

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Chester County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MONTRELL GRAHAM,

APPELLANT

APPELLATE CASE NO 2020-000250

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

QUESTION I

The lower court erred in denying appellant's directed verdict motion on the accessory charge because appellant had no knowledge that the co-defendant committed a felony and no intent to assist the co-defendant.

QUESTION II

The lower court erred in denying the defense an opportunity to impeach the state's key witness, Kochese Gregory, with his prior manslaughter conviction.

STATEMENT OF THE CASE

Appellant Montrell Graham was convicted of accessory after the fact to the commission of a felony¹ per jury trial held during the February 2020 term of the Chester County General Sessions Court before Judge J. Derham Cole. Appellant was sentenced to imprisonment for a period of fifteen years, suspended upon the service of five years followed by five years probation. Appellant was represented at trial by William Frick, Esquire, and Assistant Attorney General Candice Lively appeared on behalf of the state.

Appellant appealed. This brief follows.

¹ Appellant's co-defendant Quinton Tywan McClinton was tried along with appellant at trial and found guilty of attempted murder, assault and battery in the first degree, and possession of a firearm.

STANDARD OF REVIEW

Directed Verdict

“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.

Impeachment

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court’s] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law.” State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

QUESTION I

The lower court erred in denying appellant's directed verdict motion on the accessory charge because appellant had no knowledge that the co-defendant committed a felony and no intent to assist the co-defendant.

The event that gave rise to the accessory charge in this case was a Christmas gathering that began on December 24, 2018, at Images Club in Chester, South Carolina. The melee occurred between several patrons at the club on that night, which led to the shooting of one Kochese Gregory. The state alleged that co-defendant McClinton shot Kochese Gregory during the shoot-out and that appellant drove McClinton to his (McClinton's) home after Kochese Gregory was shot². Although the fighting began when CiCi Whitlock threw a drink or cup with a drink in Gregory Killian's face, somehow Kochese Gregory, who was at the club and did not throw a drink in anyone's face, was attacked by the men in the club, and as Gregory Kochese moved outside to escape, he ended up wounded by gunfire. The state's witnesses' testimony established that there was mass fighting and shooting everywhere and that no one knew who was being beaten or shot as it was impossible to know this due to the high level of sheer and complete chaos and bedlam at the crime scene.

Kochese Gregory testified that he was inside the club until it was closing and that when he made his move to the poolroom partition in the club, he was physically attacked and beat by McClinton and a host of other people. Kochese Gregory explained that after the beating, he tried to exit through the door to the outside, and then he turned and saw "McClinton lean over the white car and [shoot]." McClinton was in the parking lot outside according to Kochese Gregory. Kochese Gregory stated that he went back into the poolroom side to tell people that he had been

² Appellant drove McClinton and McClinton's brother Carlton Dion, who was also at the club during the event, away from the club when the event ended.

shot. R. 225, 1.23-p.242, 1.11. Kochese Gregory suffered a gunshot wound to his torso. R 210, 1.22 – p. 211, 1.10.

The elements of accessory after the fact to a crime are 1.) the felony has been completed; 2.) the accused must have knowledge that the principal committed the felony; and 3.) the accused must harbor or assist the principal felon. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). In Collins, supra, the Court held that one’s mere presence at the scene of the crime would not preclude one’s conviction as an accessory after the fact and overruled precedent that the absence of the accessory was required.³

The OK Corral shoot-out in this case involved so many perpetrators that it was nearly impossible to have proved appellant had no knowledge as to which of the numerous perpetrators committed the violent crimes at the scene, much less which perpetrator shot Kochese Gregory. The witnesses didn’t know who shot or fought whom. For example, Kochese Gregory testified that it was “pandemonium” at the scene because he was attacked by people with pool sticks, and “their feet,” and that “they were stomping [him],” and “they beat [him],” and that these people numbered “fifteen” or more were “all over [him],” and then “they...dispersed,” R. 230, 1.15-p. 233, 1.1. Note further that the melee and commotion continued in the parking lot because although Kochese Gregory saw McClinton in the parking lot; nonetheless, the parking lot was filled with numerous people outside who were firing gunshots. Kochese Gregory added that there were so many shots fired from the parking lot that the shots were “ringing out.” R. 236, 1.1-5,

³ State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); State v. Whitted, 279 S.C. 260, 305 S.E.2d 245 (1983); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995); Court denied 116 S. ct. 821 (1996).

