State of South Carolina
In the Court of Appeals

Appeal from Greenville County
Letitia H. Verdin, Family Court Judge

The State

Respondent

v

David S Boyd II

Appellant

Appellant case No. 2012-207268

Pro Se Brief

Statement Of Issue on Appeal

1. Whether the trial Court err in denying appellant's motion for a Directed verdict to the charge of Armed Robbery and Possession of a weapon during the commission of a violent crime. TO the charge of Assault and battery with intent to kill and the charge of receiving stolen goods when the State failed to present any substantial evidence beyond a reasonable doubt that Appellant enter and take by means of force or intimidation, goods or monies described as: U.S Currency, belonging to Bank of Travelers Rest. Whether the Appellant willfully, unlawfully and with Malice aforethought, either express or implied, commit an assault and battery upon David Dill. Whether the Appellant received, buy or possess stolen goods?
2. Whether the trial court err by allowing into evidence a statement made by appellant to Detective weiner under the totality of the circumstances?
3. Did the trial court err by allowing Don Dickinson to testify without limit as a expert with limited education?
4. Did the trial court err in ruling that a bandana was non-Punyible?
5. Did the trial court err by letting two doctors testify to the word dye and there previous information was inadmissible Hearsay?
6. Did the trial court err by letting the state ask leading question to Don Dickinson where it Bolstered the witness
7. Did defence counsel err by not calling Greg Lynch a favorable witness to the defence?
8. Did the trial court err by not doing a more detailed voir Dire from pretrial publicity?
9. Did the trial court err by ~~not~~ allowing Item 4.1 bandana it evidence with giving defence counsel time to review the chain of custody?

Statement of the Case

Appellant was convicted of Armed Robbery, assault and battery with intent to kill, receiving stolen goods and possession of a weapon after a jury trial held before the Honorable Letitia H. Verdin in Greenville County January 9-13, 2012. Two consecutive twenty(20) year sentences were for armed robbery and assault and battery with intent to kill. A ~~ten(10)~~ five (5) year sentence was imposed for possession of a weapon and a ten(10) year sentence was imposed for receiving stolen goods. Brian Johnson, Esquire, and James Erwin, Esquire, were trial attorneys.

This Appeal follows:

Argument

The trial court err in denying Appellant's motion for a directed verdict to the charge of Armed Robbery, assault and battery with intent to kill, receiving stolen goods, and possession of a weapon during a violent crime when the State failed to present any substantial evidence beyond a reasonable doubt.

Appellant's Armed Robbery, Assault and battery with intent to Kill, receiving stolen goods, and possession of weapon during a violent crime was based off the Bank of Travelers Rest being Rob shortly before noon December 10, 2008 (Tr. Page 446 lines 2-8)

David Dill who was next door saw red smoke going up into the air and a white minivan backing out of a parking space (Tr. 128 lines 14-22) Based off instinct Dill followed the Van (Tr. Page 134 lines 23-24) Dill stated when he drove past the minivan he could see a black hoodie on, dark bandana and a bill of a ball cap (Tr page 132 lines 21-25) (Tr. page 132 lines 1-2) Dill was later shot. (Tr page 134 lines 12-14) Dill observed what he belived to be the robber/shooter going into woods but couldn't see a face (Tr. Page 150 lines 6-25) Dill gave a statement a year later (Trp 147 lines 17-20)

Shawn Rafferty testified he saw a male standing in the road and motioned with his ungloved left hand for him to come forward. He couldn't see a face but could tell he was African American ~~dd~~ male with a hoodie on he did not see his face covered and wouldn't be able to recognize him. He also stated he could not tell what was in his right hand. (Tr. page 159 lines 11-25) (Tr. Page 160 lines 1-15) (Tr. page 165 line 2-9) He also stated that he didn't notice anything besides a hoodie he did not see gloves, nor did he see a gun (Tr. page 166 lines 7-17)

David Weiner arrived minutes after the Robbery of the Bank of Travelers Rest and the shooting of David Dill to the extent red smoke was still coming out of the vans window (Tr page 446 ~~[illegible]~~ lines 16-25) (Tr page 447 line 1-6)

Very quickly a tight perimeter was setup and a K9 track established.

