THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RALPH B. HAYES,

APPELLANT

RECEIVED
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SC Court of Appeals

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

Opinion No. 2014-UP-385

Appellate Case No. 2012-213261

PETITION FOR REHEARING

On November 5, 2014, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Hayes, 2014-UP-385 (filed Nov. 5, 2014). Pursuant to Rule 221(a), SCACR, Appellant asks this Court to rehear this matter in light of the significant points overlooked and/or misapprehended by this Court in rendering its opinion, which will be explained more fully below.

Appellant asked this Court to direct a verdict of acquittal in his favor due to the lack of any direct or substantial circumstantial evidence against him. In rendering its opinion, this Court cited State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36 (Ct. App. 2003) for the proposition

that "[f]light from prosecution is admissible as evidence of guilt." Further, this Court cited State v. Caulder, 287 S.C. 507, 516, 339 S.E.2d 876, 882 (Ct. App. 1986) for the proposition that an "incriminating response" means "any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial." Thus, it appears this Court determined the state met its burden of presenting any direct or substantial circumstantial evidence of guilt by presenting evidence of flight and of an alleged "incriminating response" by Appellant. However, a review of the record reveals the state's evidence against Appellant failed to demonstrate anything other than a mere suspicion.

In fact, the prosecutor's opening statement demonstrated the paucity of evidence against Appellant. Acknowledging that a jury would want evidence, such as "the defendant in possession of the murder weapon, the defendant confessing to law enforcement, her DNA on him; things of this nature," in order to convict, the prosecutor candidly admitted she had none. Rather, the evidence she would offer would be "some fingerprint evidence important for where things were found," "a little bit of DNA evidence only relating to [the deceased]," and a conversation between Appellant and a homeless man. R. 2, lines 6 – R. 4, line 4.

This Court's opinion, and the state's case, appears to rely solely upon the testimony of a homeless man whose credibility was attacked through his prior inconsistent statements. In June 2009, Larry White was living on the streets in Greenville. He chose to be homeless because he "like[d] to explore and go from state-to-state, seeing how other states [are] and then compare it to [his] state." R. 24, lines 10 – 18. White claimed that he talked to Appellant on a particularly hot day in June as he sat on a shaded bench behind Able Body, a labor hall. He recalled it was a Sunday because Able Body was closed. He could not remember the date, but agreed with the

prosecutor who suggested it was June 9, 2009.[1] R. 24, lines 22 – 24. R. 25, lines 2-22. R. 27, lines 7 – 12. He saw a young man, whom he identified as Appellant, drinking a beer and crying. When White asked what was wrong, the man allegedly responded "I done fucked up bad, real bad." R. 25, line 24 – R. 26, line 3. White claimed Appellant said, "It's going to fuck my sister up when I tell her what I done." Tr. 129, lines 15 – 17. In response to White's questioning, Appellant explained "I went in the house and found my girl dead, man. The dope boys cut my girl all up, pulled her panties down to her ankles and put her in the bathtub." R. 26, lines 18 – 20; R. 29, lines 12 – 14. Upon seeing the deceased, Appellant ran out the house. When White asked why he did not call the police, Appellant responded that the police would think he had committed the crime because it was his girlfriend. R. 26, lines 21 – 24; R. 28, lines 15 – 24.

Even on direct examination, White admitted that Appellant did not state that he had hurt the deceased or committed the crime. White related only that Appellant continued to cry during their conversation. R. 27, lines 1 – 12. The prosecutor continued to press White regarding what Appellant could have done that was so bad. R. 27, lines 13 – 14. White responded that Appellant "hesitated for a while," then looked at White, "did like this on the table," and said "but you ain't never killed nobody." R. 27, lines 15 – 18; R. 40, lines 12 – 16.

White further claimed that Appellant said he was going to Kentucky and had purchased a bus ticket for the trip. Although White was unable to see the location or the time on the ticket, he did observe a Greyhound bus ticket in Appellant's possession. R. 28, lines 2 – 5; R. 70, lines 10 – 12; R. 70, lines 16 – 22.[2]

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[1] June 9, 2009 was a Tuesday. R. 66, lines 7 – 13.

[2] An officer testified that in September 2010, he picked up Appellant from New York and returned him to Greenville, South Carolina. R. 5, line 5 – R. 6, line 16.

