STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Case No. 2017-GS-42-5423

The State,

Respondent,

v.

Lorenzo Guillermo Daniel Calderon,

Appellant

APPELLATE CASE NO. 2018-001707

INITIAL BRIEF OF APPELLANT

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II. Did the trial judge err in allowing the introduction of evidence of prior wrongs or acts by the Appellant that was (i) irrelevant and inconsequential to the probability of whether or not Appellant committed the offense of Accessory After the Fact to a Felony because they occurred before the felony, and (ii) if at all relevant, was unfairly prejudicial, confusing, and misleading?

III. Did the trial judge err in allowing the introduction of a gun that was (i) irrelevant and inconsequential to the probability of whether or not Appellant committed the offense of Accessory After the Fact to a Felony because it was not used in the felony, and (ii) if at all relevant, was unfairly prejudicial, confusing, and misleading?

IV. Did the trial judge err in refusing to grant immunity pursuant to the Protection of Persons and Property Act where it misstated the evidence offered at the hearing on Appellant's motion for immunity and applied a higher burden of proof?

STATEMENT OF THE CASE

On October 27, 2017, a Spartanburg County grand jury indicted Appellant for Accessory After the Fact to a Felony. Indictment 2017-GS-42-5423.

Appellant filed a "Notice of motion invoking immunity under Section 16-11-440(C)" of the South Carolina Code of Laws, 1976, as amended on August 28, 2018. Notice, filed August 28, 2018. A hearing was held before Honorable J. Derham Cole court on August 29, 2018. The trial court issued its order denying Appellant's motion on September 5, 2018. Order, dated September 5, 2018.

The State, represented by Derrick B. Bulsa and Jesse Michael Williams, called the case for trial on September 10-13, 2018, before Judge Cole and a jury. Transcript page 1. Monier Mufid Abusaft represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 596, lines 14-7. Judge Cole sentenced Appellant to fifteen years imprisonment. Tr. 605, ll. 9-14; Sentence sheet.

On September 18, 2018, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. Because the State did not present direct evidence or substantial circumstantial evidence to prove Appellant's guilt of all of the elements of the offense charged, the trial judge erred in failing to direct a verdict in favor of the Appellant.

Standard of review

Where the State fails to produce evidence of the offense charged, the trial court must direct a verdict in favor of the defendant. State v. Odems, 395 S.C. 582, 596, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). On appeal of a denial of a directed verdict, the evidence shall be viewed in a light most favorable to the State. Odems, 395 S.C. at 586, 720 S.E.2d at 50.

Relevant Facts

In the early evening of May 5, 2017, Devin Ruttle shot and killed Dalton Moore in the parking lot of a community center on Foster Street in Cowpens, South Carolina. Tr. 99, ll. 15-21; Tr. 100, ll. 13-16; Tr. 105, ll. 7-9; Tr.117, l. 15 - Tr. 118, l. 5; Tr. 392, ll. 10-11. While driving his car in Cowpens, Ruttle saw Moore walking along Foster Street near the community center and saw Moore motion to him, but Ruttle did not stop at that time. Tr. 387, l. 23 – Tr. 388, l. 9. Shortly thereafter, Appellant came to be a passenger in Ruttle's car. Tr. 389, ll. 15-23. Ruttle believed Appellant and Moore had some type of ongoing disagreement. Tr. 383, ll. 14-18. Ruttle decided he wanted to speak to Moore to ensure Moore knew Ruttle had nothing to do with any disagreements between Appellant and Moore. Tr. 388, ll. 15-18. Ruttle parked his car on a side street out of view of the community center, left his car and the Appellant, and walked to the community center. Tr. 451, ll. 15-25; Tr. 390, ll. 11-14, 22-25.

Ruttle testified that immediately upon reaching Moore and beginning to speak to him, Moore moved toward him and pulled a knife from behind his back. Tr. 391, ll. 1-5, l. 21. Fearing for his life, Ruttle pulled a gun from his waistband and told Moore to stop. Tr. 391, ll. 22-24; Tr. 392, ll. 5-6; Tr. 393 ll. 12-13; Tr. 397, ll. 11-17. Ruttle testified that Moore continued to step toward him so he attempted to fire a warning shot, but the gun did not fire. Tr. 392, ll. 2-4. As he was walking backwards, Ruttle saw Moore "charging towards" him so he fired again, this time striking Moore. Tr. 392, ll. 8-11.

