STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DIONTE J'CHON HABERSHAM,

APPELLANT.

APPELLATE CASE NO. 2021-000805

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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

Rules

STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred in admitting the prejudicial and unreliable testimony from the state's reported footwear examination experts, Claycomb and Darnell, since a proper application of the State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), warranted exclusion of this testimony?

2.

Whether the court erred by refusing to direct a verdict of acquittal since there was no direct or substantial circumstantial evidence that appellant shot and killed the decedent and the evidence raising suspicion of appellant's guilt was insufficient to warrant denying the motion for a directed verdict?

STATEMENT OF THE CASE

Appellant was indicted at the August 22, 2019, term of the Jasper County jury for the offenses of murder and possession of a weapon during the commission of a violent. R. 492. His case was called to trial on July 19, 2021, before the Honorable Bentley Price, and a jury. Arie D. Bax represented appellant. Assistant Solicitor Sean Thornton was the prosecutor. R. 1.

On July 22, 2021, the jury found appellant guilty on both counts. R. 490, ll. 6-13. Judge Price sentenced appellant to thirty-three years imprisonment for murder and he imposed a five-year concurrent sentence for possession of a weapon during the commission of a violent crime. R. 491, ll. 7-9; R. 494.

This appeal follows.

ARGUMENT

1.

The court erred in admitting the prejudicial and unreliable testimony from the state's reported footwear examination experts, Claycomb and Darnell, since a proper application of the *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), warranted exclusion of this testimony.

Relevant facts

Defense Counsel Bax made a motion to exclude the footwear impression evidence. The motion was based on the "counsel's [State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)] standards for admissibility of scientific evidence . . . I will start with the shoeprint, and we will go from there." R. 247, ll. 8-12.

The solicitor then called Dawn Claycomb as a witness during the in camera hearing. Claycomb was a SLED agent in 2018 when the shooting in this case took place. R. 247, l. 21 248, l. 2. "I was a crime agent as well as footwear examination." R. 248, ll. 3-5. She had been a SLED agent approximately six years at that time. R. 248, ll. 8-11. Claycomb left SLED in June of 2019. R. 248, ll. 15-17.

Claycomb had a Bachelor of Science Degree in Forensic Science. R. 249, ll. 4-6. When she started at SLED in 2012 she underwent approximately eight months of in-house training. She was given a competency test "[w]here I was being [found] competent to respond to crime scenes and process - - to document, photograph, process evidence to crime scene requests." R. 249, ll. 7-17. She estimated in her seven years at SLED she went to over three hundred crime scenes. R. 249, ll. 18-21.

Claycomb said there was also an in-house training program at SLED for footwear examination. Claycomb also attended "[W]illiam Bozdiak's workshops at an International

Association of Identification Conference that I also attended that consisted of recovery of footwear evidence, barefoot evidence, and then two additional workshops for gait analysis." R. 249, l. 22 – 250, l. 16. Claycomb said at the end of her three-year training she took a competency test and was found to be competent in Footwear analysis. R. 250, ll. 17-22. Claycomb said she also took a proficiency test each year, and she also passed those tests. R. 251, ll. 1-7.

Claycomb said that footwear impression evidence it starts with class characteristics, "the size, shape, and design" of the shoe. R. 251, ll. 8-15.

The following occurred on direct examination of Claycomb by the solicitor:

> Q. Would that be the same thing as the tread pattern?
>
> A. Correct. The tread or the outsole of the bottom of the shoe.
>
> Q. Go ahead, ma'am.
>
> A. Class characteristics. If those appear to be similar, you would continue to the next step, wear characteristics. If those were observed, you would note those. Then further on to look at randomly acquired characteristics. Those would be non-repeatable characteristics from normal wear and tear of someone wearing a shoe.
>
> Q. What physically or what protocols do you use when you are trying to come up with whether two items match, don't match? Talk about what the actual process is.
>
> A. There are side-by-side comparisons. If you have an unknown impression and then a known shoe, you can do a side by side. There is overlay or superimposition, overlay a test impression of that known shoe over top of the unknown impression. You can see similarities or dissimilarities. There is also what we call ACD [ACE-V] methodology. Analyze, compare, evaluate, and then you verify. After you come to your conclusion and evaluate it, it is then verified by a secondary competent footwear examiner or peer review or technical review is what it would be called.

> Q. Is a peer review -- does the peer reviewer conduct their own examination of all the materials?
>
> A. Yes. They themselves will look at unknowns and knowns along with my results and review those results.
>
> Q. Is there then a collaboration between the two of you to make sure everyone is in agreement?
>
> A. Yes. They will review that, and a report will not be put out until there is an agreement between two competent footwear examiners for the result.

