STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JUL - 3 2013

S.C. Supreme Court

Appeal from York County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case № 2009-144086

The State,

Petitioner,

vs.

Francis Larmand,

Respondent.

Return to Petition for Writ of Certiorari

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010

rauch@simplepc.net
S. C. Bar № 06188

Attorney for Francis Larmand

Index

Table of Authorities

Cases: Page:

Statutes:

Question Presented

Did the Court of Appeals err in reversing the circuit court's denial of Respondent's directed verdict motion?

STATEMENT OF FACTS

Kerriann Larmand, the wife of the Defendant Frank Larmand, owned and operated a business in the Charlotte area known as Pop-A-Lock. The business was a basic locksmith business. As part of a franchise operation the business would also respond to calls to open car doors and other emergency calls. Rec. on App. at 324. Mrs. Lamard had reason to believe that someone in the company was stealing calls when a cash customer called for services such as a request to unlock an automobile. As a result she, with the assistance of her husband, set up a call for service in an attempt to determine who was stealing the calls from her company. Rec. on App. at 326, ll 12-25 to 327, ll 1-23.

As part of the mystery call, Frank Larmard was to go to the Knights Stadium outside of Charlotte. There he would wait and see who came in response to the mystery call. Prior to leaving Kanapolis, NC, where he lived, he met his brother-in-law, Leo Lemire. He requested Mr. Lemire to join him as another person was needed to receive the call as that person's voice would not be recognized by any employee or former employee of Pop-A-Lock who may be involved. Rec. on App. at 371, ll 20-372, ll 1-12. Mr. Larmand went to Knights Stadium and his wife placed the called requesting assistance in unlocking an automobile. The call was placed at 10:14 pm. Rec. on App. at 329, ll 10-22. Mike Taylor, who at the time was employed by Pop-A-Lock, received the call at 10:18 pm. Rec. on App. at 23-25. Mr. Taylor call Ryan Lochbaum, a former employee who was terminated in October of 2008, at about 10:43. Rec. on App. at 176, ll 6-8. Mr. Lochbaum testified that Mr. Taylor was simply asking him for directions to Knight Stadium. He had previously told officers involved in the case that Mr. Larmand and Mr. Lemire were trying to lure him out to Knight Stadium that evening. Rec. on

App. at 174, ll 5-11. As he had been terminate several months before, Mr. Lochbaum had no legitimate reason to be responding to a call for Pop-A-Lock. Mr. Lochbaum had also been denied unemployment benefits because of his misconduct while employed by Pop-A-Lock. This upset Mr. Lochbaum. Rec. on App. at 167, ll 3-15.

After no one from Pop-A-Lock, or anyone trying to steal the service call, came to Knights Stadium, Mr. Larmand decided to go by the residence of Mr. Lochbaum. He went for the purpose of seeing if any employees of Pop-A-Lock were there and to determine if a red car with a Pop-A-Lock sign was at the residence. Rec. on App. at 377, ll 1- 12. Mrs. Larmand had received reports of a red car with a Pop-A-Lock sign was seen in the Charlotte area. Rec. on App. at 341, ll 17-25. When Mr. Larmand drove by Mr. Lochbaum's residence, he noticed several people gathered around a van but did not see a red car. He parked his truck past the house and instructed Mr. Lemire to remain in the truck. Rec. on App. at 378, ll 12-16. He then walked to the residence of Mr. Lochbaum. He stood in the street near the van for a short period of time until someone acknowledged his presence. He stated that he wished to speak to Mr. Lochbaum. A person notified Mr. Lochbaum that someone was there to see him. Rec. on App. at 380, ll 12-20. Mr. Lochbaum then asked the others present to leave as he wanted to talk to Mr. Larmand in private. Rec. on App. at 72, ll 10-14. Mr. Larmand and Mr. Lochbaum then moved slightly down the street in the direction of the houses where his neighbors lived. Rec. on App. at 80, ll 1-9; 65, ll 1-3; 105, ll 7-9.[1] At least three other people were present when Mr. Lochbaum asked to speak

[1] The State in its petition has contended that Mr. Larmand "started walking down the street away from where the neighbors were standing." Pet. for Cert. at 18. Mr. Larmand walked with Mr. Lochbaum toward the front of the residence of Mr. Jesse Harris, his next door neighbor. On the other side of Mr. Lochbaum's residence is a large field.

to Mr. Larmand in private. Rec. on App. at 68, ll 21-25 to 69, ll 1-4.