After Moore had been struck, Ruttle noticed the Appellant had driven his car back onto Foster Street. Tr. 392, ll. 18-21. Ruttle got into the car and the Appellant drove the car to the end of Foster street, where Ruttle again took the wheel. Tr. 392, ll. 22-24. Ruttle testified this distance was covered in probably less than 1 minute or even 30 seconds. Tr. 405, ll. 6-14. Ruttle recalled he told Appellant about the knife and what happened either before or after they switched

drivers. 404, l. 18 – Tr. 405, l. 5. Thereafter, Appellant was with Ruttle until Ruttle was stopped by police. Tr. 405, ll. 20-25. Based on the testimony it appears police stopped Ruttle approximately an hour or less after the shooting. Tr. 100, ll. 15-16; Tr. 183, l. 24 – Tr. 184, l. 7; Tr. 185, ll. 23-25.

Appellant did not drive the car again, did not alter the appearance of the car, did not dispose of the gun used in the shooting, did not dispose of any of Ruttle's clothing, and did not offer to assist Ruttle to leave the area. Tr. 399, ll. 4-13; Tr. 405, l. 20 – Tr. 406, ll. 11; Tr. 407, ll. 16-24. As Ruttle testified, Appellant was merely present. Tr. 407, l. 25 – Tr. 408, l. 1. The State Law Enforcement Division ("SLED") Special Agent who was responsible for the investigation, Special Agent Owens, even testified that his investigation did not lead him to believe Appellant assisted Ruttle after the shooting. Tr. 277, ll. 10-12, Tr. 281, ll. 15-18. Nevertheless, the State chose to prosecute Appellant for an Accessory After the Fact to a Felony. Indictment. The trial court denied Appellant's motion for a directed verdict. Tr. 364, ll. 11-13; Tr. 503, ll. 7-9.

Discussion

The trial court erred in denying Appellant's motion for a directed verdict because the State failed to offer evidence to prove guilt beyond a reasonable doubt of Accessory After the Fact to a Felony.

To establish guilt of an Accessory After the Fact to a Felony, the State must prove beyond a reasonable doubt that 1) a felony has been completed, 2) the accused had knowledge the principal committed the felony, and 3) the accused harbored or assisted the principal felon, 4) for the purpose of enabling the principal felon to escape detection or arrest. State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (2013). "It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged. . . ." State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004).

"The accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." Brown, 360 S.C. at 586, 602 S.E.2d at 395 (2004). While it is the job for the jury to weigh the evidence, "it becomes the duty of the trial judge to direct a verdict" where there is an absence of evidence. State v. Bostick, 392 S.C. 134, 139, 708 S.E. 2d 774, 776. (citing State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984)). In ruling on a directed verdict motion, the trial court "views the evidence in the light most favorable to the State and must submit the case to the jury 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. Pearson, 415 S.C. 463, 473, 783 S.E.2d 802, 807 (2016) (quoting State v. Bennett, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016)).

"If there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused," then the case is properly submitted to the jury. Odems, 395 S.C. at 586, 720 S.E.2d at 50. However, where the evidence raises only a suspicion of guilt, the trial court should grant a directed verdict in favor of the accused. Bostick, 392 S.C. at 142, 708 S.E.2d at 778. In Bostick the South Carolina Supreme Court held the State had only raised a suspicion of guilt of the accused at his trial for the offense of murder. Id. The State presented multiple items of circumstantial evidence against the Bostick including: 1) personal items of the deceased found in the accused's family's burn pile, 2) the burn pile was accelerated by kerosene or diesel fuel, which the accused's mother did not use, 3) the accused's shoes had a pattern of gasoline, which was used as the accelerant for the house fire where the deceased was found dead, and 4) blood was found on the accused's jeans. Id. at 141, 708 S.E.2d at 778. The Supreme Court held this circumstantial evidence raised only a suspicion of guilt and reversed the circuit court's error in failing to direct a verdict in favor of the accused. Id. In the case of the Appellant, the State

presented far less circumstantial evidence tending to prove Appellant's guilt than was presented in Bostick.

