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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES MONROE BROWN,

APPELLANT.

APPELLATE CASE NO. 2021-000469

FINAL BRIEF OF APPELLANT

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2.

Whether the court erred by refusing to direct the verdict as to the charge of murder where there was no direct or substantial circumstantial evidence appellant committed any overt act under the theory of accomplice liability to aid or abet another person or persons in killing the decedent?

STATEMENT OF THE CASE

Appellant was indicted at the July 24, 2018, term of the Chesterfield County grand jury for the offense of murder. R. 364. His case was called to trial on April 21, 2021, before the Honorable Paul M. Burch, and a jury. Grant Smaldone represented appellant. Kernard Redmond was the deputy solicitor.

On April 22, 2021, the jury found appellant guilty of murder. R. 346, ll. 13-17. Judge Burch sentenced appellant to thirty-five years imprisonment. R. 361, ll. 9-11.

This appeal follows.

STANDARD OF REVIEW

Issue one: Search and seizure

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their 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). When an appellate court reviews the decision to issue a search warrant it must decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

Issue two – Directed verdict

"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

1.

The court erred by refusing to suppress evidence seized pursuant to a search warrant for appellant's phone since the warrant affidavit was vague and overbroad and the state stipulated that the one specific allegation in the affidavit that appellant's phone called the decedent's phone before the murder was false since that state failed to produce the probable cause necessary for a search warrant.

Relevant facts

Prior to trial defense counsel Smaldone moved to suppress the evidence seized pursuant to the search warrant in this case on the grounds of its "[v]agueness and over broadness. And to, primarily with the lack of probable cause on which it was issued..." R. 8, ll. 15-20. Defense counsel continued:

> "[I] don't believe there's any probable cause to issue a search warrant for someone's phone. Especially, given the scope of the search warrant. The scope basically asks for anything and everything relating to that number, including call records, data and location. Nothing about why they would want the location. Nothing about why they would want the data. Just saying, this phone called that phone a few minutes before a murder and so we need to know everything about this person. Additionally, your Honor, I don't believe that that is even accurate. We'll get in to that in a minute. But I don't think that that number even called the victim's phone in this case. So I think there's really -- on it's face theirs is probable cause to issue that sort of search warrant. And I don't even think that on it's face, it's accurate. I think that is not an accurate statement that was made to the Magistrate when getting the search warrant."

R. 9, l. 10 – 10, l. 3.

As seen below, the state would stipulate during the suppress hearing that appellant's phone *did not call the decedent's phone* as alleged in the search warrant affidavit. The search

warrant affidavit, State's exhibit 1, was exceptionally vague and overbroad, and its one relevant allegation regarding appellant's phone calling the decedent's phone was false. R. 364. As will be seen supra, the state would stipulate during the suppression hearing that appellant did not call the decedent, and the decedent did not call appellant.

The affiant was Lieutenant Wayne Jordan. The affidavit stated that Jordan was a graduate of the South Carolina Criminal Justice Academy who had received training on cellular phones and analysis of cellular phone data and records. R. 364. The affidavit continued:

> The affiant knows through training and experience that physical evidence such as cell phone records and usage is crucial and often one of the only links to a suspect and other perpetrators of the crime. The affiant knows that cell phone records are a valuable investigative tool, and can link an offender to a crime scene or a particular location. Cell phones are commonly used for email, text messaging, video, and photos, and this data, in addition to the records of calls made, may provide evidence of the crimes being investigated or leads into the identities of the perpetrators.
>
> Through experience and training, your affiant knows cellular phone services that includes text messaging and e-mail services, such as cellular service provider, maintain records related to subscriber information, account registration, credit information, billing and airtime records, outbound and inbound call detail, connection time and dates, Internet routing information (Internet Protocol numbers), GPS and tower locations, and message content, that may assist in the identification of person/s accessing and utilizing the account. Through experience and training, your affiant knows that the cellular service provider maintains records that include cell site information and GPS location. Cell site information shows which cell site a particular cellular telephone was within at the time of the cellular phone's usage. Some model cellular phones are GPS enabled which allows the provider and user to determine the exact geographic position of the phone. Further, the cellular service provider maintains cell site maps that show the geographical location of all cell sites within its service area. Using the cell site geographical information and GPS information, officers would be able to determine the physical location of the individual using the cell phone number 843-439-7060

