

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Florence County
Paul M. Burch, Circuit Court Judge

DOMINIQUE ALEXANDER CASH,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001820

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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ISSUE PRESENTED

Whether the court erred by refusing to direct a verdict on the greater offense of assault while resisting arrest where there was no evidence Appellant assaulted the police officer, and any injuries the officer suffered were inflicted by third parties?

STATEMENT

During the March term of 2013, a Florence County Grand Jury indicted Dominique Cash, Appellant, for assault on a law enforcement officer. App. 386 – 387. Appellant was tried before the Honorable D. Craig Brown and a jury, from April 9 – 10, 2013. Jay Jordan represented Appellant. Robert Wells represented the State. App. 1. Appellant was convicted as indicted and he was sentenced to ten years' imprisonment. App. 229, ll. 2-7; App. 237, ll. 4-7.

Appellant attempted to directly appeal his conviction and sentence but on June 6, 2013, this Court dismissed the matter pursuant to Rule 203, SCACR, for failure to timely serve notice of appeal. App. 243 – 269. The remittitur was issued June 27, 2013. App. 251.

On August 30, 2013, Appellant filed an application for post-conviction relief (PCR). App. 270 – 276. On April 23, 2014, the State made its return. App. 277 – 282. On July 12, 2016, and again on March 9, 2017, Appellant amended his application. App. 283 – 286. An evidentiary hearing was convened on the matter on March 17, 2017, before the Honorable Paul M. Burch. Kristy Goldberg represented Appellant. Lindsey McCallister represented the State. App. 287. On August 24, 2017, the PCR court issued an order of dismissal. App. 373 – 385.

On July 3, 2017, Appellant timely served notice of intent to appeal. On June 13, 2018, Appellant filed a petition for writ of certiorari. On October 29, 2018, the State filed its return to petition for writ of certiorari. On November 13, 2018, the Supreme Court transferred the case to this Court pursuant to Rule 243(1), SCACR.

On October 23, 2020, this Court issued an order in which it granted certiorari as to the PCR judge's finding that Appellant was not entitled to a belated direct appeal and denied certiorari as to the issue of ineffective assistance of counsel. The order dispensed with further

briefing on the petition for certiorari, proceeded with direct review pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986), and ordered Appellant to file his appellant's brief.¹

This appeal follows.

¹ See *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

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 776-77. “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 erred by refusing to direct a verdict on the greater offense of assault while resisting arrest where there was no evidence Appellant assaulted the police officer, and any injuries the officer suffered were inflicted by third parties.

Relevant facts

The State alleged that Appellant's cousin, Adrian Boney, and two female acquaintances began cursing at Motel 6 employees in the motel lobby after they became upset over a policy that did not allow them to retrieve their items from a motel room registered to someone else. App. 41, ll. 16-25; App. 146, ll. 14-18. Appellant was not involved in that disturbance. App. 48, l. 25 – 49, l. 19. The motel manager called 911, and Deputy Josh Phillips of the Florence County Sheriff's Office responded. App. 56, ll. 7-15. Deputy Phillips said he decided to place Boney in investigative detention because the two women were "arguing and cussing," and Boney "started yelling and cussing." App. 68, ll. 10-13; App. 69, l. 1 – 70, l. 2.

Appellant testified that he saw Phillips take Boney "out [of] the hotel lobby. The officer knew I was behind him." App. 170, ll. 18-20. Appellant said he had a close relationship with Boney and "needed to know" what was going to happen. App. 170, ll. 22-23. When Phillips was about two yards from his patrol car, Appellant said he asked: "[W]hat's his charge?" App. 171, ll. 18-20. Appellant testified that Phillips immediately pushed him, and when Appellant asked what the officer was doing, Phillips pushed him again and started wrestling Appellant. App. 171, ll. 21-25. Appellant said Phillips tripped and "pulls me on the ground with him. I try to get up off the ground; he [is] pulling me on my neck so I'm not able to get up off the ground." App. 172, ll. 7-10.

