RECEIVED
Feb 23 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE JUNIOR COVINGTON,

APPELLANT

APPELLATE CASE NO. 2022-000831

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting the video deposition of a jail house snitch and allowing the State to publish the contents of a letter the snitch claimed he received from Appellant offering to make a witness disappear when the evidence did not meet an exception pursuant to Rule 404(b) and any possible probative value of the evidence was substantially outweighed by the danger of unfair prejudice?

2. In this murder case where the body was never recovered, did the trial judge err in refusing to direct a verdict of acquittal when the State failed to present substantial circumstantial evidence of guilt?

STATEMENT OF THE CASE

In April of 2021, the Chesterfield County Grand Jury indicted Appellant, Andre Junior Covington, for murder, indictment #2021-GS-13-0461. (R. p. **). On April 4, 2022, Appellant proceeded to jury trial before the Honorable Michael G. Nettles. Kyle Hobbs represented Appellant at trial. Kernard Redmond prosecuted the case. The jury found Appellant guilty. Judge Nettles sentenced Appellant to forty-five (45) years in prison. A timely notice of intent to appeal was served on June 10, 2022. This appeal follows.

STANDARD OF REVIEW

Rule 404(b) evidence

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "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." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." Clasby, 385 S.C. at 154, 682 S.E.2d at 895; "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)." Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

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.

In a murder case, the corpus delicti consists of two elements: the death of a human being and the criminal act of another causing the death. State v. Speights, 263 S.C. 127, 208 S.E.2d 43 (1974). The corpus delicti must be established by the best proof obtainable, direct evidence is not essential, and such may be sufficiently proved by circumstantial evidence when that is the best obtainable. Id. Furthermore, circumstantial evidence may be sufficient to establish the corpus delicti of murder even though the cause of death can not be determined. State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Thomas 222 S.C. 484, 73 S.E.2d 722 (1952).

ARGUMENTS

1. **The trial judge erred in admitting the video deposition of a jail house snitch and allowing the State to publish the contents of a letter the snitch claimed he received from Appellant offering to make a witness disappear when the evidence did not meet an exception pursuant to Rule 404(b) and any possible probative value of the evidence was substantially outweighed by the danger of unfair prejudice.**

In June of 2019, Terris Parsons. "TP," disappeared. TP has not been seen or heard from since June of 2019. A body was never found. TP's girlfriend, Latoya Broadie, told police that TP went out to buy cigarettes on June 2, 2019, at 9:45 PM and never returned. (Tr. p. 135, lie 9 – p. 136, lines 1-15). TP was driving a champagne colored 2010 Buick Lacrosse. (Tr. p. 182, lines 18-21). Broadie was able to access TP's phone records and the next morning she called one of the numbers displayed from the night before. (Tr. p. 141, line 5 – p. 142, 143, lines 1-25). The police determined that Appellant was the last person to talk with TP and decided to interview Appellant. (Tr. p. 178, lines 16-21; State's Exhibit #80, Interview 1). Appellant denied seeing TP on the evening of June 2, 2019. (State's Exhibit #80, Interview 1). Video surveillance showed TP's car going to Appellant's house on Chapman Street and then both TP's car and Appellant's blue Mustang leaving the Chapman Street house in Cheraw. (Tr. p. 183, line 21 – p. 184 lines 1-22). The police re-interviewed Appellant and his then girlfriend, Lillie Moore, and they were both subsequently charged with obstruction of justice. (Tr. p. 188, lines 1-23; State's Exhibit #80, interview #2).

The police also received information that TP's car may have been seen at an abandoned car wash in Morven, North Carolina. (Tr. p. 181, lines 9-19). A detective testified that TP's phone may have been in Morven, North Carolina. (Tr. p. 253, lines 8-19). The police were unable to locate TP or his car in Morven, North Carolina. (Tr. p. 181, lines 23-25). The police interviewed Robert Wilson who admitted that on June 2, 2019, he dropped his son off at the

son's home in Morven, North Carolina. (Tr. p. 535, lines 2-10). Wilson admitted that while he was in Morven he called TP at about 9:57 PM. (Tr. p. 535, lines 10-12). Wilson admitted that he deleted text messages from June 2, 2019. (Tr. p. 535, lines 7-8).