A couple of days later, White overheard other people discussing the murder of a young lady while at the labor hall. The people explained that she had been "cut up and stabbed real, real bad." R. 32, lines 17 – 22. Upon hearing that a woman had been stabbed, White thought of his alleged conversation with Appellant. R. 32, line 24 – R. 33, line 4. White was forced to admit that in addition to overhearing the conversation among other homeless individuals regarding the murder, he also saw police officers showing a photograph of an individual and asking for help to solve a crime. R. 40, line 17 – R. 41, line 10. White, however, denied ever seeing the photograph. R. 46, lines 1 – 4; R. 49, lines 1 – 7. Despite this assertion at trial, White was forced to admit that he told police he "did not really look at the picture at first" when the officers were displaying it. R. 50, lines 11 – 18; R. 56, lines 10 – 16. Additionally, White informed police that he told the employee of the labor hall that the man in the photograph shown by the police was the same man he had talked to a week earlier. R. 52, lines 10 – 15; R. 56, lines 17 – 24.

Sometime later in the month of June, White asked an employee of the labor hall to call the police. Although White was unable to recall when he actually spoke to the police or even when he decided to speak to the police, he agreed with the prosecutor that it was probably around June 18, 2009. White gave a formal statement at the conclusion of his two to four hour interview. R. 33, lines 4 – 9; R. 33, lines 12 – 23; R. 34, lines 18 – 20. White testified his formal statement provided a true and accurate account of his conversation with Appellant. R. 35, lines 9 – 22; R. 40, lines 5 – 10. White selected Appellant's photograph from a photographic lineup. R. 36, lines 5 – 8; R. 37, lines 10 – 21. Additionally, White identified Appellant in court. R. 38, lines 18 – 23. White claimed that he got involved in the case because he was "brought up in a church" and "brought up to do the right thing." R. 41, lines 21 – 22.

No physical evidence connected Appellant to the murder. Christopher Gray, a latent print examiner, testified that prints from the toilet in the bathroom where the deceased's body was found were identified as being made by Appellant. Specifically, Appellant's left palm print was recovered from the exterior top of the toilet lid in two areas and Appellant's right palm print was recovered from the exterior top of the bathtub. R. 132, line 13 – R. 134, line 2. On cross-examination, Gray clarified that the prints were found on toilet tank lid and none of the prints were in blood. R. 135, line 17 – R. 136, lines 10; R. 137, lines 1 – 3.

Jonathan Hamilton, a crime scene investigator, found a single droplet of blood at the entrance way on the floor and a single droplet of blood on the kitchen floor. R. 144, line 22 – R. 145, line 3.[3] Hamilton testified that the deceased's body was wedged between the toilet and the tub. R. 169, lines 11 – 18. Hamilton found suspected blood on the toilet lid which indicated to him that at one point the lid had been up. R. 170, lines 3 – 17. Adrienne Hefney, a SLED DNA analyst, tested the swabs that were collected from the single droplet of blood on the floor of the entryway and from the kitchen floor. R. 193, lines 12 – 17. The profiles developed from the swabs indicated female DNA. R. 194, lines 7 – 11. Jagannadha Kandala, a DNA analyst with the Greenville County Department of Public Safety tested three areas of the deceased's shirt. R. 202, line 16 – R. 204, line 13. Dr. Kandala developed partial profiles from the shirt samples. R. 205, lines 3 – 10. Dr. Kandala compared the partial profiles developed from the shirt samples with the profiles developed by SLED from the entrance way and the kitchen floor. Dr. Kandala opined that the DNA from the shirt samples matched the DNA from the blood spots found on the floor. R. 205, line 11 – R. 206, line 3.

[3] Christopher Miller, the lead investigator, testified that he did not even see the blood at the very bottom of the steps near the entryway when he entered. R. 215, lines 1-4.

At the close of the state's case, Appellant moved for a directed verdict of acquittal. R. 241, lines 6 – 8. Specifically, Appellant argued that the state had failed to present substantial circumstantial evidence reasonably tended to prove his guilt. Appellant argued that the evidence, at best, showed "mere suspicion." R. 242, lines 10 – 18. The state responded simply that "there [was] enough evidence - - from which the jury could rightfully convict" Appellant. R. 242, lines 21 – 25. The trial judge found there existed "sufficient evidence, taking it as a whole, direct and circumstantial, for the jury to make a decision on this." Thus, he denied Appellant's motion. R. 243, lines 1 – 6.

The prosecutor's closing argument reinforced the lack of evidence against Appellant. The prosecutor began by referring to the "tons of raw emotion" displayed by the deceased's family and the "horrific images" entered into evidence by the prosecution. R. 244, line 24 – R. 245, line 1. In referring to the evidence to indicate that Appellant was the actual perpetrator, the prosecutor noted that this was not a case where Appellant was found standing over the deceased's body with a bloody knife. Despite this lack of direct evidence, the prosecutor argued that evidence indicated Appellant was the perpetrator. R. 247, lines 3 – 11. The prosecutor argued that Murdaugh had seen the deceased on Sunday morning, June 7 at 10 a.m. and no one had seen her after that date. R. 247, lines 12 – 16. Thus, the last time she was seen alive was on June 7 and her body was found on June 13, meaning she died sometime between June 7 and June 10. The prosecutor then turned to the testimony of White. Allegedly, Appellant told White that his girlfriend was dead because she had been stabbed repeatedly by the dope man. Appellant allegedly said the deceased's mother had paid for her drug debts previously, but the deceased's mother blew this "out of the water" when she testified she had never paid off drug debts for the deceased. The prosecutor made the feeble argument that Appellant's alleged response to White's