After Mr. Lochbaum and Mr. Lamrad had spoken for a brief time, Mr. Lemire, who had left the truck after Mr. Larmand left, came at Mr. Lochbaum with a pistol. Rec. on App. at 150, ll 14-22. Mr. Lochbaum turned to confront Mr. Lemire and grabbed the pistol. In the struggle they both fell to the ground. At that point the neighbors who were with Mr. Lauchbaum earlier came and helped subdue Mr. Lemire. When the two fell to the ground, Mr. Lochbaum testified that Mr. Larmand tried to pull him off of Mr. Lemire. Rec. on App. at 151, ll 18-24. Mr. Lauchbaum was successful in obtaining the pistol from Mr. Lemire. At that point the struggle ended and Mr. Larmand and Mr. Limire left the area. 154, ll 4-14. Mr. Lauchbaum received only a very minor scratch to his hand. Rec. on App. at 159, ll 16-22.

After leaving the scene Mr. Larmand was stopped by William Watson of the Rock Hill Police Department. Mr. Lemire was arrested that night for presenting and pointing a firearm. Mr. Larmand was briefly questioned and released. Rec. on App. at 59, ll 1-16. Mr. Larmand was arrested the next day when he came to arrange bail for Mr. Lemire.

ARGUMENT

Did the Court of Appeals err in reversing the circuit court's denial of Respondent's directed verdict motion?

As this Court and the South Carolina Court of Appeals have said on numerous occasions, "If there is any direct evidence or any *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *State v. Cherry*, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004)(emphasis added); *See, also*, *State v. Odems,* 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Lollis,* 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Martin*, 343 S.C. 580, 541 S.E.2d 254 (2000); *State v. Gilliand,* 402 S.C. 389 741 S.E.2d 521 (Ct. App. 2012); *State v. Meggett,* 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012).[2] The standard is not is there some circumstantial evidence that by some stretch of the imagination, could be interpreted to be evidence of guilt.

The Respondent is critical of the Court of Appeals for referring to the evidence of the defense. What the Respondent fails to recognize is that the testimony of the State, including the neighbors, only proves the two defendants were at the scene at the same time. The State's case does not even support the proposition that the defendants traveled from North Carolina together. While that is an undisputed fact, the evidence came from the defense and the Court of

---

[2] The South Carolina Court of Appeals in *State v. Cherry,* 348 S.C. 281, 559 S.E.2d 297 (2001) discussed whether courts in applying the "substantial circumstantial evidence" standard are engaging in the weighing of evidence, which appellate courts are forbidden to do. The United States Supreme Court in *Jackson v. Virginia,* 443 U.S. 307 (1979) specifically rejected the "any evidence" standard in criminal cases. The Court said "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. To the extent that any appellate court determines whether the circumstantial evidence is "substantial" or if the evidence is more than a "modicum" an appellate court will, to some extent, weigh the evidence, notwithstanding frequent protestations to the contrary.

Appeals should not be criticized for citing such an uncontested fact.

As to circumstantial evidence this Court has said "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). This Court has further said circumstantial evidence is sufficient to convict when " the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels,* 401 S.C. 251, ___, 737 S.E.2d 473 (2012).

As lynching is in essence a conspiracy, what this Court has to say about proving a conspiracy is also relevant to lynching. This Court has said "Thus, we focus here on the sufficiency of the evidence of an *agreement* between the alleged conspirators, and not, as the State would have us do, on the alleged common *object,* that is, the importation and distribution of Dilaudid in a defined geographic area." *State v. Gunn* 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993) (emphasis in original) This is the standard against which the circumstantial evidence in this case must be viewed.