On June 25, 2019, Moore led police to a cream colored car at an abandoned house in Florence. (Tr. p. 192, line 1 – p. 193, lines 1-25). The car was registered to TP. (Tr. p. 451, lines 1-5). According to Moore, on June 2, 2019, Appellant asked her to follow him on Highway 52 to Morven, North Carolina as he drove the cream car and she followed in Appellant's blue Mustang. (See State's exhibit #81 – video deposition of Lillie Moore and Bruce Romero).[1] Moore denied seeing TP that night. According to Moore, she brought Appellant back home to Cheraw in the blue Mustang. Moore claimed that the next morning Appellant received a phone call from a young lady and Appellant stated that, "He never showed up." (See State's Exhibit #81). According to Moore, on the evening of June 3, 2019, she and Appellant went back to a car wash in Morven, North Carolina to move the cream car. (See State's Exhibit #81). Moore stated that this time she drove Appellant's Lexus. (See State's Exhibit #81). According to Moore, she followed Appellant to Florence where Appellant parked the cream car behind a house. (See State's Exhibit #81). Moore stated that she drove Appellant back to Cheraw in the Lexus. (See State's Exhibit #81).

On November 26, 2019, Appellant was charged with kidnapping. (Tr. p. 471, line 25 – p. 472, lines 1-12). At this time Appellant was detained at the Marlboro County Detention Center. (Tr. p. 462, lines 2-9). On March 18, 2020, Captain Wayne Jordan interviewed Bruce Romero, who was also detained at the Marlboro County Detention Center. (Tr. p. 463, line 17 – p. 464,

[1] Instead of requiring the State to meet its burden of proof and require witnesses Lillie Moore and Bruce Romero to appear at trial, defense counsel agreed to the video depositions of these two witnesses on February 9, 2022, prior to trial. (Tr. p. 235, line 16 – p. 236, 237, lines 1-25). This matter will need to be addressed in PCR.

lines 1-18). Romero gave Captain Jordan a letter he claimed was from Appellant. (Tr. p. 464, lines 19-23). A video deposition of Romero was played at trial. (Tr. p. 486, line 11 -p. 487, lines 1-12). The video deposition is included in State's exhibit #81 with Lillie Moore's video deposition. While trial counsel did not object to the procedure and use of the video deposition, counsel did object to the content of the Romero deposition and reference to the letter based on Rule 404(b) and 403, SCRE. (Tr. pp. 90-102).

The judge overruled the objection and found that a redacted version could be published to the jury. (Tr. p. 235, line 1 – p. 236, lines 1-11). Counsel renewed the objection when the Romero video deposition was played for the jury and before the letter was published. (Tr. p. 486, line 25 – p. 487, lines 1-2). The prosecutor read to the jury the content of a redacted letter Romero claimed was given to him by Appellant. (Tr. p. 487, line 18 – p. 488, lines 1-4). At the close of the State's case counsel renewed the objection to the content of the Romero deposition and the letter. (Tr. p. 513, lines 8-11). The objections were again overruled. (Tr. p. 515, lines 4-7). The trial judge erred in admitting the video deposition of Bruce Romero and allowing the State to publish the contents of a letter Romero claimed he received from Appellant offering to make a witness disappear when the evidence did not meet an exception pursuant to Rule 404(b) and any possible probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Romero became a jailhouse snitch. Romero met Appellant while they were both at the Marlboro County Detention Center. (See State's Exhibit #81). Romero claimed that while they were in jail Appellant gave him a copy of his kidnapping arrest warrant and a letter. (See State's Exhibit #81). In the video deposition Romero stated that he believed the letter could help him

with the serious charges he was facing. (See State's Exhibit #81). At trial the prosecutor read the purported letter to the jury stating:

> First, let me tell you how I can help you in a major way. If they don't have any witnesses they don't have a case. You follow me. I can make that happen. Trust me. That can be done while you're out on bond for the State bonds for the State charge, which, you know, the charge will get dismissed because there is no one to take the stand against you. Are you still with me.
>
> Once again, I'm telling you that if I get out, there will be nobody to take the stand. I can make witnesses disappear. They wouldn't have a case because they have to be able to take the stand. Trust me. I want this paper back.