question about what could he have done that was so bad, which was "you ain't never killed nobody," was an indication that Appellant had killed the deceased. R. 247, line 17 – R. 248, line 15; R. 249, lines 17 – 23. The prosecutor also relied upon the testimony of Wood, who claimed she saw Appellant at least twice around the time of the deceased death to place Appellant in the area. R. 249, line 24 – R. 250, line 18.

Concerning the physical evidence, the prosecutor referred to Appellant's palm print found on top of the toilet and on top of the tub and asked the jury why the prints would be there. R. 252, line 19 – R. 253, lines 6. The prosecutor, without any evidence to support her, argued that Appellant dropped blood belonging to the deceased at the bottom of the stairs and in the kitchen. R. 253, lines 7 – 14.

The prosecution concluded by noting the police had not been able "to come up with anybody that they can point the finger to, say, maybe this person did this." As a result, "[t]he only suspect was then, and is now, [Appellant]." R. 253, lines 14 – 24. The prosecutor was so desperate for a conviction in light of the lack of evidence against Appellant, she even showed the jury a photograph of the victim, which had not been admitted into evidence, during her closing argument. Again, the prosecutor was appealing to the emotions of the jury because she had no evidence against Appellant. R. 255, line 14 – R. 260, line 3.[4]

The jury expressed its confusion on being asked to determine Appellant's guilt based upon the paucity of evidence when it inquired whether Appellant was right-handed or left-handed and sought guidance regarding the level of murder with which Appellant was charged.

[4] Appellant objected and moved for a mistrial based upon the prosecutor's misconduct. The judge sustained Appellant's objection and issued a curative instruction to the jury. R. 260, lines 8-20.

R. 277, lines 4-9; R. 284 (jury note). The judge responded that the jury had all of the evidence and re-instructed the jury concerning the elements of murder. R. 278, line 2 – R. 280, line 17.

After the jury returned guilty verdicts, Appellant renewed her previous motions. R. 282, lines 9-10. The judge responded: "Well, I think the jury has spoken on this case. As I said before, I think there is – certainly was sufficient direct evidence and substantial circumstantial evidence for a jury to make this determination, rather than I. I believe the jury has spoken. I will deny your motion, respectfully." R. 282, lines 11-16.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.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 any 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. Our state supreme 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 Odems Court, the language of the traditional circumstantial evidence jury 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 one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the 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 prosecution presented no direct evidence against Appellant and very little circumstantial evidence. It must be acknowledged that Appellant's alleged statements to White, the homeless individual, could only be called circumstantial evidence. See State v. Rogers, 405 S.C. 554, 748 S.E.2d 256 (Ct. App. 2013)(explaining that the statement "it's done" was circumstantial evidence because it required an inference as to the meaning of "it" and "done"). No physical evidence connected Appellant to the crime. The prosecution established only that a connection existed between the deceased and Appellant, but established no connection between Appellant and the deceased's death. Appellant and the deceased had been in a romantic relationship for five years around the time of the deceased's death. The two lived together in the apartment where the deceased's body was found. Not surprisingly, Appellant's prints were found in the apartment where

he lived. Not surprisingly, the deceased's family did not see Appellant after the deceased's death because Appellant and the deceased had argued, broken up, and Appellant had left the deceased's death. Not surprisingly, Appellant was seen at the apartment where he lived at the usual time and place where his neighbor saw him. The only evidence the prosecution presented that showed Appellant even had knowledge of the deceased's death was the testimony of White. However, even White's testimony only established that Appellant knew about the murder and did not report it, not that he had any involvement in the death. Importantly, Appellant did not admit guilt to White or confess to participation of any sort. Very telling of the prosecutor's weak case was the repeated resort to appeal to the "raw emotion" of the jury in her closing argument, including displaying a photograph of the deceased, which was not from the crime scene and was clearly inadmissible victim impact evidence, asking the jury for justice of the deceased who was a mother, daughter, and sister.

Appellant respectfully requests this Court rehear the matter and direct a verdict of acquittal in Appellant's favor concerning the charges of murder and possession of a weapon during the commission of a violent crime due to the lack of evidence against him.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 20th day of November, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Kaycie S. Timmons, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ralph B. Hayes #320369, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 20th day of November, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of November, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.