> That on January 21st, 2017 James Henderson Jr was shot and killed at his home in Cheraw, South Carolina and during this incident he received several phone calls from the target number minutes before his murder. This is an ongoing Murder investigation.
>
> This search warrant must be faxed out of state, and due to factors beyond the control of the affiant, it is highly likely the records will not be provided by Verizon within the 10 days required. The affiant asks the court to extend the time limit to whatever period of time is reasonable necessary for Sprint to produce the records sought. As part of this search warrant, the affiant requests the court direct Verizon and its employees/authorized agents and representatives to not disclose the existence of this search warrant to the account holder as the release of this information could impede the investigation by alerting the suspect(s) of the progress and focus of the investigation.

R. 365. (emphasis added).

Suppression hearing

Wayne Jordan of the Chesterfield Sheriff's Department was the only witness during the suppression hearing. R. 10, ll. 15-22. Jordan was the supervisor of the detective unit. R. 10, l. 25 – 11, l. 2. Jordan identified State's exhibit 1 as the "search warrant I had signed by the magistrate." R. 11, ll. 21-25; R. 364. The target was appellant's cell phone at "843-439-7060." [1] R. 12, ll. 1-3.

Jordan testified that the murder in this case happened on January 21, 2017, in the Hillian-Edwards Road vicinity of Chesterfield County. R. 12, ll. 14-16. The following occurred on direct-examination of Jordan:

> Q. [A]nd what did you – to the best that you can recall, what did you tell the Magistrate in support of you getting the search warrant?

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[1] The phone numbers in this case are critical to specify the cell phones at issue. Consequently, they are not redacted. Appellant is incarcerated because he was convicted of murder and the victim is deceased so there is no harm possible from these phone numbers not being redacted.

> A. That this number was also associated with the victim's phone as far as numerous threats and it was part of an ongoing murder investigation. Jordan said that State's exhibit 2 was a form letter from Verizon. R. p. *. He said that State's exhibit 3 had the phone number of the cell phone and the account number, and that State's exhibit 4 was the "incoming and outgoing phone calls that were made during this time." R. 14, l. 1 – 35, l. 1; R. 367. (State's exhibits 2-4).[2]

R. 13, ll. 13-18.

On cross-examination Jordan said he was not sure how he initially received appellant's phone number ending in 7060: "It was not brought to my attention who gave what investigator the information. It was just collected..." Jordan said the information he received as a result of the search warrant went to SLED for further analysis pertaining to cell tower mapping. R. 15, ll. 2-6. R. 15, l. 20 – 16, l. 10. Jordan said he thought he got the information from "some investigator," and he then observed "I believe it all came from the victim's phone." R. 16, ll. 11-18. Jordan added "the victim's phone was recovered. I do not know how it was recovered..." R. 16, ll. 15-25. The following occurred on cross-examination of Jordan

> Q. You obtained the number from a witness or from an investigator that got it from a witness that said it was involved and on the victim's phone; right, essentially?
>
> A. I believe that's correct.
>
> Q. And you later learned that that number, the number ending in 7060 never called the victim in this case; right?
>
> A. I can't say whether it did or didn't. I don't know.
>
> Q. Okay. Did you ever know whether it did or didn't?

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[2] Jordan said that State's exhibit 2 was a form letter from Verizon. R. 367. He said that State's exhibit 3 had the phone number of the cell phone and the account number, and that State's exhibit 4 was the "incoming and outgoing phone calls that were made during this time." R. 14, l. 1 – 15, l. 1; R. 367. (State's exhibits 2-4).

A. I never looked at -- like I said, I don't acquire the records. I don't analyze the records. I give them all to SLED and let them analyze it. I cannot say yes or no to that question.

Q. Okay. Can you say yes or no whether that number ending in 7060 texted the victim's phone in this case?

A. Again, I cannot answer that question.

Q. Can you say whether the phone number ending 7050 was saved in the victim's phone in this case?

A. Again, I can't tell you about the phone that was saved because, to my knowledge, we never recovered the phone.

Q. Okay.

A. We got the phone records from doing a search warrant because it was an AT&T phone at the time if I remember correctly.

