STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY MCNEIL,

APPELLANT

APPELLATE CASE NO: 2021-000933

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court erred when it failed to grant a directed verdict on the charge of attempted murder after the State's case in chief lacked any evidence of malice aforethought or intent to kill.

II. The trial court erred in overruling defense counsel's objection to improper burden-shifting during the cross-examination of Shaderick Williams.

STATEMENT OF THE CASE

On June 12, 2017, the Charleston County Grand Jury indicted Appellant for one count of attempted murder (2017-GS-10-03653) and one count of possession of a weapon during the commission of a violent crime (2017-GS-10-03652).

Appellant was tried before the Honorable R. Kirk Griffin and a jury at the Charleston County Courthouse beginning August 16, 2021. He was represented by assistant public defenders Benjamin Lewis and Nichols D'Angelo, Esquires. He was prosecuted by Jordan Norvell and David Dutremble, Esquires. On August 18, 2021, Appellant was found guilty of the lesser included charge of assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime. Due to his prior record, Appellant was sentenced to life without the possibility of parole for assault and battery of a high and aggravated nature, with no sentence for the other charge due to his life sentence. A notice of appeal was properly filed on August 25, 2021 and this initial brief follows.

STATEMEMENT OF FACTS

On July 20, 2016, Maurice Washington was shot in the hand and groin outside of a trailer park in North Charleston, South Carolina. Initially, Washington informed law enforcement who questioned him at the hospital that he was shot by a man named Antonio who was dressed in all dark-colored clothing. However, eight days after the shooting, Washington voluntarily contacted law enforcement to inform them that Appellant, a life-long friend, was the shooter.

Washington's second story involved Appellant picking him up at his house and driving around for most of the day while they smoked drugs and discussed further drug sales. During this day, the pair spent time with Zia Fredericks, a cousin of Appellant. Washington repeatedly alleged that Appellant had a smirk on his face most of the day and it was not until he began driving erratically that he thought Appellant may be acting strange. He further alleged that Appellant pulled up to his own trailer park and was talking to another friend named Shaderick Williams, nicknamed "Sed." Washington had called his friend Boo to come get him and, as he exited Appellant's vehicle, Appellant stopped speaking with Sed, pulled out a Springfield 9 mm handgun, and shot Washington. Washington then began to run, dropping his phone, and weaving between trailers. Boo eventually arrived and took Washington to an urgent care center, and he was then transferred to MUSC.

At trial, the State's primary witness was Washington who recounted his second story involving Appellant. On cross-examination, Washington admitted to fabricating the first story so he could deal with Appellant in his own way. He further admitted that he had been convicted of a crime of dishonesty. Tr. p.217, lines 7-12. The State presented no direct physical evidence tying Appellant to the shooting, nor did it present any motive for the shooting. Its other witnesses included law enforcement officers from various departments that were involved due to

jurisdictional issues, doctors who saw Washington and a SLED analyst who confirmed the existence of gunshot residue on Washington. Appellant presented one witness in defense, his first cousin Shaderick Williams, who testified that he was close with Appellant, had no knowledge of a shooting, and did not have any knowledge whatsoever of Appellant shooting Washington.

STANDARD OF REVIEW

"In criminal cases, the Appellate Court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

Review is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court's decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E. 2d 840, 846 (Ct. App. 2005). Under the "clear error" standard, the appellate court will not reverse a trial court's finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. [T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

"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 416, 429 S.E.2d at 409.

ARGUMENT

I. The trial court erred when it failed to grant a directed verdict on the charge of attempted murder after the State's case in chief lacked any evidence of intent to kill.

Per South Carolina statute, someone guilty of "attempted murder" is defined as "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied." S.C. Code Ann. § 16-3-29. Through its presentation of evidence, the State did not introduce any evidence that Appellant had any intent to kill a person. Instead, Mr. Washington's testimony was his second story – that Appellant pulled out a gun and shot, which was witnessed by Sed. There is no evidence adduced that Appellant aimed at a specific part of Mr. Washington's body, fired more than one shot, made any statement that he intended to harm Mr. Washington, or had any motive to kill whatsoever. Therefore, the court erred when it refused to grant Appellant a directed verdict, since the State offered no proof that Appellant had the requisite intent to kill. This argument is valid at the mid-point of trial and close of presentation of evidence even though Appellant was convicted of a lesser included offense that did not require intent as his original charge of attempted murder necessitated intent to kill and malice.

Rule 19(a), SCRCrimP provides, in relevant part, "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." "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). "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).

"[M]ere suspicion is insufficient to support [a] verdict." Id. at 625, 677 S.E.2d at 605. "[T]he court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004). "[T]he trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citing Cherry, supra). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances not amounting to proof . . ." Id.

Here, the State offered evidence as to the element of attempt to kill in presenting the testimony of Mr. Washington that Appellant shot him. Even considering Washington's initial story of another man shooting him, the fact that he was shot is undisputed. This fact is supported by all the State's evidence and testimony, both medical and law enforcement. It is undisputed that Washington was shot and that this injury could have been fatal. However, this is the only evidence presented by the State.

The State did not offer any evidence as to the critical elements of attempted murder or its lesser included offenses, including intent to kill and malice aforethought required for an attempted murder conviction. Washington could not and did not provide testimony on these elements – he did not say that Appellant said anything or acted in a way that shows he intended to kill him. The law enforcement witnesses did not and could not provide testimony on these elements – their testimony was based on the bare bones of their investigation, most of which centered on Washington's initial false statement. Lastly, the medical witnesses could not and did not provide testimony on these elements – they could only testify to how Washington appeared at presentation and how he was treated medically. This lack of evidence is a clear failure on the part of the State to prove the required elements necessary to convict Appellant.

