The State Of South Carolina
In The Court Of Appeals

Appeal from Florence County
Honorable William H. Seals, Circuit Court Judge

The State,

Respondent,

vs.

Diondrae E. Jackson,

Appellant.

#2019-000937

Appellants Pro Se Anders Brief

Diondrae Jackson #241391
Lee Correction Institution
990 Wisacky Highway
Bishopville, South Carolina
29010/72A-1128

Index

Questions Presented

Question One:

Did trial court err in allowing Prosecution to Present video and cross-examine appellant in violation of his rights under Doyle v. Ohio?

Question Two:

Did trial court err in refusing to Grant appellants motion for directed verdict on murder when court erroneously charged voluntary manslaughter over defense objection?

QUESTION Three:

Did Prosecution violate appellant rights to a fair trial, when Prosecution slammed "four Quarters" in front of Jury as well as made improper comments to inflame Passions of Jury?

Question One:

Factual Analysis:

Before trial the following colloquy took Place outside Presence of Jury.

The Court: All right, I'm ready for any Pretrial motions that either of you might have.

Mr. Tucker: We're ready, Your honor. At this time, the state is ready to Proceed with a Jackson v. Denno hearing.

The Court: All right.

Mr. Tucker: There are actually two statements that we'll be looking at and working with this afternoon. Your Honor, the first will be the interview of the defendant that the investigator made. The second would be a Jail video. We can kind of get to that in turn.

ROA Pg 40; lines 25; Pg 41; lines 1-9

However, the appellant asserts his rights to a fair trial was violated, by the submission of this video. for reasons as follows:

First, the video tape was altered and was never authenticated by state, thus, as counsel argued at hearing that:

Mr. Edgeworth: ... the tape has already been modified and I still can't hear it. There are four or five different video camera angles that were Provided to me in discovery and in none of them can I make out that Particular statement as being allegedly made.

So without it being corroborated, all were dealing with is just the fact that the state is relying that this is some type of excited utterance that Purportedly was made.

ROA Pg 86; lines 11-18

or as revealed on cross-examination that:

Q: Well, and we are talking about the video. Were you aware that that video was put together, that the soundtrack is different from one camera to the video of another?

A: No, sir, that's it's job, I don't get involved in that.

ROA Pg 80; lines 8 to 12

The Prosecution admitted this during hearing that:

The Court: So you're telling me there are two videos and the state is telling me you took two videos and sort of overlapped them and blended them to make this video?

Mr. Tucker: That's correct, your honor. In other words, you can hear the audio and then video that is shooting back at the angle that you see in the video doesn't have any audio, but if you play them both simultaneously, that's what you——

The Court: I see, you have an audio track and a video track?

Mr. Tucker: That's correct.

The Court: And you play the same at the same time———

Mr. Tucker: That's correct

The Court: ——— and that's what you get? Okay

Mr. Tucker: And both of those were captured and provided to Mr. Edgeworth pursuant to discovery.

The Court: I see, I see. All right go ahead

Mr. Edgeworth: That's essentially correct, your honor. I think there were four separate videos that are four different angles, so to speak, and they took one of those and overlaid it over the other, which is———

The Court: The visual with the sound.

Mr. Edgeworth: Yes. Your honor

The Court: Got it. All right. I don't have any problem with that. I think its admissible.

ROA Pg 88; lines 21-25; Pg 89; lines 1-20

As such, this video was not admissible and Prejudicially commented on defendant right to remain silent. Especially when the state altered this evidence

Second, the video was used as a means by state to violate defendant's right to remain silent (ROA Pg 86; lines 1-4) and coupled with Prosecution's cross-examination of appellant in front of Jury

Q: Now, this is your first best opportunity to tell your side of the story; correct?

A: Correct.

ROA Pg 453; lines 20-22

Q: He asked you what happened Diondrae, didn't he?

A: Yes

Q: And you told him a far different story than you testified here today, didn't you?

A: Yes

ROA Pg 454; lines 1-5

Q: Now, you also told investigator Tilton during that statement that when you Got out of the car the first time, Latesha tells you, Just like you've testified here today, there's a Gun in there if anything kind of Pops off. Do you recall telling Investigator Tilton that?

A: In the statement, Yes.

Q: Okay. And you testified that again today; right?

A: Right.

Q: And You admitted here today and in the statement Pulling the Glove box down or the Glove box being down and You feeling around in there and finding the Gun; correct?

A: Correct.

