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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA A. KELLY,

APPELLANT.

APPELLATE CASE NO. 2021-000600

ANDERS BRIEF OF APPELLANT

VICTOR R SEEGER
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it denied Appellant's motion for a directed verdict on the discharging a firearm into a vehicle charge against him?

STATEMENT OF THE CASE

During the January 2020 term, the Florence County Grand Jury indicted Appellant for attempted murder, pointing and presenting a firearm, and discharging a firearm into a vehicle. R. 116 – 119.

On May 26, 2021, Appellant proceeded to a bench trial before the Honorable William H. Seals. R. 1. Christie Henderson represented Appellant. Id. Ryan White and Jaynie Leftridge represented the state. Id.

Appellant was found guilty of discharging a firearm into a vehicle and pointing and presenting. R. 88, l .17 – 89, l. 3. Judge Seals sentenced Appellant nine years' imprisonment for discharging a firearm into a vehicle and five years' imprisonment, to run consecutively. Id.

This appeal follows.

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 776-777. "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.

ARGUMENT

The trial court erred when it denied Appellant's motion for a directed verdict on the discharging a firearm into a vehicle charge against him.

Relevant Facts

On September 18, 2019, on Sand Pit Road in Florence County, Appellant allegedly approached a work crew from an Alabama tree cutting company, Buford Tree Surgeons, with a shotgun. R. 9, l. 20 – 11, l. 6; R. 66, l. 15 – 70, l. 24. The work crew was on the Sand Pit Road property to mark trees for removal for Duke Energy. R. 9, l. 20 – 11, l. 6; R. 66, l. 25 – 67, l. 2.

Appellant was on the property with consent from the owner to go fishing. R. 87, ll. 20 – 25. Appellant allegedly ordered the work crew off the property. R. 28, l. 25 – 32, l. 23. The work crew then began to the leave the property. Id. As the work crew drove away, the workers claimed Appellant shot two shotgun shots at their trucks. R. 20, ll. 15 – 18; R. 32, l. 24 – 34, l. 19; R. 70, ll. 2 – 12.

Shortly thereafter, Jeffrey Martin, the Regional Safety Supervisor at Buford Tree Surgeons, reported the alleged incident to police. R. 17, l. 7 – 18, l. 12; R. 19, l. 24 – 21, l. 4; R. 33, ll. 16 – 20. Officer Jawuan McWhite responded to the call. R. 17, l. 15 – 18, l. 12. He took statements from the work crew and called Investigator Alvin Worsley. Id. Officer McWhite testified that he saw damage to the one of the trucks, but the photographs he took of the truck that Appellant allegedly blasted with a shotgun showed no gunshot damage. R. 21, l. 10 – 23, l. 14; R. 26, ll. 5 – 6.

Investigator Worsley went to the nearby trailer park on Creekside drive. R. 55, ll. 7 – 23. He saw residents of the trailer park outside and told them to go into their homes because there was an armed man in the area who recently fired a gun. R. 58, l. 21 – 59, l. 12. The residents told

Worsley "y'all must be taking about [Appellant]?" Id. As a result, Worsley went to Appellant's residence and informed him of the accusation. Id. Appellant was then detained by the SWAT team. Id. In response to being informed of the charges, Appellant allegedly told Worsley "If I wanted to kill them, I could have easily done it." R. 53, l. 25 – 54, l. 3.

At Appellant's trial, Jeffrey Martin claimed that Appellant pointed the shotgun at him and threatened to use it on him if the work crew did not leave the property. R. 30, l. 23 – 34, l. 19. Martin identified Appellant as the suspect both when Appellant was detained by police and with an in-court identification. R. 34, l. 20 – 35, l. 30. Martin claimed Appellant fired the shotgun as the work crew left and one of the trucks was damaged from the gunshot, but notably he did not testify that he saw any damage to the truck. R. 38, l. 21 – 39, l. 3.

The other Buford Tree Surgeon employees Ashlyn Duplisea, Parker Jarvis, and Shanice Stokely also testified. Jarvis claimed that Appellant pointed the shotgun at the "driver beside him" during the incident. R. 64, ll. 3 – 20. Jarvis also made an in-court identification of Appellant as the suspect. Id.

