STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Dec 01 2020
SC Court of Appeals

Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANKLIN PIERRE DOVER,

APPELLANT

APPELLATE CASE NO. 2019-001244

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by refusing to direct a verdict where there was no direct or substantial circumstantial evidence that appellant shot the decedent as the state alleged, leaving the jury to speculate on the murder charge where others were prime suspects, since appellant was entitled to a directed verdict under these circumstances?

STATEMENT OF THE CASE

Appellant was indicted by the Cherokee County grand jury at its September 4, 2014 term for the offense of murder. R. 482-483. His case was called to trial on July 15, 2019, along with co-defendant Rajshun Bernard Foster before the Honorable R. Keith Kelly, and a jury. Michael Morin represent appellant. Tracy Racine represented co-defendant Foster. R. 1; r. 20, ll. 13-17.

On July 17, 2019, the jury found appellant Dover and co-defendant Foster guilty of murder. R. 469, ll. 3-11. Judge Kelly sentenced appellant to life imprisonment. Co-defendant Foster was sentenced to thirty-five years' imprisonment. R. 475, ll. 12-17.

This appeal follows.

STANDARD OF REVIEW

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. 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 of 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. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409.

ARGUMENT

The court abused its discretion by refusing to direct a verdict where there was no direct or substantial circumstantial evidence that appellant shot the decedent as the state alleged, leaving the jury to speculate on the murder charge where others were prime suspects, since appellant was entitled to a directed verdict under these circumstances

Relevant Facts

Terrica Bonner testified she was dating the decedent, "Slick," and she had lived with him for a time in her apartment in Connecticut Village. R. 93, ll. 5-21. Bonner said that the decedent would enter her apartment through the window or the backdoor, which bordered on the woods behind her apartment. R. 96, ll. 19-22.

Bonner testified that on Sunday, June 22, 2014, the day of the shooting, the decedent was friends with both appellant Dover and co-defendant Foster. R. 97, ll. 8-21. However, she claimed, "[T]heir friendship wasn't like it used to be" for whatever reason. R. 97, ll. 22-25.

Bonner claimed that "[a] couple days before 'Slick' got killed," appellant and Foster were looking for the decedent, and they came by her apartment. "It wasn't no friendly visit." R. 98, ll. 19-25. She claimed the men said they "[h]ad something for him." R. 119, ll. 21-24.

On Sunday, June 22, 2014, at the Connecticut Apartments, Bonner was driving into the apartment complex where she saw the decedent walking in the parking lot. She stopped and talked to him. She saw co-defendant Foster driving through the apartment complex in his girlfriend's car at the same time. She noticed two other men inside that car. R. 101, ll. 7-21.

As Bonner was leaving Connecticut Village to go to her mother's house a short time later, she again spotted co-defendant Foster and the other two men in his car. She maintained

that about five to ten minutes later, "I had a phone call that 'Slick' just got killed." R. 101, l. 17 – 104, l. 2.

On cross-examination, Bonner admitted that she told the police that two men had come to her apartment looking for the decedent before the murder. She did not name appellant Dover as one of those two men. R. 112, ll. 1-13.

Bonner maintained that was staying with her mother, and she only stayed at her apartment times in Connecticut Village at times when the murder occurred. She still maintained that co-defendant Foster had come by her apartment looking for the decedent a couple days before the murder. R. 115, ll. 16-22.

Bernice Dowdle also lived in Connecticut Village on June 22, 2014. She had lived there for twenty years. She knew the decedent because "I met him by coming by in the mornings and [him] asking me for a cigarette." R. 127, l. 23 – 128, l. 22.

Dowdle testified that co-defendant Foster was looking for the decedent before the murder. Two days before the murder, Dowdle recalled that Foster asked her if she had seen the decedent. She told him that she had not seen the decedent. Foster told Dowdle to tell the decedent he was looking for him if she saw him. Dowdle said, "I thought y'all was cool." She said Foster responded, "I did too." R. 130, ll. 6-12.

Dowdle said the next time she saw the decedent, she told him Foster "is looking for you dead or alive." She said this was an expression used when she was a child to mean you were "in trouble" with the person looking for you. R. 131, ll. 12-18.

On the day of the murder, Dowdle heard a loud noise, and she ran across the apartment complex to where the sound appeared to come from -- she saw the decedent laying dead on the ground near Bonner's back door. Dowdle related that she saw co-defendant Foster sitting in his

car which was parked by a trash can with "Mr. Bonner." Everyone knew "Mr. Bonner as "Red," and Red would later testify for the state against appellant. R. 132, ll. 15-20.

Kiara Douglas also lived in Connecticut Village. She had known the decedent for two or three months at the time he was murdered. R. 206, l. 25 – 207, l. 23.

Douglas saw the decedent on the day he was killed. She maintained the decedent came by her apartment that day and that he was "nervous." He allegedly told Douglas that he had gotten into an argument with co-defendant Foster and appellant. R. 208, ll. 6-16. Significantly, Douglas admitted she did not see appellant or Foster that day, nor did she see any altercation between them and the decedent. R. 208, ll. 17-24.