Here the state is urging this Court to focus upon the fact that Ryan Lochbaum was in fact attacked and not the proof of an agreement to attack Mr. Lochbaum. The evidence presented by the state only proved that Mr. Lochbaum was attacked. It did not prove an agreement. The Court of Appeals has held "[T]o sustain a conviction for lynching the State must produce at least some evidence of premeditation." *State v. Smith*, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002). The proof of premeditation must be more than speculation or conjecture. The Respondent has not shown any proof of premeditation that is more than

speculation or conjecture. The Respondent urges that from the fact both defendants came to the scene together, there was premeditation and planning to assault Mr. Lochbaum. But just as likely, the two defendants arrived at the scene together so Mr. Larmand could speak with Mr. Lochbaum and Mr. Lermire was acting on his own when he attacked Mr. Lochbaum. In fact, considering that Mr. Larmand never attempted to get Mr. Lochbaum by himself and away from others, the latter version is more likely. The state has produced no evidence which makes a guilty explanation substantially more likely than the innocent explanation. For that reason, the state has failed in its proof. The question is not may a guilty explanation be inferred from the facts, but rather has the state proven that a guilty explanation is more likely to the extent that a reviewing court can conclude the guilty explanation is substantially more likely.

The Court of Appeals did not, as the Respondent contends, ignore the evidence of the state, but rather simply acknowledged that the evidence of the state simply puts the two defendants at the same place at the same time. In *State v. Hernandez,* 677 S.E.2d 603, 605, 382 S.C. 620, 625 (2009) this Court held, "[T]he State failed to present any evidence such as acts, declarations, or specific conduct to support this inference [knowledge], and thus, we find that the conclusion that Petitioners knew the Thunderbird occupants and therefore had knowledge of the drugs in the tractor trailer is mere speculation." This Court did not consider the specific conduct of being at the same place at the same time sufficient to prove knowledge of the drugs even though the defendant followed the tractor trailer down a secluded road. The same principle is applicable here. Under the prior definition of lynching, as well as the current law, the State is required to prove premeditation. The premeditation required is to have the intent to commit an act of violence upon another person. S. C. Code § 16-3-230. The premeditation has to be formed

before the alleged attack.

In the present case no action or statement of Mr. Larmand indicated any intent to assault or strike Mr. Lochbaum as part of a conspiracy with Mr. Lermire. The wearing of dark clothes is no more an indication of a conspiracy than it is of the fact that the clothing is their work clothes. The state produced no evidence the clothing was not their normal work clothes. The state produced no testimony to make a guilty inference from the facts indicating guilt more likely than an innocent explanation of the facts. When Mr. Larmand approached Mr. Lochbaum, there was no attempt on Mr. Larmand's part to separate Mr. Lochbaum from his friends. The suggestion that his friends leave was made by Mr. Lochbaum. Mr. Larmand and Mr. Lochbaum then moved to an area toward a more populated area as opposed to the area where there were no houses. Mr. Larmand did not take Mr. Lochbaum to a place where Mr. Lermire was hiding. This certainly does not make a planed attacked upon Mr. Lochbaum more likely than not. When Mr. Lermire said "This is what you get for f***ing with *my* family," this is an indiction of Mr. Lermire's attitude and intent and not Mr. Larmand's.

The Respondent has urged that the "only" reasonable inference from the State's evidence is that there was a premeditated plan to attack Mr. Lochbaum, but the state has not shown what facts, other than they traveled together to Rock Hill, to support that conclusion. Under the facts of this case, a guilty explanation is not substantially more likely than an innocent explanation. When the state fails to give a jury a rational basis for rejecting an innocent explanation of the circumstantial evidence, then the state has not met its burden of proof. A jury should not be required to guess between two equal conclusions from the circumstantial evidence produced. Such proof is not proof of substantial circumstantial evidence.

The State argues that because Mr. Larmand parked some distance away he planned on attacking Mr. Lochbaum. First, according to the scale of the Google Earth map used as an exhibit, the distance is slightly over 1,110 feet. The car was parked in the vicinity of several houses from which people could observe and describe the car. After the alleged attack, they would both have to go over 1,000 feet to the automobile. The logic of placing a "get away" car so far from the scene of the alleged planned attack simply does not support an inference that the attack was planned by both Mr. Larmand and Mr. Lemire.