In State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001), Lollis appealed the trial court's denial of his motion for directed verdict after he was convicted of arson of his home. His wife confessed to setting the fire and asserted that her husband did not know about it. Id. at 582, 541 S.E.2d at 255. The evidence against Lollis amounted to unsubstantiated allegations of financial difficulties, his relationship to the person who confessed to starting the fire, and the fact he had a key to a storage unit where he stored some of his valuables. Id. at 584, 541 S.E.2d at 253. Lollis testified that the purpose of the storage unit was to keep certain items out of the way while he did renovations to the house. Id. at 585, 541 S.E.2d at 256. The Supreme Court held that the evidence against Lollis raised nothing more than a suspicion of guilt and that the trial court erred by denying Lollis' motion for directed verdict. Id. In the case of Appellant, the State similarly presented evidence that amounted to nothing more than suspicion of guilt. The fact that Appellant appeared near the scene of the shooting driving Ruttle's car after the shooting and then drove no more than a few blocks before exiting the driver seat is not substantial circumstantial evidence that Appellant knew a felony had been committed and that he aided Ruttle with the intent to help him avoid arrest or detection.

In State v. Bennett the Supreme Court of South Carolina clarified that "in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id. at 237, 781 S.E.2d at 354. In a case brought on circumstantial evidence, a jury may only convict the accused where "every circumstance relied upon by the State [is] proven beyond a reasonable doubt; and ... all of the circumstances proven

[are] consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Odems, 395 S.C. at 591, 720 S.E.2d at 53. The circumstantial evidence explanation in Odems illustrates the lack of evidence against the Appellant. In Odems the Supreme Court held that although it may have been suspicious that Odems was found in the getaway car connected to a burglary, he subsequently fled from law enforcement, and then requested for assistance from an uninvolved person, this evidence did not reasonably tend to prove Odems' guilt of charges stemming from the burglary. Odems, 395 S.C. at 590-592, 720 S.E.2d at 52-53. Taken together, the circumstances presented as to the Appellant do not point conclusively to guilt of the offense charged nor are they sufficient for a reasonable juror to find him guilty beyond a reasonable doubt.

With respect to an Accessory After the Fact to a Felony charge the State bears the burden of proving beyond a reasonable doubt that the accused not only assisted the principal but also knew of the felony and that the assistance was for the purpose of enabling the principal to avoid arrest. Hooks v. State, 353 S.C. 48, 52, 577 S.E.2d 211, 213 (2003) (overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) on other grounds).

At the trial of the Appellant, the State failed to introduce evidence that the Appellant knew the principal (Ruttle) had committed a felony. The testimony indicates the Appellant was out of sight and would not have seen what transpired between Ruttle and Moore and, therefore, had no way of knowing which, if either, of the men did any shooting or if anyone was struck. Tr. 390, ll. 22-25; Tr. 425, ll. 12-25. Ruttle asserted self-defense at trial. Tr. 397, ll. 11-17. Self-defense is a complete defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Ruttle testified that he told Appellant "that Dalton had a knife and that he came towards me" Tr.

403, l. 16-23. A review of the testimony indicates the Appellant would not have known a felony had been committed, one of the required elements of an Accessory After the Fact to a Felony.

The State also failed to introduce evidence that the Appellant assisted the principal (Ruttle) with the purpose of enabling him to escape arrest or detection. Although Ruttle testified that after the shooting he got into his car that was being driven by Appellant, he did not testify that Appellant drove the car to help him escape the police. Tr. 392, ll. 18-24. Appellant could have driven the car from where Ruttle parked back to Foster Street for any number of reasons other than for the purpose of assisting Ruttle in escaping arrest or detection. The State did not introduce any evidence tending to show why Appellant drove Ruttle's car back to Foster Street from where Appellant had parked. The State called seven witnesses who were all inside or behind their homes across the street from where the shooting happened. Tr. 2, l. 17 – Tr. 3, l. 18. One of these witnesses testified to hearing a revved car engine after he heard the gunshots. Tr. 161, l. 15. None of the other witnesses testified regarding hearing any revving car engine or speeding car. The lone witness's testimony about the car engine amounts to speculation, at best, as to the Appellant's intent and is not proof of, but is merely a suspicion of guilt.

Further, Special Agent Owens testified he had no reason to believe Appellant assisted Ruttle. Tr. 281, ll. 15-18. Ruttle testified Appellant did not assist him nor offer to assist him avoid detection or arrest. Tr. 407, l. 16 – Tr. 408, l. 1. A witness who saw Ruttle and the Appellant after the shooting testified Appellant was not providing any assistance to Ruttle. Tr. 460, l. 18 – Tr. 461, l. 12; Tr. 461, ll. 13-19.

