STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

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Jul 09 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY BREYAN,

APPELLANT.

APPELLATE CASE NO. 2019-001589

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by denying Appellant's motion for a directed verdict for the offense of threatening the life of a public official when the state failed to present any direct or substantial circumstantial evidence that Appellant's alleged statement to a magistrate court judge contained a threat to take the life of or to inflict bodily harm upon the judge or members of his immediate family?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on June 11, 2019 for threatening the life of a public official. R. 71. His case was called to trial on September 11, 2019 before the Honorable Robin B. Stilwell, and a jury. R. 1. Assistant Solicitor Bryna Seay represented the state, and Michael Martinez represented Appellant. R. 1.

The jury found Appellant guilty as indicted. R. 68, ll. 18-22. He was sentenced to four years imprisonment. R. 69, ll. 5-8.

This appeal follows.

STANDARD OF REVIEW

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)).

"A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). "When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight." State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

ARGUMENT

The trial judge erred by denying Appellant's motion for a directed verdict for the offense of threatening the life of a public official when the state failed to present any direct or substantial circumstantial evidence that Appellant's alleged statement to a magistrate court judge contained a threat to take the life of or to inflict bodily harm upon the judge or members of his immediate family.

Relevant Facts

The state alleged at trial that Appellant threatened the life of Michael O'Brien, who was a magistrate court judge in Greenville County, and the life of his family. O'Brien is married and has three children and one grandchild. R. 9, ll. 13-17. He worked at the local detention center and was tasked with signing warrants and setting bond for newly arrested individuals. R. 8, l. 12 – 9, l. 1.

On May 31, 2018, Appellant went before Judge O'Brien to have his bond set on an unrelated charge. O'Brien was on the bench and Appellant "was in the area behind the fencing where they hold the prisoners." R. 10, l. 13 – 11, l. 2. A detention center guard was with Appellant. R. 11, ll. 3-7. O'Brien advised Appellant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and explained to him what he was charged with. R. 11, l. 8 – 12, l. 6. According to O'Brien, Appellant began talking about his First and Fourteenth Amendment rights. O'Brien "let that go for a good while" and then set Appellant's bond. R. 12, ll. 7-19.

After he set Appellant's bond, O'Brien claimed Appellant "started cussing at [him] in the courtroom." R. 12, ll. 20-21. He asserted, "He said, Fuck you, fuck you, Judge. You don't have any authority over me. Then he told me I could suck his dick. And he said a few more fuck you's." At that point, O'Brien cited Appellant for contempt of court since he was being

"disruptive" in the courtroom and asked the detention center guard to remove Appellant from the courtroom. R. 13, l. 9 – 14, l. 19. According to O'Brien, before Appellant "ever got anywhere close to being out of the courtroom, he said, . . . I'm going to fuck you up, you and your family." R. 14, ll. 18-23. O'Brien considered this a threat. R. 14, ll. 24-25.

O'Brien admitted Appellant became very agitated after the judge set his bond. Appellant was adamant that O'Brien had no authority over him and that O'Brien was violating the constitution. R. 20, ll. 15-22. While the hearing was audio recorded, the state failed to preserve the recording. O'Brien claimed the system "glitched" and the recording was unavailable. R. 21, l. 23 – 22, l. 22.

The state failed to call the detention center guard who was present in the courtroom as a witness. Apparently, the officer was no longer employed with Greenville County. R. 24, ll. 3-10. However, the state presented Jesse Wasserman, the arresting officer, as a witness. Wasserman worked for the Greenville County Sheriff's Office as a K9 handler with the traffic interdiction unit. R. 25, ll. 6-10. On May 31, 2018, Wasserman arrested an individual after a traffic stop involving narcotics. He transported the individual to the detention center and placed him in a holding cell while he typed up an arrest warrant. R. 26, ll. 8-18.

According to Wasserman, the computers used by officers to draft warrants were just outside the "bond court area." R. 26, ll. 8-18. As he was typing the warrant, Wasserman claimed he "heard an extremely loud commotion from inside bond court." R. 27, ll. 1-4. He "heard a male voice yelling, screaming." R. 27, ll. 5-7. He poked his head around the corner and looked through the cracked door. He saw a "subject carrying on, using profanities, and a detention center guard beginning to lead him toward the door." R. 27, ll. 8-18. He identified the

person as Appellant. He claimed Appellant said "he was going to fuck the Judge up." R. 27, l. 19 – 28, l. 2. Wasserman perceived this as a threat towards Judge O'Brien. R. 28, ll. 5-7.