Duplisea and Stokely claimed as they drove away Appellant shot a shotgun shot that hit the truck. R. 46, l. 11 – 49, l. 13; R. 70, l. 2 – 72, l. 11. While the alleged victims claimed Appellant shot hit their truck, the photographs taken by Officer McWhite showed no gunshot damage done. R. 26, ll. 11 – 13; R. 46, l. 11 – 49, l. 13. Despite that lack of physical evidence, Duplisea claimed she saw damage done to the trucks, but could not explain why she failed to point out the damage she allegedly saw to Officer McWhite when he took their statements and took the photographs of the truck. R. 51, ll. 8 – 23; R. 73, ll. 1 – 14.

Defense counsel moved for a directed verdict on all charges because the state failed to present "competent evidence to substantiate the charges." R. 73, l. 24 – 74, l. 5. The trial court

denied Appellant's motion for a directed verdict. R. 74, ll. 6 – 8. Appellant was subsequently found guilty of pointing and presenting and discharging a firearm into a vehicle. R. 88, l. 18 – 89, l. 2.

Discussion

In this case, the photographs of the trucks Appellant allegedly shot at showed no gunshot damage such that the state did not present "direct or substantial circumstantial evidence" of Appellant's guilt for the discharging a firearm into a vehicle charge. See State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) ("If the state has presented 'any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,' this Court must affirm the trial court's decision to submit the case to the jury."). Accordingly, the lower court erred when it denied Appellant's motion for directed verdict regarding his discharging a firearm into a vehicle charge. R. 75, l. 12 – 76, l. 7.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the trial court erred when it denied Bostick's motion for directed verdict of acquittal for the murder charge against him. Bostick, at 141 – 42, 708 S.E.2d at 778. In Bostick, a woman from Pineland, South Carolina was murdered and her home set on fire. Id., at 136 – 37; 708 S.E.2d at 775. Two days after the fire, investigators found items belonging to the deceased in the burn pile in Bostick's backyard. Id., at 137, 708 S.E.2d at 775. Bostick was the deceased's neighbor. Id.

After being interviewing by investigators, Bostick willingly provided his clothing and shoes to investigators for testing. Id. Blood was found on Bostick's jeans, and a DNA analysis was performed, but it came back inconclusive. Id., at 137, 708 S.E.2d at 775 – 76. At the close of the state's case-in-chief, Bostick moved for a directed verdict, which was denied. Id., at 137, 708 S.E.2d at 776.

The jury found Bostick guilty murder, and the circuit court sentenced him to thirty years' imprisonment. Id., at 138, 708 S.E.2d 776. On appeal Bostick alleged that the evidence submitted did not rise to the level of "substantial circumstantial evidence" necessary to submit the case to the jury. Bostick, at 138 – 39, 708 S.E.2d at 776. Our Supreme Court held that even when analyzing the evidence in the light most favorable to the state, "the State's evidence here raised only a suspicion of guilt by Bostick. No direct evidence linked Bostick to the crime scene or the items in the burn pile." Bostick, at 141 – 42, 708 S.E.2d at 777. Accordingly, "the evidence presented by the State *raised, at most, a mere suspicion* that Bostick committed this crime. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." Bostick, at 142, 708 S.E.2d at 777 (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). (emphasis added)

In State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017), Cain challenged his conviction for trafficking in methamphetamine. Cain, at 26, 795 S.E.2d at 847. On appeal, Cain's argument that the trial court erred when it denied his motion for directed verdict was held as unpreserved by the Court of Appeals. Id. However, our Supreme Court reversed the Court of Appeals' decision. Id.

In Cain, police officers in Spartanburg County obtained an arrest warrant for a Travis Kirby. Cain, at 27, 795 S.E.2d at 847. Cain was renting a bedroom in Kirby's house at the time and gave police permission to enter. Id. at 27, 795 S.E.2d at 848. While searching for Kirby inside the house, the police discovered equipment for manufacturing methamphetamine. Id. The police called a forensic chemist to investigate the scene. Id.