More evidence was presented that the Appellant in fact did not assist Ruttle with avoiding arrest or detection than was presented that he did know a felony had been committed and he assisted Ruttle avoid arrest or detection.

Viewing the evidence in a light most favorable to the State, the evidence presented by the State was not sufficient for a reasonable juror to conclude beyond a reasonable doubt that Appellant knew Ruttle had committed a felony, assisted him, and did it for the purpose of helping Ruttle avoid arrest or detection. The State failed to present evidence of all of the material elements of Accessory After the Fact to a Felony and, at best, raised merely a suspicion of guilt. Therefore, this Court should find the trial court erred in failing to direct a verdict in favor of the Appellant.

II. Because evidence of prior wrongs or acts by the Appellant was (i) irrelevant and inconsequential to the probability of whether or not Appellant committed the offense of Accessory After the Fact to a Felony and (ii) if at all relevant, was unfairly prejudicial, confusing, and misleading, the trial judge erred in allowing the introduction of such evidence at trial.

Standard of review

"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. Lyles, 379 S.C. 328, 333, 665 S.E.2d 201, 204 (Ct. App. 2008). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id.

Relevant Facts

Appellant incorporates herein the "Relevant Facts" presented under Argument I and further states the following: a few weeks prior to the shooting, Appellant and Moore had an interaction sometime around Easter of 2017 (the "Easter Incident"). Tr. 382, ll. 2-7, l. 12 – Tr. 383, l. 7. At that time, Appellant was a passenger in Ruttle's car when it was stalled and Moore

came running toward the car with his hand behind his back, which caused Ruttle to panic. Tr. 382, l. 12 – Tr. 383, l. 4. Appellant then presented a gun and Moore immediately retreated away from the car and nothing further took place. Tr. 383, ll. 4-7.

Later, on the date of Moore's death, May 5, 2017, Appellant was riding in a truck driven by Hunter Sizemore when Sizemore passed Moore, who was walking along Foster Street. Tr. 203, ll. 4-8; Tr. 204, l. 17 – Tr. 205, l. 4; Tr. 209, l. 23 – Tr. 210, l. 17. According to Sizemore's testimony, Appellant "hollered something out the window" at Moore that sounded like "don't get caught lacking." Tr. 209, ll. 19-24; Tr. 210, ll. 18-25. A few hours after that, Appellant was a passenger in Sizemore's truck riding behind Ruttle's car when Moore waved at Ruttle to stop. When Ruttle turned around, Appellant got out of Sizemore's truck and into Ruttle's car, where Ruttle told him to stay after he decided to stop and go speak to Moore. Tr. 388, l. 25 – Tr. 389, l. 2; Tr. 389, ll. 15-23; Tr. 390, ll. 2-11. Appellant gave Ruttle a gun "just in case," but at no point did they have a conversation about Ruttle shooting Moore. Tr. 390, ll. 15-21; Tr. 403, ll. 4-15; Tr. 414, ll. 19 – Tr. 415, 1. 1. Over objections of Appellant, the trial court admitted testimony concerning these prior acts of Appellant. Tr. 210, l. 16 – Tr. 211, l. 10; Tr. 414, l. 19 – Tr. 417, l. 21; Tr. 432, ll. 11-21; Tr. 491, ll. 24-25; Tr. 497, l. 14 – Tr. 502, l. 23; Tr. 512, ll. 2-22; Tr. 594, l. 24 – Tr. 595, l. 4; Tr. 599, ll. 8-13.

Discussion

The trial court erred, over objections of Appellant, in allowing the introduction of evidence, through witness testimony, alleging prior wrongs or acts of the Appellant because the testimony was irrelevant, unfairly prejudicial, confused the issues, and was misleading to the jury.

Relevant evidence is any "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. "Evidence which is not relevant is not admissible." Rule 402, SCRE.

In Lyles the Court of Appeals upheld the trial court's exclusion of testimony proffered by two defendants, both on trial for murder, regarding previous drug sales and the presence of drugs at the apartment where the murder occurred, finding "no probative link between the proffered testimony and the pending charges". Id. at 339, 665 S.E.2d at 207. The defense argued that the proffered testimony went to the credibility of the defendants in their assertions that they went to the apartment to buy drugs. Id. at 340, 665 S.E.2d at 207. The Court of Appeals held that the proffered testimony was not offered as a defense or mitigation and therefore "not probative of any issue material to reaching a verdict." Id. The Court of Appeals concluded that the "absence of a logical connection to the facts in debate makes the evidence irrelevant and inadmissible." Id.

