

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

James A. Wilson

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PETITIONER

MAY 09 2019

S.C. SUPREME COURT

V.

State of South Carolina

RESPONDENT

Appellate Case NO# 2018-001432

Anders Brief Pursuant to White v. State

Issue Presented

Whether the trial court erred in denying Wilson motion for a directed verdict on the charge of murder, where the state failed to offer any substantial circumstantial evidence that petitioner intended to kill the decedent with malice aforethought, where witnesses did not see him shoot her, and where petitioner testified it was an accident?

Statement

James Wilson was indicted by an Horry County grand jury for possession of weapon during the commission of a violent crime and murder on September 17, 2015. APP. 528-

531: He Proceeded to trial before the Honorable Steven John and a Jury on June 27, 2016. APP. 1. George DeBustis and Seth Oskins appeared on behalf of the State, and Ralph Wilson, S.C. Represented Petitioner, Following a 3-day trial, the Jury found Petitioner guilty of the Possession of a Weapon charge and guilty of the lesser-included offense of Voluntary Manslaughter. APP. 424 1.17 - APP. 425 1.5. Judge John Sentenced Petitioner to Twenty-Seven years incarceration on the Voluntary Manslaughter charge and five years concurrent on the Possession of a ~~Firearm~~ Firearm charge. APP. 2138 11.6 - 24. This brief, filed contemporaneously with a petition for Writ of certiorari under Rule 243 (i)(I), SCACR, follows.

## STANDARD OF REVIEW

A case should be submitted to the jury when 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.<sup>11</sup>

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 to 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. Herburn, 406 S.C. 416, 429 753 S.E. 2d 462, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the ~~directed verdict motion~~ accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Herburn, 406 S.C. at 416, 429 S.E. 2d at 409.

### Argument

The trial court erred in denying Wilson's motion for a directed verdict on the charge of murder, where the State failed to offer any substantial circumstantial evidence that petitioner intended to kill the decedent with malice aforethought, where witnesses did see him shoot her, and where petitioner testified it was an accident.

### Relevant facts

On May 8, 2015, Nigeria McDonald was accidentally shot while she was attempting to break up a fight between two women, Trudy Cox and Jaime Spivey. APP. 63 1. 11-14; APP. 67 1. 20 - APP. 70 1. 8; APP. 73 1. 5 - APP. 78 11. 12-16.

Although she claimed to see petitioner allegedly strike the decedent before she was shot, Cox did not see who fired the shot, and she did not see petitioner immediately after the shot was fired - APP. 75.116 - APP. 76 1.3; APP. 78 11.12-16. Cox testified that Spivey started the fight, and the gunshot ended it. APP. 105 11.9-13.

Spivey's mother, Schansis Hemingway, observed the fight. APP. 110 11.10-22. She did not see who fired the shot, and more importantly, she never saw petitioner. APP. 112 11.3-18. Hemingway saw a man named Kendrick Green pull a gun out of his pants after the decedent was shot. APP. 120 1.12 - APP. 121 1.23. Hemingway testified that she never saw a man with a gun besides Green that night. APP. 112 11.2-4.

Kendrick Green decided a year after the shooting and only 4 days before trial. APP. 132 12.15 - APP. 133 4.6 - APP. 134 22.25 - APP. 135 1.2, and after he had overheard the petitioner ~~state~~ state in jail that he was going to trial because the incident was an accident. APP. 150 1.8. Kendrick was also facing other felony charges while currently in jail for a distribution charge. APP. 132 11.20.

Regarding the fight, Green testified that petitioner "mashed the decedent in the face and told her to stop; let them fight. APP. 128 11.4-8. Green indicated that the decedent attempted to swing at [petitioner], and while her arm was extended, [petitioner]

Shot her through the heart, face-to-face. APP. 128 21. 23-4-8.  
Green testified that the victim was shot and came to rest  
between ~~Frady's~~ black car and the red car that was at  
the scene where the victim was shot. APP. 140. 15. 22 - APP. 141 19.  
25 - APP. 142. 1. 3.

Do to the facts and evidence presented in trial defense  
counsel informed Green that, in fact, that is not where the  
~~victim was shot~~ body was found. APP. 142-10. 11. (RULE 601. Competency)

NIKARA BUSH claimed to see Petitioner shoot the victim  
after defendant and decedent got into a physical altercation.