R. 251, l. 16 – 252, l. 22.

Claycomb estimated that she had worked on fifteen to twenty footwear cases. She had been qualified to be an expert in one prior case. R. 255, ll. 14-18. That case was apparently State v. General T. Little, 2021-UP-196 (withdrawn, substituted and refiled July 22, 2021) wherein this Court found Claycomb was properly allowed to testify as an expert in footwear impression evidence. However, the South Carolina Supreme Court subsequently granted certiorari on the footwear impression evidence issue involved in that case, and it was pending in that Court upon the filing of the initial brief in this case.

The solicitor then told the judge that he wanted to talk about the evidence in this specific case. The attorney could then argue regarding the science involved and the admissibility of the proffered testimony.

Claycomb said "bio-foam impressions, which were also test the type of impressions used in this case were similar to the "ink impressions of known shoes." R. 256, ll. 11-16. Claycomb stated that she did a report in this case which was peer-reviewed by her co-worker, Tom Darnell. R. 257, l. 23 – 258, l. 5.

Claycomb testified that she considered item nineteen, 21.9, the left shoe from the known sample, a definitive match in this case. R. 259, ll. 5-23. In addition to the match Claycomb said the shoe characteristics were consistent.[1] R. 259, l. 17 – 260, l. 17.

On cross-examination, Claycomb said the competency test she took was administered by CTS. CTS was "an external company."

Claycomb admitted that she did not know what the permissible error rate was on the competency test. In other words, she did not know how many wrong answers one could have and still pass the test. R. 262, l. 15 – 263, l. 5. Claycomb also acknowledged there was no threshold number of common characteristics that had to exist before she could opine there was "a match." R. 270, l. 12 – 271, 17.

In addition, Claycomb also said she was not aware of any database where shoes would be matched for similar characteristics. R. 267, ll. 3-10; 268, l. 19 – 270, l. 17. Claycomb further admitted she was not familiar with any publication which stated that the validity of the ACE V method was not a reliable method or a valid scientific comparison method. R. 265, ll. 4-15.

As to review of her work, Claycomb said she did not remember if there was ever a time that SLED agent Tom Darnell, who reviewed her work, ever disagreed with her results or conclusions. R. 273, l. 25 – 277, l. 2.

The state then proffered the testimony of Agent Darnell. R. 277, ll. 8-12. Darnell started work at SLED in 1990, he retired, but he went back to work in 2012. He was presently doing latent fingerprint work as an examiner. Darnell offered that he had also performed "blood stain pattern analysis. I have done footwear. I have done tire tread, crime scene reconstruction. Pretty much anything to do with crime scene." R. 277, l. 13 – 278, l. 8.

---

[1] Item 21.9, the photograph of which is before this Court, was the footwear impression that Claycomb opined was a definitive match. R. 259, ll. 17-23; 260, ll. 10-17.

Darnell had Bachelor of Science Degree in Criminal Science from the University of South Carolina. He graduated in 1982. R. 278, ll. 9-14. Darnell received in-house training which consisted of "lot of reading, a lot of written tests, some practical examinations, moot court." R. 278, l. 15 – 279, l. 3. Darnell testified he also trained under William Bodziak and Dwane Hilderbrand from the State of Arizona. R. 279, ll. 4-9. Darnell said he considered item 21.9, appellant's left shoe that was submitted to be "a match." R. 282, ll. 14-18.

The following occurred on cross-examination of Darnell by defense counsel:

> Q. You said that you had trained under -- you referred to as William Bodziak. I know Bill from a case that I did with him years ago. Did you do training through the things that he has published, or did you go to seminars he was teaching or both?
>
> A. I actually went to a footwear symposium, which was at the FBI academy in the early 90s. I don't remember if he was there or not. I would imagine he was close by. I have actually sat in on his classes. He travels around now. He is retired, and he travels around and teaches footwear and tires. I have actually participated in his classes. We had to take tests and do practical examinations and also had moot court with him.
>
> Q. Are you aware of whether or not the FBI lab is now currently today still doing impression evidence examinations?
>
> A. As far as I know, they are. I couldn't -- I have not -- I have not had any contact with the FBI in quite a few years. To answer your question, I really don't know.