Q. All right. Okay. So you never recovered the victim's actual phone. You just pulled of the his records?

A. To my knowledge I do not know if we recovered the phone. I don't remember. I can't tell you that. All I know is that we did a search warrant and I'm pretty sure it was an AT&T phone because I remember us pinging that phone that night that gave us latitude/longitude coordinates. So I'm pretty sure it was going to be an AT&T phone and that's where we got most of our records from at the time. To tell you that we have the phone in our custody, I cannot tell you that.

R. 17, l. 25 – 19, l. 16.

On redirect testimony the solicitor stated "first of all, *I will actually stipulate for the record that we do not have any phone calls being made between the victim's phone number and to the defendant's phone.*" R. 20, ll. 3-8. (emphasis added). Although seemingly not relevant to obtaining the search warrant, the police apparently learned at some point that appellant's phone called the decedent's cousin, "S. dot's," phone at 8:37 p.m. on the night of the murder. R. 21, l.

16 – 22, l. 5. It was never made clear to the best of appellant's knowledge what, if anything, the decedent's cousin allegedly had to do with this crime.

The solicitor again stipulated that "*the defendant's phone never actually called the victim's phone...I can stipulate to that* [also]." R. 22, 13-22.

Jordan said he "guessed" he could also stipulate that appellant's phone never texted the victim's phone either. R, 22, ll. 23 – 23, l. 1. Jordan alleged that "we had folks giving us information, giving us names. Plus we went through the phone book, we had this number as well. Jordan admitted "that information was not on the search warrant, however." R. 23, ll. 13-14.

Jordan also said there were other text messages being sent between several defendants "including Brenton Davis" that evening. R. 24, ll. 14-25. Jordan said all the cell phone information they received was "sent to SLED." R. 26, l. 1 – 27, l. 9. The search warrant in this case was dated January 24, 2017. R. 364. The murder was on the night of January 21st, 2017. Thus, the search warrant affidavit was filled out only a couple of days after the murder.

When Jordan's testimony concluded, the judge then ruled, without further argument: "With the objection of the testimony in having dealt with similar search warrants before, in fact, we had a trial last week or a year and half ago before the pandemic hit and we got deep into the cell phone technology. I don't see any problem with the warrant. I will deny the objection. Overrule -- I'm sorry, overrule the objection." R. 27, ll. 14-21.

Trial evidence

As will be seen infra, during the trial Sergeant Craig Burns of the Chesterfield Sheriff's Department testified that appellant denied being in Chesterfield County on the night of the murder. Appellant said he was at the Club Envy. Burns also said appellant did not give him his

correct cell phone information and he maintained that appellant told him that he lost his cell phone prior to that time. R. 189, l. 24 – 190, l. 17; R. 204, ll. 17-23; State's Exhibit 29, (Interview with appellant). As will be seen infra, despite a very hostile interrogation appellant insisted he was at the Club Envy on January 21, 2017, the night of the murder, and the interrogator responded that while appellant may have been there, he was not at the club at 10:00 p.m. Appellant consistently maintained he was not present in Chesterfield County where the murder occurred.

Burns also testified and claimed that the phone records showed "activity on the defendant's phone and up until and past murder of Mr. Henderson." R. 205, ll. 6-9. Burns later had to admit that appellant never telephoned the decedent in this case and that the appellant never texted the victim. R. 231, ll. 18-24. Burns also admitted that appellant had no prior criminal record, he worked at Mohawk Carpet, and he was the father of four children. R. 230, l. 19 – 231, l. 7.

Burns testified that co-defendant Brenton Davis had telephoned appellant on the night of the murder. Burns also maintained that the phone records indicated that appellant called co-defendant Jamarcus Sellers on the night of the murder. R. 210, l. 3 – 215, l. 22.

The state's meandering contention was that appellant was acting in concert with Brenton Davis and Jamarcus Sellers and that he was therefore guilty under the theory of accomplice liability. While the state had to admit that appellant never called the decedent or texted decedent and that the decedent never called or texted appellant -- when blended together throughout the testimony -- it created an atmospheric that state desired of appellant participating with Davis and Sellers in something that was occurring.

Discussion

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. It provides that "no warrant shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." State v Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012). When an appellate court reviews the decision to issue a search warrant it must decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

In determining the validity of the search warrant, a reviewing court may only consider information which was brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2021). Although a "totality of the circumstances" test is utilized in probable cause determinations, our General Assembly has imposed stricter requirements than federal law for issuing a search warrant. See State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009); State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). The affidavit or a search warrant may be supplemented by sworn oral testimony before the magistrate. State v. Adolphe, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994).