ROA PG 454; lines 14-25

This line of questioning was a violation of miranda, and consequently, the court found that Appellant was mirandized. thus, State likewise engaged in Piling my testimony against their as follows:

Q: So again, these were all four eyewitnesses and Latesha Newton also said the same thing, that You had the Gun and that You went to the car and You came back and that was when the shooting started, but again, these were four People. Latesha Newton had know You all her life; correct? Pretty much?

A: Correct.

Q: And the other three had never met You before; correct?

A: Correct

Q: So why would they lie?

ROA PG 468; lines 19-25; PG 469; lines 1-3

This line of questioning was improper, and throughout the entire cross-examination Prosecution violated appellant Rights (ROA PG 450-476; PG 481-482)

Legal Analysis

The courts of South Carolina have consistently recognized the significance of Doyle on Post-arrest silence. Moreover, our Supreme Court and appellate court have warned Solicitors against violation of the Doyle Prohibition. See, State v. Myers, 301 S.C. 251, 258-59 (1990) State v. Arther, 290 S.C. 291 (1986)

In State v. Gray, 304 S.C. 482 (Ct. App 1991) this court found a defendant had been denied due process by the Prosecutor's efforts to impeach with Post-arrest, Post-miranda silence. In this assault with intent to commit criminal sexual conduct trial.

Gray did not Give any statement to the Police, but took the stand at trial and asserted his innocence. The Prosecution on cross-examination asked if he was read his rights after being arrested and whether he understood them. Gray responded affirmatively and the Prosecutor next asked if he then Gave the story he was not Presenting to the Jury. Gray replied he only told Police he would not Give a Statement. The Prosecutor then asked whether he expected the Jury to believe him, at which Point defense counsel objected. The objection was overruled and the Prosecutor repeated the last question.

In Doyle v. Ohio, 426 U.S. 610 (1976) held "the use for impeachment Purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violates the Due Process Clause Of The Fourteenth Amendment" Doyle, id at 619.. In this case, the defendants received miranda warnings when they were arrested for selling marijuana. They made no statements to the Police. At their separate trials, the defendants testified, for the firsttime, about their innocence explaining they had been framed by a Government informant. The state then attempted to impeach the defendants credibility on cross-examination by questioning them about their Post-arrest silence. The state did not suggest that the evidence was admissible as evidence of Guilt, but asserted the Jury needed all relevant evidence surrounding the truthfulness of the defendant's exculPatory statements. Doyle, id at 617

The court went on to hold that "Miranda decision compels rejection of the state's Position" Doyle, id at 617..

Question Two:

Factual Analysis Of Case

The incident took Place at the Downbeat club in Florence County on May 6th. 2018 at around 2am in the early morning hours. (ROA PG 113; lines 24-25; PG 114; lines 1-12) Appellant fired his Gun in Self-defense when a Gang-member Pulled out his Gun (ROA PG 441; line 21-25; PG 442; lines 1-11) Both men fired and as a result Mr. Spates was killed.

Appellant was charged with murder of Mr. Spates, and because appellant was found not Guilty of attempted murder on Mr. Oliver, appellant avers that charge has no bearing on disposition of whether court should have Granted directed verdict motion on murder.

The Jury found appellant Guilty voluntary manslaughter. Appellate counsel has addressed trial court charging voluntary manslaughter over defense objection (ROA PG 482 lines 22-25; 483; lines 6-25; PG 484; line 1-9) Defense counsel once again renewed his motion for a directed verdict (ROA PG 485; lines 1-9) and trial court denied motion

Evidence of murder was circumstantial at best, as reflected in Prosecution Request for involuntary manslaughter as follows:

> Mr. Tucker: And I certainly think that based on the evidence I think there is an argument to be made that it could be. You know, the Jury could say-- I mean there's enough evidence to I think support a voluntary-manslaughter lesser-included.
>
> The Court: In what regard
>
> Mr. Tucker: Well, with regards to the --- it being an altercation to begin with and then, of course, going out to Get the Gun...
>
> ROA PG 413; lines 17-25

By Prosecution own colloquy, appellant had a cooling off Period. However, once appellant came back into club at the request of bouncer (ROAPG 439; lines 5-25; PG 438; lines 14-22) The same Group of men continued taunting appellant (ROAPG 440; lines 12-16), it was not until Mr. Spates was Given the Gun that appellant Perceived them as a threat (ROAPG 440; lines 17-23) and once Mr. Spates drew his Gun. Appellant moved Latesha out of the way and fired at Mr. Spates (ROAPG 442; lines 4-11)

Testimony at trial clearly indicates, that appellant was entitled to a directed verdict as Prosecution stated that:

> Mr. Tucker: ..... Certainly, the use of an inherently dangerous firearm certainly affected it. When investigator Tilton talked about I don't think he had any intent to Go there, I think he was referring to the fact that he didn't intend to Go down to the downbeat club, but that it happened after he Got into that altercation .....
>
> ROAPG 411; lines 15-20

Prosecution own summation of testimony during colloquy, Points conclusively to the facts this was "Self-Defense" and that Prosecution was wrong for requesting involuntary manslaughter by stating "He Goes out to car, reflects, Grabs a Gun from Glove box and Goes inside" (ROAPG 411; lines 20-21) Moreover, the victim tested Positive for Gunshot Powder residue on his hand(s) (ROAPG 328; lines 18-25; PG 329; lines 1; PG 331; lines 15-23). As a consequence this negates any notion victim was not armed.

For this reason appellant is entitled to a directed verdict on murder

Legal Analysis

When a motion for directed verdict motion is made in a criminal case, the trial Judge is concerned with the existence or non-existence of evidence, not its weight. The trial Judge should Grant a directed verdict motion when the evidence merely raises a Suspicion that the accused is Guilty, it is his duty to submit the case to the Jury if there is any evidence, either direct or circumstantial, which reasonably tends to Prove Guilt of the accused, or from which Guilt may be fairly or logically deduced. See, State v. Irwin, 270 S.C. 539 (1978) In reviewing the appeal of a refusal to Grant a directed verdict motion of not Guilty, this court must look at the evidence in light most favorable to the State. Irwin, id..

Where it is undertaken by the Prosecution in a criminal case to Prove the Guilt of the accused by circumstantial evidence, not only must the circumstances be Proven, but they must Point conclusively, that is to a moral certainty to the Guilt of the accused, they must be wholly and in every Particular Perfectly consistent with each other, and they must further be absolutely inconsistent with any other reasonable hypothesis than the Guilt of accused.

Two cases from this courts Jurisprudence are instructive in explaining the Proof required in cases built wholly on circumstantial evidence. In State v. Bostick, 392 S.C. 134 (2011) the state accused of killing his neighbor, Polite, and burning down her home. The state Presented the following evidence against Bostick (1) Investigators found items belonging to Polite, including watch and two set of car keys, in a burn Pile located on Bostick family Property (2) Bostick shoes contained a Pattern that matched Gasoline,

and Gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA; Bostick, id at 141-42. However, the state never introduced a motive or a murder weapon into evidence, id.,. Thus, the evidence Presented by the state raised at most, a mere suspicion that Bostick committed this crime.

In State v. Lollis, 343 S.C. 580 (2001) this Court Of Appeals decision was reviewed by State Supreme Court reversing a circuit courts refusal to direct verdict on charge of 2nd degree arson, id... Lollis lived in a mobile home with his common law wife, Tammy Burgess Lollis. Burgess confessed to setting fire to the home and claimed Lollis had no knowledge of her Plans, id at 582. According to Burgess, she burned the home in order to erase the couples mortgage debt, id..

The Lollis court found that, even when viewed in light most favorable to the state, the circumstantial evidence does not reasonably Prove Lollis Guilt.

Question Three:

Appellant contends that, during closing arguments the Prosecution, vouched for credibility of witnesses, inflammed Passions of Jury, violated his right to fair trial as credibility of appellant and state's witnesses was critical to case.

A) Inflammed Passions of Jury:

Mr. Tucker: Life. It's cheap in Diondrae Jackson's world. In fact, it's worth one dollar

(Whereupon, counsel Placed four quarters on the rail of the Jury box)

ROA Pg 486; lines 1-5

The man took a loaded firearm in his waistband and murder in his heart into a club after he Got into a fight with a Guy over four quarters..... for Mr. Jackson, he took a loaded firearm to a confrontation where the other Guys had nothing at all"

ROA PG 488; lines 24-25; PG 489; lines 1-4

And then he left and he comes back with the Gun and starts blasting

ROA PG 490; lines 10-11

... and the most ironic part of this is neither of those individuals were the ones with whom he was arguing over four quarters

ROA PG 490; lines 20-22

He chose to Go back into that club with a loaded weapon in his waistband and murder in his heart.

ROA PG 491; lines 12-14

There was a red shirt or two. That's a fairly common color. But in Mr. Jackson's world, he sees red, he starts blasting.

ROA PG 494; lines 21-22

The first words out of his mouth when he Gets to the Jail, I caused one murder, the other one Got to die too.