Appellant testified he was punched in the face by Phillips and put his hands up. App. 172, ll. 12-13. Appellant said Boney then began kicking Deputy Phillips. App. 172, ll. 19-22. Appellant explained that he never struck, hit, or jumped on the deputy. App. 171, ll. 6-13.

Deputy Phillips testified that when he reached the patrol car with Adrian Boney, he felt a tug on his shoulder. App. 70, ll. 10-13. Phillips claimed that he looked over his shoulder and Appellant was standing “right on top” of him and asked why Boney was being arrested. App. 70, l. 24 – 71, l. 3. Phillips said that he pushed Appellant and told him to “back up off of me.” App. 71, ll. 7-9. Phillips alleged Appellant “kind of lunged at me,” and Phillips again “said back up and I shoved him back again.” App. 71, ll. 9-13. According to Phillips, when he pushed Appellant the second time, Appellant grabbed his arm, and Phillips struck Appellant in the face. App. 71, ll. 12-16.

Phillips explained: “There were bushes behind us. We kind of tripped over the bushes while I was trying to get [Appellant] on the ground so I could get cuffs on him. We fell. He [Appellant] fell on top of me.” App. 71, ll. 20-22. Phillips claimed Appellant “covered [his] microphone up where I couldn’t get out radio contact to other officers responding for backup.” App. 72, l. 25 – 73, l. 2. Phillips said that while Appellant was on top of him, the “two females had run up by that time and Mr. Boney had come around.” App. 72, ll. 1-2. Phillips alleged that Boney kicked him in the head, and said: “I started getting multiple kicks to the back of my head, multiple kicks to my right side.” App. 72, ll. 13-15; App. 72, ll. 20-21. The two females were also kicking Phillips. App. 57, ll. 10-13. One of the women “was stomping on his head.” App. 61, ll. 9-11. Motel employees claimed Appellant tried to reach for Phillips’ gun, but Phillips said as soon as he was kicked by Boney he rolled over on top of his gun “so they couldn’t try and get

my gun off of me.”² App. 44, l. 23 – 45, l. 2; App. 57, l. 18-21; App. 722, ll. 13-19. Phillips did not allege Appellant kicked him.

Lieutenant Wilson Powell arrived and saw Phillips on the ground with Appellant on top of him; Appellant had fallen on Phillips when Phillips tripped over the bushes. Appellant stood up when Powell got out of the police car. Powell arrested Appellant and Phillips arrested Boney. App. 90, l. 8 – 91, l. 6; State’s Exhibit #1. Appellant did not immediately accede to his arrest. Lieutenant Powell said he had to “wrestle” with Appellant because he would not put his hands behind his back. Appellant was in a “fetal” position. Phillips assisted Powell in handcuffing Appellant. App. 91, ll. 3-5; App. 73, ll. 15-22. Appellant admitted he did not comply with the officers’ attempt to handcuff him by putting his hands behind his back. App. 173, ll. 3-5.

Phillips suffered a concussion and “some issues with [his] back” as a result of being kicked by Boney and the girls. App. 86, l. 20 – 87, l. 5. Phillips also had redness and lacerations on his hands, arms, legs, and head. App. 116, ll. 7-8; App. 118, ll. 20 – 123, l. 1.

Phillips did not allege Appellant hit or kicked him. There was no evidence that Appellant encouraged Boney or the females to kick or injure Phillips. Nevertheless, the State indicted Appellant for assaulting Phillips while resisting arrest pursuant to S.C. Code Ann. § 16-9-320(B). App. 387.

At the close of the State’s case, defense counsel moved the court direct a verdict of acquittal. Defense counsel argued the State had not made a “sufficient case to go to the jury as it pertains to assault and battery on a police officer as to [Appellant] . . . they have not met that burden . . .” App. 127, ll. 2-9. The court denied the motion, noting that if there was “any direct or

² Motel employees also claimed Appellant “jumped on” or “grabbed” Phillips from behind but this was inconsistent with both Phillips’ testimony and with Appellant’s testimony about how events unfolded. App. 44, ll. 2-4; App. 57, ll. 6-9.

substantial circumstantial evidence reasonably tending to prove the guilt of the accused . . . the case should be submitted to the jury.” App. 127, ll. 14-20.