Defense counsel correctly argued that the affidavit in this case was extremely vague and overbroad. State's exhibit 1 simply states that information obtained from cell phones can be valuable during a criminal investigation, and that Wayne Jordan was allegedly qualified to interpret the cell phone information. R. 364.

The specific language in the affidavit that appellant's phone ending in 7060 called the decedent's phone several times minutes before the murder was admitted to be, by stipulation of the solicitor, simply not true. It was a materially false statement. There was nothing else in the

affidavit that could replace this false statement as far as redacting it, and the remainder of the affidavit providing probable cause. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999) (false information not considered); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (South Carolina has a stricter standard for the issuance of a valid search warrant than what may pass muster under the Fourth Amendment).

The January 24, 2017, affidavit of Lieutenant Wayne Jordan for appellant's cell phone information did not provide probable cause for the issuance of the search warrant under the Fourth Amendment to the United States Constitution. See, also, State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (our stricter state court precedent that probable cause must be contained in the search warrant affidavit itself).

Since the use of appellant's cell phone information was sprinkled throughout the testimony before the jury it created a spurious atmospheric of appellant's alleged participation in the murder which was highly prejudicial. Appellant's conviction should be reversed, and appellant should be granted a new trial.

2.

The court erred by refusing to direct the verdict as to the charge of murder where there was no direct or substantial circumstantial evidence appellant committed any overt act under the theory of accomplice liability to aid or abet another person or persons in killing the decedent.

Relevant facts

Sergeant Timmy Jordan of the Chesterfield County Sheriff's Department testified he was dispatched to 31 Hillian-Edwards Road on January 22, 2017, at 11:03 p.m. regarding a "shots fired" call. Tr. 64, l. 17 – 65, l. 16. Jordan said he was met by an "irate, scared, and frightened" Shameika Ingram at the scene. Ingram kept saying: "he's missing, he's missing." R. 42, ll. 14-22.

Ingram told Jordan that the decedent was taking a friend home, Quincy Gordan, who lived "right down the road and when he came in, he made a statement that, 'they're trying to put me in a box.'" R. 42, l. 22 – 43, l. 2.

Jordan noticed bullet holes in the trailer next door to Ingram's trailer "and a couple of casings on the ground there at the residence," so he called for backup. R. 45, l. 3 – 46, l. 14. Jordan recalled that it took over an hour for the police to locate the decedent's body which was found across Highway 9 in the eastbound lane of that highway. As will be seen infra, the decedent was shot three times in the back. There would be no evidence in this case that appellant had a gun with on the night of the murder, and there was certainly no allegation that he shot the decedent. R. 47, l. 4. – 48, l. 11.

Deputy Spence Vaughn of the Chesterfield County Sheriff's Office was also dispatched to the "shots fired" scene on the night of January 21, 2017. R. 49, l. 16 – 50, l. 15. Vaughn remembered that the decedent's body was found leaning up against a tree which the pathologist

would later opine was the result of the decedent grabbing the tree for support after he was shot in the back. R. 53, l. 14 – 54, l. 22.

Vaughn vaguely testified about Chesterfield Law Enforcement receiving information about possible suspects in the shooting. "[W]e was investigating and somebody was able to determine some possible suspects and we actually reached out to the Bennettsville Police Department and had them looking." R. 54, l. 7 – 55, l. 10. Vaughn acknowledged that law enforcement did not recover the decedent's cell phone or the murder weapon. R. 60, ll. 18-25.

Moniquah Ingram testified she lived with the decedent for a little over a year in this trailer park before the fatal shooting on January 21, 2017. R. 93, l. 5 – 94, l. 23. Ingram remembered when the decedent returned to the trailer that night he said, "Baby, they want to put me in a box." R. 95, l. 12 – 96, l. 3. It was explained that "putting someone in a box" meant that several people would surround the target and kill him. Ingram recalled that the decedent's phone was ringing that evening and the decedent went outside seemingly to talk to someone. "Once he went outside, I got up and went to the back window thinking it was a female." However, instead, Ingram saw "[t]wo guys on one side of the vehicle, black vehicle in the middle and two or three guys on the other side of the vehicle." Ingram confirmed there were several men outside. The only man that Ingram could identify was "Bliz." Blitz was Brenton Davis. R. 98, l. 18 – 99, l. 25.

