marlboro cigarette butts -- where Schrock admitted he smoked Marlboro cigarettes -- were all insufficient circumstantial evidence to take the case to the jury.

Here, also, the evidence only raised a suspicion that appellant committed the homicide with malice aforethought. The undisputed evidence was that appellant was very angry because of an affair he thought his wife was having with his Uncle Marcus. Appellant's son confirmed that the confrontation immediately before appellant shot his wife over her affair with his Uncle Marcus. There was evidence his wife "broke down" when confronted about the affair, and appellant shot her.

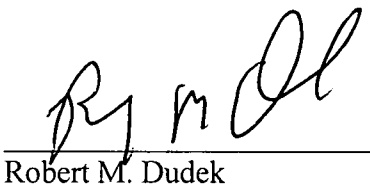
Further, appellant admitted to Officer Roach immediately after the shooting that he was incensed about the affair. This was a voluntary manslaughter case and not a murder case. Since voluntary manslaughter is the killing of another human being in the heat of passion upon an adequate legal provocation and *without malice*, the circuit judge

abused her discretion by refusing to direct a verdict of acquittal on the murder charge (unlawful killing of another with malice aforethought).

CONCLUSION

An order of acquittal should be issued.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of December, 2012.

STATE OF SOUTH CAROLINA

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tito Harris states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on March 14-17, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, he asks the Court to relieve him as counsel for Tito Harris.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of December, 2012.

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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) True–billed indictment;
(2) Entire Trial Transcript
(3) State's Exhibit #62 (Micro cassette of appellant's statement). The Clerk of Court advises that no transcript was introduced despite the court reporter's index.

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

December 7th, 2012

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 7th, 2012

Robert M. Dudek
Chief Appellate Defender

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Columbia, South Carolina 29211-1589

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CERTIFICATE OF SERVICE

The undersigned attorney 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 Donald J. Zelenka, Esquire, at P.O. Box 50666, Columbia, SC; and on Tito Harris, #345287 at Lieber Correctional Institution, this 7th day of December, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of December, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.