STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2013-000438

THE STATE,

Respondent,

v.

MELVIN HAYNES,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly determined the State's reasons for striking each juror were race neutral.

II. The Protection of Persons and Property Act did not afford Appellant immunity from prosecution for firing a shotgun at people who were not threatening him with any level of force.

III. The circuit court properly refused to charge the law of accident and/or mistake of fact when there was absolutely no evidence Appellant accidently or mistakenly fired a shotgun blast directly at the driver's side of a truck already moving away from Appellant, striking the truck's back window and the headrest of the driver's seat. (Appellant's Issues III and IV).

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On September 3, 2009, the Dorchester County Grand Jury indicted Appellant Melvin Haynes on one count of assault and battery with intent to kill ("ABWIK"), arising from an incident on June 28, 2009, during which Appellant shot John Davis ("Davis"), who was in the process of repossessing Appellant's truck, with a shotgun. The case was called for trial on December 6, 2011, before the Honorable Edgar W. Dickson, Circuit Court Judge.

After the jury was selected, Appellant noted the jury pool was "overwhelmingly" white, and challenged the State's strikes of three black jurors as racially motivated. The State gave specific reasons for each of its five strikes. A black female and a white male were struck because they lived in the same small town as Appellant, and where the incident occurred. One white male and one black male were struck because they had criminal domestic violence arrests on their records, and the incident at issue involved violence. (Trial Transcript [TT], pp. 41-42; Record on Appeal [R.], pp. _____),

The State's remaining strike was a black female, who worked in a home for senior citizens and took care of elderly people. The solicitor explained he struck her because Appellant was an elderly man who was disabled, there would be testimony regarding medications and she would know about those medicines, and he believed she would be more sympathetic to Appellant as a result. (TT, pp. 42-43; R., pp. ____).

Appellant contended the State's reason for striking the last black female juror was not race neutral because the State did not strike a white cardiac nurse, who would also know about medical issues, medicines and old people. The State responded that unlike the black female juror, the cardiac nurse did not work exclusively with the elderly. The

circuit court found the State's reasons were race neutral and plausible. (TT, pp. 43-46; R., pp. _____).

Appellant also moved for immunity from prosecution under the Protection of Persons and Property Act on the ground he was defending himself when he fired the shotgun. The State responded Appellant was never threatened, he was not protecting himself or his home when he fired at the truck that was driving away, and he had no right to use violence to protect personal property. The circuit court found the statutory immunity provision did not apply. (TT, pp. 60-62; R., pp. _____).

Paul Lee, a branch manager for Carolina Car Credit, testified his company held a car loan on Appellant's truck. Appellant's loan became several months delinquent, and Lee discovered the insurance on the truck had been terminated. (State's Exhibit 6; R., p. ____). There were also concerns about where Appellant actually resided, because payments he did send had a Texas return address on the envelopes, but they were postmarked in Ravenel, South Carolina. (State's Exhibit 7; R., pp. _____). Lee contacted Appellant several times to discuss the delinquent payments, and asked him to provide proof of insurance on the truck. Appellant told Lee he lived in Texas, and said he would send proof of insurance. Appellant never completely cured the delinquency or provided proof of insurance on the truck. (TT, pp. 98-108; R., pp. _____).

On or about April 22, 2009, Carolina Car Credit sent Appellant a letter advising him the account was in default, giving him until May 20, 2009, to cure the default or the truck could be repossessed, and stating no further notice would be sent if the default continued. The letter was sent via both United States regular mail and certified mail. The certified letter was returned as unclaimed, but the letter sent via regular mail was not returned. (TT, pp. 108-112, 129-135, State's Exhibit 5; R., pp. _____).

After the letter went out, Lee had several conversations with Appellant regarding the loan. No payments were received in May, 2009. Two payments were received in June, 2009, but the loan was still several payments in arrears, and Appellant had not provided proof of insurance. After the multiple attempts to rectify the problems with Appellant's loan were unsuccessful, Lee contracted with Davis to repossess Appellant's truck. (TT, pp. 112-116; R., pp. _____).

