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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Hon. Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2020-000095
Lower Court Case No. 2016A1810300547

The State ..... Respondent,

vs

Keunte D. Cobbs, ... Appellant

INITIAL REPLY BRIEF OF APPELLANT

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Question I

Did the trial court err in failing to direct a verdict in favor of Keunte Cobbs when the State failed to prove substantial circumstantial evidence of either malice aforethought or sudden heat or passion based upon sufficient legal provocation nor did they disprove a element of self-defense?

Error Preservation

The State contends that the argument put forth by Mr. Cobbs in this appeal as to a directed verdict is not preserved. They argue, "If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call." *State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007). In this case, the pitch was in fact thrown. Mr. Cobbs is entitled to argue the call, be it that the pitch was not high, low or wide. They are all versions of Mr. Cobbs' contending the pitch was a strike. Mr. Cobbs asked for a directed verdict. He threw the pitch. He told the judge, "It's almost entirely circumstantial, and I just don't think it rises to the necessary level." ROA at 485, ll 2-3. And, at the end of the trial, he renewed the same argument. ROA at 536, ll 22-24. On appeal, Mr. Cobbs has argued that the lower court did not apply the proper standard as to a circumstantial evidence case. This is precisely the same argument made below. At the trial below, Mr. Cobbs is entitled to presume the lower court knew the proper level of proof in a circumstantial evidence case. "Trial judges are presumed to know the law and correctly apply the law." *Liberty Mut. Fire Ins. Co. v. Tussey*, 946 N.E.2d 656 (Ind. Ct. App. 2011). Because the pitch was thrown, Mr. Cobbs is now entitled to argue the pitch was not high, low or wide. All of those are variations on why the pitch was good.

In addition, Rule 19 of the South Carolina Rules of Criminal Practice provides, "On

motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor . . . if there is a failure of competent evidence tending to prove the charge . . . ." Under the rule, the trial judge is required to direct a verdict even if the defendant did not ask for a directed verdict. The rule uses the mandatory word "shall." This is true for the simple reason that the State should have no interest in sustaining a conviction that the State failed to prove.[1]

Argument

The State correctly notes that many cases in South Carolina have used the phrase "substantial circumstantial evidence" when discussing what is necessary to send a case to the jury when the evidence is circumstantial. Unfortunately, no case in South Carolina has ever defined the phrase, "substantial circumstantial evidence." "A conundrum exists in the criminal case law of South Carolina: the term 'substantial'-as it relates to the scope of review for directed verdict motions-has never been defined." *State v. Cherry*, 348 S.C. 281, 295, 559 S.E.2d 297, 304 (Ct. App. 2001), aff'd but criticized, 361 S.C. 588, 606 S.E.2d 475 (2004)(J. Anderson, concurring and dissenting)[2] The State appears to argue that if the jury is given two equally plausible explanations based on the circumstantial evidence, then the jury is entitled to elect either one. This cannot be the meaning of "substantial circumstantial evidence." Nor can it rise to the level of proof beyond a reasonable doubt.

If two plausible inferences can be drawn from the circumstantial evidence, a valid

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[1] Rule 50 of the South Carolina Rules of Civil Procedure uses the permissive word "may" in the directed verdict rule. Also, the civil rule does not expressly say a trial judge on it own motion shall direct a verdict.

[2] Judge Ralph King Anderson in his opinion, attempts to only define "substantial evidence" and not "substantial circumstantial evidence." Regardless, his opinion as to circumstantial evidence is instructive.

argument can be made that the State has not proven its case. As noted by the Florida court, "[I]t is the actual exclusion of each other hypothesis which clothes mere circumstances with the force of proof. Thus, evidence leaving uncertain which of several hypothesis may be true, or establishing only a probability favoring one hypothesis rather than another, cannot be equal to proof of guilt, no matter how strong the probability may be." *Jones v. State*, 466 So. 2d 301, 319 (Fla. Dist. Ct. App. 1985), approved, 485 So. 2d 1283 (Fla. 1986). Thus, if a reasonable hypothesis of innocence has not been excluded, the proof is short of beyond a reasonable doubt. Counsel recognizes that the South Carolina Supreme Court has, on at least one occasion, upheld a verdict when the opinion itself has recognized the Defendant has a plausible theory of innocence. "Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations." *State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015); *But see, State v. Lollis*, 343 S.C. 580, 585, 541 S.E.2d 254, 257 (2001)("Finally, Lollis presented a plausible explanation for placing valuables in the storage room on the day of the fire—he was trying to protect them from drywall dust as he remodeled his home."). In *Lollis*, the jury had the opportunity to judge the credibility of Lollis, but the Court still reversed the conviction.