ROA PG 498; line 24-25

... looking him in the face, shot him in the stomach. In the hospital for over two months and he almost died

ROA PG 504; lines 20-22

B) <u>Vouching for credibility of witnesses</u>:

... There's many ways to tell a lie. There's only one way to tell the truth and there's only one time to tell the truth, when Your asked what happened right after it happened

But he didn't. He waits a Year, doesn't say what happened, this version You heard today, to anybody until he comes in here today because he's had a Year to work on it.

ROAPG 520; lines 23-25; PG 521; lines 1-4

So what happened to the weapon? Well, it depends on which version You believe, that Mr. Jackson wants to try to convince You of, the one that they -- he freely admits he threw the Gun out.

ROAPG 498; lines 5-8

In Diondrae Jackson's world, eyewitness testimony doesn't count if they all know one another. Eyewitness testimony doesn't matter if they can't find the Gun. Eyewitness testimony doesn't matter if You can blame Your actions on someone wearing a red shirt.

ROAPG 499; lines 10-14

What do these eyewitnesses all have in common? None, with the exception of Latesha Newton, knew Jackson before that night. So why would they lie? They had no axe to Grind, no Past wrongs to avenge

ROAPG 504; lines 4-9

The only Person who heard threats made towards him was Mr. Jackson and, again, that depends on which version of his story You're willing to listen to. Was it the one he Gave Roger Tilton OR the one he tried to feed You folks in here today

ROAPG 496; lines 13-16

While the statements by state, were directed at inflamming Passions of Jury. By slamming four quarters on rail in front of Jury, or characterizing witnesses, as being scared of the defendant (ROA PG 502; lines 2-8) or mischaracterization of evidence. To Portary shooting of one of victims Malcolm Spates as unJustifiable (ROA PG 497; lines 1-4) aroused sympathy for victims.

Similarly, the Prosecution closing argument vouched for credibility of its witnesses and also commented on defendant's miranda rights, as addressed in question one and in this instance collectively infringed on appellant right to a fair trial.

Legal Analysis:

Like a United States Attorney, a Solicitor " is the representative not of an ordinary Party to a controversy but of a Sovereign whose obligation to Govern impartially is as compelling as its obligation to Govern at all; and whose interest, therefore, in criminal Prosecutions is not that it shall win a case, but that Justice shall be done." See. Berger v. United States, 295 U.S. 78. (1935)

Berger was the first detailed consideration of improper Prosecution argument. the court, reversed Berger's conviction for conspiracy to issue counterfeit money, holding that the Prosecutor had acted inappropriately both in his cross-examination of witnesses and in his closing argument.

Throughout his closing argument the Prosecutor made a number of statements which the South Carolina Supreme Court held improper. See. Fortune v. State, 428 S.C. 545 (2019)

For over a century, this court has recognized that improper argument by a Prosecu-

for can be "Prejudicial to the accused" Fortune, id at 554-55; Dunlop v. United States, 165 U.S. 486, 498 (1897); cf. Williams v. United States, 168 U.S. 382, 398 (1897) Contrary to respondent crabbed view of the applicable case law, there exist a broad body of cases in which this court has established clear rule defining both what Prosecutors may and may not argue and how courts should assess the Prejudice from improper comments. Fortune, id at 551-553; Dunlop, id; Williams, id.

Statements of the Prosecutor were not merely improper, but were so seriously Prejudicial as to deny the respondent his Fourteenth Amendment to a fair trial. See. Frazier v. Cupp, 394 U.S. 731, 736 (1939) The statements were in violation of the teachings of Berger

There can be no serious question as to the impropriety of the statements made by the Prosecutor in his closing argument. The statements violate clearly every Pertinent Proscription in the ABA standards relating to the Prosecution function Professional responsibility. Berger, id at 88,.

Conclusion

Appellant contends this court should Grant writ on question one, three as it relates to improper comments on appellant right to remain silent, or, Grant relief on Question two and Grant directed verdict motion, or in the alternative, issue writ on all Grounds.

Wherefore, it is Prayed court Grant writ.

Date: 7-23 day of _____, 20__.

Respectfully Submitted
s/ Diondrae Jackson
Diondrae Jackson Affiant

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July , 2020

Honorable Chief Clerk Of Court
South Carolina Court Of Appeals
Post Office Box 11629
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Re: State v. Diondrae Jackson # 2019-000937
Subject: File Pro Se Anders Brief

Hon. Chief Clerk

Enclosed find my original Pro Se Anders Brief, and respectfully ask that You Return a clocked Stamped filed copy for my records

with kind Regards
s/ Diondrae Jackson
Diondrae Jackson/Pro Se

cc: File
Encl. Anders Brief

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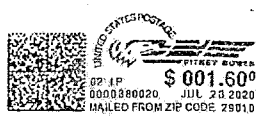

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