Douglas maintained she told the decedent to gather his clothes and for him to call a friend or relative to pick him up so that he did not get hurt. She thought the decedent had gone to get his clothes as she suggested. However, about fifteen minutes later, the decedent was dead from a gunshot. R. 209, l. 6 – 210, l. 22.

Chariece Allen was another tenant at Connecticut Village on June 22, 2014. R. 244, ll. 2-14. She also maintained the decedent was "nervous" on the day he was shot. R. 248, ll. 4-9.

Allen remembered seeing co-defendant Foster and Red around the time the decedent was shot at Connecticut Village. She said, "It all happened so fast, like he walked around the building, I look up [sic], I see a man [sic] and then boom, he shot [sic]. That's how it happened." R. 253, ll. 4-7.

On cross-examination, Allen admitted that she was smoking marijuana with the decedent on the afternoon that he was killed. After the decedent was shot, Allen did not give the decendnt any help. Instead she ran away because "my nerves was tore up. I don't want to sit there and look at nobody like that." R. 256, l. 3 – 258, l. 14.

Allen remembered people in the apartment complex running around after the shooting. Conversely, she said co-defendant Foster allegedly was sitting in his car calmly after the shooting. R. 259, l. 6 – 260, l. 23.[1]

The testimony of Susan Crawford from the prior trial was read to the jury without objection, due to her failing health. Crawford remembered it was a hot day when the decedent was shot that June day. She recalled a confrontation between co-defendant Foster and the decedent. She did not know what the argument was about, but she said she heard money mentioned in the same conversation with a lot of cursing being exchanged. R. 307, l. 6 – 311, l. 21. She also claimed she saw Appellant Dover in the area at the time. R. 310, l. 8 – 311, l. 21.

Antron Bonner, as stated, was "Red." Red was charged with murder at the time he testified for the state during this joint trial.

Red said on the day of the fateful shooting that he was going to a family cookout in Spartanburg to celebrate a family member being released from prison. He also remembered that day that his grandmother wanted him to go to the local store to buy her chewing tobacco before the party. R. 312, l. 5 – 313, l. 18. Red was living with his girlfriend, "Monkey," at the time. R. 315, ll. 8-21.

The essence of Red's claim was that he got into a car with co-defendant Foster and appellant. Appellant allegedly had a rifle and was wearing "doctor's glove[s]." Another man, "T," had a handgun. R. 318, l. 19 – 320, l. 20.

Red claimed that co-defendant Foster drove the men, Red, appellant, "T," and himself, into Connecticut Village. He claimed that co-defendant Foster pulled into a wooded area near

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[1] The pathologist, Dr. Janice Ross, testified that the decedent died of a single gun shot to the chest. R. 271, ll. 6-9.

the apartments. Appellant and "T" got out of the car with their guns, according to Red. R. 322, ll. 20-25.

Red maintained that he went along with the men because he correctly thought marijuana was going to be purchased. Co-defendant Foster talked to the decedent, and marijuana was obtained during the trip. R. 323, l. 17 – 325, l. 27.

Red testified that co-defendant Foster got a phone call as they were driving in his car. Red related that Foster then picked up appellant and "T" from the Village apartment complex. R. 325, ll. 7-25.

Red claimed when co-defendant Foster picked up appellant, that appellant said "[D]rive, drive. Get me out from this side of town." R. 327, ll. 1-8. Red also maintained that co-defendant Foster asked appellant, "[W]here did you shoot him?" and that appellant responded, "Up in the chest area." R. 327, ll. 9-20.

Red claimed that Foster dropped appellant off at another one of appellant's girlfriend's houses—Mary's house—and that Red went to the store "and got my grandma's tobacco." R. 328, ll. 3-25. Red also claimed that appellant told him not to talk about the events of that day, "or I could get in trouble about it." R. 329, ll. 11-25.

As stated, Red was charged with murder at the time of the trial. He claimed he did not know anything about the solicitor's talks with his attorney which involved downgrading his charges to "misprision of a felony" from murder.[2] R. 330, ll. 1-4.

On cross-examination by defense counsel Morin, Red, who was unemployed, said he got some of the money to buy marijuana from his grandmother. Red maintained that he had about

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[2] There is no record of Antron "Red" Bonner being incarcerated within the South Carolina Department of Corrections. See Incarcerated Inmate Search, South Carolina Department of Corrections website.

eight dollars at the time, and that when his grandmother gave him money for her tobacco, "She probably gave me the rest out of that change." R. 324, l. 4 – 335, l. 16.

Directed Verdict Motion

Defense counsel Morin moved for a directed verdict on behalf of appellant. He argued the state had failed to prove the identity of appellant as the shooter and that the jury was left to merely speculate about his guilt. R. 399, ll. 19-23. The judge denied the motion for a directed verdict. R. 400, ll. 17-21.