Should a case be submitted to the jury if the theory of guilt is plausible but less plausible than the theory of innocence? Is not making a determination as to which is more plausible also weighing the evidence, an act the courts constantly say is not proper for a judge. Indeed, the simple determination of whether the circumstantial evidence is substantial, an act the law requires trial and appellate judges to perform, is in fact weighing evidence, at least to some degree.

In *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016), the Court said, "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." The problem with the comment is that if the evidence in a circumstantial evidence case shows a plausible explanation consistent with innocence, has the State truly proven the case beyond a reasonable doubt? Put another way, when the State fails to disprove the plausible explanation, has the State met its burden of proof? In this case, the State failed to disprove self-defense.

Once issues of credibility are resolved in favor of the State, the review of the evidence as to whether the State has proven a circumstantial evidence case beyond a reasonable doubt should be the same for the jury, the trial judge, and the appellate court. No court should hold that two equally plausible explanations of the facts are sufficient to convict beyond a reasonable doubt. To do so would literally make proof in such a circumstantial evidence case a flip of the coin. Such a standard does not meet the requirements of *In re Winship*, 397 U.S. 358 (1970).

To be substantial circumstantial evidence, the proof should be, at the very least, facts that make one theory substantially more probable than the other. To truly give life to the beyond a reasonable doubt standard on appellate review, the standard should be that the State has excluded any reasonable explanation but that of the guilt of the accused. Any other standard would be short of proof beyond a reasonable doubt. If another theory is plausible, then doubt must exist as a matter of law.

As stated by the author of a law review article:

> Alternatively, a less discriminating standard would more easily

> find guilt, being more sensitive to evidence of guilt. Thus, this standard would convict one hundred percent of factually guilty defendants. However, this broader standard would inevitably convict some factually innocent defendants, as it would be so broad that it would mistake the possibility of guilt (some proof of guilt in the evidence) for guilt beyond a reasonable doubt. Thus, a broader standard derogates from that mandated by the Due Process Clause and the Winship Court.
> Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 233 (2007)

So, the question to any court reviewing a circumstantial evidence case, is whether the standard of review is to be a standard that frees more innocent defendants at the expense of freeing a few guilty defendants, or is the standard to be one that convicts innocent defendants to prevent the freeing of some guilty defendants? If we are to have a standard of review that seeks to enforce the beyond a reasonable doubt standard, it should be the former.

The State has further argued that because in a recorded telephone conversation, Mr. Cobbs stated he was not going to use self-defense, then that is evidence that he did not shoot in self-defense. The State ignores the fact that the comment was made in the context of his saying he was not present and therefore did not shoot. If one says they were not present, of course, they are not shooting in self-defense. ROA at 518, l 24 to 519, l 15.

The State has further argued that the Defendant leaving the scene is proof of lack of self-defense. They cite a California case. A reading of the case shows that the Defendant in that case did not have a self-defense case. As the Court stated in the sentence preceding the statement about flight, "Defendant's own testimony thus defeats the claim that he acted in self-defense." *People v. Hernandez*, 51 Cal. 4th 733, 747, 247 P.3d 167, 177 (2011).

In *State v. Tassin,* 129 So.3d 1235 (La. Ct. App. 2013), the issue was whether the Defendant was entitled to a charge on self-defense. The Court looked at many factors, which included the fact the crime was not reported and the defendant left the scene. The Court ultimately said, "We have thoroughly considered these claims presented by defendant and conclude that the evidence which defendant alleges entitled him to a self-defense instruction, when viewed with all the other evidence, does not permit a reasonable inference that defendant acted in self-defense." *Id.* at 1248.

While the Court in *State v. Kirby*, 206 N.C. App. 446, 454, 697 S.E.2d 496, 502 (2010) did state that flight by the defendant could be considered by the jury, the facts of the case also establish that Mr. Kirby had a weak self-defense case at best. Two other eyewitnesses gave testimony which negated the claim of self-defense. In the present case, there are no eyewitnesses who testified other than Mr. Cobb.

Likewise, in *People v. Blake*, 24 N.Y.3d 78, 83, 21 N.E.3d 214, 217 (2014) ample evidence existed of the lack of self-defense other than the Defendant leaving the scene. As the Court noted, "Yet, perhaps most damaging to defendant's contention that the missing video would have borne out his assertion that he acted to defend himself, was the proof that he attempted to bribe the arresting officers to destroy videotapes the officers said they had of the altercation." *Id.* at 83. Again, in this case there is no evidence other than the Defendant leaving the scene. Also, the issue of flight after the shooting was never argued by the State as an admission of guilt nor in opposition to the motion for a directed verdict by the Defendant.

