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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOBIAS M. THOMAS,

APPELLANT

APPELLATE CASE NO. 2021-000843

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for attempted armed robbery when the State failed to prove the specific intent element required for an attempted armed robbery?

STATEMENT OF THE CASE

In December of 2020, the Aiken County Grand Jury indicted Appellant, Tobias Marques Thomas, for attempted armed robbery, possession of a weapon during the commission of a violent crime and possession of a weapon by a person convicted of a crime of violence, indictments #2020-GS-02-2070, 2071, 2072. (R. p. **). On July 19, 2021, Appellant proceeded to jury trial before the Honorable Jocelyn J. Newman. Andrew Farley represented Appellant at trial. Bradley McMillian and Sam Grimes prosecuted the case. The jury found Appellant guilty. Judge Newman sentenced Appellant to ten (10) years for attempted armed robbery, five (5) years consecutive for possession of a weapon during the commission of a violent crime and five (5) years consecutive for possession of a weapon by a person convicted of a crime of violence. A timely notice of intent to appeal was served on July 21, 2021. 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 judge erred in refusing to direct a verdict of acquittal for attempted armed robbery when the State failed to prove the specific intent element required for attempted armed robbery.

At trial Appellant testified that the co-defendant, Danatavius Isles-Lytes, called him and asked Appellant if he had marijuana to sell because Isles-Lytes had a buyer. (R. p. 127, line 3 – p. 128, lines 1-17). Appellant agreed to meet Isles-Lytes at Hahn Village in Aiken, South Carolina. (R. p. 128, line 18 – p. 129 – 132). Appellant testified that they smoked marijuana in Isles-Lytes' car as they waited for the buyer. (R. p. 132, line 3 – p. 133, 134). Eventually, Isles-Lytes pointed out an individual walking to his car as the buyer. (R. p. 134, line 18 – p. 135, lines 1-22). Before the two men approached the person Appellant believed to be the buyer, Isles-Lytes asked Appellant what he would receive in exchange for setting up the sale. (R. p. 135, line 23 – p. 136, lines 1-13). Appellant told Isles-Lyte that he would "holler at him" when the deal was complete. (R. p. 136, lines 1-3; lines 15-16).

Appellant testified that he and Isles-Lytes approached the car but Appellant became suspicious when the presumed potential buyer did not have a cigar to empty and smoke the marijuana to test the quality of the product. (R. p. 136, line 16 – p. 137, 138, lines 1-23). Appellant testified that Isles-Lytes stood by the car with his gun out. (R. p. 139, lines 13-16). Isles-Lytes got in the backseat of the car and Appellant got in the front passenger seat[1]. (R. p. 139, line 22 – p. 140, lines 1-12). Appellant suspected that either the driver or Isles-Lytes was going to rob him when the driver said he did not smoke or sell marijuana and had not called for Appellant. (R. p. 140, line 10 – p. 141, 142, lines 1-4). Appellant admitted that he put his gun in his lap out of an

[1] Isles-Lytes testified that he got in the backseat. (R. p. 64, lines 5-10). The driver of the car, however, identified Appellant as the person in the backseat. (R. p. 51, line 20 – p. 52, lines 1-7).

abundance of caution. (R. p. 143, lines 21 – p. 144, lines 1-2). The driver told Appellant that he did not have any money but offered to give him a bank card or a phone. (R. p. 142, line 17 – p. 143, lines 1-11). Appellant wanted to get the money from a marijuana sale and testified, "I told him, nah. I didn't come down here for bankcard or nothing crazy. I just came down and get the money and go back where I came from." (R. p. 143, lines 3-5). Appellant testified that Isles-Lytes was in the backseat laughing. (R. p. 142, lines 9-15). After that Appellant and Isles-Lytes got out of the car and left Hahn Village in Isles-Lytes' car. (R. p. 144, lines 7-25).

The driver of the car, Michael Parrish, testified that two men approached his car, pulled a gun and told him, "Run that Shit, Fuck Boy." (R. p. 42, lines 8-15). When asked what he thought that meant, Parrish testified that he thought it was slang for give me anything of value. (R. p. 42, lines 16-24). Parrish testified that the two men got in the car and asked, "where's the money at." (R. p. 43, lines 18). The two men left after determining Parrish did not have any money. (R. p. 45, lines 1-6). Parrish testified that the men did not take anything from him. (R. p. 47, lines 13-16).