R. 283, l. 19 – 286, l. 11.

Defense counsel told the judge the defense argument against the admissibility of this evidence was based in Rule 702, SCRE, and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and State v. Jones II, 383 S.C. 535, 681 S.E.2d 580 (2009). Defense Counsel Bax noted in State v. Jones II that William Bodziak was one of the experts in that case as well as Robert Kennedy from the Canadian National Mounties. Bax said our Supreme Court in State v. Jones II, ruled the

footwear evidence [barefoot sole impression evidence] was not admissible under the standards of State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and State v. Jones I, 344 S.C. 562, 541 S.E.2d 813 (2001)[2].

Defense counsel stated when looking at whether the method was scientifically valid it had been shown that the ACE V method used in this case was not scientifically valid. R. 289, ll. 4-15. Defense counsel also noted the testimony from Agent Claycomb that there was no database of randomly acquired characteristics that occurred in the general population for comparison. Instead, "this is literally just the examiner looking from one thing to another." R. 289, l. 23 – 290, l. 22.

Defense counsel argued the conclusions of the reported footwear experts were not supported by any meaningful evidence or estimates of their accuracy and therefore they were not scientifically valid. R. 290, ll. 20-22. "There might be some very talented people in law enforcement, but it's still just a person comparing two things. To call that science is not the definition of science." R. 290, l. 23 – 291, l. 3.

The solicitor then improperly cited an unpublished opinion, State v. General T. Little, 2021-UP-196 (withdrawn, substituted and refiled July 22, 2021, by this Court), as support for the footwear evidence being admitted in this case. The solicitor said Dawn Claycomb was the expert in State v. Little, supra, as well.

Solicitor Thornton said it was unfair to compare the evidence in this case to State v. Jones II, to that in this because that was barefoot sole impression evidence from the inside of a boot.

---

2 In State v. Jones I, our Supreme Court also held that this barefoot insole impression evidence was not scientifically reliable and should not have been admitted. Despite this holding, the state in State v. Jones II, again put the largely identical barefoot sole impression evidence before the jury, and the Court reversed again.

R. 291, l. 5 – 294, l. 1. The solicitor maintained that the judge should accept the footwear impression evidence as reliable science and qualify Claycomb and Darnell as experts in that area.

Defense Counsel Bax responded that State v. Jones II was relevant because William Bodziak testified in State v. Jones II that barefoot sole impressions were valid science and our Supreme Court had disagreed with that conclusion. Bodziak was also, as seen, a trainer for Claycomb and Darnell in footwear impression evidence here.

After hearing all of the proffered evidence on footwear impression and gunshot residue evidence, the judge ruled: "It all goes to the weight, not to the admissibility. As to all the experts, I will allow them to testify. We will take a quick break and then come right back." R. 306, ll. 1-4.

Jury in

In the presence of the jury SLED Agent Claycomb testified she received a bachelor's degree in forensic science from Waynesburg University. R. 351, ll. 16-19. She received internal training at SLED and "on scene hands-on experience, responding to crime scene for footwear impressions, as well as external training examination and recovery of footwear evidence, 40 hours." R. 352, ll. 2-11. She passed a "competency test" after completing her training, and she took a once-a-year proficiency test to continue doing footwear examination. R. 352, l. 12 – 353, l. 6. Claycomb confirmed to the solicitor that with footwear impression evidence she was "comparing the two to see if they are similar or the same." R. 354, ll. 9-12.

Claycomb testified she could do an inked test impressions from the bottom of the shoe which would give her a two-dimensional impression or design of that shoe. R. 356, ll. 2-14. She could also do a three-dimensional model, using bio-foam. R. 356, ll. 15-22. Claycomb had been recognized one time before in this state as an expert in footwear analysis. R. 356, l. 23 – 357, l.

7. The judge then qualified Claycomb as an expert in footwear analysis over defense counsel's objection. R. 357, ll. 4-11.

Defense counsel continued to object to the footwear impression evidence in this case throughout Claycomb's testimony. R. 358; R. 360; R. 385; R. 401; R. 403. Claycomb repeated her in-camera testimony that of the eleven photographs of the footwear impressions "one was a match to the known shoe. Another was consistent or corresponding to the known shoe." R. 362, ll. 10-18.

On cross-examination Claycomb admitted she did not know what the error rate was to still be considered a "pass" on the competency exam in footwear impression evidence. R. 366, l. 24 – 367, l. 8. Claycomb repeated she also was not aware of scientific articles which stated that the ACE V method or technique she used was not scientifically valid. She confirmed that ACE V stood for "Analyzation, comparison, evaluation, and verification." R. 367, ll. 9-15.