Chris Cooper stated the perimeter was in effect from noon until 4:00, 4:30ish (Tr. Page 388 lines 20-24) He also stated no perimeter units encountered anyone going in or out of the search area. (Tr. Page 388 lines 15-24)(Tr page 389 lines 16-21)

Deputy Tim Fuller also testified he did not come in contact with anyone other than the officers he was with (Tr. Page 346 lines 18-23)

Master Deputy Doug Wannemacher testified he cleared a sewer system for any evidence that somebody had come through. He also stated he did not come across anyone during his track of this tightly sealed perimeter on December 10th 2008. He also returned the next day and found no articles related to anybody he was tracking (Tr page 302 lines 22-24)(Tr page 303 lines 1-25)(Tr page 304 lines 1-25)

Shawn Muserallo testified that appellant didn't pull a gun at him, make any sort of threatening gestures towards him, nor was he wearing a black hoodie or sweatshirt or ball cap of that nature. (Tr. Page 416 lines 11-23)

Captain Jackie Kellett stated that they do not issue reports from nonidentification or inconclusive, they only issue reports if they get a fingerprint match. No report was issued. (Tr page 632 lines 22-25) (Tr page 633 lines 1-25)(Tr. Page 634 lines 1-5) She also stated that the prints on the car were not made by Mr. Boyd. (Tr page 628 lines 19-22)

Don Dickinson testified that in a live demo an activated dye pack stained a few pair of slacks because of wind direction (Tr page 730 lines 14-22) Dickinson stated that 3SI Security pack has three main purposes, to stain the money, to apprehend the robber and deter crime (Tr. page 745 lines 7-19) He also stated the effects would be amplified in an enclosed space and two dye packs would have twice the volume of smoke and tear gas (Tr. page 736 lines 23-24) (Tr. 737 lines 1-5) He also stated that the dye pack temperature is 395 degrees and it cooks very, very rapidly. It's no longer a permanent stain. You might have to brush it off. (Tr page 730 lines 3-13)

He later states that dye packs retains heat for about 10 minutes after it is activated and if touched the wrong way would result in transferred dye (Tr page 731 lines 14-25) He also stated they use heat to embed the stain in the fibers (Tr page 736 lines 4-6) He later states the smoke is the stain (Tr page 739 lines 4-6)

John Roberts testified that he did not analyze GSR Kit from Appellant because it was taken beyond the six hour time frame (Tr page 782 lines 18-25) (Tr page 783 lines 1-12) He also at the states request examine GSR Kit from Appelant for the presence of MAAQ (Tr page 783 lines 13-25) (Tr Page 784 lines 1-25) (Tr Page 785 lines 1-22) He also stated that he done a report from the GSR test for the presence of MAAQ. He stated it is a reliable report (Tr page 786 lines 1-22) Based off his experience dye would have take at least actone to remove. (Tr page 787 lines 6-15) This was his first time asked to perform a GSR kit for MAAQ (Tr. Page 788 lines 11-20) He also stated it's possible to scrape mud or blood off clothing and test for MAAQ (Tr page 788 lines 18-25) (Tr. Page 789 lines 1-10) John Roberts test results for the presence of MAAQ on GSR kits from Appellant fell within SLED protocol's (Tr Page 795 lines 1-10)

Ila Simmons report dated April 9th, 2009 contained the results from three items. Of those items two dye packs were consistent with MAAQ the second item and the third item a pair of jeans and a gray shirt were visually examined for the presence of MAAQ. The second and third items did not contain the presence of MAAQ (Tr page 814 line 15-25 (Tr. page 820 lines 1-18) She also stated that MAAQ would stick easier to cloth, skin then metal (Tr. page 822 lines 14-25) (Tr page 823 lines 1-22) She also stated that MAAQ is not water soluble and analyzed hundreds of standards of MAAQ. She has put it on different items and seen how it can and cannot be removed. (Tr page 824 lines 3-15)

