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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT

V.

ANTHONY SANDERS,

APPELLANT

APPELLATE CASE NO. 2023-001544

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by denying Appellant's motion for a directed verdict when the state failed to present any direct or substantial circumstantial evidence Appellant shot the decedents, rather the evidence merely raised a suspicion Appellant was involved in the murders?

STATEMENT OF THE CASE

On August 30, 2007, the Dorchester County grand jury indicted Appellant for three counts of murder. App. 795-800. The state sought the death penalty against Appellant. On November 21, 2009, the Honorable R. Markley Dennis, Jr. presided over pretrial hearings. App. 1. On January 21, 2010, the parties again appeared before Judge Dennis for a status conference. App. 209. The state was represented by Russell Hilton and Blair Jennings. Appellant was represented by Mark Leiendecker, Mitchell Farley, S. Boyd Young, and Laura Wood Young. App. 209. The purpose of the status conference was to place on the record a "Contractual Consent Order to Waive Rights to a Jury Trial." App. 209, ll. 14-20. On March 8, 2010, Appellant proceeded to a bench trial before Judge Dennis. App. 239. Judge Dennis found Appellant guilty of all three counts of murder. App. 507, ll. 16-20. Thereafter, Judge Dennis sentenced Appellant to life without parole. App. 516, ll. 6-8.

Appellant attempted to file a *pro se* notice of appeal on March 24, 2010. App. 518-519. On April 22, 2010, the Court of Appeals dismissed the notice of appeal due to Appellant's failure to provide the Court with a proof of service showing the notice of appeal was timely served on opposing counsel. App. 520. Following subsequent communication between the Court and Appellant, the Court of Appeals finally dismissed the notice of appeal on July 14, 2010. App. 521-525. On August 25, 2010, the Court of Appeals issued remittitur. App. 526.

Appellant filed an application for post-conviction relief (PCR) on January 6, 2011. App. 527-532. On May 4, 2011, the state filed a return to this application. App. 533-537. Subsequently, on May 17, 2012, the state filed a motion to dismiss Appellant's application. App. 538-540. On May 22, 2012, the matter proceeded to a hearing before the Honorable DeAndrea G. Benjamin. App. 541. David Spencer represented the state and Jessica Cassick represented

Appellant. App. 541. On August 20, 2012, Judge Benjamin dismissed Appellant's application. App. 554-557. On August 28, 2012, Appellant filed a motion for reconsideration. App. 558-559. The state filed a return to Appellant's motion for reconsideration dated August 30, 2012. App. 560-562. Judge Benjamin ultimately denied the motion. App. 563-564.

Appellant filed a timely notice of appeal with this Court. App. 565-566. On July 5, 2013, Appellant filed a petition for writ of certiorari. App. 567-585. On November 18, 2013, the state filed its return. App. 586-595. By order dated September 11, 2014, this Court granted the petition and ordered further briefing. App. 596. By opinion published June 17, 2015, this Court held the PCR court erred in dismissing Appellant's application without an evidentiary hearing to determine whether Appellant received effective assistance of counsel in being advised to enter into the agreement to waive his right to a jury trial and his right to any appellate, post-conviction, or habeas corpus review. Thus, this Court reversed and remanded the case for an evidentiary hearing on this narrow issue. App. 637-642; Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015). The remittitur was issued on July 6, 2015. App. 643.

On July 9, 2018, an evidentiary hearing was held before the Honorable Robin B. Stilwell. App. 644. Christian Saville represented the state and Leslie Sarji represented Appellant. App. 644. By order filed October 17, 2018, Judge Stilwell found Appellant received ineffective assistance of counsel in being advised to enter into the agreement waiving his right to a jury trial and his right to appellate, post-conviction, and habeas review. Accordingly, Judge Stilwell ruled the agreement was "invalid." He ordered a hearing be held on the merits of Appellant's application for post-conviction relief. App. 684-689.

On July 18, 2019, Appellant filed an amended application for post-conviction relief. App. 690-691. An evidentiary hearing was held on May 17, 2021 before the Honorable Kristi F.