Charge on the Law

The trial judge charged that "[t]he use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude such an inference in proper after considering all the facts and circumstances in evidence. You are free to accept or reject the permissive inferences, depending on your view of the evidence.

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would simply be an evidentiary fact to be taken into consideration by you, along with all other evidence, and give it such weight as you determine it should receive." R. 458, l. 24 – 459, l. 15.

State v. Belcher, 385 S.C. 597, 685 S.E.2d 892 (2009), was decided by the Supreme Court ten years before the trial in this case. In Belcher, our Supreme Court held that it was improper to charge the jury that an inference of malice could arise from the use of a deadly weapon where there was any evidence which would "reduce, mitigate, excuse, or justify the killing" in the case.

Later, in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), our Supreme Court held that regardless of the evidence presented at trial, a trial judge should not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon under any circumstances. Burdette was decided on July 31, 2019, fourteen days after the conclusion of appellant's trial on July 17, 2019. Regardless, this "implied malice" jury instruction issue was not preserved for appellate review pursuant to Belcher because there was no objection to this jury instruction on inferred or implied malice from the use of a deadly weapon.

Discussion

A case should be submitted to the jury if there is any direct evidence or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). When there is an absence of such evidence, it is the duty of the trial judge to direct a verdict. State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-453 (1984).

In this case, the evidence was largely circumstantial that appellant Dover was with co-defendant Foster, who other witnesses had seen threatening the decedent. The only alleged direct evidence of Appellant Dover's involvement came from Red, who was charged with murder at the time he testified for the state against appellant. Red, as seen above, has apparently evaded incarceration in the South Carolina Department of Corrections entirely.

There was much more circumstantial evidence in cases against other defendants where our Supreme Court has ruled that a directed verdict should have been issued. In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held that a directed verdict should have been issued where the victim died in an arson. Appellant Bostick had accelerant or gasoline on his shoes after the fire, and some of the victim's personal items were found in a burn pile behind

Bostick's house. Yet, our Supreme Court held this was insufficient circumstantial evidence to constitute "substantial circumstantial evidence."

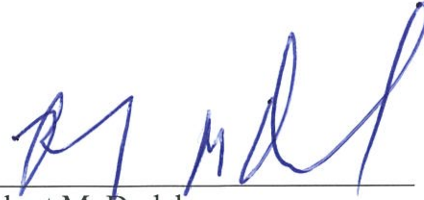
In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the circumstantial evidence was also stronger against the defendant than it was against appellant Dover in this case. In Arnold, the victim, Cox, was shot. His body was found off of a road in Colleton County. On the last day Cox was seen alive, he borrowed a friend's BMW Z3 to go to the dentist's office. This car was found in a parking lot in Johnson City, Tennessee, and there was evidence the defendant Arnold telephoned a friend from ten miles away from the car. Arnold's fingerprints were also found inside the car. However, our Supreme Court reasoned that the state only proved that Arnold was in the BMW on the last day Cox was seen alive and that was insufficient evidence to make this a jury question.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 532 (2000), there was extremely strong circumstantial evidence against Martin. A car very similar to Martin's was seen in the decedent's housing complex parking lot on the night the decedent was killed. When Martin's co-defendant's girlfriend asked the men why they were late picking her up that night, the men responded, "Some shit happened tonight," and "Someone may have gotten killed tonight." Further, personal affects that may have belonged to the victim were found in the trashcan outside the girlfriend's place of employment, a tavern. Yet, our Supreme Court held Martin was entitled to a directed verdict. See, also, State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) (directed verdict should have been issued in a burglary case even though Odems was in the car with the burglars at the time of the traffic stop and where Odems ran from the police when the burglars were arrested).

In short, there was an abundance of evidence against co-defendant Foster in this case. With the exception of the self-serving testimony of Red Bonner, the state's evidence only raised a suspicion of appellant's guilt. It impermissibly left the jury to speculate on appellant's guilt as correctly argued by defense counsel.

CONCLUSION

By reason of the foregoing argument, a directed verdict of acquittal should be issued.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of December, 2020.

STATE OF SOUTH CAROLINA

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FRANKLIN PIERRE DOVER, APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Franklin Pierre Dover states:

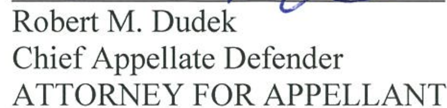
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge R. Keith Kelly, which was held on July 15 - 17, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Franklin Pierre Dover.

Respectfully Submitted,



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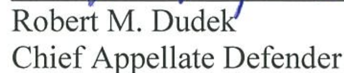
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment;
(2) Entire trial transcript dated July 15-17, 2019

I certify that this designation contains no matter which is irrelevant to this appeal.

December 1, 2020



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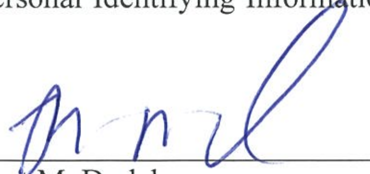
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

December 1, 2020.



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