In addition, Claycomb was not aware of a database of the types of shoes in this country that could be used for comparison. There was no database of size nine Puma or Nike shoes sold in the United States in the last year, two years or three years. R. 369, ll. 4-24. Claycomb admitted there was also no minimum number of randomly acquired characteristics that had to be found before an examiner could opine there was "a match." R. 370, ll. 10-14.

Claycomb said the shoe at issue in this case was a size ten -- as that size was assigned by the manufacturer. R. 371, l. 20 – 372, l. 5.

The following occurred on cross-examination of Claycomb:

> Q. You are just looking at these two and you are saying, based on my experience, that is a match?
>
> A. Correct.
>
> Q. That is what you want to say is science?

A. That is -- I don't –

R. 372, ll. 19-23.

Claycomb acknowledged that she could not remember if anyone at SLED had ever disagreed with her footwear analysis conclusions. R. 375, l. 22 – 376, l. 25. Claycomb repeated she was not aware of scientific articles which stated that the ACE V method was not scientifically valid. She did admit she was aware several scientists or engineers from the Counsel of Advisors questioned the validity of footwear impression evidence. R. 381, ll. 7-21.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (*quoting* State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Discussion

It is the responsibility of the court to find that the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, here, footwear impression evidence. See Watson v. Ford Motor Company, 389 S.C. 434, 446, 699 S.E.2d 169, 171 (2010). The court here erred in qualifying Claycomb and Darnell as experts and allowing her to give opinion evidence pursuant to Rule 702, SCRE, on the subject of footwear impression evidence.

Her testimony was speculative and it was very prejudicial. Claycomb's only alleged peer review was by her co-worker, Darnell. She was only vaguely aware of the literature finding the

ACE V method she employed was not scientifically valid. There was no database for footwear impression comparison characteristics, and no standard for how many characteristics must be the same or similar before an "expert" could opine, as Claycomb did here, that the shoe impression was a "match."

Further, Claycomb had only been found an expert in one prior case, the State v. Little case now pending before the Supreme Court. While appellant acknowledges every expert must be qualified for the first time in some case, the point is that Claycomb was an inexperienced footwear impression examiner even if this was a valid science, which appellant strongly contends it is not. The judge abdicated his gatekeeping duties by finding the challenge only went to the weight of the evidence and not its admissibility.

"[A] trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence." State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).

Rule 702, SCRE, states "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This footwear impression evidence was not valid science, and even if it was, Claycomb was not qualified to give her devastating shoe match opinion.

In State v. Council, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517 (1999), our Supreme Court held that "In considering the admissibility of scientific evidence under the Jones[3] standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990). This type of evidence is also subject to attack for relevancy and prejudice. Ford, supra."

Again, Claycomb was not aware of literature which stated the ACE V method she employed was not scientifically valid. There was no database or a set number of common characteristics that needed to be found before an expert in footwear impression evidence could opine there was a "match." The only peer review was by Claycomb's co-worker at SLED, Tom Darnell. Claycomb could not even remember if Darnell ever disagreed with any of her conclusions in any case. As defense counsel stated, "this is not science," since it was a person looking at a known shoe and an inked or bio foam impression and deciding on their own if it was a match.

The error in this case and the corresponding prejudice was similar to that in State v. Ellis, 345 S.C. 175, 547 S.E.2d 590 (2001) and State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018).

In Ellis this Court held that a law enforcement officer who is qualified as an expert in crime scene processing and fingerprint identification was not qualified to give an opinion as an

---

3 State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) where there was no objection to the qualifications of the experts in "bite marks," and where "the odontologist's testimony was that the plaster dental impressions taken of appellant Jones 'unquestionably match the bites and their marks in all aspects, all thirty seven aspects, that are present on (the photographs).' There was no showing that the techniques and theories employed were other than accepted by the photographic and dental communities."

expert in what was essentially crime scene reconstruction evidence. The witness exceeded the scope of his expertise by rendering his conclusion that the victim was riding a bicycle at the time he was shot. In the context of the Ellis case this was meant to convey to the jury that the victim was not a threat as Ellis claimed in his self-defense case. This improper opinion testimony of the victim's position at the time he was shot was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001), *citing* State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991).

In Andrews, Witness Graham was qualified as an expert in the field of EMS. Graham was therefore qualified to testify as an expert in pre-hospital emergency care that was administered to the victim and the resulting medical observations of the victim's body and injury.