This was confirmed by the solicitor who argued at closing that there were eighteen shell casings found in the parking lot. R. 423, 1.18-25⁴

The eyewitnesses confirmed that the club event in question was total mayhem, which again meant that it was difficult to know who shot whom. At trial, James Young testified that it was a “big fight” at the club on that night, and that he didn’t know if McClinton and appellant were outside because there were “a lot of us out there,” and that he “seen (sic) people jumping on [Kochese Gregory],” and added that Gregory Williams was also fighting Kochese Gregory. R. 64. L.22-24; R. 66, 1.2-4; R. 66, 1.16-25. Young stated further that a lot of shots were fired with his estimate of more than ten. R. 76, 1.4-12.

Gregory Killian testified that he was at the club on that night when it was closing and that the confusion and chaos began when CiCi Whitlock approached him and threw a drink in his face, while three or four guys stood beside CiCi Whitlock, and that somehow he (Grgory Killian) and McClinton exchanged heated words, and afterwards the commotion continued outside the club. Gregory Killian stated that there was also one by the name of Chocolate Pudding involved in the mix. Apparently, someone was angry at his brother Kelvin Killian, who was a bouncer on that night, when the problems began. However, Gregory Killian claimed that he did not see McClinton shoot or fight Kochese Gregory, and that he did not recall seeing Kochese Gregory at the scene until he was shot. Finally, Gregory Killian testified that he did not know appellant and did not see him that night at the club. R. 42, 1.1-p.60, 1.25.

Bernice June stated that she was present at the club on the night of the shooting when she heard gunfire and knew that “[McClinton] and them were shooting like hell” outside. R. 83, 1.1-

⁴ Solicitor’s closing: [H]e saw the chaos that was going on, He then said...McClinton get his by Tina Davis’ car and he’s limping...as he is headed to the car...he started ducking because there was gunfire...18 shell casings into parking lot were found...that’s a whole lot of shooting. R. 423, 1.16-25.

p.87, l.4; R. 95, l.1-3. Bernice said she did not recall saying that she saw McClinton shooting on that night. R. 97, l.3-p.98, l.6.

Daverican Gregory, aka Chocolate Pudding, testified that the fight began with a confrontation between Troy Killian, CiCi Whitlock, and Antonio Killian, aka Kelvin Killian, who was Gregory Killian's brother. Daverican Gregory stated that he never saw all the men (McClinton, Carlton Dixon and appellant) shooting at the crime scene. Also, Daverican Gregory stated that Kochese Gregory was not present when CiCi Whitlock threw the drink, and that there were ten to fifteen people inside fighting and that on the outside shots rang out everywhere. Daverican Gregory stated that he did not see Kochese Gregory. R. 99, l.9-p. 118, l.6.

State's witness Kelvin Killian testified that he and George Killian (his brother) were present at the club and that he (Kelvin Killian) was working as the security guard on the night in question. Kelvin Killian stated that the fighting began when CiCi Whitlock threw a cup in Gregory Killian's face, and thereafter McClinton hit him, but added that there were "so many people fighting," and that there were "people everywhere," and that there was fighting outside as well. Kelvin Killian stated further that he did not see the shootings (only heard gunfire). Nevertheless, Kelvin Killian gave a statement identifying McClinton as the shooter, but testified at trial that he didn't know who shot whom because he could not make or confirm an identification on that subject. R. 120, l.7-p. 134, l.6.

Tina (Terquila) Clifton testified that she was at the club on the night in question and witnessed all the fighting inside, but she moved away when the shootings began, and went on to explain that most people were "copy-cattin'" with the assessment that McClinton shot Kochese Gregory, and admitted that she saw guys with their arms extended out, but did not know who they were at the time. R. 134, l.17-p. 149, l.16.

Benika Kershaw stated that she went to her car after the drink was thrown in Gregory Killian's face and when the fighting began, and then drove to the gas station across the street in order to watch the action. Kershaw noted that there were "so many individuals" that were fighting, and that "they" were beating an individual on the ground, and that she gave the police names of perpetrators based on what other people were saying, but could not "pinpoint" the identity of the perpetrators. R. 163, 1.5 p. 182, 1.23; R. 202, 1.6-p. 203, 1.8.