Curtis. App. 692. Benjamin Limbaugh represented the state and Leslie Sarji represented Appellant. App. 692. By order filed September 7, 2023, Judge Curtis granted Appellant a belated direct appeal, but denied relief on Appellant's remaining allegations. App. 772-794.

This brief of appellant pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) follows.

STANDARD OF REVIEW

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *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." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)).

"A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). "When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight." State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

ARGUMENT

The trial judge erred by denying Appellant's motion for a directed verdict when the state failed to present any direct or substantial circumstantial evidence Appellant shot the decedents, rather the evidence merely raised a suspicion Appellant was involved in the murders.

Relevant Facts

The solicitor's closing argument demonstrates the weak case against Appellant. As the solicitor explained, the case was "truly the quintessential who-done-it." The killings occurred "in the middle of the night with no eyewitnesses." The state's case was purely circumstantial. App. 486, ll. 15-23.

On July 10, 2007, patrol deputies with the Dorchester County Sheriff's Office responded to the Archdale Forest Apartments in reference to gunshots being heard in the apartment complex. While patrolling the area, officers noticed an apartment door partially opened. Upon approaching the door, the officers saw two bodies on the floor inside. App. 260, l. 3 – 261, l. 25. The decedents were later identified as twenty year old Jatavius Devore and his mother Diane Grant. While processing the apartment, investigators obtained gel lifts of footwear impressions left on the floor in dirt. App. 271, l. 8 – 272, l. 1. They also found and collected two shell casings. Both shell casings were .40 caliber Smith and Wesson. One was manufactured by Federal and the other by RP. App. 274, l. 22 – 276, l. 23.

Later that morning, investigators found a third body behind a different apartment in the same complex. It was the body of a female who was nude from the waist down. A pair of pajama bottoms and underwear were found on top of an electrical box near the body. The female was later identified as fifteen year old Deanna Devore, the sister and daughter of the two decedents found in the apartment. Investigators found and collected four shell casings, which were also .40 caliber Smith and Wesson ammunition manufactured by Federal, near Deanna's body. App. 281, l. 20 – 286, l. 23.

During the execution of a search warrant, investigators recovered several pairs of Nike Air Force One sneakers from Appellant's bedroom, which he shared with his twin brother, and three .40 caliber Smith and Wesson bullet manufactured by Federal and one .40 caliber Smith and Wesson bullet manufactured by RP. Investigators also seized a safe from the bedroom. App. 291, l. 7 – 300, l. 6.

Using the Integrated Ballistics Identification System (IBIS), investigators determined the markings on the shell casings recovered from the apartment matched markings on shell casings from two other shootings, one at the Anchor Bar and Grill that occurred on March 4, 2007 and another that occurred at the Hunter Ridge Apartments on March 20, 2007. App. 289, l. 24 – 290, l. 11. Xavier Walker was a suspect, and had been charged, in the shooting at the Hunter Ridge Apartments. Investigators interviewed Walker, who, "after some negotiations," told them that Appellant was the shooter at the Hunter Ridge Apartments despite the fact that several eyewitnesses had identified Walker as the shooter. In light of Walker's cooperation, the charges against him were dismissed. App. 334, l. 20 – 336, l. 22.

A bouncer at the Anchor Bar and Grill, Reginald Chavers, identified Appellant as one of two shooters that night. He explained that on March 4, 2007, Appellant was removed from the bar. Chavers then observed Appellant walk across the street and enter a truck. The front and back passenger windows then rolled down. Appellant, sitting in the back, fired a single shot from a semiautomatic handgun. Another individual, sitting in the front, fired multiple shots using a Tec-9 submachine gun. App. 407, l. 21 – 418, l. 25.

The State Law Enforcement Division (SLED) concluded that the gel lifts of the footwear impressions from the apartment were consistent with the Nike Air Force One sneakers recovered from Appellant's room. The footwear analyst merely determined the gel lifts were consistent with *all* Nike Air Force One sneakers of that type and size. The analyst was unable to determine if Appellant's shoes made the impressions. App. 358, l. 4 – 359, l. 25; App. 366, ll. 13-16.