(Tr. p. 487, line 18 – p. 488, lines 1-4). Romero claimed on the video deposition that Appellant wanted Romero to give him one thousand dollars ($1,000.00) so he could hire a lawyer and get a bond. (See State's Exhibit #81). The Romero video deposition and contents of the purported letter should have been excluded. The error in the trial judge refusing to exclude this evidence requires reversal of the conviction and remand for a new trial.

In ruling that the letter was admissible the trial judge stated:

> With regard to the letter, I am gonna allow the redacted – we've had discussions in chambers about that and we're gonna allow the redacted version of it to be published before the jury. And the reason for that is I specifically find that the prejudicial value does not over – override the probative value with regard to this particular piece of evidence. And when you look at all of the evidence, and the fact that there was a warrant and the letter, it's probative with regard to identity and that the reason why I'm admitting it.

(Tr. p. 235, lines 1-10). The trial judge erred. The evidence does not meet the identity exception, or any other exception of Rule 404(b). Any possible probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Rule 404(b) of the South Carolina Rules of Evidence provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the

existence of a common scheme or plan, the absence of mistake or accident, or intent." Appellant's purported claim that he could make a witness disappear in order to convince Romero to give him money is evidence of other crimes, wrongs, or acts pursuant to the rule. The Romero evidence serves no legitimate purpose and fails to meet an exception to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. The Romero evidence should have been excluded.

In State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), the South Carolina Supreme Court confirmed the logical connection test for the admission of evidence pursuant to Rule 404(b), SCRE, established in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In Perry the Court wrote:

> Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged. See, *e.g.*, Gaines, 380 S.C. at 29, 667 S.E.2d at 731 ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000) ("If the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." (quoting Lyle, 125 S.C. at 417, 118 S.E. at 807)).

430 S.C. at 31, 842 S.E.2d at 658.

Evidence that Appellant tried to con Romero into giving him money by claiming that he could make a witness disappear has no logical relevance or connection to some disputed fact or element in the murder of TP. There is no allegation that TP was murdered to prevent him from testifying against someone in a trial. The Romero evidence fails to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

The trial judge erred in finding that the letter was probative of identity. Appellant's purported claim that he could make a witness disappear, supported by nothing more than the

allegation contained in the arrest warrant for kidnapping, does not refute the defense of alibi as the evidence of two other forgeries in the same city on the same day did in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). While Appellant denied seeing TP on the night of June 2, 2019, the purported interaction between Appellant and Romero took place some time in March of 2020. The State failed to demonstrate that the Romero evidence served some purpose other than using Appellant's character to show his propensity to commit the crime charged.

If Appellant's attempt to con Romero into giving him money to make bond is somehow construed to show identity for the murder charge, any possible probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE. In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020), the South Carolina Supreme Court wrote:

> The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Under rigid scrutiny, considering the individual facts and circumstances of this case, any possible probative value of the Romero evidence is substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show Appellant's propensity to commit the crime charged. The Romero evidence does not meet the clear and convincing standard required by State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989). The State relied heavily on the Romero evidence in closing argument, referring to the evidence as the "cherry on top." (Tr. p. 557, lines 1-25; p. 560, lines 4-10). As TP's body was never found, the State relied on a "pattern of life" assessment to establish death. (Tr. p. 458, line 19 – pp. 459-461, lines 1-5).

While Moore's video deposition testimony about Appellant attempting to conceal the cream car may raise suspicion, there is no forensic evidence linking Appellant to the murder of TP. The trial judge erred in refusing to suppress both the Romero video deposition and letter. The error is not harmless.