Forensic chemist Beth Stuart did not find any methamphetamine at the scene but did find ingredients used for methamphetamine manufacturing. Id. Stuart determined that the empty packages of Sudafed she found could "theoretically" produce 17.67 grams of methamphetamine

if Cain manufactured the methamphetamine with maximum efficiency. Id. Cain was charged with trafficking in methamphetamine under § 44-53-375(C) of the South Carolina Code Ann. Id.; S.C. Code Ann. § 44-53-375(C). Under that subsection, one is guilty of trafficking methamphetamine if one knowingly attempts to manufacture ten grams or more of methamphetamine. S.C. Code Ann. § 44-53-375(C).

Cain made a pretrial directed verdict motion to dismiss the trafficking charge and renewed the directed verdict motion at the close of evidence, both motions were made on the basis that the state did not present sufficient evidence to prove the required quantity of methamphetamine for establishing trafficking under S.C. Code Ann. § 44-53-375(C). Cain, at 27, 795 S.E.2d at 848. The trial court denied the directed verdict motions and Cain was found guilty. Id. Cain appealed his conviction where he argued the state's evidence of quantity of methamphetamine was insufficient because the state could only allege that it was "theoretically possible" Cain could have committed the offense. Id. at 28, 795 S.E.2d at 848.

Our Supreme Court held that the state's evidence of a theoretical amount produced at a maximum efficiency was insufficient to prove the quantity element in S.C. Code Ann. § 44-53-375(C) because the statute "does not criminalize the theoretical possibility of manufacturing 'ten grams or more' of methamphetamine." Cain, at 33, 795 S.E.2d at 851. Accordingly, "because the State did not establish the level of efficiency Cain could have actually achieved in his attempt to manufacture methamphetamine," the Court held the state did not prove the quantity element of the statute such that the directed verdict motion[1] should have been granted. Id.

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[1] Our Supreme Court also held that the quantity issue was preserved for review. Cain, at 36, 795 S.E.2d at 852 – 53. While Cain may have used differing verbiage between the pretrial directed verdict motion and the directed verdict motion made at the close of the evidence, the trial court clarified that it understood Cain to have renewed his directed verdict motion on the basis of quantity and that it was denying the renewed directed verdict motion. Id.

In State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006), a magistrate court convicted Bailey for disorderly conduct pursuant to S.C. Code Ann. §16-17-530, the circuit court overturned Bailey's conviction, and the state appealed the circuit court's decision. Bailey, at 40, 626 S.E.2d at 899. Bailey and one of his employees were involved in an altercation at a gas station regarding the processing of a payment for gas. Bailey, at 41, 626 S.E.2d at 899.

The gas station attendant called the police and Deputy Stacy Brooks arrived on the scene. Id. at 41, 626 S.E.2d at 899. Brooks testified that Bailey was "extremely argumentative and loud and boisterous." Id. Brooks asked Bailey to step outside the store. Id.

Deputy Giles Gladsen arrived at the scene and stayed outside the store with Bailey while Brooks went inside to get the clerk's version of events. Id. The clerk showed Brooks the computer screen that indicated Bailey had not paid for the gas. Id. Brooks returned outside to inform Bailey that he needed to pay for the gas. Id. Bailey then "became loud and boisterous" with the officers, and "although Bailey never used profanity, his behavior drew a lot of attention from people inside and outside the store." Id. Bailey "was absolutely disorderly within the view of the general public." Id. Bailey continued to refuse to pay for the gas and "continued to be loud and boisterous" at which point the officers "had no choice" but to arrest Bailey for petit larceny and public disorderly conduct. Id.

In the magistrate's court, after the state rested its case, Bailey moved for a directed verdict because the state failed to prove that Bailey used fighting words towards the police officers such that he could not be convicted of disorderly conduct pursuant to State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991). Bailey, at 42, 626 S.E.2d at 899; See State v. Perkins, supra (holding that criticizing the police does not rise to the level of disorderly conduct absent the utterance of fighting words). The magistrate agreed that Perkins "may have some

applicability" but nonetheless found there was evidence Bailey was in violation of S.C. Code Ann. §16-17-530 such that the matter should go to the jury. Id. Bailey was convicted and sentenced to thirty days in jail, suspended upon the payment of a $258 fine. Id.