Davis testified that on June 28, 2009, he and his brother, Robert Davis ("Robert"), saw the truck parked at an address in Dorchester County. Davis backed his tow truck, which had "Recovery" on the back window, up to the back of the truck, and Robert got out to verify the boom was properly aligned with it. Davis then heard a banging noise he thought might be from the tow truck hitting Appellant's truck, but Robert ran back up to the tow truck cab, shouting "he's shooting." Davis looked in his mirror and saw a naked man, later identified as Appellant, standing in the doorway of the house holding a shotgun. (TT, pp. 142-149, State's Exhibit 12 [Photograph]; R., pp. ____).[1]

When Davis started driving down the driveway, Appellant pointed the gun at the truck and fired. When he got down the road from Appellant's house, Davis realized his truck's back window was shot out, and there was blood inside the cab. The truck was shot on the driver's side, and Davis was hit in the face, head, nose, ear and back. Davis stopped the truck and called the police to report he had been shot. (TT, pp. 149-155, State's Exhibit's 12-19 [Photographs], Defendant's Exhibit 4 [Photograph] ; R., pp. ____).

[1]State's Exhibits 12-26 and Defendant's Exhibits 4-9 are photographs, and will be transported to the Court.

Robert testified he was outside the tow truck checking the VIN number on Appellant's truck when he saw Appellant come out the back door with a gun. He stated Appellant pointed the gun at him and pulled the trigger, but it just clicked. Robert started running back to the cab of the tow truck and Appellant shot again, hitting Robert in the arm and face. He and Davis yelled they would "drop the truck," but Appellant loaded the shotgun again and shot Davis. (TT, pp. 182-188, State's Exhibits 21-22 [Photographs]; R., pp. _____).

Appellant testified that on June 28, 2009, he was asleep when he heard a noise outside. He looked out the back door and saw a truck in the yard hooking up his truck. He "had never seen these guys before." (TT, pp. 282-283; R., pp. _____).

Appellant grabbed a twelve gauge shotgun from beside his door, and went outside. He testified the truck windows were tinted and he could not see inside it. He "was hollering stop," but the truck "started to pull off and he "shot at the truck." He then went back inside the house and called his brother. Several hours later, Appellant and his brother went to the police department to report the truck was stolen. (TT, pp. 288-290; R., pp. _____).

Appellant stated he never received any notification about his truck being repossessed. He admitted talking to Lee about the delinquent payments, and stated he sent in two payments so he "thought everything was clear." (TT, pp. 294-297; R., pp. ____).

On cross-examination, Appellant admitted he "know [sic] somebody was in the truck," and the truck was "driving off" when he "shot at the truck." He further admitted he did not call the police to report his truck had been stolen, but waited until his brother

got to the house several hours later and drove him to the police department. (TT, pp. 322-335; R., pp. _____).

Appellant requested jury charges on accident, self-defense and mistake of fact. The circuit court denied the requests, stating the evidence did not support any of those charges. The court did charge the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). (TT, pp. 347-349, 389; R., pp. _____).

The jury convicted Appellant of ABWIK, and the circuit court sentenced him to a prison term of twenty years, which was subsequently reduced to fifteen years. (TT, pp. 399, 406; R., pp. _____). This appeal followed.

ARGUMENT

I. The circuit court properly determined the State's reasons for striking each juror were race neutral.

Appellant contends the circuit court erred in denying his challenge under Batson v. Kentucky, 476 U.S. 79 (1986), to the State's jury strikes as improperly based on race. Specifically, he asserts he established the State's proffered racially neutral reason for striking the black juror who worked in a home for seniors was pretextual because the State did not strike the white juror who was a cardiac nurse, and the selected jury only had one black juror. While Appellant correctly recites the case law regarding Batson issues, his application of those principles to this case is conclusory at best.

When a party challenges the opposing party's peremptory jury strikes as improper under Batson and its progeny, the circuit court must adhere to the three step procedure established in Purkett v. Elem, 514 U.S. 765 (1995), and adopted in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). State v. Cochran, 369 S.C. 308, 631 S.E.2d 294, 297-98 (2006). If the circuit court follows that procedure, when reviewing the granting or denial of the Batson motion, the appellate courts give deference to the circuit court's findings, and apply a clearly erroneous standard of review. *Id.* at 297; *see also* State v. Scott, 406 S.C. 108, 749 S.E.2d 160, 163 (Ct. App, 2013) (same); State v. Rogers, 405 S.C. 520, 748 S.E.2d 247, 250 (Ct. App. 2013) (same). In this case, it is undisputed the circuit court followed the proper procedure in addressing Appellant's Batson challenge, and therefore, this Court must use the clearly erroneous standard of review.