Neither the comment about not using self-defense nor the fleeing of the scene truly make the facts any stronger for the State. They do not make it either more or less likely that the event

in the bathroom was less likely to be as Mr. Cobbs stated. The circumstantial evidence from which the State seeks to convict is that two armed men entered the bathroom shortly after another armed man entered the bathroom. Shots were fired from the weapon of the first man. One man was wounded and another killed. Those facts do not disprove that Mr. Cobbs acted in self-defense. We must bear in mind that a pure circumstantial evidence case is the only case tried in our court system in which everyone can tell the truth, and an innocent defendant be convicted.

Question II

Did the trial court err in failing to dismiss the charges based upon the speedy trial provision of Article I § 14 of the Constitution of the State of South Carolina and the Sixth Amendment to the United States Constitution when the two year delay in the first trial and the eighteen month delay in the second trial were attributable to the State not being prepared to try the case?

The State in its brief correctly notes that the Court has set no specific time limit as to when a presumption of prejudice arises in any one case. The State, however, improperly argues that in this case the time for speedy trial purposes should start to run from the date of the mistrial. While *Hallowell v. State,* 178 A.3d 610 (Md. Ct. Spec. App. 2018) and *Graham v. State,* 299 So.3d 273 (Ala. Crim App. 2019) do state the speedy trial time starts to run from the date of the mistrial, nothing in either case suggests that prior to the mistrial either Defendant had ever asserted his right to a speedy trial. In this case, Mr. Cobbs has since before his first trial filed a speedy trial motion. That motion was not ended by a mistrial on the manslaughter charge. The motion continued. The State was aware of the desire of Mr. Cobbs for a speedy trial. The time from his original arrest cannot, therefore, be ignored. Mr. Cobbs has constantly asserted his right

to a speedy trial.

The American Bar Association in its publication Criminal Justice Standards: Speedy Trial, 12-2.1 says, "(b) If the defendant is to be tried again following a mistrial, then a new reasonable speedy trial time limit should be set. The new speedy trial time limit period generally should be shorter than that applicable to the original charge and should commence from the date of the mistrial." Even this Standard does not involve a defendant who even before the mistrial was requesting a speedy trial. This was clearly not followed in this case.

The State in its brief argued that one reason the first trial was delayed was due to the fact that Mr. Cobbs did not seek appointment of counsel for almost a year. Br. of Resp. at 29. The failure of Mr. Cobbs to seek the appointment of counsel did not prevent the State from continuing its investigation of the case and sending different items to SLED for analysis. In fact, the failure to request counsel could not have prevented the state in preparing for trial.

After the first trial, the State did not for about 16 months seek to re-try Mr. Cobb. Part of the claim for delay was they were conducting an investigation of the case. The State learned nothing at the first trial that they did not know before the first trial that needed to be investigated. The failure or delay of the State in investigating the case simply cannot ever be a basis for denying the Defendant their right to a speedy trial. To so hold makes a mockery of the right to a speedy trial.

The burden should be on the State to justify any failure to try this case. On the record in this case, the Solicitor stated that he had been ordered by the trial judge to try four other cases. ROA at 39, l 21 to 39, l 11. The State only mentioned one case they tried which was in fact older than Mr. Cobbs' case. The State did not attempt to justify the delay in re-trying Mr. Cobbs by

pointing to the cases it had to try that were older than Mr. Cobb's case. The State can not justify not trying Mr. Cobbs because it had to try a case not as old as Mr. Cobb's case. To do so would give the State the right to always violate a Defendant's right to a speedy trial with no repercussions. In a matter as important as the denial of a speedy trial, the State should be required to produce more simply saying, " Trust me, I'm from the government, and I'm here to help." Prior to the hearing the government knew or should have known what its burden was to counter the argument of a denial of a speedy trial. They took no action or produced no firm facts to meet that burden.

The State has further argued that Mr. Cobbs has not proven prejudice. After a delay of over 16 months since the previous trial, the State should have the burden of proving a lack of prejudice. As the Texas Court noted, "This Court's case law holds a defendant has the burden to make some showing of 'prejudice' although a showing of 'actual prejudice' is not required. This Court's case law also holds that when a defendant makes a 'prima facie showing of prejudice,' the State carries 'the obligation of proving that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay.'" *State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999)(internal citations omitted). With a weak at best exaltation as to why the case was not tried sooner, this Court should hold the State has not proven that Mr. Cobbs was not prejudiced and dismiss the indictment in this case.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, this Court should reverse the conviction in this matter and dismiss the charges against Keunte D. Cobbs.

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