Shameika Ingram testified she was not related to Moniquah Ingram. R. 107, ll. 12-25. Shameika lived in the trailer where the decedent previously lived until the decedent moved a short distance to another trailer. "I stayed there with my boyfriend at the time, his mother and little brother." R. 108, ll. 3-16.

Shameika said she was awoken by a car door slamming that night. She then saw car lights streaming from outside the trailer. She heard a profane voice yell: "SB [the decedent's name] bring your ass outside." R. 109, l. 22 – 110, l. 6. She remembered her boyfriend yelled back that he was not "SB."

Shameika was a very hostile witness towards the defense and she claimed that she saw appellant outside in the trailer park that night. The judge earlier ruled that Shameika could make an in-court identification of appellant as being present that night despite the fact she could not identify appellant from pre-trial photo arrays, and where she also admitted she searched through social media to try and learn who had been involved in the shooting. R. 105, l. 17 – 107, l. 2.

She admitted before the jury the man she claimed was appellant did not have a gun. As stated, Shameika had been unable to identify appellant as one of the men involved despite the fact he was in a line-up she was shown after the shooting. She also mistakenly described the man she belatedly claimed was appellant as a "bald man." R. 117, l. 5 – 126, l. 14.

Shameika maintained that one of the men outside her trailer was holding a gun, and another one was on the phone with the decedent "[t]elling him to come outside and answer to him. He was screaming it over the phone." R. 111, l. 4 – 112, l. 20. Shameika saw "at least five people" outside her mobile home on that night. While she could not identify appellant from lineups that were shown to her she confirmed to the solicitor that she thought appellant was "an active participant" in whatever was occurring.

The solicitor would essentially make these two words from Shameika's claim -- "active participant" -- the sole basis for why appellant should not be granted a directed verdict. R. 115, l. 18 – 116, l. 16. While Shameika did an in-court identification of appellant she admitted on cross-examination that she had been unable to pick appellant out of pre-trial lineups. Shameika

admitted her description of appellant having a "bald head" was also inaccurate but she stubbornly refused to admit her identification of appellant as being one of the men present was also incorrect. R. 124, l. 17 – 127, l. 1; 128, l. 19 – 129, l. 1.

The pathologist Dr. Janet Ross testified that the decedent was shot four times in the back. The fatal shot entered the decedent's back and went into his chest causing him to bleed to death. R. 146, l. 11 – 149, l. 8.

SLED agent Suzanne Cromer testified as a firearms analyst that at least three firearms were involved given the cartridge cases that were found at the scene. "The two firearms that I received in this case, did not fire any of the five components that I received." Cromer repeated that a minimum of three guns were involved in the shooting, and there could have been four firearms involved. R. 165, l. 15 – 166, l. 24.

Sergeant Craig Burns then testified that "while I was in the wooded area looking around for Mr. Henderson [the decedent], I overheard some gentlemen talking . . . once we got Mr. Henderson to the morgue, it had me go online and look for the names of the person[s] that I overheard and it [led] me to Marlboro County." R. 184, l. 19 – 185, l. 21.

Burns remembered going to the Bennettsville Police Department and one of the men Burns sought to interview was appellant. R. 186, ll. 1-23. Burns said he was looking for Demarcus Sellers, Brenton Davis and appellant. R. 186, l. 24 – 187, l. 16. Burns interviewed appellant, who apparently voluntarily came in to be questioned initially at the Bennettsville Police Department. Burns testified that the police learned appellant drove a Chevy Impala which the police located in Brenton Davis's backyard. R. 189, l. 22 – 190, l. 19. It would later be admitted that the backyard to Brenton Davis's house could be seen from the road so it was not as if the vehicle was purposely being hidden. Burns said that appellant denied being in Chesterfield

County on the night of the murder and he told Burns he was at the Club Envy that night. Burns testified that appellant gave him an incorrect cell number for his phone. Tr. 216, ll. 1-17.

Burns maintained that appellant's alibi about being at the Club Envy did not check out, and that appellant told him he lost his cellphone before the incident which Burns was investigating. R. 190, l. 3 – 190, l. 3; 204, ll. 20-23.