At the close of the case, defense counsel moved for a directed verdict on the accessory charge on the ground that appellant had no knowledge that a crime had been committed by the co-defendant, and furthermore had no intent to assist the felon. R. 396, 1. 16 – p.397, 1. 19; R.398, 1.21 – p. 401, 1.1. the trial judge denied the motion. R. 401, lines 2-10.

A judge should grant a directed verdict motion when there is only a suspicion that the accused is guilty. State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (2007). Due process requires the prosecution to establish every element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.307 (1970). In the instant case, there was insufficient proof that appellant had knowledge that co-defendant McClinton assaulted and shot Gregory because of the complete disorder at the scene coupled with the incredibly high concentration of people there armed with pool sticks and guns. The testimony of the eyewitnesses proved this. Moreover, not one witness could swear with certainty which perpetrator did what during the rumpus; and therefore, appellant likewise witnessed so much confusion there that the state could not establish sufficient proof what appellant saw of the fifteen or more people in the ruckus and as a result, the state did not establish sufficient proof that appellant had knowledge that McClinton beat and/or shot Kochese Gregory. The incident was a chaotic war zone. There was no proof that there was any intent to assist anyone just because appellant decided to exit the crime scene. Note that

defense witness Joseph Foster testified that Gregory was armed and shooting out to the parking lot during the incident. R. 408, 1.9-p.411, 1.4. There were so many different accounts and so many different recollections of the mass beatings and shootings that it was impossible to prove that appellant had knowledge that his codefendant committed attempted murder and assault or intended to assist with an escape. The lower court erred in denying appellant's directed verdict motion on the accessory charge, which meant that his ultimate conviction was in violation of due process under the Fourteenth Amendment.

QUESTION II

The lower court erred in denying the defense an opportunity to impeach the state's key witness, Kochese Gregory, with his prior manslaughter conviction.

At trial, the defense sought to impeach Kochese Gregory on his prior involuntary manslaughter conviction for which he served five years and was released on May 1, 2018. The shooting event in question occurred on December 25, 2018, and the instant trial commenced on February 3, 2020. R. 158, 1.17-p.160, 1.8. The state argued that the prior in question was not admissible because ten years had lapsed between the date of conviction or release from prison, and the trial judge agreed and ruled against the admissibility of the prior at issue in the case. R. 160, 1.10-p.162, 1.13. Rule 609(b), SCRE states the following:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old...is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence.

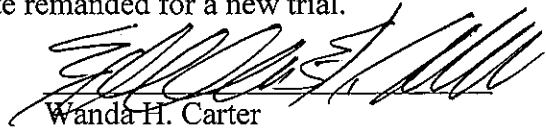
See also, State v. Robinson, Opinion No. 27883 (S.Ct. filed May 8, 2019)., where the Court held that Rule 609(b) also requires the trial judge to balance the probative value of the evidence of a prior conviction against the prejudice. Robinson explained that in State v. Colf, 337 S.C. 622, 625-26, 525 S.E.2d 246, 247-48 (2000), we adopted the five-factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect and these factors include:

- 1) The impeachment value of the prior crime;
- 2) The point in time of the conviction and the witness's
- 3) subsequent history;
- 4) The similarity between the past crime and the charged
- 5) crime;
- 6) The importance of the defendant's testimony; and
- 7) The centrality of the credibility issue.

Because the event in question occurred the same year Kochese Gregory was released from prison, and the interest of justice required Kochese Gregory's impeachment since the state's case hinged primarily on the credibility of Kochese Gregory and his testimony, as he was the state's key and central witness, then he (Kochese Gregory) should have been impeached with his prior because the centrality and importance of his testimony rendered his impeachment value high. Appellant was denied the right to a fair trial when the trial judge denied him an opportunity to impeach Kochese Gregory with his prior manslaughter conviction.

CONCLUSION

Based on the foregoing argument, counsel would request that appellant's conviction and sentence be vacated, or in the alternate remanded for a new trial.



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This 14th day of April, 2021.

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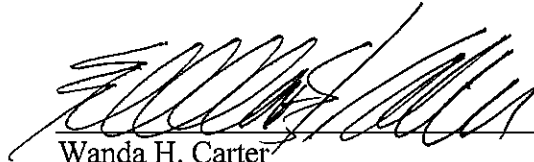
Apr 14 2021

SC Court of Appeals

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."

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