Jason Brewer received items from a Bank Robbery investigation and asked to determine if they were positive for MAAQ. He issued three separate reports. The first report included jeans, shirt and belt Following the FBI analysis of bank security devices standard operating procedure he take a representative sample from the above named items Each item received a visually examination

and a Solution test. All items above tested negative for MAAQ (Tr page 900 lines 8-25 (Tr. Page 901 lines 1-25) (Tr. Page 902 lines 1-25) (Tr. Page 903 lines 1-9) The Second test was the examination of a bandana. It started with a visually examine and then a solubility test on the entire area of the bandana and seen no color transfer. The exam was ceased and the report was issued as negative for Bank dye material (Tr. Page 904 lines 2-25) (Tr. page 905 lines 1-4) He also stated mud or blood wouldn't prevent him from determing what was underneath. (Tr page 921 lines 16-24) Jason Brewer testified about the chemical nature of MAAQ and what would dissolve it. MAAQ is not soluble in water and cannot be easily removed. FBI also have procedures for testing to see if a material that was in contact with bank dye and was then bleached they can tell ~~was~~ if it was exposed to bleach. (Tr page 908 lines 19-25) (Tr. Page 909 lines 1-25) He also states that off his experience he can usually hazard a pretty good hypothesis as to whether or not that item is positive for bank dye (Tr page 908 lines 6-12) At his request more item were sent as a comparison to determine whether or not there was actually MAAQ even involved in this incident. (Tr Page 924 lines 4-25) (Tr. page 925 lines 1-4)

Lilly Gallman recieved numerous items for DNA testing. Item 13.1 a swab from the sock exterior was a mixture of at least three individuals, no conclusive statement can be made as to the inclusion or exclusion of David s Boyd II to this mixture (Tr Page 857 lines 6-16) Item 13.2 a swab from the interior of a sock is a mixture of at least two individuals Appellant is excluded as a contributor (Tr. Page 862 lines 3-22) She also tested Item 5 a swab from a steering wheel, Item 6 a swab from the inside of a door handle, Item 7.1 swab from inside glove and also Item 7.2 is also from inside glove. Item 5 and 13.2 were insufficient for reliable interpretation. Items 7.1 and 7.2 were mixtures of at least two individuals Appellant is excluded as a possible contributor. (Tr. page 864 lines 7-25) (Tr page 865 lines 1-25) (Tr page 866 lines 1-25) (Tr. page 867 lines 1-2) She also stated that in this case nothing from a mixed sample indicates in what order the DNA got on the item. She also stated she couldn't indicate as to how Appellants DNA got there. (Tr. Page 873 lines 3-20) She testified DNA can be transffered through primary transfer (Tr page 871 lines 6-25)

At the conclusion of the State's case, defense counsel moved for a directed verdict to the charge of Armed Robbery and possession of a weapon during a violent crime, assault and battery with intent to kill any receiving stolen goods. (page 882 lines 19-25 (Tr page 883 lines 1-25) (Tr. page 884 lines 1-20) The trial court denied the motion. (Tr page 888 lines 17-25) (Tr. page 889 lines 1-2) That ruling was in error. After Appellant put up his defense, the directed verdict motion was renewed and was again denied. (Tr. Page 931, lines 24-25. p933. line 13) That ruling was in error.

Due process as guaranteed by the Fourteenth Amendments requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense!" Jackson v Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979)

Our Court has held.

> The trial judge is concerned with the existence or non-existence of evidence, not with its weight: and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, ~~or~~ or which his guilt may be fairly and logically deduced. [emphasis added]

> 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 the accused

> . . . All of the facts proved must be consistent with each other, and, taken together, should be of a conclusive nature and tendency, producing a reasonable and moral certainty that the appellant and no one else committed the offense charged. It is not sufficient that they created probability, though a strong one: and if, therefore, assuming all the facts to be true, which the evidence tends

to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of appellant, then the proof fails. . . [it] is not sufficient to establish a probability of guilt arising from the doctrine of chances that the fact charged is likely to be true.

