STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTRELL R. FELDER,

APPELLANT

APPELLATE CASE NO. 2011-203747

FINAL BRIEF OF APPELLANT

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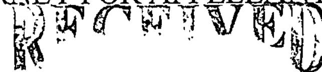

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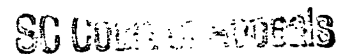

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to allow cross examination of the investigator about the scope of his investigation and the fact that the victim had pending burglary charges, when the State argued that the motive for the shooting was retaliation for the victim burglarizing appellant's home?

2. Did the trial judge err in refusing to direct a verdict of acquittal when the State failed to place appellant at the scene of the crime?

STATEMENT OF THE CASE

In January of 2009, the Sumter County Grand Jury indicted Felder for murder and possession of a firearm during the commission of a violent crime, indictment #2009-GS-43-59. On November 14, 2011, Felder proceeded to jury trial before the Honorable Howard P. King. Attorneys Shaun C. Kent and Ray Chandler represented Felder at trial. The jury returned verdicts of guilty and Judge King sentenced Felder to forty two (42) years. A timely notice of intent to appeal was served on November 23, 2011. This appeal follows.

STATEMENT OF FACTS

The jury found Felder guilty of shooting Willie McKenzie. Kayla and Antrell McFadden testified that in the early morning hours of July 18, 2008, they were walking to the Kangaroo convenience store when a man asked them for a cigarette. (R. p. 153, lines 17 – p. 154, 155, lines 1-19; p. 181, lines 20 – p. 182, 183, lines 1-25). Neither knew the man requesting a cigarette. (R. p. 155, lines 14-17; p. 183, lines 6-16). The McFadden cousins gave the man a cigarette and continued on their way to the store. (R. p. 155 lines 18-19). The man stood by a fence. (R. p. 184, lines 1-2). Before they arrived at the store a white car with tinted windows pulled up on the left shoulder of the road. (R. p. 184, lines 9- p.185, lines 1-4). A man got out of the white car and shot the man who was standing by the fence and had just been given a cigarette by the McFaddens. (R. p. 156, lines 14 – p. 157, lines 1-10; p. 184, lines 14 – p. 185, lines 1-4). The man died as a result of being shot and was identified as Willie McKenzie. (R. p. 296, lines 6-8; p. 304, lines 3-11). The shooter left in the white car. (R. p. 162, lines 5-7; p. 186, lines 21 – 24). In describing the car Kayla McFadden testified, "I just remember it was white and had tinted windows; that's all." (R. p. 157, lines 2-4). Antrell McFadden described the car as white with tinted windows. (R. p. 184, lines 24 –p. 185, lines 1-4).

Kayla McFadden described the shooter as wearing a hat, a white shirt and dark pants. (R. p. 158, lines 22-25). Antrell McFadden described the shooter as wearing a white shirt and blue jeans. (R. p. 185, lines 5-12). Antrell McFadden described the shooter as a black male about five feet seven inches tall weighing 190 pounds. (R. p. 185, lines 13 – p. 1862, lines 1-2). Neither of the witnesses was able to identify the shooter in a photo line-up that contained a photo of appellant Felder. (R. p. 235, lines 1-19).

The McFaddens were taken to the police station and interviewed. (R. p. 228, lines 12-17). After the interview, the police drove the McFaddens to their home. On the way home they noticed a car that was similar to the car driven by the shooter. (R. p. 230, lines 24 – p. 231, lines 1-11). Based on the description, other officers stopped the car. (R. p. 231, lines 12-19). Stacey Caughman, appellant's girlfriend, was driving the car when it was stopped. The car was registered to Ida Mae Felder, the appellant's mother. (R. p. 231, lines 19 – p. 232, lines 1-20).

Detective Lyons admitted that the Felder car did not have tinted windows, as described by the witness. (R. p. 285, lines 11 – p. 286, lines 1-8). Later in the trial the State showed another detective, Detective Potteiger, a photograph of the Felder vehicle. (R. p. 330, lines 5-11). This detective testified that the windows of the vehicle appeared to have lines. (R. p. 330, lines 10-11). The detective then testified that when you remove tint from windows, lines remain. (R. p. 330, lines 19 – p. 331, lines 1-4). Detective Lyons also admitted that another witness described the shooter's vehicle as having silver handles. (R. p. 289, lines 7-12). The detective confirmed that the Felder vehicle had white handles, not silver handles. (R. p. 285, lines 11-14). There was no evidence found in the car that linked this car to the shooting.