Similar to the proffered testimony in Lyles, the testimony at trial regarding Appellant's actions prior to the shooting, including the Easter Incident and his actions earlier on the day of the shooting, were not probative of any issue material to the jury reaching a verdict. The only facts of consequence with respect to an Accessory After the Fact to a Felony charge were what Appellant did after the felony itself, that being the shooting. The trial court erred and abused its discretion in allowing the State to present the challenged evidence of Appellant's actions prior to the shooting.

Even if this Court finds the challenged evidence relevant, relevant evidence is inadmissible if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "Prejudice exists when there is 'a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.'" State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857,

860–861 (Ct. App. 2010) (citing State v. Martucci, 380 S.C. 232, 248, 669 S.E.2d 598, 606 (Ct.App. 2008). In Lyles the Court of Appeals held that the proffered testimony regarding drugs, even if relevant, was unfairly prejudicial and that the trial court correctly ruled it inadmissible as it insinuated a witness was a drug dealer and a victim had drugs by him and such testimony could unfairly impugn their character and cloud the issues. Id. at 340, 665 S.E.2d at 207.

Testimony regarding the Easter Incident and Appellant's actions earlier in the day of the shooting was unfairly prejudicial to Appellant and such prejudice substantially outweighed any probative value of the testimony. This testimony had no tendency to make the existence of any fact determining Appellant's guilt of Accessory After the Fact to a Felony more or less probable. Its only purpose was to prejudice the jury against Appellant, impugn his character, and portray him as someone who would commit a crime, rather than actually prove he committed the crime for which he was charged. Appellant was tried on Accessory After the Fact to a Felony, not on Murder or Conspiracy or Accessory Before the Fact to a Felony. Evidence related to acts prior to the felony only confused the issues and mislead the jury as to Appellant's role in the events. There is a reasonable probability that the jury's verdict was influenced by the erroneously admitted evidence.

In addition to the unfair prejudice of admitting testimony regarding Appellant's actions prior to the shooting, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "Evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." State v. Lyle, 125 S.C. 406, 118 S.E.2d 803, 807 (1923). Where there is not a clear connection between the extraneous criminal transaction and the crime charged . . . the

accused should be given the benefit of the doubt, and the evidence should be rejected." Id. In Lyle the South Carolina Supreme Court held that, in certain instances, prior crimes or bad acts may be admitted where they tend to prove 1) motive, 2) intent, 3) absence or mistake or accident, 4) a common scheme or plan between two crimes, or 5) the identity of the accused. Id. The State did not present testimony regarding Appellant's actions prior to the shooting for the purpose of any of the exceptions set forth in Lyle, nor was there a clear connection to the crime charged, and, therefore, giving the Appellant the benefit of the doubt, it should have been rejected.

Finally, the trial court erred in allowing the State, over the objection of Appellant, to repeatedly refer to the contested testimony regarding the aforementioned prior acts of Appellant while insinuating a plan or scheme between Appellant and Ruttle with respect to Moore. The State charged Appellant with Accessory After the Fact to a Felony and by allowing the State latitude to make such comments and insinuations regarding a plan or scheme between the men, the trial court permitted the State to argue that Appellant had committed a crime for which he was not charged or tried, to confuse and mislead the jury.

This Court should find that the trial court committed a legal error and abused its discretion in admitting the challenged evidence of prior acts and wrongs of the Appellant.

III. Because a gun that was not used in or present at the shooting was (i) irrelevant and inconsequential to the probability of whether or not Appellant committed the offense of Accessory After the Fact to a Felony and (ii) if at all relevant, was unfairly prejudicial, confusing, and misleading, the trial judge erred in allowing the introduction of the gun at trial.

Standard of review

"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." Lyles, 379

S.C. 328, 333, 665 S.E.2d 201, 204. "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id.