After that, as soon as Nana reached her hand in to  
break the fight up, that is when he pushed her face, Mashed  
her in her face, and she looked at me like, did he just hit me.  
So we were both going to jump on him, and that is when she  
swung. When she swung she missed. It was like a reflex thing.  
She ~~swung~~ missed, and he stepped back and shot her and that  
is when Jaime's mom said, You better run because someone is  
going to get you. APP. 169 7. 8-16: ~~known~~

Bush testified that Kendrick Green came running over  
asking what is going on what happen, what happen. APP. 170 9. 12.  
She stated that she and the victim was standing side-by-side

When the shot was fired and they both ~~and~~ were facing the Petitioner. APP. 192 5.20, And when the victim was shot they were standing up, both of them were standing upright. APP. 193 8.10 She also testified that the decedent never seen the gun. APP. 206 5.6.13 - APP. 207 13.16.

Petitioner turned himself in to law enforcement officers at the Fremont Baptist Church the next morning. APP. 27 11.1-5; APP. 305 11. 3-10. He testified at trial in his defense and confirmed that Spivey, his girlfriend, was pregnant at the time of the fight. APP. 324 1.3 - APP. 326 1.25. Like the decedent, he was trying to break up the fight. Id. Petitioner testified with great detail about how he came in contact with the decedent:

She put her weight into me. She wasn't like [pushing] me or [trying] to hit me or nothing, she was just trying to budge me out of the way. When she budge me out of the way, her hip hit my hip, and my gun fell off my hip. So when my gun fell off my hip I picked my gun up. And she was kind of like -- I guess she [saw] my gun [fall] off my hip, but she was like this, and my gun fell off my hip. I picked the gun up, and she looked at me. She turned like this and looked at me. So I wasn't holding my gun like this, it was like this (indicates, gun pointed at the ground), and I pushed her, she fell, like she stumbled back, she tried to ~~grab me~~ ~~but when she tried to grab~~

catch herself like this (indicates), but as soon as she fell back, she tried to grab me, but when she tried to grab me to keep the balance, she grabbed me and slid and her hand was on my hand like this (indicates). So I yanked, but when she first grabbed, the gun was like this and I aint had my gun tight, you know what im saying. When she grabbed my gun, it almost fell out of my hand, so I yanked my gun and all I hear is, Boom, the gun went off, so im like -- she [fell]. She was like this, and she [spun], the whole body [spun]. By then, I aint thin -- I didnt think I hit her. APP. 325 1.14 - APP. 326 1.13.

Petitioner testified that there was never a time when he wanted to or ~~intended~~ intended to shoot the decedent or anyone else. APP. 331 11. 11-22.

Expert Witness Nicholas Batalis testified that this bullet, as you can see, was on the left side of the body near the armpit. It tracked cross the body from left to right, and also went downwards. APP. 258 25 - APP. 259. 1.5. The cause of death, as found by Dr. Nicholas Batalis, was a gunshot wound to the chest. APP. 261 11. 17-21. Dr. Batalis testified that at a face-to-face angle the shooter would have to reach out at an angle to have made that type of injury or the victim's trajectory. APP. 266. 19-25 - APP. 267 1.17 - APP. 268 1.10. Dr. Batalis stated or if the decedent sees the gun presented and would turn, that would be another way when it could happen. APP. 272 7.19.

Dr. Batalis testified that it was also possible for the angle to have been made in a struggle in regards to the gun. APP. 272 20.25 - APP. 273. 1-10. Batalis stated that if two people are facing each other and in a normal gun situation pointing straight out you would not get this injury. APP. 273 18.23.

In closing arguments solicitor Mr. DeBusk stated when someone pulls a gun, what is the first reaction? You'll duck. If Nigeria McDonald ducked just a little bit, it goes right back to where the ~~marking~~ person standing pointing a gun at. It is not difficult. She sees the gun pointed. What is her first reaction? I'm in trouble, she ducks, and that's where she's hit. It lines up. APP. 344. 11.17. Solicitor stated that the defendant lied when he was on the stand and that the state's witnesses Nisi's story and Isendrew's Green story was consistent with the physical evidence. APP. 395 4.13.

Trial counsel knew or should have known that solicitor's closing statements were improper, due to the inflaming statements that was made in closing arguments that contradicted the state witnesses testimony, the expert witness testimony, and the petitioner's testimony in that the incident was an accident. The state's eye witnesses testified that the petitioner unlawfully shot the victim at a face-to-face angle and that the victim was standing straight up and never seen the gun. APP. 128 4.8-21.23.