The State further argues that the fact that Mr. Larmand and Mr. Lemire fled the scene in also evidence of their guilt. In *State v. Grant*, 275 S.C.404, 272 S.E.2d 169 (1980) this Court said "evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence." *Id.* at 408, 272 S.E.2d at 171. Under the facts of this case evidence of flight is even less than marginal. After the fight the firearm Mr. Lemire possessed was in the hands of Mr. Lochbaum. Both Mr. Larmand and Mr. Lemire had been in a altercation with several individuals. They were out numbered. Mr. Jessie Harris testified that someone, he thought Mr. Lochbaum, told Mr. Larmand and Mr. Lemire to leave. Rec. on App. at 123, ll 18-25. They quickly left the scene. When the officer turned on his blue light, Mr. Larmand stopped his automobile and did not try to evade the police. Rec. on App. At 57, ll24-25 to 58, ll 1-3. Apparently Mr. Larmand was not even given a ticket for speeding. Rec. on App. at 59, ll 1-13.

Mr. Lemire testified that he was told to remain in the car. Rec. on App. at 463, ll 15-20. He did not leave the truck until after he heard a loud argument. Rec. on App. at 466, ll 13-16. He testified that his leaving the truck was not part of any plan or scheme.

The Court of Appeals has held, when a case is based only upon circumstantial

evidence, the evidence must be substantial. *State v. James*, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004). *See, also, Jackson v. Virginia,* 443 U.S. 307 (1979). The reason for such a rule is simple. A purely circumstantial evidence case is the only case ever tried in our criminal justice system in which every witness can tell the truth and an innocent man be convicted. While cross -examination may be effective in some cases to prove that a witness is not being truthful, cross-examination is seldom able to discredit the witness in a purely circumstantial evidence case because the witness is being truthful. Under the facts of this case there is simply no substantial evidence that Mr. Larmand with Mr. Lemire planned any attack on Mr. Lochbaum. The facts are simply not sufficient to convict Mr. Larmand of the crimes for which he was convicted.

may be proven by circumstantial evidence the evidence still must be substantial and be more that speculation.

The State has argued that the Court of Appeals has ruled "that the State's case failed because there was no testimonial evidence of an express agreement between Respondent and Co–Defendant to attack and injure the victim." Pet. For Cert. at 21. What the Court of Appeals has ruled is simply a correct statement of the law that the state is required to produce direct evidence or substantial circumstantial evidence of a premeditated agreement by Mr. Larmand and Mr. Lemire to assault Mr. Lochbaum.

"Substantial circumstantial evidence" is more than one of two possible conclusions from the evidence. The phrase certainly means more than a 50/50 chance. If the phrase is to have any meaning, it must mean that the state is required to produce evidence that makes guilt substantially more likely than not from the circumstantial evidence presented. Such

a rule is rational and logical. A pure circumstantial evidence case is the only case tried in our criminal justice system in which every witness can tell the truth and an innocent person be convicted.

CONCLUSION

In this case the state failed to produce substantial circumstantial evidence Mr. Larmand had any premeditate agreement with Mr. Lermire to go to the residence of Ryan Lochbaum and commit the crime of lynching. Without proof of a premeditated agreement, no proof of the crime exist, this Court should deny the Petition for Writ of Certiorari.

June 28, 2013

C. RAUCH WISE
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S. C. Bar № 06188
rauch@simplepc.net
Attorney for Francis Larmand

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
In the Court of Common Pleas

Honorable William H. Seals, Jr.., Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals

Appellate Case No. 2013-001143

The State ..... Petitioner,

vs

Francis Larmand ..... Respondent.

CERTIFICATE OF SERVICE

I hereby Certify that I am the attorney for the Respondent in the above entitled case. That on June 29, 2013, I did deposit in the United States Mail with proper postage affixed thereto, a copy of the Return to Petition for Writ of Certiorari in the above case addressed to Salley W. Elliott, P.O. Box 11549, Columbia, South Carolina, 29211.

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 006188

Attorney for Respondent