Two minutes before the police received the phone call about the shooting, the police received a phone call in reference to a burglary of the appellant's home at 39 Harry St. (R. p. 232, lines 1 – p. 233, lines 1-9). The police went to 39 Harry St. where they spoke with Stacey Caughman in reference to the burglary. (R. p. 430, lines 2-16). Appellant was not present when the officer arrived at 39 Harry St. (R. p. 433, lines 10-12). In his statement appellant said he left before the police arrived because he had a bag of marijuana. (R. p.

326, lines 1-17). At the time of the shooting the victim was found to be in possession of a video camera with video of a child's birthday party attended by appellant's girlfriend Stacey Caughman. (R. p. 245, lines 18 – p. 246, lines 1-7). A red hat was recovered at the scene of the shooting. (R. p. 221, lines 19-20). The appellant's fingerprints and DNA were found on the hat. (R. pp. 370 373; p. 425, lines 7-17). Antrell McFadden identified the hat as being worn by the shooter. (R. p. 191 lines 2-25). Another unidentified individual's DNA was also found on the hat. (R. p. 425, lines 11 – p. 426, lines 1-18). Appellant told the police that hats of his were taken in the burglary. (R. p. 327, lines 19 – p. 328, line 1). The jury found appellant guilty. This appeal follows.

ARGUMENT

The trial judge erred in refusing to allow cross examination of the investigator about the scope of his investigation and the fact that the victim had pending burglary charges when the State argued that the motive for the shooting was retaliation for the victim burglarizing appellant's home.

During the cross examination of Detective Lyons counsel for appellant moved, outside of the presence of the jury, to be able to question the detective about the fact that the victim, Willie McKenzie, had two pending burglary charges at the time of his death. (R. p. 246-266). The detective testified that he believed the motive for the murder was retaliation for a burglary. (R. p. 249, lines 5-11). The State agreed that there were two outstanding burglary warrants against the victim. (R. p. 252, lines 8-22). The State objected to the line of questioning about the victim's pending burglary charges arguing that it was improper third party guilt evidence. (R. p. 253, lines 1-3). Counsel argued that he was not offering the priors for third party guilt but rather to challenge the scope of the investigation for failing to investigate the pending burglaries to determine if those incidents were connected to the shooting. (R. p. 253, lines 10-22).

The judge sustained the State's objection. The judge ruled:

> After having studied the matter and thought about it, I first of all do not find that the testimony is relevant under 403 - - 401, 402, and 403, is not relevant to the issue to show anything in connection with the shooting. It simply would be from a standpoint of supposed motive, but I don't see where the burglary has anything to do with the actual shooting.
>
> Neither do I think that under 404(A) (2) that it is probative of anything to show action in conformity therewith.
>
> And, third, I'm not sure this victim (sic) has any knowledge of it.

> After having – seemed like to me the sole purpose of the prejudicial effect outweighs the probative value – substantially outweighs the probative value of the impeachment because what it would tend to do is to simple show the victim was a bad person. And even further than that, that it may be for the purpose of showing third party guilt, which I just don't think is appropriate in this case, and I don't think it's an appropriate questioning for impeachment purposes, especially just to show that the impeachment was not with regard to any improper testimony on the part of the witness in this case, but simply to show that they didn't go as far as the defense thinks they should have in the investigation.

(R. p. 265, lines 1-25). At the close of the State's case, counsel for appellant renewed his motion to allow cross examination about the victim's pending burglaries. (R. p. 453 lines 8-12). The judge maintained his previous ruling sustaining the State's objection to the cross examination. (R. p. 453, lines 13-15). The judge erred.

The State admitted that their theory of the case was that the appellant shot the victim in retaliation for the victim burglarizing appellant's home. (R. p. 256, lines 24 – p. 257, lines 1-9). Detective Lyons admitted that he did not investigate the other two pending burglaries as possibly being connected to the shooting. (R. p. 250, lines 10 – p. 251, lines 1-9). The State even argued that the investigator may not have even known about the pending burglaries. (R. p. 261, lines 4-5). Appellant was entitled to require the State to meet its burden and challenge the State's failure to fully investigate the case.