When it comes to directing a verdict, the court views the evidence in the light most favorable to the nonmoving party, here being the State. Bostick at 139, 708 S.E.2d at 777. Regardless, the question remains whether there is evidence at all to consider. As the State points out, the court is concerned "not with the weight of the evidence but the existence or nonexistence." Tr. p.338, lines 15-17. Appellant maintains that there is no evidence of intent to kill. The items to which the prosecutor points – that Washington watched Appellant pull a gun out and point and fire, as well as that Washington did not know if Appellant intended to keep shooting – in no way make up actual evidence of intent to kill, which was the basis of defense counsel's motion for directed verdict. Again, this is combined with the fact that the only evidence, direct or circumstantial, linking Appellant to the shooting was the testimony of a convicted felon and liar, Maurice Washington. Quite simply, the State failed to present evidence of the defense charged, thus entitling Appellant to a directed verdict. Hepburn, 406 S.C. at 429, 753 S.E.2d at 408.

The trial court erred by refusing to direct a verdict of acquittal, since no evidence was produced that Appellant had the requisite intent to kill. Rule 19(a), SCRCrimP; State v. Hepburn, 406 S.C. at 429, 753 S.E.2d at 408; State v. Cherry, 361 S.C. at 593, 606 S.E.2d at 478; State v. James, 362 S.C. at 561, 608 S.E.2d at 457. This court must reverse.

II. The trial court erred in overruling defense counsel's objection to improper burden shifting during the cross-examination of Shaderick Williams.

During the cross-examination of Shaderick Williams, the defense's only witness, the solicitor asked Williams, "And today is the first day that you could help him out by doing anything?" Tr. p.354, lines 3-4. Defense counsel objected to burden shifting and the trial judge overruled the objection. Tr. p. 354, lines 6-8. This was reversible error as the question and moved the burden of proof from the prosecution to the defense. Even though Appellant was not the one testifying, his witness was asked to defend his choices in a way that would aid the prosecution.

"The obvious rationale behind the principle that the burden of proof is on the State is the safeguard of the presumption of innocence. When the burden is shifted likewise the safeguard is removed." State v. Attardo, 263 S.C. 546, 551, 211 S.E.2d 868, 870 (1975). This safeguard of innocence is one of the oldest tenets of United States law and is referred to in the initial judge's remarks of every criminal jury trial. We are reminded of the right to remain silent and how no inferences should be made from a defendant's decision to remain silent. Similarly, we are reminded it is solely the prosecution's burden to prove a criminal case beyond reasonable doubt. Therefore, any request by the prosecution to have a witness comment on what was done by or for the defense is improper.

Here, by asking Williams this question, the prosecution implied that he should have done something more and/or earlier. This implication is strengthened by prior questioning of this witness in which he stated he had no idea why he was there, had no knowledge of the shooting, and had told the prosecutor the same in earlier meetings. Tr. p.349, line 21 – p.354, line 2. Any implication by the prosecution that the onus is on the defense to do anything affirmative to "prove its case" strips the presumption of innocence from the accused.

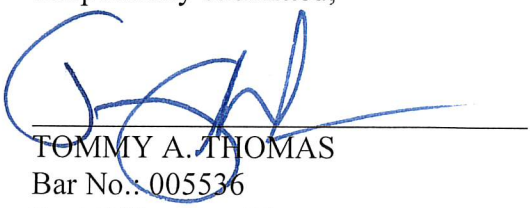
Though burden shifting is most commonly seen in closing arguments and jury charges, wherein an implication is made that the accused should have done more to defend himself, any inference by the State toward an imaginary burden on the part of the accused is improper. "The Fourteenth Amendment to the United States Constitution prohibits any State from depriving a person of liberty without due process of law, and in Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court held that the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element of the crime charged." Sandstrom v. Montana, 442 U.S. 510, 527, 99 S. Ct. 2450, 2461 (1979) (Rehnquist, concurring).

The trial court erred by overruling defense counsel's objection to burden shifting, thus violating Appellant's right to a constitutionally fair trial. This court must reverse.

CONCLUSION

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

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable R. Kirk Griffin

Case No.: 2021-000933

State of South Carolina,

Respondent,

vs.

Michael Anthony McNeil,

Appellant.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant designates that the following matter be included in the Record on Appeal pursuant to Rule 208, SCACR.

1. Transcript of Trial, dated August 16-18, 2021 (was transcribed in three parts).
2. Indictments
3. Sentencing sheets

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

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Kirk Griffin, Circuit Court Judge

CASE NO.: 2021-000933

The State,

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v.

Michael A. McNeil,

Appellant,

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Appellant hereby certify that I emailed, a copy of the Initial Brief of Appellant and Designation of Matter to William M. Blitch, Jr., Esq. of the Attorney General's Office, at:

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Jackie Miller

From: Jackie Miller
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To: William Blitch
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Via Email

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SC Court of Appeals

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RE: State v. Michael A. McNeil
Appellate Case No.: 2021-00933

Dear Ms. Allen:

Please be advised that I received the Transcript of Record from the Court Reporter on October 12, 2021. Attached please find the Initial Brief of Appellate, Designation of Matter and Certificate of Service for filing. Please email the clocked copies back to me.

Should you have any questions, please feel free to contact me. Thank you.

Yours truly,

Tommy A. Thomas,
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