Bailey appealed to the circuit court where he argued the magistrate court erroneously failed to grant his motion for directed verdict and failed to give the requested jury charge that "fighting words" must be present in order to charge one with disorderly conduct pursuant to Perkins. Id., at 43, 626 S.E.2d at 900. After hearing both arguments, the circuit court reversed Bailey's conviction and the state appealed. Id.

The Court of Appeals held that while Bailey could have been charged with disorderly conduct for his conduct inside the store, "Bailey was not placed under arrest until *after* his confrontation with his deputies outside" and "there [was] no evidence in the record that anything Bailey said to the deputies amounted to 'fighting words.'" Bailey, at 47, 626 S.E.2d at 902. Accordingly, the Court of Appeals determined that Bailey's motion for directed verdict should have been granted and affirmed the circuit court's reversal of Bailey's conviction. Id.

In the instant case, the state did not present direct or substantial circumstantial evidence that Appellant fired the shotgun into the work crew's truck. See State v. Schrock, 283 S.C. 129, 133 – 134, 322 S.E.2d 450, 452 – 53 (1984). The most important evidence regarding the discharging a weapon into a vehicle charge in this case was the photographs of the truck that was allegedly damaged. R. 21, l. 10 – 23, l. 14. Those photographs clearly showed there was no evidence of gunshot damage done to the truck in question. Id. See State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 777 (holding that a trial court properly grants a motion for directed verdict when the state presented evidence that raises only a mere suspicion that a defendant committed the crime charged).

The evidence the state offered to show Appellant discharged the shotgun into the work crew's truck only presented a mere suspicion of guilt and was undermined by the photographs revealing no damage. The work crew members who were inside the trucks when the gun was allegedly fired testified to hearing a shot hit the truck; however, that testimony was suspect because they were inside the truck at the time such that they could not actually see the gunshot hit. R. 38, l. 21 – 39, l. 3; R. 46, l. 11 – 49, l. 13. Moreover, the work crew members were forced to admit on cross examination that they unexplainably "forgot" to show the investigating officers the damage allegedly done to the truck from the gunshot. R. 51, ll. 8 – 23; R. 73, ll. 1 – 14.

Furthermore, Officer Jawuan McWhite testified that they saw damage to the truck after the incident. R. 21, l. 5 – 23, l. 14; R. 26, ll. 5 – 13. However, Officer McWhite was forced to contradict that testimony when faced with the photographs *he took* of the undamaged trucks on cross-examination. R. 21, l. 5 – 23, l. 14; R. 23, ll. 20 – 24. When defense counsel asked McWhite if he could see gunshot damage on the truck that was allegedly shot, McWhite admitted that there was no gunshot damage shown in any of the photographs. Id.; Id.

Due to the lack of evidence presented by the state that the shotgun shots Appellant allegedly fired were discharged into the work crew's truck, defense counsel properly moved for a directed verdict at the close of the state's case. R. 73, l. 23 – 74, l. 8. Since the state did not present direct or substantial circumstantial evidence that Appellant discharged a firearm into a vehicle, the trial court erred when it denied that directed verdict motion. Id.; Hepburn, at 442, 753 S.E.2d at 415 – 16. Accordingly, Appellant's conviction for discharging a firearm into a vehicle should be vacated and the motion for directed verdict of acquittal granted.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate Appellant's conviction and grant his motion for directed verdict of acquittal regarding the discharging a firearm into a vehicle charge.

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2022.

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JOSHUA A. KELLY,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua A Kelly states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge William H. Seals, which was held on May 26, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, He asks the Court to relieve him as counsel for Joshua A Kelly.

Respectfully Submitted,

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentence sheets;
(2) Trial Transcript dated May 26, 2021;
(3) State's Exhibit #1 (911 Report);
(4) State's Exhibit #2-#7 (Photos of truck); and
(5) State's Exhibit #8, #9 (Maps)

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

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

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February 3, 2022.