First, the judge erred in finding that the questioning in regard to the victim's pending burglary charges was irrelevant. Evidence is relevant if it has "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. As argued by counsel at trial, the State made the pending burglary charges relevant by arguing that the motive for the shooting was retaliation for the victim burglarizing

appellant's home. (R. p. 258 lines 1-22). The questioning in regard to the pending burglary charges has a tendency to show that the State's theory that the motive for the shooting was retaliation for the burglary of appellant's home is less probable as the shooting could have been connected to the pending burglaries charges rather than the burglary of appellant's home. The questioning was relevant and goes to the scope and quality of the investigation.

Second, the judge erred in finding that the probative value of allowing cross examination about the victim's pending burglary charges was substantially outweighed by the danger of unfair prejudice. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App. 2008), the South Carolina Court of Appeals wrote, "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876, (2007) (citing State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990)).

Based on the entire record in the present case, the probative value of questioning the officer about the victim's pending burglary charges was not outweighed by any unfair prejudice. The questioning about the victim's pending burglary charges was highly probative of the officer's failure to fully investigate the case.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State

v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown." State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. White, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct.App. 2007). The judge's failure to allow cross examination of the officer about the victim's two pending burglary charges constituted a prejudicial abuse of discretion.

The judge's refusal to allow cross examination of the officer about his failure to investigate the victim's pending burglary charges deprived appellant of his due process right to present a complete defense. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004); accord State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); Schmidt, 288 S.C. at 303, 342 S.E.2d at 402. The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. *See* U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403–404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair

opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The present case is distinguished from State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct.App. 2008). In Lyles the Court of Appeals affirmed the trial judge's finding that the proffered testimony from a neighbor that, months earlier, a person named C.C. offered to sell him drugs outside of the apartment where a murder, burglary and armed robbery took place and evidence that a marijuana cigarette was found next to the murder victim was irrelevant. The Court noted that there was no probative link between the proffered testimony and evidence, to the trial and the charges of murder, burglary first degree and armed robbery. Additionally, the Court found that even if the testimony and evidence was relevant, it was inadmissible as unfairly prejudicial. In Lyles the Court wrote:

> However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302, 93 S.Ct. 1038. "The right to present a defense is not unlimited, but must 'bow to accommodate other legitimate interests in the criminal trial process.' " Hamilton, 344 S.C. at 359, 543 S.E.2d at 594 (quoting Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038)). " 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " Montana v. Egelhoff, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)) (brackets in original). Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission. Hamilton, 344 S.C. at 359, 543 S.E.2d at 594.379 S.C. at 342-343, 665 S.E.2d at 209 (Ct..App. 2008).

In the present case, there is a probative link between the pending burglary charges and the shooting because the State made motive an issue arguing that appellant shot the victim in retaliation for the burglary of his house. The proffered testimony in regard to the victim's pending burglary charges was admissible pursuant to the evidentiary rules. The testimony was relevant as it challenged the scope of the investigation and the probative value was not outweighed by any unfair prejudice. Appellant was prejudiced by the exclusion because he was unable to present a complete defense.

The judge's refusal to allow proper cross examination of the officer also violated appellant's right to confront witnesses. In State v. Saltz, 346 S.C. 114, 131, 551 S.E.2d 240, 249 (2001), the South Carolina Supreme Court, citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) wrote:

> In Van Arsdall, the United States Supreme Court held "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose the jury to the facts from which jurors ... could appropriately draw inferences relating to reliability of the witness.' " *Id.* at 680, 106 S.Ct. 1431 (emphasis added) (quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). However, this Court has cautioned the bench that "before a criminal defendant can be prohibited from engaging in [such cross-examination] ..., the record must clearly show that the cross-examination is somehow inappropriate." State v. Graham, 314 S.C. 383, 385–86, 444 S.E.2d 525, 527 (1994).

The bias to be shown by the cross examination of the officer in regard to the victim's prior record is simply the officer's failure to fully investigate the case. The record fails to reflect that the proposed cross examination was improper. The refusal to allow the otherwise appropriate cross examination is a violation of the Confrontation Clause.

Third, the judge erred in excluding the testimony as improper third party guilty evidence. Trial counsel agreed to limit his questioning and argued:

> Judge, I have no desire to get in to the fact that – we can limit my question. I have no desire to get in to the fact that, okay, what is – if you want to limit me, saying I can't talk about this person, this person, or this person, I can limit it so far as did you investigate any further, any of these prior burglaries?
>
> No, I did not. We developed this suspect and we stopped here; that goes to my invest – that goes to my defense that they did not fully investigate this case; that's our defense. Did not fully investigate. How do we know? You're saying the motivation is burglary, there's 2 pending burglaries our there this officer didn't even know about, didn't even look in to it.