After Appellant was removed from the courtroom, Wasserman spoke to O'Brien. O'Brien told him that he thought Appellant's statement "was a direct threat against him, based on his job as a judge." R. 28, ll. 8-11. Consequently, Wasserman "went to another judge, presented that judge with probable cause. And they issued a warrant for threatening the life of a public official." R. 28, ll. 11-14.

After the state rested, Appellant moved for a directed verdict. Defense counsel argued the state failed to present sufficient evidence that the words Appellant said contained a threat to take the life of or inflict bodily harm on Judge O'Brien or members of his immediate family. R. 34, ll. 14-20. While counsel admitted what Appellant allegedly said was inappropriate, inflammatory, and profane, he asserted that the statute requires a more express threat to take the life of or inflict bodily harm on a public official or members of his immediate family. R. 34, ll. 20-25. He argued that the evidence the state presented is "simply not enough" and merely raised a suspicion Appellant was guilty. R. 35, ll. 1-5.

Counsel cited to three cases demonstrating that an explicit expressed threat to commit violence is necessary under the statute, including In the Interest of Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004), State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997), and State v. Bailey, 416 S.C. 344, 785 S.E.2d 622 (Ct. App. 2016). R. 69, ll. 6-24. In In the Interest of Jeremiah W., "the Defendant stated he 'had a gun and he was going to blow the officer's F-ing head off.'" In Bridgers, "The Defendant stated to a highway patrol officer, 'I'm going to get my gun. I'm going to come to your home in Lake City. And I'm going to kill you.'" Lastly, in Bailey, "The Defendant [said] . . . that he intended to shoot up the health center and kill everyone

in the mobile crisis. And he told the mental health examiner to get away from his door or he would add her to his list. Then he stated, 'I'm adding you to the list anyway. I'm going to kill you too.'" R. 35, ll. 6-24. Counsel argued that "these cases demonstrate that there must be a clear communication of bodily harm or death. And it can't be left to the jury to speculate about the . . . meaning of these words." R. 35, l. 25 – 36, l. 3.

The assistant solicitor argued there was sufficient evidence to submit the case to the jury. She asserted that Appellant was before Judge O'Brien for a bond hearing. Therefore, the judge "was acting within his professional responsibilities." She said O'Brien testified that Appellant said, "I'm going to fuck you up, you and your family." The solicitor concluded this was "clearly" a threat and Judge O'Brien perceived it as a threat. R. 36, ll. 9-19.

The trial judge neither agreed nor disagreed that Appellant's alleged statement was a threat. He maintained it was "quintessentially a jury question." R. 36, l. 23 – 37, l. 1. The judge concluded there was evidence in the record that would support the state's contention that Appellant's statement was a threat. Accordingly, the judge found, in the light most favorable to the state, that there was evidence from which the jury could find the state met its burden of proof. R. 37, ll. 2-11. He ultimately denied the motion for a directed verdict. R. 37, ll. 10-11.

Appellant testified in his own defense. He believed that the pending charge for which Judge O'Brien was setting bond was unconstitutional. R. 41, ll. 9-11. He told O'Brien that he was acting unlawfully and illegally by setting bond on an unconstitutional charge. R. 42, ll. 4-10. Appellant admitted that he told O'Brien he would have him removed from his position as a judge and sue him financially. R. 42, l. 11 – 44, l. 24. However, he did not remember threatening O'Brien or stating the words O'Brien claimed he said. R. 44, ll. 2-9; R. 45, ll. 5-7. He never intended to hurt Judge O'Brien or his family physically. R. 46, l. 25 – 47, l. 7.

After the defense rested, Appellant renewed his motion for a directed verdict. R. 48, ll. 6-9. However, the judge stood by his previous ruling. R. 48, ll. 10-11.

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict for the offense of threatening the life of a public official when the state failed to present any direct or substantial circumstantial evidence that Appellant's alleged statement to Judge O'Brien contained a threat to take the life of or to inflict bodily harm upon the judge or members of his immediate family.

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256).

In State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000), our Supreme Court held the trial judge erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, in State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001), the Court directed a verdict of acquittal for second degree arson where the state presented no direct evidence that Lollis was involved in setting fire to his home.

The circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held Odems was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that he was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other occupants in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51.

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. The Court concluded the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the decedent in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The state also presented evidence that Bostick had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the decedent's home. Moreover, a DNA expert was able to exclude ninety-nine percent of the population from contributing to blood found on Bostick's jeans, but could not opine the DNA matched the decedent. Id. at 142, 708 S.E.2d at 778. The Court concluded this evidence was insufficient.

The state charged Appellant with threatening the life of a public official. South Carolina Code Ann. § 16-3-1040(A) states in relevant part, "It is unlawful for a person knowingly and willfully to deliver or convey to a public official . . . any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat *to take the life of or to inflict bodily harm* upon the public official . . . or members of his immediate family if the threat is directly related to the public official's . . . professional responsibilities." (emphasis added).

