

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

John C. Hayes, III, Circuit Court Judge

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JUN 26 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KEVIN TYRONE BENNETT,

APPELLANT

Appellate Case No. 2012-207559

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred by not granting appellant a directed verdict where the evidence against him was only circumstantial and insubstantial?

STATEMENT OF THE CASE

In February 2011, Kevin Bennett (“Bennett”) was indicted for burglary of a building, second degree; petit larceny; and malicious injury to real property causing less than \$2,000.00 worth of damage. R.142. On January 24 - 25, 2012, Bennett was tried in Spartanburg County before the Honorable John C. Hayes, III and a jury. R. 1. Beverly Jones represented Bennett. R. 1. Dan Cude represented the State. R. 1. The jury found Bennett guilty on all three charges. R. 138, l. 19 – 139, l. 6. Judge Hayes sentenced Bennett to ten years’ imprisonment on each conviction, to run concurrently. R. 141, ll. 8 - 14. On January 31, 2012, Bennett served his notice of appeal. This appeal follows.

ARGUMENT

The trial court erred by not granting appellant a directed verdict where the evidence against him was only circumstantial and insubstantial.

Relevant Facts

On November 17, 2010, someone burgled the C.C. Woodson Community Center in Spartanburg. R. 8, l. 19 – 9, l. 4. Officer Frank Osrechek of the Spartanburg City Police Department responded because of an alarm activation at approximately 3:30 am. R. 9, ll. 5 – 9. He found a smashed window and a broken door adjacent to the window. R. 9, ll. 10 – 12. Another policeman found a tire iron in the community center’s computer room. R. 31, ll. 17 – 19. A television, computer, and computer monitor were missing from the community center. R. 43, l. 18 – 44, l. 18. The missing television had been mounted on a wall and the police found chairs from the computer desks underneath where the television had been. R. 31, ll. 8 – 19. Another television appeared to be in an unnatural position. R. 21, ll. 9 – 24.

The State presented no direct evidence that Bennett committed any crime. No witness observed Bennett at the scene of the crime that night. The goods stolen from the community center were never recovered. No evidence that Bennett confessed to the crime was presented. The State produced only two pieces of circumstantial evidence. First, a fingerprint expert testified that a single fingerprint lifted from one of the televisions at the center matched Bennett’s index finger. R. 117, ll. 18 – 23. Second, a DNA expert testified that Bennett’s DNA matched a spot of blood found on the wall of the computer room. R. 95, ll. 20 – 25.

At the close of the State's case, Bennett moved for a directed verdict on the ground that the fingerprint and blood sample were insufficient to convict Bennett. R. 136, ll. 3 – 11. Judge Hayes denied the motion. R. 136, l. 24 – 137, l. 5. Bennett renewed his motion after the verdict and Judge Hayes again denied the motion. R. 139, l. 25 – 140, l. 9.

Discussion

The South Carolina Supreme Court “has repeatedly affirmed the principle that when 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, 720 S.E.2d 48 (2011). Specifically, the trial court “should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.” Odems, 395 S.C. 586, 720 S.E.2d 50 (citation omitted). In this case, the evidence presented by the State was barely sufficient to raise a suspicion that Bennett was guilty.

The Court is required to view the evidence in the light most favorable to the State. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011). Even in this light, the only pieces of circumstantial evidence in the State's case incriminating Bennett were a single fingerprint and the DNA. It was undisputed that the community center was open to the public from 6:00 am to 9:00 pm Monday through Friday and also on the weekends. R. 42, ll. 3 – 23. Bennett had been in the community center several times before the crime. R. 45, ll. 19 – 24. The doors to the room where Bennett's fingerprint was found on the television—the “community room”—were not always locked and events were frequently scheduled in that room. R. 44, ll. 16 – 25. Additional fingerprints were found on the television that were “insufficient” for comparison. R. 16, ll. 20 – 23. The police

did not try to lift any fingerprints from the other television in the community room. R. 20, l. 20 – 21, l. 12.

The first policeman on the scene (who found the fingerprint) also looked for evidence in the computer room. R. 25, ll. 7 – 23. He did not notice any blood. R. 25, ll. 7 – 23. The officer charged with processing the computer room for evidence conducted an extensive examination, but did not notice any blood. R. 37, ll. 11 – 20. It was not until after 9:30 the next morning—six hours after the crime—that an officer with Spartanburg’s burglary task force examined the community center that “two small droplets of blood” were found two inches below the mount for the television in the computer room. R. 56, ll. 2 – 17. This officer did not find any blood at the entry point where glass had been broken. R. 55, ll. 6 – 14. Two or three employees of the community center were already at work when the blood spots were found. R. 61, ll. 20 – 21.