Under the three part procedure mandated by Purkett and Adams, the opponent of a peremptory strike must make out a prima facie case of discrimination on an improper basis, i.e., race or gender. The burden then shifts to the proponent of the strike to present

a non-discriminatory neutral explanation, which need not be specific, persuasive, or even plausible. Cochran, 631 S.E.2d at 298; Scott, 749 S.E.2d at 163-164; Rogers, 748 S.E.2d at 250-251. Whether a proffered reason is facially neutral must be determined by examining the totality of the facts and circumstances in the record, including the credibility and demeanor of the proponent of the strike. State v. McCray, 332 S.C. 536, 506 S.E.2d 301, 303 (1998).

If such an explanation is presented, the opponent of the strike must show the proffered reason, though facially neutral, was mere pretext to engage in purposeful discrimination, which may be established by showing another juror was seated who shared nearly every quality with the struck juror other than the discriminatory factor. Cochran, 631 S.E.2d at 298; Scott, 749 S.E.2d at 163-164; Rogers, 748 S.E.2d at 250-251. The court may also consider the jury panel composition when determining whether a party engaged in purposeful discrimination. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, 813 (2001).

Appellant argues the composition of the jury panel - eleven white jurors and one black juror - indicates "the State may have engaged in purposeful racial discrimination." (Brief of Appellant, p. 11). As a threshold matter, there is no evidence, or even an allegation, the State in any way controlled the number of potential black jurors in the jury pool, or the order in which the jurors were called. Therefore, in the absence of evidence indicating deliberate discrimination, the State should not be penalized in its exercise of peremptory strikes simply because the final jury panel only included one black juror.

Further, Appellant's argument ignores what happened prior to and after the jury strike at issue. The State struck a white male juror prior to striking the senior home employee, and thereafter struck a black male, a white female, and a black female

(alternate). (Random Strike Sheet, R. pp. ___). Appellant does not challenge the legitimacy of the State's strikes as to the other two black jurors, one before and one after the challenged strike. Given the fact Appellant concedes the other strikes were appropriate, he cannot argue a pattern of discrimination.

Appellant also argues he carried his burden of showing pretext in striking the senior home employee because the State seated the cardiac nurse. This argument ignores significant differences between the two jurors.

While compared jurors do not have to be "identical" in order to show pretext, they must at least be "similarly situated." Employment distinctions may be sufficient to show the stated reason for striking a particular juror was not pretextual. *See* Cochran, 631 S.E.2d at 300 (employment status is a neutral reason for using a peremptory strike); Scott, 749 S.E.2d at 164 (there were sufficient distinctions between a teacher and a warehouse manager to defeat a Batson challenge, because even though a teaching position involves some supervisory and management skills, it is not a management or supervisory position in itself); Rogers, 748 S.E.2d at 251 (fact that defense counsel's strike was based on a stereotype of teaching profession was insufficient to establish the reason was pretexual) (*citing* Cochran).

Appellant acknowledges the State provided a race neutral explanation for striking the black female juror at issue: she worked at a home for seniors, took care of the elderly, would be more sympathetic to an elderly defendant, and had medical knowledge in a case involving some medical testimony. (Brief of Appellant, p. 11). He asserts the State then "negated [its] racially neutral reason for striking [the seniors home employee]" by seating the white female cardiac nurse, "who also worked with elderly patients and had medical knowledge." The fundamental flaw in Appellant's assertion is the lack of any evidence

regarding the extent of the cardiac nurse's work with elderly patients, as opposed to the black juror's employment in a home for seniors, specifically working and caring for elderly patients.

In fact, the transcript citations Appellant uses as support for his assertion of pretest are nothing more than defense counsel's conclusory statements regarding his belief that "if anybody knows anything about medical issues and medicines and old people, it's nurses, cardiac nurses," they "don't have a lot of twenty-two year olds, but they do have a lot of sixty-five year olds, and they "primarily deal with older people." As the solicitor stated in response, there is a significant difference between someone who specifically works at a home for the elderly, and a cardiac nurse who may not work directly with elderly people.[2] (TT, pp. 43-46; R., pp. _____).

While employment as a cardiac nurse may involve the care of elderly people, unlike employment in a home for seniors, the position itself is not directly, much less solely, related to the care of elderly people. Clearly, a person in a position related solely to the care of elderly people is more likely to be sympathetic toward an elderly defendant, particularly one with purported medical disabilities. As in Scott, this is a sufficient employment distinction between the two jurors, to constitute a legitimate and completely neutral basis for the State's peremptory strike.