Relevant Facts

When police pulled Ruttle over after the shooting and Appellant was with him, they found a 9mm pistol in the trunk of Ruttle's car. State's exhibits 39-40, 65; Tr. 187, 11. 19-21; Tr. 248, ll. 7-10; Tr. 252, ll. 8 – Tr. 253, l. 4. This pistol was not used in the shooting of Moore or even present at the scene of the shooting. Tr. 270, ll.16-25; Tr. 319, l. 23 – Tr. 322, l. 8; Tr. 338, l.24 – Tr. 339, l. 10. This 99mm pistol had been modified such that it appeared to be a much more powerful weapon, such as a rife, but was still a 9mm pistol ("Modified 9mm"). State's exhibit 65; Tr. 314, ll. 6-16. Over Appellant's objections the trial court admitted both the Modified 9mm and photos of the Modified 9mm. State's exhibits 39, 40, 65; Tr. 230, l. 4 – Tr. 232, l. 16; Tr. 235, ll. 10-18; Tr. 252, l. 8 – Tr. 253, l. 7; Tr. 364, l. 14; Tr. 491, ll. 24-25; Tr. 599, ll. 8-13.

Discussion

The trial court erred, over objections of Appellant, in allowing the introduction of the Modified 9mm and photos of the Modified 9mm because they were irrelevant, unfairly prejudicial, confused the issues, and misleading to the jury.

Relevant evidence is any "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. "Evidence which is not relevant is not admissible." Rule 402, SCRE. Even if this Court finds the challenged evidence relevant, relevant evidence is still inadmissible if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE.

"Prejudice exists when there is 'a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.'" State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 860–61 (Ct. App. 2010) (citing State v. Martucci, 380 S.C. 232, 248, 669 S.E.2d 598, 606 (Ct.App.2008).

In Elders the South Carolina Court of Appeals held that knives presented at Eder's trial were irrelevant and prejudicial. Elders was convicted of several charges, including armed robbery, all stemming from a single event. Id. at 477, 688 S.E.2d at 859. The trial court admitted into evidence four knives that were found in Elders' belongings. Id. at 479, 688 S.E.2d at 860. Finding that there was "considerable evidence in the record demonstrating that the knives were not used in the commission of the crimes[,]" the Court of Appeals held that the knives "tended to prove not that Elders committed the crimes in question, but rather that he was the sort of person who might commit such crimes." Id. at 486, 688 S.E.2d at 864. In the case at hand, the trial court admitted the Modified 9mm and photo of the Modified 9mm, despite uncontested evidence that it was not used in or even present at the shooting. Since the Modified 9mm had no connection to the shooting, the State offered it as evidence not to prove Appellant committed the crime for which he was charged, but to show Appellant was the kind of person who would act as an Accessory After the Fact to a Felony.

This Court should find that the trial court committed a legal error and abused its discretion in admitting the guns over Appellant's objections.

IV. Because the trial court misstated the evidence offered at the hearing on Appellant's motion for immunity under the Protection of Persons and Property Act and applied a higher burden of proof, the trial court erred in denying Appellant immunity under the Act.

Standard of Review

The denial of a pretrial motion for immunity is reviewed for an abuse of discretion. "An abuse of discretion occurs when the trial court's ruling is based on an error of law, or, when grounded in factual conclusions, is without evidentiary support." State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App 2014) (citing State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)).

Relevant Facts

Prior to the shooting, Ruttle saw Moore walking along the road as he drove by, at which time Moore waved him down. Hearing Transcript page 16, lines. 19-22. Around this time Appellant was riding in another car that he got out of and then he got into Ruttle's car. Hearing Tr. 19, ll. 16-20. Ruttle testified that after Appellant got into his car, he pulled over and parked on a side road away from where he saw Moore, and accepted a gun from Appellant, "just in case," so that Appellant would be satisfied and remain in the car. Hearing Tr. 20, ll. 6-16; Hearing Tr. 39, ll. 15-20. Ruttle went to speak to Moore with the intent of letting him know he had no issues with him, despite whatever issues may have existed between Moore and his friend, the Appellant. Hearing Tr. 16, l. 20 – Hearing Tr. 17, l. 3. When Ruttle saw Moore brandish a knife he told him to stop before attempting to fire a warning shot. Hearing Tr. 20, l. 21 – Hearing Tr. 21, l. 12. Ruttle testified he feared that Moore was going to stab him and possibly kill him. Hearing Tr. 28, ll. 5-14.