(R. p. 258, lines 25 – p. 259, lines 1-12).

The testimony was not offered to show that the shooting was committed by another person. Instead, the testimony was offered to challenge the quality and scope of the investigation.

The error in excluding the appropriate cross examination of the officer in regard to the victim's pending burglary charges was not harmless. The State's evidence was not overwhelming. The witnesses did not identify appellant as the shooter. The only evidence placing appellant at the scene of the shooting was the fact that he drove a car that looked similar to the car involved in the shooting and a hat with his DNA and fingerprints was found at the scene.

2. The trial judge erred in refusing to direct a verdict of acquittal when the State failed to place appellant at the scene of the crime.

At the close of the State's case, appellant moved for a directed verdict. (R. pp. 451-452). The judge denied the motion stating:

> I think there is evidence in the record, both direct and circumstantial, that place the defendant at the scene. There is evidence by which it could be inferred from the record – could be – the jury could find from the record that the defendant was the individual who fired the shot, even though there are no – there's no direct testimony to that. There is both circumstantial evidence of that and direct evidence of his wearing the hat and his DNA on the hat, and the hat was found at the scene and the other things that Mr. Meadors referred to.

(R. p. 456, lines 4-13). The judge erred. While the hat with appellant's DNA and fingerprints was found on the scene, there is no evidence that appellant was wearing the hat at the time of the shooting.

The State relies on the clothing description, white shirt and dark pants, the vehicle description, white four door car, the hat found at the scene with appellant's DNA and the burglary as motive for the shooting in arguing against the directed verdict motion. (R. p. 453, lines 19 – p. 482, 483, lines 1-5). While both McFaddens described the shooter as wearing a white shirt, Kayla testified that the shooter was wearing dark pants (R. p. 157, lines 22-25) but Antrell testified that the shooter was wearing blue jeans (R. p. 185, lines 5-12). Appellant told police that earlier in the evening he was wearing a white shirt and black shorts, not pants or blue jeans. (R. p. 327, lines 10-13). The shooter's vehicle was described as a white car with tinted windows and silver handles. (R. p. 157, lines 2-4; R. p. 184, lines 24 –p. 185, lines 1-4; R. p. 289, lines 7-12). Neither of the McFaddens described the car as being a four door. While the Felder vehicle was white, it did not have tinted windows or silver handles. (R. p. 285, lines 11 – p. 286, lines 1-8). Importantly, none of the four factors relied upon by the State or by the judge - clothing description, vehicle description, hat or the burglary – place appellant at the scene of the shooting.

In State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 776-777 (2011), the South Carolina Supreme Court wrote:

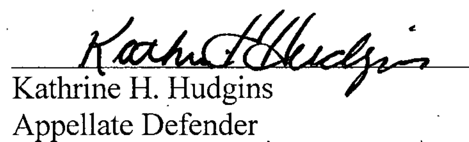
> A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). "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." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). 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. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

In Bostick the Court found that the trial judge should have directed a verdict of acquittal where no direct evidence linked the defendant to the crime scene or to the items from the victim's house found in defendant's mother's burn pile. In the present case the only evidence linking appellant to the crime scene is the hat. The State, however, failed to establish that that appellant was wearing the hat on the night in question. Viewing the evidence in the light most favorable to the State, the evidence merely raises a suspicion of guilt. As the court wrote in Bostic, "Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)." 392 S.C. at 142, 708 S.E.2d at 778. The judge erred in refusing to direct a verdict of acquittal.

CONCLUSION

Based on the argument presented in issue two, the conviction and sentence should be reversed and the Court should direct a verdict of acquittal. Alternatively, based on the argument presented in issue one, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

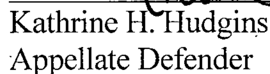
V.

ANTRELL R. FELDER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of May, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2013.

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

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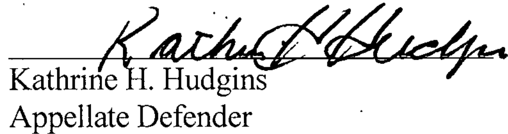
SC Court of Appeals

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 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."

May 28, 2013



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