There is ample support in the record for the circuit court's denial of Appellant's Batson motion. Appellant failed to establish pretext and purposeful discrimination in the face of the State's facially neutral explanation for its strike of the seniors' home

[2]The solicitor indicated the cardiac nurse was currently in graduate school. Therefore, she might not have been even working with cardiac patients at the time of this trial.

employee. Therefore, the circuit court's finding of no discriminatory purpose was not clearly erroneous, and that finding should be affirmed.

II. The Protection of Persons and Property Act did not afford Appellant immunity from prosecution for firing a shotgun at people who were not threatening him with any level of force.

Appellant contends the circuit court erred in denying his pre-trial request for immunity under the Protection of Persons and Property Act (the "Act"), S.C. Code §§16-11-410 through -450 (Supp. 2013). Specifically, he argues he was entitled to immunity under §16-11-440(A)(2) because he had reason to believe Davis was stealing his truck when he shot at Davis' truck, and therefore, he was justified in using deadly force in the face of an "unlawful and forcible act." Simply stated, this contention is just plain wrong.

Under certain circumstances, §16-11-440(A) of the Act provides a presumption of "a reasonable fear of imminent peril of death, or great bodily injury to [the person] or another person when using deadly force" likely to cause death or great bodily injury to another person. (Emphasis added). "A person who uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force." S.C. Code §16-11-450 (Supp. 2013).

The immunity from prosecution afforded under §16-11-450 applies "*if* a person is found to be justified in using deadly force." State v. Curry, 406 S.C. 364, 752 S.E.2d 263, 266 (2013) (emphasis in original).

> Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all the elements of self-defense, save the duty to retreat.

Id. (emphasis added). The well-established elements of self-defense are: 1) the defendant was at no fault in bringing on the difficulty; 2) an actual belief the defendant was in "imminent danger of losing his life or sustaining serious bodily injury, or he actually was

in such imminent danger;" 3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or the circumstances warranted a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his life; and 4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury. *Id.* at n. 4 (*citing* State v. Davis, 282 S.C. 45, 317 S.E.2d 452 [1984]). Only the fourth element, the duty to retreat, is excused under the Act. *Id.* The immunity afforded by the Act is "predicated on an accused demonstrating the elements of self-defense by a preponderance of the evidence." *Id.* at 267.

There is no evidence Davis or Robert threatened Appellant in any way, and Appellant admitted the tow truck was "pulling out" of his yard when he fired the shotgun at it. Appellant testified the men did not attempt to break into his house, and they were not "coming" at him. According to his own testimony, the only thing he believed was happening was someone stealing his truck. (TT, pp. 322-328; R., pp. _____).

Even if Appellant believed someone was stealing his truck, which is certainly disputed in this case, nothing in the Act, or self-defense case law, allows the use of deadly force to prevent the theft of personal property absent a threat of death or serious bodily injury during that theft. Therefore, as a matter of law, Appellant could not establish the second element of self-defense - a reasonable belief of, or actual, imminent death or serious bodily injury, and he was not entitled to immunity from prosecution under the Act. Accordingly, the circuit court properly denied Appellant's motion for immunity under the Act, and the ruling should be affirmed.

III. The circuit court properly refused to charge the law of accident and/or mistake of fact when there was absolutely no evidence Appellant accidently or mistakenly fired a shotgun blast directly at the driver's side of a truck already moving away from Appellant, striking the truck's back window and the headrest of the driver's seat (Appellant's Issues III and IV).

Appellant contends the circuit court erred in denying his requests for jury charges on accident and mistake of fact.[3] The sole basis for his argument is his testimony he only meant to shoot at the truck, and could not see if anyone was inside because the windows were heavily tinted. Appellant's own testimony, and the physical evidence, belie his assertion.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41, 50 (Ct. App. 2007). In reviewing jury charges for error, the appellate court must consider the jury charge as a whole in light of the evidence and issues presented at trial, and reverse only for abuse of discretion. Mattison, 697 S.E.2d at 583-584; *see also* State v. Brandt, 393 S.C. 526, 713 S.E.2d 591, 603 (2011).