In closing argument, the solicitor claimed Appellant was guilty of assault while resisting arrest because he assaulted Phillips while Boney was resisting arrest. App. 205, l. 23 – 206, l. 2. The solicitor also claimed the video footage from Powell’s dashboard camera showed Appellant striking Phillips, but the footage did not. *See* State’s Exhibit #1.³ Moreover, as seen, Phillips never alleged Appellant struck him.

In addition to assault while resisting arrest, the jury was charged on the lesser offense of resisting arrest. App. 216, l. 16 – 217, l. 6. Nevertheless, Appellant was convicted as indicted. App. 229, ll. 2-6.

Discussion

Appellant neither beat nor wounded Deputy Phillips. The injuries to Phillips were inflicted by Boney and the two women. S.C. Code Ann. § 16-9-320(B) provides,

It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not . . .

Appellant did not assault Phillips either. “The crime of assault has long been defined as an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with a present ability to complete the attempt or offer by a battery.” *Matter of McGee*, 278 S.C. 506, 507, 299 S.E.2d 334, 334 (1983). “[I]f by words and conduct a person intentionally creates a reasonable apprehension of bodily harm, it is an assault.” *Id.* “The elements of assault are: (1)

³ State’s Exhibit #1 is the dashboard camera footage from Lieutenant Powell’s patrol car and is on file with this Court.

conduct of the defendant which places the plaintiff, (2) in reasonable fear of bodily harm.” *Mellen v. Lane*, 377 S.C. 261, 276, 659 S.E.2d 236, 244 (Ct. App. 2008).

Appellant’s conduct was not an assault, since he did not attempt to batter Phillips. Nor did Appellant’s conduct place Phillips in reasonable fear of bodily harm. Although Phillips undoubtedly feared bodily harm, his fear was due to the actions of Boney and the women in kicking him. Phillips admitted that Appellant merely touched his shoulder. Phillips responded by pushing Appellant. Although Phillips claimed Appellant “kind of lunged” at him thereafter, Phillips responded by “shoving” Appellant back again. Phillips alleged that when he shoved Appellant back this second time, Appellant grabbed his arm. However, Appellant likely grabbed Phillips’ arm to steady himself, since Phillips admitted he tripped over bushes and took Appellant down with him.

Rule 19(a), SCRCrimP provides, in relevant part, that “the court shall direct a verdict in the defendant’s favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment.” “[A] jury weighs evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict.” *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). 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. *State v. Hepburn*, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). “A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged.” *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

An accused “is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged.” *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Brown*, 103 S.C. 437, 88 S.E. 21 (1916); *State v. Gore*, 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995)). Accord *State v. Heath*, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006) (we “reverse Appellant’s conviction because the State failed to establish an essential element of the crime charged”).

Appellant did not attempt to assault, beat or wound Phillips while Boney was being arrested. Likewise, Appellant did not attempt to assault, beat or wound Phillips when he, Appellant, was being arrested. Therefore, the trial court erred in refusing to direct a verdict of acquittal on the charge of assault while resisting arrest. Rule 19(a), SCRCrimP; *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for entry of a verdict of acquittal.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2021.

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STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dominique Alexander Cash states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on April 9 – 10, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Dominique Alexander Cash.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant Pursuant to White v. State and a true copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Anders Brief of Appellant Pursuant to White v. State and Appendix have been served on Dominique Alexander Cash at PO Box 663, Wallace, NC 28466, this 4th day of January, 2021.

s/ Joanna K. Delany

Joanna K. Delany

Appellate Defender

ATTORNEY FOR APPELLANT