However, this Court held that the trial court abused its discretion by allowing expert testimony from Graham regarding the victim's location at the time he was shot. Graham opined that the victim was standing on the porch when he was shot. This conclusion exceeded the scope of her expertise in emergency medical services. It was very prejudicial in the context of the Andrews case since the defendant contended he was acting in self-defense when he shot and killed the victim who was inside his house when he shot him. This Court found the error was not harmless.

In this case appellant strongly contends that the trial court should have issued a directed verdict of acquittal even when considering this footwear impression evidence. Consequently, Claycomb's opinion that appellant's shoe was a match to impressions left in the dirt near the crime scene which the police followed to find the shell casings in the dirt was very prejudicial.

The firearm used in this case was never found, and the testimony was only that a single gun was involved in this case.

The state's case was purely circumstantial, and the opinion of the footwear impression "match" was very prejudicial as was Claycomb's other opinion that the shoe impressions were "consistent". A law enforcement improper opinion which goes to the heart of the case is not harmless. State v. Fordham, 254 Ga. 59, 325 S.E.2d 755 (1985).

The error in this case was also similar to that in State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017). In Westmoreland this Court found that the trial judge erred by allowing a lay opinion from the coroner that the offense was a "homicide". A homicide is an intentional act which in the context of the Westmoreland case was extremely prejudicial since the defendant told the police that he accidentally hit the decedent. As accident is obviously the opposite of an intentional act.

Likewise, in this case the improper footwear impression "match" and "consistent" evidence was very prejudicial given appellant's repeated denials of his involvement in this case where it seemed his cousin Fabian Habersham, as seen in the directed verdict issue, was the natural suspect since his mother was the next-door neighbor of the decedent child, and directly involved in the property dispute that law enforcement believed was the motive for the shooting into the mobile home

Finally, as stated above, the state improperly cited State v. Little, 2020-UP-196 (Withdrawn, substituted and refiled July 121, 2021) in which this Court held Agent Claycomb's footwear impression analysis testimony was admissible. State v. Little was an unpublished case and should not have been cited or considered. As stated, the Supreme Court granted certiorari in

the State v. Little case on the footwear impression opinion testimony of Agent Claycomb at the time of the initial brief.

The footwear impression opinion testimony by Agent Claycomb in this case was improper, inadmissible, and it should not have been admitted. It was highly prejudicial, and appellant should be granted a new trial.

2.

The court erred by refusing to direct a verdict of acquittal since there was no direct or substantial circumstantial evidence that appellant shot and killed the decedent and evidence raising suspicion of appellant's guilt was insufficient to warrant denying the motion for a directed verdict.

Relevant facts

Sandy Montano was the mother of the two-year old decedent boy in this case. She lived on Fordville Road in Jasper County on August 16, 2018. R. 21, l. 9 – 23, l. 7.

Montano testified that her mobile home bordered on the property of Angenia Habersham and that they were involved in a property line dispute. Montano's husband, Nelson, had put logs between their properties to keep Ms. Habersham's visitors, especially Donald Stevenson, from driving through their property. R. 24, l. 21 – 26, l. 8. Fabian Habersham, appellant's cousin, who lived there "off and on" with Angenia Habersham was also involved in this dispute. R. 26, l. 5 – 27, l. 7.

Montano remembered that on the night of August 16, 2018, she was in bed with her two-year-old son when she heard what she thought were firecrackers behind their mobile home. R. 27, l. 20 – 29, l. 8. She looked over at her son and "he was laying there, but he wasn't moving and he wasn't breathing." R. 29, ll. 2-9. Montano called out for her husband to help and they called 911. R. 29, l. 17 – 31, l. 15. The child had been hit in the head by a stray bullet shot from outside the mobile home. Tragically, the child did not survive.

Nelson Montano also called 911 that night following the shooting. He attempted to do CPR on the child after the child was shot. R. 33, l. 12 – 38, l. 6.

Nelson testified the dispute with Fabian Habersham's mother over the property lines was because "[I] just didn't want those people driving on the drainage field of the septic tank" in the large field by their home. Consequently, Nelson laid down the logs to block access. R. 39, l. 9 – 40, l. 3. Nelson had called the police and taken photographs of Donald Stevenson driving his dump trunk onto Nelson's property. R. 50, l. 22 – 51, l. 21.

Nelson offered that Ms. Habersham's friend, Donald Stevenson, was at her home so often he considered Stevenson to be living there. R. 41, l. 22 – 42, l. 21. Nelson remembered on the night of the shooting that Stevenson left Habersham's mobile home, where appellant did **not live,** right after the shooting. Nelson saw his brake lights driving away in the distance. R. 45, ll. 3-23.