The defense of accident applies when (1) the harm was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of the weapon. State v. Williams, 400 S.C. 308, 733 S.E.2d 605, 610 (Ct. App. 2012). "If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine." *Id.* (*citing* State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 [1999]) (emphasis added).

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[3]Appellant's written requests for charges were not entered in the circuit court record. Therefore, it cannot be determined whether the requested charges were substantively correct, but for purposes of argument, the State assumes they were correct.

A mistake of fact may negate the mental element of an offense and preclude conviction. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63, 77 (1998). To apply in a general intent crime, the mistake of fact must be reasonable, and not due to the defendant's negligence or carelessness. *Id.* The trial court is not required to give an instruction on mistake of fact absent some evidence there was a reasonable basis for the purported mistake. *Id.*

Appellant's testimony established the following: 1) when he looked outside after hearing a noise, he saw a truck hooking up to his truck in the yard; 2) nobody was outside the truck; 3) he had never seen "these guys" before; 4) the truck started to pull off; 5) he could not see anybody outside the truck; 6) he loaded his shotgun, then aimed and shot at the truck as it was pulling off; and 7) he was very familiar with the shotgun he used, and had shot it many times. (TT, pp. 282-289, 317-325, 327-328; R., pp. _____). Including Appellant's testimony, the evidence presented at trial established the truck was already moving forward and away from Appellant when he aimed and fired the shotgun shot right at the back of the driver's head. (State's Exhibits 12, 13, 14, 15, 16, 20,and Defendant's Exhibit 4 (Photographs).

Based on the undisputed evidence, Appellant was not entitled to jury charges on either accident or mistake of fact. As to accident, Appellant intended to stop whoever was driving the tow truck from taking his truck, he was not entitled to act in self-defense because he was never in danger of death or serious bodily injury, and he exercised no due care when firing a shotgun at the driver of a moving truck. Rather, he **deliberately** loaded a shotgun he had shot many times, **aimed** it at a truck moving away from him, and fired it directly **at** the driver's head. There was absolutely nothing accidental about it.

Similarly, the evidence did not support a jury charge on mistake of fact. Appellant's purported belief there was no one in the truck is contrary to the undisputed evidence, particularly Appellant's own testimony that he did not see anyone outside the truck, and the truck was moving forward when he aimed the shotgun at it and fired. At a minimum, Appellant was negligent and/or careless when he shot at the driver's side of a moving truck. Consequently, there was no evidence of a reasonable basis for a mistake of fact, and a jury charge on mistake of fact was not warranted.

In the absence of any evidence indicating Appellant's actions were either accidental or based on a reasonable mistake of fact, jury charges on those defenses were not warranted or appropriate. The circuit court properly denied Appellant's requests for the charges, and the ruling should be affirmed.

CONCLUSION

The record supports the circuit court's rulings on Appellant's Batson motion, his motion for immunity under the Act, and his requests for jury charges on accident and mistake of fact. Accordingly, Appellant's conviction should be affirmed.

Respectfully submitted,

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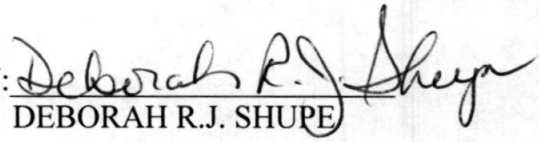
BY: 
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ATTORNEYS FOR RESPONDENT

April 4, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2013-000438

THE STATE,

Respondent,

v.

MELVIN HAYNES,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal:

1. Trial Transcript, pp. 1, 41-46, 60-63, 98-219, 222-234,274-290,294-297,303-329,335,345-349,389, 399-401, 406-407
2. Random Strike Sheet dated 12/6/2011
3. State's Exhibits 5, 6, 7, 12-26 (Photographs)
4. Defendant's Exhibits 4-9 (Photographs)

To facilitate preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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April 4, 2014

STATE OF SOUTH CAROLINA
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Appeal From Dorchester County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2013-000438

THE STATE,

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v.

MELVIN HAYNES,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani
Assistant Appellate Defender
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I further certify all parties required by Rule to be served have been served.

This 4th day of April, 2014.

Sally B. Ellison

SALLY B. ELLISON
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April 4, 2014

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Re: The State v. Melvin Haynes
Appellate Case No. 2013-000438

Dear Counsel:

Enclosed are two copies of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 1 copy enclosed)
Victim Services (with enclosure)

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