APP. 206 5. 6.13 - APP. 207 13.16. Do to the trajectory ~~the~~ expert witness testified that you would not get this type of injury unless the victim sees the gun presented and turned, or if the shooters arm was out at an angle when the shot was fired. APP. 206 19-25 - APP. 207 1.17 - APP. 208 1.10. Expert witness also testified that it was possible that the incident could have happen in a struggle between the victim and the accused. APP. 272 2.25 - APP. 273 1.10. This was substantial and concrete evidence and facts. In closing arguments solicitor argued that the victim did see the gun presented and ducked to keep the bullet from hitting her and that's how the bullet entered and exited her the way it did, APP. 394 11.17, and that the defendant lied when he was on the stand, and that the state's witnesses Niki's story and Isidrick's Green story was consistent with the physical evidence, APP. 395 4.13. The solicitor acted as an witness by arguing alleged facts, he was not qualified in the area of ballistics or the trajectory of a bullet, and the state never presented any concrete evidence at trial to prove that the petitioner had lied, and his closing arguments tended to confuse the jury, bolster the credibility and false testimony of the states witnesses whom the solicitor knew were testifying falsely, and led the jury to believe that the solicitor had knowledge of facts and evidence other than that presented in court. The inflammatory statements were improper because there was no evidence presented proving the victim seen the gun and ducked to keep the bullet from hitting her. U.S. V. Conrad.

320 F.3d 851-856 (<sup>8th Cir 2003</sup> ~~2003~~). Trial counsel unreasonably failed to object and ask for curative instruction. Applicant was prejudiced in that his defense was that of accident and his guilt or innocence hinged on whether the jury believed the state or defense witness. Solicitor's closing arguments confused jury made them disregard substantial evidence proving that the shooting could have possibly been an accident. Applicant was also prejudiced in that but for counsel's failure to object to the solicitor's improper statements and ask for a curative instruction, no reasonable juror would have voted to find the petitioner guilty of voluntary manslaughter, and possession of a weapon during the commission of a violent crime.

At the conclusion of the state's case-in-chief, counsel for petitioner moved for a directed verdict "On the grounds that the evidence that has been produced by the state fails to meet the elements of either murder and/or possession of a pistol during the course of a violent crime." App. 278 11.11-17. The trial court denied the motion. App. 278 1.18 - App. 280 1.14.

After the defense rested, counsel again renewed the motion. App. 366 11.3-17. The motion for a directed verdict was again denied. Id. Counsel again renewed all of his previous motions after the jury's verdict was announced. App. 427 11.3-12. The motions were denied. App. 427 1.13 - App. 429 1.1.

## Discussion

The state's case against Petitioner was largely circumstantial. Murder is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10.

During the state's case-in-chief, although a few witness observed the fight, only a few had knowledge regarding the shooting.

When ruling on a motion for a direct verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E. 2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E. 2d 263 (Ct. App. 1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the state. State v. Powell, 326 S.C. 313, 487 S.E. 2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E. 2d 63 (1998); State v. Huggins, 325 S.C. 103, 481 S.E. 2d 114 (1997).

When a case is built wholly on circumstantial evidence, if the state fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a direct verdict. State v. Odems, 305 S.C. 582, 586, 720 S.E. 2d 48, 50 (2011). "The trial court should

❑ grant a directed verdict motion when evidence presented merely raises a suspicion of guilt. "State v. Bestick, 302 S.C. 134, 142, 708 S.E.2d 774, 779 (2011). The State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act". State v. Schrock, 283 S.C. 129, 133, 322 S.E. 2d 450, 452 (1984). "The [trial] court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E. 2d 126, 127 (2006).

When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof. State v. Hepburn, 406 S.C. 416, 429, 753 S.E. 2d 402, 409 (2013). Even in the light most favorable to the State, there is not enough evidence to indicate that Petitioner acted with malice. A jury therefore could not find Petitioner guilty of murder beyond a reasonable doubt. The trial court should have directed a verdict in Petitioner's favor.

### Conclusion

Petitioner respectfully request this court reverse his convictions based upon trial error in failing to direct a verdict in his favor.

Date, May 6, 2019

James A. Wilson

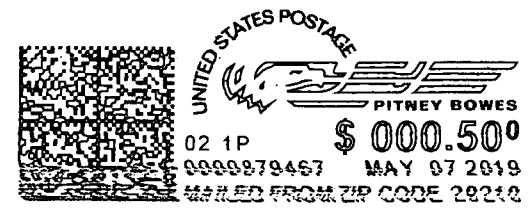
Petitioner

James A. Wilson, 339674 Saulda Bm#143

B.R.I.C

4460 Broad River Road

~~██████~~  
Columbia, SC 29210,



DANIEL E. SHEAROUSE, CLERK OF COURT  
Post Office Box 11330  
Columbia, South Carolina 29211

2921101000 8089