The State’s DNA expert testified that DNA from the blood in the community center’s computer room matched Bennett’s DNA. R. 95, ll. 20 – 25. Bennett was a frequent visitor to the computer room. R. 46, ll. 2 – 7. The expert stated the possibility that an unrelated individual would be randomly selected and match that DNA profile was one in 17 quintillion. R. 95, ll. 20 – 25. The expert used this unfathomable number to buttress its “match” even though 17 quintillion “is about a billion times larger than the earth’s population.” R. 96, ll. 8 – 14. The expert did not offer any testimony about the probability of the DNA sample matching an individual related to Bennett. The probability of finding a match with an individual related to Bennett would be much higher than the figure given by the State’s expert. See Richard Lempert, The Suspect

Population and DNA Identification, 34 *Jurimetrics J.* 1, 6 (Fall 1994). The State's expert did not give the probability that the DNA profile would match an individual related to Bennett or consider the pool of people who use the community center.

The circumstantial evidence in this case is similar to other appellate decisions finding directed verdicts were appropriate. In State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000), a burglary case, the only evidence that the defendant committed the crime was a fingerprint on a screen near a broken window. It was undisputed that the defendant had been in the victim's home on several prior occasions. Id. The Court concluded that the fingerprint was evidence only that the defendant had been "in and around the victim's house" and was insufficient to prove burglary. Id. Similarly, Bennett's fingerprint and DNA in a public place that he undisputedly frequented before the crime are insufficient to prove he committed a crime.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), another burglary case, the circumstantial evidence was as follows: (1) the defendant was found in a car with the burglars and the stolen goods, (2) the defendant fled from the police, and (3) the defendant "asked an uninvolved person to lie for him" to the police. The unconvincing reason the defendant supposedly fled was because the driver told him that he had a suspended license. Id. at 585, 720 S.E.2d at 49. The evidence against the defendant in Odems is much greater than the scant evidence against Bennett. The Supreme Court held that nothing placed Odems at the scene of the crime and reversed his conviction.

Even in murder cases, the South Carolina Supreme Court has reversed convictions where the circumstantial evidence was greater than in Bennett's case. In State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), the defendant's fingerprint was found

on a coffee cup in a car borrowed by the victim. The victim disappeared after leaving his office in Savannah, Georgia, and his body was found three days later in Colleton County. Id. at 388, 605 S.E.2d at 530. The borrowed car was found in Johnson City, Tennessee near where the defendant called another witness the day after the crime. Id. at 388-89, 605 S.E.2d at 530. The defendant and the victim had been sexual partners. Id. The Supreme Court held that a directed verdict should have been granted because the fingerprint only established that defendant “was in the borrowed [car] on the same day the victim was last seen alive.” Id. at 390, 605 S.E.2d at 531. The fact that the car was found in Tennessee near the defendant only raised “a suspicion of guilt.” Id. The evidence in Arnold is much stronger than in Bennett’s case. The fact that the car was borrowed meant that the fingerprint placed the defendant in a car with the victim—a private place—on the day of the murder. In Bennett’s case, no one could testify when the fingerprint and blood were left in the community center—a public place frequented by Bennett.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), another murder case, the circumstantial evidence against Bostick exceeded what the State presented against Bennett. In Bostick, the victim was found bludgeoned in a house set ablaze with gasoline. Id. at 136-37, 708 S.E.2d at 775. The victim’s car keys and other items were found in a burn pile on Bostick’s property. Id. at 141-42, 708 S.E.2d at 778. Bostick’s shoes had gasoline on them and his clothes had blood on them. Id. at 142, 708 S.E.2d at 778. While the blood excluded 99% of the population other than the victim, the DNA expert would not testify as to a “match.” Id. The Supreme Court held the above

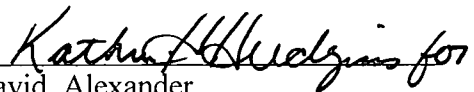
evidence was insufficient to convict Bostick and reversed. Id. Certainly this evidence far exceeds the case against Bennett.

Ultimately, the State's evidence in this case only proves an undisputed fact: that Bennett was in the community center at some point in time before the burglary. Even viewing this evidence in a light most favorable to the State, this evidence barely raises a suspicion that Bennett committed this crime. No "substantial" circumstantial evidence ties Bennett to this crime to the exclusion of the other reasonable hypothesis: that Bennett's fingerprint and DNA were left by him on one of his many visits to the community center. When compared to the above-cited cases, it is clear that the trial court erred in not granting a directed verdict.

CONCLUSION

For the above-stated reasons, this Court should reverse appellant's convictions.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 26th day of June, 2013.

Kathleen H. Huchins for
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT


SUBSCRIBED AND SWORN TO before me
(this 26th day of June, 2013.

Paul McKay (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 26th, 2013



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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