2. **In this murder case where the body was never recovered, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to present substantial circumstantial evidence of guilt.**

The present case is a "no body" murder case. The State presented no evidence of violence or other means of death used upon TP. TP's body and no part of his body has ever been found. The State relied on testimony from family members and a "pattern of life" assessment to establish death. (Tr. p. 458, line 19 – pp. 459-461, lines 1-5). At the close of the State's case Appellant moved for a directed verdict of acquittal. (Tr. p. 515, line 8 – pp. 516 – 520, lines 1-9). The trial judge denied the motion for directed verdict stating, "Motion for directed verdict is denied. It is indeed a question of fact for the jury." (Tr. p. 522, line 25 – p. 523, line 1). The lack of evidence was additionally argued in a post-trial motion for new trial. (June 1, 2022, Tr. pp. 1-7). The trial judge denied the motion stating, "Mr. Hobbs, taking into consideration all of the circumstantial evidence, and there was a bunch of it, clearly there was contact with him before the – he – the deceased went missing. The text messages confirmed that. We have video of him coming to his residence and there was confirmation in the texts that he was indeed there. He secreted evidence by lying in the -- in his statements and he secreted the car. All of which the jury took into consideration." (June 1, 2022, Tr. p. 11, lines 6-14). The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to present substantial circumstantial evidence of guilt.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant 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); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999).

The evidence relied on by the State in this case was exclusively circumstantial. The evidence consisted of: 1.) Appellant being the last person to communicate with TP; 2.) Appellant denying that he saw TP on the night of June 2, 2019; 3.) video showing TP's car going to Appellant's house and then showing both TP's car and Appellant's blue Mustang leaving the house; 4.) Moore's testimony that she drove Appellant's blue Mustang to Morven, North Carolina, following Appellant in the cream car and then bringing Appellant back to Cheraw in the Mustang; 5.) the fact that TP's phone may have been in Morven, North Carolina; 6.) a phone call to Appellant from TP's girlfriend the next morning and Moore overhearing Appellant state

that "he never showed up"; and 7.) Moore's testimony about moving the cream car to Florence. As discussed in issue one above, the Romero testimony and letter should have been excluded from the State's evidence. Alternatively, without waiving the challenge to the evidence, the Romero evidence combined with the other evidence presented by the State does not constitute substantial circumstantial evidence which reasonably tends to prove the guilt of Appellant or from which his guilt may be fairly and logically deduced. The circumstantial evidence merely raises a suspicion and was not sufficient to submit the case to the jury.

In State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648 (2006), a "no body" murder case, the South Carolina Supreme Court wrote:

> In a murder case, the corpus delicti consists of two elements: the death of a human being, and the criminal act of another in causing that death. State v. Martin, 47 S.C. 67, 25 S.E. 113 (1896). In State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987), this Court held that the circumstantial evidence surrounding the victim's sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships, was sufficient to establish the corpus delicti of murder or that the victim is dead by the criminal act of another. See State v. Speights, 263 S.C. 127, 208 S.E.2d 43 (1974). See also State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

In the present case while the circumstantial evidence surrounding TP's disappearance, including testimony from family members and the "pattern of life" assessment, may establish the first element required - death, this evidence does **not** establish the second element – the criminal act of another in causing that death. This missing second element is what distinguishes the present case from Weston, Owens, and State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015).

In Weston, the Court wrote:

> Further, the evidence presented by the state warranted submission of the case to the jury. Evidence was presented that Weston had gone to live with his mother in the fall of 1997, and that she became very upset and was depressed Weston was living with her. Friends and family advised Franchey to either change the locks,

eject Weston, or find him another place to live. Two days before her disappearance, Franchey told a friend she had decided to tell Weston to leave. She was last seen alive on August 6, 1998. The same day, the maintenance supervisor of the apartment complex noticed that the trunk to Mrs. Franchey's vehicle was open, and was lined with clear plastic. The maintenance supervisor also testified that Franchey, a retired educator, did not have any bumper stickers on her car but that, immediately after she disappeared, a sticker which read "My kid beat up your honor roll student" was on the car. The apartment manager testified that when she went to the apartment on Aug. 8th, the shower curtain in Franchey's bathroom was missing.

Randy Myers, an apartment complex resident, testified that at 4:30 a.m. on Saturday, August 8th, he saw Weston loading garbage bags into the trunk of Franchey's car. Several people also testified that they had never seen Weston drive Franchey's car before, Weston did not have a driver's license, and that immediately after Franchey disappeared, Weston was driving her car.