A partial DNA profile developed from oral swabs from Deanna Devore "matched" Appellant's DNA profile. App. 373, ll. 14-25. However, the "probability of randomly selecting an unrelated individual having a DNA profile matching the semen on this item [was] approximately one in two hundred sixty." In other words, one out of every two hundred and sixty people, who were unrelated to Appellant, would have DNA matching the profile developed from the oral swab. App. 374, ll. 1-8. SLED also developed a DNA profile that was a mixture of two individuals from Deanna's pajama pants. The major contributor was an unidentified male individual. App. 379, l. 24 – 380, l. 16.

Law enforcement obtained the phone records for Xavier Walker and Appellant. Walker's phone was turned off from 10:30 pm on the night before the shooting until 8:46 am the morning after the shooting. Appellant's phone records showed multiple calls during the early morning hours of July 10, 2007, the day of the deaths. Appellant's phone received a call at 2:06 am and then someone using the phone placed a call at 2:24 am. An officer testified that the first 911 call regarding the shooting began at 2:24 am. The call placed at 2:24 am was to Madea Thompson, Appellant's girlfriend, who lived in the Archdale Forest Apartments. App. 462, l. 1 – 465, l. 11.

An investigator testified that the closest cell tower to the Archdale Forest Apartments where the shooting occurred was tower 6040. He further testified that when Appellant's phone made calls from 1:38 am until 2:26 am, the phone was pinging off tower 6040. Thereafter, the phone pinged off towers 6139 and 6024. Over objection, the officer testified the changing of the towers would indicate the phone was heading southeast in the general direction of Appellant's mother's apartment. Importantly, investigators found no phone numbers connected to the decedents on Appellant's or Walker's phone records. The records indicated Walker's phone was using cell tower 6040 prior to it being turned off at 8:46 pm. App. 469, l. 2 – 472, l. 25. The state presented no evidence connecting Appellant to the decedents.

In closing argument, the solicitor argued that Appellant shot and killed the decedents during the eighteen minute gap on his phone when no calls were placed or received. The solicitor argued "it cannot be explained away as a coincidence that his phone – there's no activity while all these actions are going on." App. 488, l. 4 – 489, l. 10. The solicitor argued the "most condemning piece of evidence" was the safe recovered from Appellant's room. The safe contained photographs, correspondence, an arrest warrant, and a newspaper article about the deaths. The solicitor argued the newspaper article was kept as a trophy or a memento of "what he did." App. 490, l. 23 – 491, l. 11.

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict when the state failed to present any direct or substantial circumstantial evidence Appellant shot the decedents. Rather the evidence merely raised a suspicion Appellant was involved in the murders.

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 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). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and … all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The only evidence against Appellant was that his phone made calls using a tower near the apartment complex close in time to the murders, a bouncer identified him as shooting a weapon at a bar months before the deaths, the markings on the shell casings from that unrelated shooting matched the markings on the shell casings from the shooting in this case, Appellant had a girlfriend who lived in the apartment complex, Appellant kept a newspaper article describing the deaths, Appellant had access to a .40 caliber weapon and ammunition, the DNA profile developed from the oral swab of one of the deceased "matched" Appellant to the same extent that it would also match one out of two-hundred and sixty people randomly selected, and Appellant's ownership of Nike Air Force One sneakers that were consistent in type and size with shoe impressions left at the apartment. The state presented no evidence of any relationship

between Appellant and the decedents and no motive for their deaths. The state's case was purely circumstantial and failed to amount to substantial circumstantial evidence of Appellant's guilt.

Respectfully, this Court should direct a verdict of acquittal for all three counts of murder.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal on all three counts of murder.

Respectfully submitted,

s/ Lara M. Caudy______________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this 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."

s/ Lara M. Caudy____________
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This 8th day of March, 2024.