Former Jasper County Deputy Joseph Frierson testified that he was dispatched at 9:45 p.m. on August 16, 2018, to the site of the shooting. R. 52, l. 10 – 54, l. 8. Frierson entered the mobile home and he saw the two-year-old with blood on his head. R. 54, ll. 9-13. Frierson went outside to investigate. He spotted bullet holes in the mobile home. Frierson then went into the field here he said he found "footprints in the field." R. 57, l. 1 – 58, l. 4.

Deirdre lived on Bees Creek Road off of Fordville Road. She remembered hearing gunshots that night but testified that was not unusual since "there was shooting out there a lot, so it kind of - - we heard shots all - - all the time really…" R. 90, l. 10 – 100, l. 13. On that August 16, 2018, night Deirdre said she heard six to eight gunshots close together. R. 92, ll. 3-5. Deirdre remembered hearing screaming in the distance and seeing the blue lights of police cars approaching the area. R. 102, l. 20 – 103, l. 6.

Jasper County Sheriff's Deputy Raymond Davis knew both Fabian Habersham and appellant, Diante Habersham. Appellant lived on Ingram Lane and Davis said Fabian lived "behind that trailer in a camper." This was apparently on a very large lot. R. 171, l. 3 – 172, l. 7.

Davis became aware of the property dispute and he went to "where Fabian lived." R. 171, ll. 4-17. Fabian was not at home. However, shortly thereafter Davis said "we saw Fabian and Dionte walk to the end of the road" together. R. 172, ll. 11-23. Davis remembered that he and his partner, Detective Hallie Godley then spoke with Fabian and appellant. R. 173, ll. 15-17. This conversation between Detective Hallie Godley, Davis, Fabian Habersham and appellant was captured on video and is before this Court to view. See State's Exhibit 24 (Dionte on Ingram -- no transcript).

Davis remembered thinking while he was talking with Fabian Habersham and appellant that the shoes appellant was wearing looked similar to the impressions he had seen in the dirt leading towards the shell casings. R. 174, l. 15 – 175, l. 18. Davis asked appellant to hold up his foot so that Detective Godley could take a photograph of his shoe. R. 175, l. 19 – 176, l. 7. Defense counsel objected to the admission of State's Exhibit No. 20, a photograph of appellant's shoe on the basis of his challenge to all of the footwear impression testimony and evidence. R. 180, l. 11 – 181, l. 13.

Detective Hallie Godley worked for the Jasper County Sheriff's Department on August 16, 2018. She remembered going to the crime scene on Fordville Road that night at about 10:05 p.m. R. 192, l. 1 – 194, l. 6. When EMS left with the child Godley began checking the property "for any evidence." R. 194, ll. 10-21. She saw bullet holes going into the mobile home where the child had been shot. She walked in the field using her flashlight and she spotted gunshot casings. R. 194, l. 18 – 196, l. 14.

Godley admitted she was looking to talk to Fabian Habersham that evening. R. 196, ll. 15-23. Godley testified she saw Fabian Habersham and that he was with the appellant. R. 209, ll. 5-8. She described Fabian as being a much larger man than appellant at 6'3 or 6'4 and three hundred pounds. R. 198, ll. 10-22.

Godley recalled that she and Detective Davis and Detective Phillips talked with Fabian Habersham and appellant out on the dirt road that night. R. 199, l. 1 – 200, l. 19. Godley also maintained that the shoes appellant was wearing that night looked similar to prints she saw in the dirt near the crime scene mobile home. R. 203, l. 2 – 204, l. 1. She testified that appellant was taken into custody that night, interviewed at the police station, and allowed to go home after the interview. R. 204, l. 24 – 208, l. 18.

Although it was not captured on bodycam or any other video Godley claimed that appellant said to Fabian at some point: "Don't worry, Cuz I got you." R. 209, ll. 3-8. The state also introduced a Facebook screenshot from appellant's account which stated: "Don't beef with my family cuz it's a lot of us and we can't control each other so #BOOM!!." See State's Exhibit No. 106.

The judge ruled that if appellant did not write this post on Facebook as the defense contended, he had "adopted" it by having it on his Facebook account. It was dated August 16, 2018, which was the day of the shooting. R. 211, ll. 6-9.