Isles-Lytes, testified that he and Appellant were sitting in Isle-Lytes' car in the parking lot at Hahn Village smoking when Appellant saw a man walk across the parking lot. (R. p. 61, line 13-p. 62, 63, lines 1-14). Isles-Lytes claimed that Appellant told him the man owed him money. (R. p. 62, lines 6-11). According to Isles-Lytes, he and the Appellant approached the man as he was sitting in his car, got in the man's car and Appellant said, "Run the shit, fuck boy." (R. p. 64, lines 5-15). Isles-Lytes testified that he and Appellant each had a gun. (R. p. 65, line 15 – p. 66, lines 1-16). Isles-Lytes testified that the driver told them he did not have any money but offered credit cards. (R. p. 68, lines 1-16). After that Appellant and Isles-Lytes got out of the car and left. (R. p. 68, line 18 – p. 69, lines 1-12).

At the close of the State's case Appellant moved for a directed verdict of acquittal arguing, "Certainly, we base that on the fact that we believe that prosecution had not been able to prove all elements of the armed robbery or the pistol, possession of a firearm during the commission of a violent crime." (R. p. 117, lines 20-23). The judge denied the motion. (R. p. 118, line 1). The trial judge erred. Viewing the evidence in the light most favorable to the State, the State failed to prove a specific intent to commit an armed robbery.

In State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007), the South Carolina Court of Appeals wrote:

> A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866–67 (Ct.App.2001). "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995). The crime is "armed robbery" when a person commits a robbery while armed with a deadly weapon. State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987).

In the present case the State failed to prove that the words, "Run the shit, fuck boy," indicated a specific intent to unlawfully take money, goods, or other personal property from another. The State failed to prove that the words, "where's the money at," indicated a specific intent to unlawfully take money, goods, or other personal property from another. As Isles-Lytes, a witness called by the State, claimed that Appellant told him the man owed him money, these words merely show an attempt to collect a debt. The State needed to prove more in order to prove a specific intent to commit armed robbery.

In State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001), the South Carolina Court of Appeals wrote:

> "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose." Id. at 397, 532

> S.E.2d at 285 (citing United States v. Calloway, 116 F.3d 1129 (6th Cir.1997)). Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942). "The preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made." Quick, 199 S.C. at 260, 19 S.E.2d at 103.

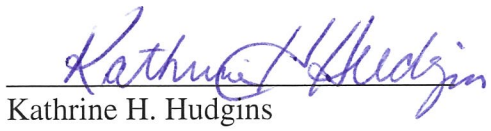
As discussed above, the State failed to prove a specific intent to commit armed robbery. Additionally, the State failed to prove an overt act in furtherance of a specific intent to commit armed robbery. According to the State's witness, Isles-Lytes, the act of approaching the man and getting in his car were acts taken in an attempt to collect a debt, not in furtherance of an attempted armed robbery.

"[W]hen the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); see Hepburn, 406 S.C. at 429, 753 S.E.2d at 408 ("In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict."). Further, when the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial judge is concerned with the existence or non-existence of evidence, not with its weight. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge "should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* " 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis.*" State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (emphasis added).

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). State v. Pearson, 415 S.C. 463, 469–70, 783 S.E.2d 802, 805–06 (2016). Viewing the evidence in the light most favorable to the State, the State failed to prove the specific intent element required for attempted armed robbery. The State only proved that either Appellant was attempting to collect a debt, although mistaken about the identification of the debtor, or was simply a making a good faith request to demonstrate an ability to purchase marijuana, although mistaken about the buyer. The words and actions attributed to Appellant do not prove a specific intent to commit armed robbery.

CONCLUSION

Based on the above argument, this Court should reverse the attempted armed robbery and possession of a weapon during the commission of a violent crime convictions and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of March, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tobias M. Thomas states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Jocelyn J. Newman, which was held on July 19 - 20, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Tobias M. Thomas.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

This 21st day of March, 2022.

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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 sentencing sheets;
(2) Entire trial transcript pp. 1-224;
(3) State's Exhibit #1 – photo of gun;
(4) State's Exhibit #2 – fingerprint stipulation;
(5) State's Exhibit #3 – sentencing sheet;
(6) State's Exhibit #4 – Video of parking lot surveillance.
To be transported.

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

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ATTORNEY FOR APPELLANT

March 21, 2022

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."

Kathrine H. Hudgins
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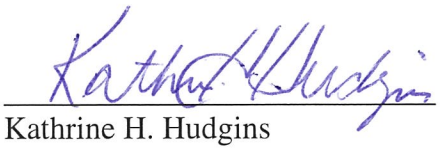
APPELLANT

APPELLATE CASE NO. 2021-000843

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case have been served upon William M. Blitch, Jr., Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and on Tobias M. Thomas, #363452, at Limestone County Detention Center, 910 North Tyus Street, Groesbeck, TX 76642, this 21st day of March, 2022.



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