In State's Exhibit 29, which is on file with this Court for viewing, appellant insisted he was at the Club Envy on the night of the murder after he was told his alibi was a lie. The investigator responded that while appellant may have been at the club that night he was not at the club at 10:00 p.m. The investigator told appellant that he should not stick with his "bullshit story" that he was not in Chesterfield County on the night of the murder. The interrogating officer was clearly misleading appellant about the evidence. Yet, in the face of this very hostile interrogation appellant repeated insisted: "I wasn't there." Appellant said he did not know who committed the murder when the investigator demanded to know what appellant knew from "Facebook" or from what he heard "on the street."[3]

Burns testified that the cellphone extraction information showed that Brenton Davis called the decedent's first cousin, "S.dot," several times on the night of the murder. R. 210, l. 3 – 212, l. 19. Burns said that the cell phone records showed that Brenton Davis was also telephoning appellant that evening. R. 212, l. 20 – 214, l. 2. The phone records showed that both Davis and appellant called Jamarcus Sellers that night, according to Burns. R. 214, l. 3 – 215, l. 22. Burns was allowed to opine that he thought appellant was with Brenton Davis on the night of the murder. R. 216, l. 2 – 217, l. 14.

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[3] State's exhibit 29 of the interrogations was redacted before it was played to the jury.

As stated, Burns admitted that appellant did not call the victim or text the victim that night. The victim also never called or texted appellant. R. 231, l. 15 – 232, l. 10.

Burns admitted that no incriminating evidence was found in appellant's car and that appellant's phone was never found. Burns could only testify that certain phone calls were made to and from that phone but again none of them were to the decedent or from the decedent to appellant. R. 228, l. 3 – 229, l. 2; 230, l. 7 – 231, l. 24. SLED agent Christopher Johnson testified that the cell phone records showed appellant's telephone was between Cheraw and Chesterfield County on the night of the murder. R. 362, l. 7 – 272, l. 3. On cross-examination, Johnson admitted that the cell phone records could not determine an "exact location" of the phone, and Johnson obviously could not testify who was actually in possession of the phone. R. 273, l. 1 – 277, l. 15.

Directed verdict motion

At the close of the state's evidence defense counsel moved for a directed verdict. Defense counsel noted even under the theory of accomplice liability, "the hand of one is the hand of all theory," that an overt act had to be committed by appellant and that there was no evidence appellant did an overt act "or that he acted in furtherance of any plan, common scheme, conspiracy, anything of that nature." Counsel argued appellant was entitled to a directed verdict on the murder charge. R. 282, ll. 3-20.

The solicitor argued that Shameika Ingram had testified appellant was at the scene on the night of the murder, and that "he was actively involved in what was going on. She didn't say he had a gun. She didn't say she saw him firing a gun. *But she did see him as a participant* in what was going on." R. 282, ll. 3-20. (emphasis added). The solicitor speculated that an overt act could have been appellant acting as "a backup" to the other men. R. 282, l. 20 – 283, l. 6.

The judge reasoned that the alleged movements by appellant and appellant crossing the county line -- which he thought was substantiated by the cell phone evidnce – to come to the trailer park, and the testimony about "the box" were sufficient for him to deny the directed verdict motion. R. 283, ll. 5-16. Counsel also renewed his motion for a directed verdict after the waiver of right to testify colloquy with appellant. R. 259, ll. 20-22.

Jury question

After the judge charged the jury, it returned during deliberations to ask "what is the definition/law of murder, hand of one hand of all, and malice?" Court's exhibit 1. R. 344, l. 17 – 345, l. 10. After the court reporter replayed the audio of the judge charging the jury on the "hand of one is the hand of all," defense counsel renewed his request that "mere presence" be recharged. The judge refused to recharge the jury on mere presence reasoning he asked the jury if there was "anything else," and it failed to request a repeat of mere presence instruction also. Appellant was then convicted of murder. R. 344, l. 25 – 346, l. 17.

Discussion

There was absolutely no evidence appellant shot the decedent, and no evidence appellant even had a gun if he was present that night as Ingram claimed. To prove that appellant was guilty under a theory of accomplice liability, also known as the theory of "the hand of one is the hand of all" the state had to prove the following points:

"A person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is

done in the presence of and with the assistance of others, the act is done by all." State v. Washington, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020). (emphasis added).