Godley admitted on cross-examination that Ms. Montano, the child's mother, said that Fabian was involved in the property dispute, and Fabian had "exchanged words" with Montano about it. R. 214, l. 21 – 215, l. 7. Godley admitted that Fabian was the person directly connected to the incident and that Fabian was not cooperative with law enforcement. Fabian refused to allow a gunshot residue test to be taken. Fabian also gave multiple versions of where he was

when the shooting occurred. R. 218, l. 17 – 220, l. 4. Despite all of these problems, Godley admitted that Fabian was never detained or arrested or interviewed. The police did not get a search warrant for his clothing either. Godley did admit that she told appellant that Fabian "putting himself there at the time of the shooting" was a problem. R. 218, l. 17 – 220, l. 21.

Godley acknowledged that she had been involved in investigating Fabian for narcotics and that Fabian had gone to prison on that basis. R. 229, ll. 7-17. Godley confirmed that law enforcement allowed appellant to go home after they interviewed him at the police station on the night of the shooting. R. 230, ll. 1-23.

Former SLED Agent Dawn Claycomb testified over objection that one of appellant's shoes was a "match" to a shoe print in the sand near the crime scene and that another was "consistent." R. 362, ll. 10-18. As seen in issue one on footwear impression evidence, defense counsel strongly argued that this was not a properly accepted science and that Claycomb was not qualified to give this opinion.

While appellant was interviewed at the police station, law enforcement took his shirt and shorts. SLED Agent Megan Fletcher acknowledged that the shorts and shirt were mixed together. She also testified that gunshot residue particles were lifted from them. Fletcher testified that "one particle characteristic of gunshot primer residence (sic) was found on appellant's clothing. R. 212, ll. 5-18. It was noted that "gunshot primer residue can come from discharging a firearm, being in the vicinity of a discharged firearm or coming into the contact with a surface that has gunshot primer residue on it." R. 407, ll. 11-14.

As stated, appellant's shorts and shirt were packaged together and Fletcher admitted that gunshot residue could get on person who was not the shooter since it will "[a]ctually go three

feet to either side. To some extent behind the shooter and as far as sixty feet in front of the shooter." R. 412, ll. 8-21.

Donald Stevenson, Jr., testified and at first denied that he told the police that he had information Fabian Habersham was involved in the shooting." R. 438, ll. 16-24. Later in his testimony Stevenson said he could not confirm nor deny that he had told that Detective Phillips that Fabian Habersham was involved in the shooting.

The following occurred on direct examination of Stevenson:

> Q. So you don't remember talking to him about Mr. Fabian Habersham being involved?
>
> A. Sir, that has been a while back. *I am not saying -- I may have -- I mean, I just really -- I can't say yeah or no*. It's just too far back. That is not what I am focusing on. There are a lot of distractions when I am out there working. Basically, I am on my own getting my work done. They may asked me something about it, it's not that it just ups that I answered, because that's not what I am doing.
>
> Q. Do you remember any officers at that time giving you a business card? Do you remember getting a business card from any officers?
>
> A. Sir, I get thousands and thousands of people calling on my phone, ringing my phone up, wanting stuff done every day. To sit here and say one particular one, I couldn't say yes right now.
>
> Q. The reason I asked is just because we are talking about talking with an officer about something like this, not necessarily a job; right?
>
> A. Yes.
>
> Q. That doesn't make it stand out in your mind?
>
> A. I talk to policeman all the time. They want me to do stuff. It don't ring any -- it's just not coming to me.

R. 444, l. 4 – 445, l. 2. (Emphasis added).

Directed verdict motion

Defense counsel moved for a directed verdict of acquittal. Defense counsel cited State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) and noted that Bostick "summarizes about four different cases that only involve circumstantial evidence." R. 414, l. 6 – 416, l. 9. Counsel noted that this case was analogous to Bostick. There were no eyewitnesses to the crime, and appellant had not confessed. Defense counsel said there was one footprint and "that evidence supports my contention that it's weak and inadmissible." Even if the evidence was admissible it was insufficient circumstantial evidence of guilt. R. 224, l. 10 – 225, l. 15.

The solicitor noted that the standard was "substantial circumstantial evidence" but contended there was sufficient evidence to get beyond the directed verdict motion. He cited appellant's shoes making a print in the dirt near the crime scene. The solicitor also noted the Facebook post which showed "some sort of retribution for messing with the Habersham family." R. 417, l. 22 – 419, l. 4. The solicitor also said the defense argument about the gunshot residue particles not being reliable only went to its weight. The judge ruled there was sufficient evidence to go to the jury and he denied the directed verdict motion. R. 417, l. 21 – 419, l. 11. At the close of the case when the defense rested, defense counsel renewed his motions noting the extensive case law he had cited. R. 449, ll. 12-21.

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.