The state presented no evidence that Appellant threatened to take the life of or inflict bodily harm on Judge O'Brien or his immediate family. Appellant's alleged statement was extremely vague and contained no expressed threat of violence. As defense counsel argued below, there must be clear communication of an explicit threat to take the life of or inflict bodily harm on the public official in order to survive a motion for a directed verdict. There was simply no evidence of such in this case. Instead, the trial judge allowed the jury to speculate about the meaning of Appellant's alleged words.

In In the Interest of Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004), our Supreme Court held the trial judge properly denied Jeremiah's motion for a directed verdict for threatening the life of a public official. After his arrest for breach of peace, an officer placed Jeremiah, who was handcuffed, into the back of a patrol car. Id. at 623, 606 S.E.2d at 767. During the ride to the police station, Jeremiah refused to answer the officer's questions and used profanity. Id. He also leaned forward through the opening of the plexiglass separating the front from the rear of the patrol car and yelled at the officer. Id. at 623, 606 S.E.2d at 768. After the officer told Jeremiah to sit back, the officer testified Jeremiah made a gesture as if he was going to spit at the officer. Id. The officer then sprayed the back seat with pepper spray. Id. At the

time of the spraying, the officer testified Jeremiah stated he had a gun, and he was "going to come blow my 'f-ing' head off." Id. Our Supreme Court held this evidence was sufficient to survive a motion for a directed verdict.

In State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196, 197 (1997), our Supreme Court held an officer with the Highway Patrol was a public official within the meaning of § 16-3-1040. While the issue on appeal did not concern a directed verdict, the facts of the case demonstrate that an explicit threat to take the life of or inflict bodily harm on a public official or his immediate family is necessary under the statute. Bridgers was involved in a car accident. Id. at 12; 495 S.E.2d at 197. Although he left the scene, witnesses were able to identify his vehicle and give the license plate number to the Highway Patrol. Id. Corporal Jack Chamberlain and two other officers went to Bridgers's home to investigate. Id. According to Chamberlain's testimony, Bridgers appeared to be intoxicated. Id. He cursed Chamberlain and wanted to fight. Id. Chamberlain testified that Bridgers said: "I'm going to get my gun. I'm going to come to your home in Lake City and I'm going to kill you." Id. Bridgers was conflicted of threatening to kill a police officer. Id.

In State v. Bailey, 416 S.C. 344, 785 S.E.2d 622 (Ct. App. 2016), Bailey, who was convicted of threatening the life of a public official, argued the trial judge erred in finding a mental health professional employed by the South Carolina Department of Mental Health was a public official, rather than a public employee, under § 16-3-1040. 416 S.C. at 346, 785 S.E.2d at 623. Bailey, who suffered from bipolar disorder, was being held in the Charleston County jail. Amy Cradock, who was employed by a subsidiary of the Department of Mental Health and served as a designated mental health examiner for the jail, was asked to assess Bailey based upon alleged threats he made as well as his actions toward detention officers that day. Id.

When Cradock received the referral, she learned that Bailey had threatened to kill a detention officer upon release. Id. Consequently, Cradock visited Bailey to assess whether he needed to be hospitalized for homicidal ideations. Id. According to Cradock, Bailey became very agitated when she arrived at his cell. Id. Cradock testified that Bailey "started making some very negative statements about the mental health center, and stated that he intended to go shoot up the health center and kill everyone." Id. Bailey further told Cradock "if [she] didn't get away from his door fast enough, [she] would be added to the list." Id. As Cradock was walking away, Bailey said, "I'm adding you to the list anyway. I'm going to kill you too." Id. While a directed verdict was not the issue on appeal, this case demonstrates the explicit threat to take the life of or inflict bodily harm on a public official or his immediate family that is necessary to support a conviction for threatening the life of a public official.

Judge O'Brien alleged Appellant stated, "I'm going to fuck you up, you and your family." Unlike the threats made in Jeremiah W., Bridgers, and Bailey, this statement simply does not contain an explicit threat to take the life of or inflict bodily harm on O'Brien or his immediate family. The vagueness of the alleged threat forced the jury to speculate as to what Appellant meant. Respectfully, because the evidence merely raised a suspicion Appellant was guilty of threatening the life of a public official, this Court should direct a verdict of acquittal.

CONCLUSION

Based on the foregoing argument, this Court should direct a verdict for threatening the life of a public official.

Respectfully Submitted,

s/ Lara M. Caudy_____
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2020.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 9, 2020.

s/ Lara M. Caudy
Appellate Defender

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