As stated above, the solicitor clung to the testimony of Shameika Ingram insisting that appellant was present even though she could not identify him from police photo arrays. She admitted that she went on Facebook to try to figure out faces and nicknames of the men who may have been in the parking lot outside of her trailer at the trailer park that night. She was allowed to speculate that appellant "seemed to be involved" or an "active participant" in whatever she thought was transpiring.

While it is tempting to dismiss all of this as "weight" considerations, it must be remembered that besides Shameika Ingram's testimony that appellant was present all the state had was cell phone testimony. The state's witnesses were forced to admit, and the solicitor even stipulated, that appellant did not call or text the decedent. In addition, there was no evidence that the decedent called or texted appellant.

The state attempted to link appellant to the murder through guilt by association by appellant's car simply being parked at the home of Brenton Davis. There was also a call involving Brenton Davis and a call from Davis to Jamarcus Sellers.

This evidence was insufficient to withstand a directed verdict motion since there was no direct or *substantial circumstantial evidence* that appellant had a prior arranged plan or scheme with Davis and Sellers to murder the decedent. There was also not any direct or substantial circumstantial evidence that appellant aided or abetted these men in a prearranged scheme to murder the decedent. The evidence in this case was suspicion evidence, and it was less suspicion evidence than there was in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Odems, 395 S.C. 582, 720 S.E.2d 48

(2011); State v. Schrock, 288 S.C. 129, 322 S.E.2d 450 (1984) and State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2011) where our Supreme Court held a directed verdict was erroneously denied to the defense in each case. Each case is discussed below.

The evidence here revealed that appellant had no prior criminal record and that he was gainfully employed. Appellant's presence at the scene, if he was actually there, was still not sufficient to establish his guilt as an aider or abettor and Ingram's naked speculation was insufficient to overcome a directed verdict evidence since it did not establish appellant was aiding and abetting in the commission of a murder when someone shot the decedent in the back as he running a good distance from the trailer park where Ingram claimed she saw appellant.

In State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010), our Supreme Court wrote:

> "Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999) (quoting Austin, 299 S.C. at 459, 385 S.E.2d at 832).
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> "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); *see* Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime.").
>
> "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Leonard, 292 S.C. at 137, 355 S.E.2d at 272; State v. Barroso, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997) (stating that mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)."

The lower court should not refuse to grant the motion for a directed verdict where the evidence, as here, merely raises a suspicion that the accused is guilty. See State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the victim testified that Mitchell had been over to his house on a couple of occasions, and that Mitchell had also attended a social gathering at the victim's home for about forty-five minutes to one hour. A police officer investigating the burglary found glass on the floor, and there was a screen from which the officer was able to get an identifiable fingerprint. That unique fingerprint matched Mitchell. The Supreme Court held that the state had failed to produce substantial circumstantial evidence reasonably tending to prove the guilt of the accused, and that a directed verdict should have been issued.[4]

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) the Supreme Court also held the defendant was entitled to a directed verdict in that murder case. There was evidence a vehicle was seen on the night of the murder in the victim's apartment complex that was very similar to the car in which Martin and his co-defendant were traveling that night. Further, when Martin and his co-defendant were late picking up Martin's girlfriend at the bar where she worked the defendant told her "some shit happened," and the co-defendant added, "somebody may have died tonight." State v. Martin, 340 S.C. at 600, 533 S.E.2d at 601.

Evidence tied to the murder scene in Martin was also found in trash cans surrounding the bar where Martin's girlfriend worked. This Court held that all of this evidence, while certainly raising a strong suspicion of Martin's guilt, was insufficient to withstand a directed verdict motion.

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[4] Appellant fully understands that all directed verdict cases are "fact intensive," and each case involves its own peculiar facts. However, each case appellant relies on in this appeal contained more insufficient suspicion of guilt evidence than existed in this case.