Discussion

Where the state relies exclusively on circumstantial evidence, the trial judge is only required to submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). "Mere suspicion" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

Appellant in this case always maintained he did not shoot into the mobile home. Fabian Habersham, not appellant, was involved in the property dispute with the decedent child's parents. Fabian refused to cooperate, and he refused to take a GSR test. Jasper County law enforcement let him get away with this even though he was a known criminal, and the police witnesses were seeking him out on the night of the murder since his mother was also directly involved in the

property dispute that was the apparent motive for the shooting into the mobile home. This case was also similar to Bostick in that regard where "Rudy Polite," the victim's son, was a prime suspect, and, as here, the circumstantial evidence against appellant was not "substantial." See State v. Bostick, 392 S.C. 134, 137-138, 708 S.E.2d 774, 776 (2011).

The Facebook posting the judge ruled appellant "adopted" by reposting it was a juvenile thing to do if appellant indeed reposted it, but it certainly was not strong evidence of his guilt. The GSR evidence was also not very strong against appellant in this case. Finally, the footwear impression evidence should not have been admitted, but even if that evidence is found to be valid by this Court, the evidence still did not make the circumstantial evidence rise to the level of "substantial circumstantial evidence."

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), cited by defense counsel, the Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon. The state presented evidence that investigators found personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

The Supreme Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and gasoline was the accelerant used to start the fire at the Polite home. The Court held this evidence raised a suspicion that Bostick may have been guilty but it was not substantial circumstantial evidence for this case to have gone to the jury.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) this Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

In State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) also cited by defense counsel in this case, Schrock admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. The Supreme Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the Supreme Court affirmed the holding of this Court that a directed verdict should have been issued. The victim, Dr. Jennings Cox, was shot, and his body found off of a road in Colleton County. On the last day Dr. Cox was seen alive he borrowed a colleague's nearly new BMW Z3 two seater to go to a dentist's appointment after seeing a patient of his own as a child psychologist. Dr. Cox never returned to

his office after he called and had his secretary cancel his remaining appointments for that day. Dr. Cox also withdrew money from an ATM at a Hardeeville bank that day.

Arnold was staying with a friend, Ware, the state's chief witness at trial who had been involved in a sexual relationship with Dr. Cox. Ware and Arnold were both truck drivers, and Ware introduced the victim to Arnold. On the weekend of June 14-15, the victim and Arnold had sex at Ware's house. Ware testified that Arnold had a gun while staying with him. Ware left for Chicago on June 17, while Arnold stayed at Ware's house. Ware received a message to call Arnold at a phone number in Tennessee. When Ware called that number it was to a phone belonging to Ware's father in Gray, Tennessee.

On June 20, the BMW the victim had borrowed car was found in a parking lot in Johnson City, Tennessee with unspecified scratches on it. Arnold's fingerprint, his right thumbprint, was found on a tab from a coffee cup found in the center compartment in between the seats in the car. Arnold was arrested at his father's house in Tennessee.

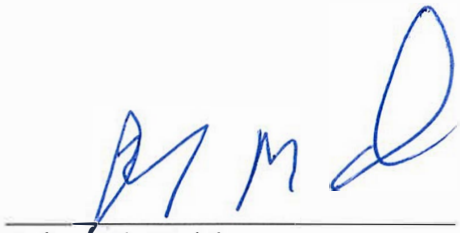
The state's theory of the case was that Arnold had the victim drove into the woods to have sex, and that Arnold shot the victim in the woods, drove to his father's house in Tennessee and stopped for coffee on the way. However, our Supreme Court reasoned the state only proved that Arnold was in the BMW on the last day that the victim was seen alive, and that was insufficient evidence to make murder a jury issue, and found Arnold was entitled to a directed verdict.

The state here did not present any substantial circumstantial evidence or any direct evidence of appellant's guilt. The footwear impression evidence should not have been admitted, and even if this Court disagrees, it did not transform the other evidence of suspicion in this case, such as the gunshot residue particles evidence into substantial circumstantial evidence. The

evidence in this case was only suspicion of guilt evidence – it was not the "substantial circumstantial evidence" needed to survive the directed verdict motion. The trial judge therefore erred by denying the directed verdict motion. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

CONCLUSION

By reason of the foregoing arguments, this Court should issue an order of acquittal as to the directed verdict issue, issue two. In the alternative, appellant's convictions should be reversed and this case remanded to the Jasper County Court of General Sessions for a new trial as to issue one.



Robert M. Dudek
Chief 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

This 12th day of June, 2023.

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 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."

June 12, 2023

Robert M. Dudek
Chief 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