The apartment complex manager testified that, when she went to check on Franchey, she saw that Franchey's plants on her back patio were turned over, and there was an empty bleach bottle on the porch. When initially confronted by the apartment complex manager and Officer Jarvis, Weston told them his mother had "met some man and run off with him" leaving him a note on the coffee table. No other witness had any knowledge of an alleged boyfriend. Further, although the apartment complex manager and Jarvis remembered seeing Franchey's purse and glasses on her bed in the apartment on August 8th, Weston told police that his mother's purse was missing. The apartment complex manager also testified that Weston came into her office a day or two later, very disheveled, sweating profusely, his eyes huge, and stated, "I was really angry with my mother and now I'm just scared."

Immediately after Franchey's disappearance, Weston called in sick to his job at Target for two days, saying he had a virus. He returned to work on Monday, August 10th, and was seen by employees to have a limp, a bruise under his eye, and scratches on his arms. He told his supervisor his cat had scratched him. He told another co-worker he had stepped off a curb and fallen into some bushes. When Jarvis and the apartment manager spoke to Weston at Franchey's apartment, Weston was wearing a heavy black jacket on a hot August day such that his arms were not visible. When Weston went back to work at Target, he bought a new shower curtain, and a rug. When police investigated the apartment, they found an area rug covering a hole in the carpet of the living room floor. Linoleum in the kitchen floor had also been torn up and was missing. Police tested the floor where the linoleum had been removed and found blood; blood was also found on drag marks leading from the hole in the carpet. Investigators subsequently tested a piece of blood-stained molding from the apartment which was determined to be was Franchey's. Blood was also found on the rubber ring that lined the trunk of Franchey's car.

Weston, 367 S.C. at 293–95, 625 S.E.2d at 649. The Court found this evidence "clearly sufficient to withstand a motion for directed verdict." The State in Weston presented evidence of violence, including blood in the apartment and trunk, to satisfy the second element – the criminal act of another in causing that death. The State failed to present evidence of the second element in the present case. There was no blood found in any of the cars, their trunks, any yards, or houses. The State failed to present evidence of violence to show that a criminal act of Appellant caused TP's death.

In Owens, another "no body" case, the State presented evidence of drag marks on the kitchen floor, human blood stains on the bedsheets, a ransom note demanding money and threatening to kill - with drafts in Owens' handwriting, marked ransom money found in Owens' possession, Owens' daughter pawning the victim's onyx ring and Gucci watch at Owens direction, head hair consistent with the victim found in the trunk of Owens' car, and statements by Owen. The Court found this evidence was sufficient to show that the victim died by the criminal act of another. As in Weston, the State in Owens presented evidence of violence to satisfy the second element - the criminal act of another in causing that death. In the present case the State failed to present evidence of violence to show that a criminal act of Appellant caused TP's death. There was no biological evidence linking Appellant to TP.

In Lynch, another "no body" case, the South Carolina Court of Appeals Court found that the trial judge did not err in denying the motion for directed verdict and wrote:

> In addition, the State presented forensic evidence that an assault occurred at the apartment where Lynch lived with the victims. Lynch also admitted to police that he did not know anyone that wanted to harm the victims. Other damaging evidence included the fact that a male's DNA was found in the victims' apartment, and Lynch told police that he had not seen other males in the apartment.

> Importantly, the State also presented substantial evidence of flight, which further distinguishes this case from the cases Lynch relies on in his brief. See State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) ("[F]light ... is at least some evidence of guilt."); State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged.").

Lynch, 412 S.C. at 173, 771 S.E.2d at 355. In the present case the State presented no forensic evidence that an assault occurred and no evidence of flight. The State failed to present evidence of violence to show that a criminal act of Appellant caused TP's death.

In moving for a directed verdict of acquittal Appellant specifically argued both that the State failed to present substantial circumstantial evidence of a killing and that the State failed to prove malice. (Tr. p. 516, line 19 – p. 517, 518, 519, lines 1-23). "Murder" is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. The trial judge erred in refusing to direct a verdict of acquittal. The State failed to present substantial circumstantial evidence of a killing and failed to present any evidence that the killing was done by Appellant with malice aforethought. In Weston, Owens, and Lynch the evidence of violence presented by the State went to malice. No such evidence was presented in this case.

CONCLUSION

Based on the above argument presented in issue two, this Court should reverse the conviction. Based on the argument presented in issue one, this Court should reverse the conviction and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of February, 2023.