State v. Irvin, 270 S.C. 539, 234 S.E.2d (1978); State v Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000); State v Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 258 (2001); State v Arnold, 361 S.C. 386, 389-90, 605 S.E.2d 529, 531 (2004); State v odems, 395 S.C, 720 S.E.2d 48 (2011) State v Bostick, 329 S.C. 134, 708 S.E.2d 774 (2011) State v Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963); State v. Powell, 25 S.E.2d 409, 209 S.C. 432; State v Kimbrell, 4 S.E.2d 121, 191, S.C. 238; State v Martin,

In applying this standard our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v Totherow, 263 S.C. 275, 210 S.E.2d 298, 230 (1974) See, also, State v. Turner, 117 SC. 470, 109 S.E. 119, 120 (1921) The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963); State v Lollis 343 S.C. 580, 583, 541 S.E.2d 254, 258 (2001); State v Arnold, 361 S.C. 386, 389-90, 605 S.E.2d 529, 531 (2004); State v Bostick, 329 SC, 134, 708 S.E.2d 774 (2011); State v odems, 395 S.C, 720 S.E.2d 48 (2011); State v Brown, 267 S.C 311, 227 S.E.2d 674, 677 (1976), citing State v Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v Varoz, 740 F.2d 772, 775 (1984); United States v ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v Taylor, 19 F.3d 899, 906 (4th Cir 1994).

In this case the state failed to present any substantial evidence that appellant had possession of a gun, shot a gun or was at the crime scene. Appellant hasn't been identified by any

eyewitnesses that can positivly associate appellant with the charges. Two K-9 officers track for hours and did not track appellant. Nor was the tighly sealed perimeter breached. They stated Appellant wore similar clothes but part of the outfit by the suspect was a gun, hoodie and a ball cap. what would make Appellant outfit similar would be a gun, hoodie and a ball cap and the presence of bank dye, which was tested numerous amounts of times. Appellant's fingerprints were not found. A bandana was found with three individuals DNA, appellant being one DNA expert testified she couldn't indicate how DNA got on Bandana. DNA expert also testified that Item 13.1 no conclusive statement can be made. Items 7.1 and 7.2 Appellant is excluded as a possible contributor to these mixtures.

Conclusion

A directed verdict should be granted to the charge of Armed Robbery and possession of a weapon durning a violent crime, assault and battery with intent to Kill and receiving stolen goods.

David S Bagel II

Pro Se Brief

3.20.2013

Argument

The trial court erred by allowing into evidence statements made by Appellant to David Weiner under the totality of the circumstances?

David weiner Stated Appellant looked at him but couldn't tell if he was police or not.(Trpage487 line 16-21) David weiner chased Appellant even though he stated Appellant didn't know he was police to the extent his car bottomed out.(Tr. Page 489 lines 2-4) weiner shot Appellant with his back turned cause he belived Appellant to be Armed. Appellant never pulled a gun at weiner. weiner stod over Appellant with his gun held on Appellant and Appellant was already shot three times(Trpage493line17-25)(Trpage494lines1-25)(Trpage495lines1-7) The allegde statements made by Appellant to weiner violated Appellants 14th Amendment right to due process and Appellants fourth Amendment The statement made by appellant couldn't have been voluntarily and intelligently made under the totality of circumstances because the immediate physical violence weiner had inflicted upon Appellant.(Trpage495lines 24-25)(Trpage495lines1-7)

Conclusion

The trial court should've sopressed the statement made by appellant because it violated appellants 14th Amendment right to Due process.

Argument

Did the trial court err by allowing Don Dickinson to testify without limits as a expert with limited education?

During voirDire examination Don Dickinson stated that he did not take any courses for MAAG and tested the electronics area of the product.

Conclusion

The trial court should've limited Don Dickinson testimony because the lack of education.

Argument

Did the trial court err in ruling that a bandana was non-fungible?