Further, in State v. Schrock, 288 S.C. 129, 322 S.E.2d 450 (1984), the Supreme Court held that evidence the defendant was in the area of the murder scene, and that footprints at the scene were similar to his footprints were found in the area where the defendant was walking were insufficient to take the case to the jury. In State v. Schrock, there was also evidence that Marlboro cigarette butts were found at the murder scene, and the defendant admitted to the police that he smoked Marlboro cigarettes. Tests performed on an oil can did not supply a conclusive connection between the crime scene and the defendant. The Supreme Court held the defendant was entitled to a directed verdict given those facts.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), our Supreme Court said the state presented insufficient evidence for the murder charge to be submitted to the jury and that trial judge erred by refusing to direct a verdict. In Bostick the victim was an older woman who lived next door to Bostick. She was a treasurer and secretary at her church and she was known to bring home a brief case containing money from the church on Sunday for deposit at the bank on Monday. The victim died in a mysterious arson. Bostick has blood on his jeans following the murder and arson. While a DNA sample was inconclusive a chemical analysis of Bostick's shoes revealed he had gasoline on his shoes. In the burn pile in Bostick's yard many items belonging to the decedent were found. These included two sets of her car keys, toe nail clippers, pens, burned papers, metal clap of a purse, and a watch. A heavy petroleum product such as kerosene or diesel fuel, was used as an accelerant in the burn pile fire. However, Bostick's mother testified that he did not use kerosene or diesel fuel in her burn pile.

Despite the very strong circumstantial evidence, our Supreme Court agreed with Bostick that this evidence did not rise to the level of being the substantial circumstantial evidence necessary to submit the case to the jury.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) our Supreme Court also held that the defendant was entitled to a directed verdict on the charges of first-degree burglary, grand larceny, criminal conspiracy, and malicious injury to property. The Court noted that even though Odems was in the vehicle with the other undisputedly guilty burglars -- with the proceeds of the burglary shortly after the burglary -- and despite the fact that Odems fled from the scene of the traffic stop and asked a witness to lie for him -- that this was insufficient circumstantial evidence that he was involved in the burglary. Our Supreme Court in State v. Odems relied on its prior opinions in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) and State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2011) to hold that a directed verdict should have been issued.

In State v. Odems, 395 S.C. 582, 587-88, 720 S.E.2d 48, 50-51 (2011), the Supreme Court observed regarding State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2011):

> "The State relied on four pieces of circumstantial evidence to convict Lollis: (1) the marital relationship between Burgess and Lollis; (2) Lollis's alleged financial trouble; (3) the fact that Lollis placed his personal valuables from the home in a storage room one day prior to the fire; and (4) Lollis's possession of the storage room key on the day of the fire. *Id.* at 584, 541 S.E.2d at 256. However, alternate evidence showed that Lollis was current on his mortgage at the time of the fire. Lollis, 343 S.C. at 585, 541 S.E.2d at 257. Moreover, Lollis testified he had no reason to burn down his home because of extensive remodeling being done at the time of the fire, and that he moved his belongings into storage in order to protect them from damage due to that remodeling work." Id. at 582–83, 541 S.E.2d at 255.
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> The Supreme Court held that the State's evidence did not "reasonably tend" to prove Lollis's guilt. "First, Burgess admitted to starting the fire without assistance from Lollis, without his knowledge, and the State presented no evidence of an agreement between them. Second, the State presented no evidence of Lollis' financial trouble.... Furthermore, Lollis did not have insurance on his personal property lost in the fire. 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. Id. at 585, 541 S.E.2d at 257 (holding

> that a mere arousal of suspicion is an improper basis to deny a motion for directed verdict)."

The State's case against Odems relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Odems in the getaway car with the burglars and the stolen goods; (2) Odems fled from law enforcement; and (3) Odems asked an uninvolved person to lie for him. State v. Odems, 385 S.C. 399, 404–05, 684 S.E.2d 573, 575 (Ct. App. 2009).

The circumstantial evidence presented in this case is less than the suspicion of guilt evidence in Odems, Bostick and Lollis. Further, appellant said his alibi was that he was at the Club Envy on the night of the murder. The interrogating officer told appellant while he may have been at the Club Envy that night he did not believe he was at the club at 10:00 p.m. Further, even if appellant was in the trailer park that night in Chesterfield County as Ingram claimed, there was no direct or substantial circumstantial evidence appellant chased the decedent for a considerable time before the decedent was shot in the back near Highway 9.

Appellant was entitled to a directed verdict on the murder charge since the state did not present any direct or substantial circumstantial evidence under the theory of accomplice liability that appellant aided and abetted other men in the furtherance of a prearranged plan to murder the decedent in this case. This Court should respectfully issue a directed verdict of acquittal.

CONCLUSION

By reason of the argument in issue two, this Court should issue an order of acquittal. In the alternative, by reason of the arguments in issue one, appellant's conviction should be reversed, and this case remanded to the Chesterfield County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2023.