Discussion

The trial court erred in denying Appellant's motion for immunity under Section 16-11-440(C) of the South Carolina Code of Laws, 1976, as amended (the "Act") because it abused its

discretion in that its ruling was controlled by mischaracterized testimony and it applied a higher burden of proof than the law requires.

The Act requires a court to grant immunity to anyone who proves by a preponderance of the evidence that 1) he acted without fault in bringing on the difficulty; 2) he believed he was in imminent danger of losing his life or sustaining seriousl bodily injury or was in actual imminent danger, 3) if he believed he was in imminent danger, a reasonable man would have believed the same; and 4) he had no way to avoid the danger of losing his life or sustaining serious bodily injury other than to act as he did. Douglas, S.C. at 318, 768 S.E.2d at 238.

Appellant moved for immunity under the Act because, if Ruttle were immune, then Appellant could not be prosecuted for Accessory After the Fact to a Felony because no felony could be prosecuted against Ruttle. The trial court's order denying Appellant's motion mischaracterized the testimony offered at the hearing on Appellant's motion. Ruttle testified that he saw Moore wave him down before he decided to stop. Hearing Tr. 16, ll. 20-22. The trial court's order makes no mention of this and characterizes Ruttle as provoking an attack by deciding to stop to speak to Moore on his own volition, and not at least in part as a response to Moore having made gestures to him to stop. The trial court's order misstates the testimony as follows:

> [Appellant], who was following, stopped his vehicle in the roadway jumping out along with Sizemore. [Appellant] had a gun and according to the testimony was angry with Moore. Upon seeing [Appellant] stop his vehicle, Ruttle approached [Appellant] and, although Ruttle had two firearms of his own in his vehicle, took a handgun given to him by [Appellant]. Placing the handgun in his front waistband, Ruttle jumped a ditch and proceeded to approach Moore. As he approached, Ruttle observed Moore pulling a knife from behind his backside upon which Ruttle pulled the handgun from his front waistband firing it at Moore and killing him.

Order, pages 2-3. A review of the testimony does not support the trial court's characterization of the events. The Appellant was not driving a car that he stopped in the middle of the road to get out of in order to give Ruttle a gun for Ruttle to immediately approach Moore to shoot him. Rather, Appellant was riding in another vehicle that he got out of and was then picked up by Ruttle. Hearing Tr. 19, ll. 16-20. Ruttle testified that after Appellant got into his car, he pulled over and parked on a side road from where he had seen Moore and accepted a gun from Appellant, "just in case," so that Appellant would be satisfied and remain in the car. Hearing Tr. 20, ll. 6-16; Hearing Tr. 39, ll. 15-20. The trial court's order notably failed to mention that Ruttle approached Moore first by attempting to speak to him and when he saw Moore brandish a knife he told him to stop before attempting to fire a warning shot. Hearing Tr. 20, l. 21 – Hearing Tr. 21, l. 12. The trial court's characterization of the testimony makes the series of events seem as though they transpired much faster than they did and as if Ruttle and Appellant ambushed Moore. The trial court's order also states that it could be inferred Moore was defending himself from Ruttle as "there are *three* men, two of whom were armed with firearms . . . ." (emphasis added). Oder p. 3. The testimony, however, indicates there was not three men at the scene as Appellant remained in the parked vehicle on the side street when Ruttle approached Moore. Hearing Tr. 20, ll. 14-20.

The trial court also erred in applying a higher burden of proof than a preponderance of the evidence, as is required. In denying Appellant's motion, the trial court speculated as to other reasons for Ruttle to have fired the weapon. Order p. 3. This speculation as grounds for denial essentially required Appellant to prove his entitlement to immunity by requiring he exclude the possibility of all other reasons for the actions of those involved, amounting to a beyond a reasonable doubt burden of proof.

This Court should find that the trial court erred by making factual and legal errors in denying Appellant's motion for immunity.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for entry of a directed verdict or in the alternative an entry of an order granting Appellant immunity or a new trial.

M. Claire Hall

ATTORNEY FOR APPELLANT

This 28th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Case No. 2017-GS-42-5423

The State,

Respondent,

v.

Lorenzo Guillermo Daniel Calderon,

Appellant

APPELLATE CASE NO. 2018-001707

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Lorenzo Guillermo Daniel Calderon, #377661, at Turbeville Correctional Institution, Turbeville, SC , this 28th day of June, 2019.

M. Claire Hall
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: 8/6/2028