STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

John C. Hayes, III, Circuit Court Judge

THE STATE,

PETITIONER,

V.

KEVIN TYRONE BENNETT,

RESPONDENT

APPELLATE CASE NO. 2014-001544

BRIEF OF RESPONDENT

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QUESTION PRESENTED BY THE STATE

The trial court did not err in denying the motion for directed verdict on the charge of burglary and the Court of Appeals errantly relied on its own alternate hypothesis in contradiction to established federal and state precedent that indicates a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

ALTERNATE QUESTION PRESENTED

Whether the Court of Appeals correctly reversed respondent's burglary conviction because the State only proved that respondent was present at a public place where a crime occurred, which did not amount to substantial circumstantial evidence of his guilt?

STATEMENT

In February 2011, Kevin Bennett ("Bennett") was indicted for burglary of a building, second degree; petit larceny; and malicious injury to real property causing less than $2,000.00 worth of damage. R.142. On January 24 - 25, 2012, Bennett was tried in Spartanburg County before the Honorable John C. Hayes, III and a jury. R. 1. Beverly Jones represented Bennett. R. 1. Dan Cude represented the State. R. 1. The jury found Bennett guilty on all three charges. R. 138, l. 19 – 139, l. 6. Judge Hayes sentenced Bennett to ten years' imprisonment on each conviction, to run concurrently. R. 141, ll. 8 - 14. Bennett appealed.

On December 12, 2013, a panel of the Court of Appeals consisting of Judges Huff, Geathers, and Lockemy heard oral argument in this case. App. 182. On May 28, 2014, the court reversed Bennett's convictions in a published opinion authored by Judge Huff. App. 182. State v. Bennett, 408 S.C. 302, 758 S.E.2d 743 (Ct. App. 2014). On June 14, 2014, the court denied the State's petition for rehearing. App. 193. This Court granted the State's petition for certiorari.

ARGUMENT

The Court of Appeals correctly reversed respondent's burglary conviction because the State only proved that respondent was present at a public place where a crime occurred, which did not amount to substantial circumstantial evidence of his guilt.

Relevant Facts

No eyewitnesses saw the break-in at the C.C. Woodson Community Center. No surveillance cameras captured any footage of the burglar. No confessions or statements were obtained from any suspect. No cell phone data was introduced to show the defendant's location at the time of the break-in. The police never recovered any items stolen from the community center, much less tied any items to the defendant. The evidence introduced against Bennett proved only that he had been in a public place he was known to frequent and where he had a right to be.

On November 17, 2010, someone burgled the C.C. Woodson Community Center in Spartanburg. R. 8, l. 19 – 9, l. 4. Officer Frank Osrechek of the Spartanburg City Police Department responded because of an alarm activation at approximately 3:30 AM. R. 9, ll. 5 – 9. He found a smashed window and a broken door adjacent to the window. R. 9, ll. 10 – 12. Another policeman found a tire iron in the community center's computer room. R. 31, ll. 17 – 19. A television, computer, and computer monitor were missing from the community center. R. 43, l. 18 – 44, l. 18. The missing television had been mounted on a wall and police found chairs from the computer desks underneath where the television had been. R. 31, ll. 8 – 19. Another television appeared to be in an unnatural position. R. 21, ll. 9 – 24.

The State presented no direct evidence that Bennett committed any crime. The State produced only two pieces of circumstantial evidence. First, a fingerprint expert testified that a single fingerprint lifted from one of the televisions at the center matched Bennett's index finger. R.

117, ll. 18 – 23. Second, a DNA expert testified that Bennett's DNA matched a spot of blood found on the wall of the computer room. R. 95, ll. 20 – 25.

At the close of the State's case, Bennett moved for a directed verdict on the ground that the fingerprint and blood sample were insufficient to convict Bennett. R. 136, ll. 3 – 11. Judge Hayes denied the motion. R. 136, l. 24 – 137, l. 5. Bennett renewed his motion after the verdict and Judge Hayes again denied the motion. R. 139, l. 25 – 140, l. 9.

Discussion

The State attempts to create a legal controversy where none exists. The State couches its question presented and its analysis in terms of whether the Court of Appeals used an incorrect legal analysis. The State contends that the Court of Appeals "relied on its own alternate hypothesis" and used the "alternate hypothesis" test when examining the sufficiency of the evidence. The Court of Appeals did no such thing.

In its opinion, the court stated, "The trial court is not, however, required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." App. 185. The court cited this Court's precedent: that a directed verdict should be granted "if the State fails to produce substantial circumstantial evidence the defendant committed a particular crime. . . ." App. 185, *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). The State claims the Court of Appeals used its own alternate hypothesis to reverse, but **never identifies** this phantom alternate hypothesis. Nowhere in its opinion does the court manufacture an alternate hypothesis.

This case is instead about the straightforward application of existing precedent: the question of how much circumstantial evidence qualifies as "substantial." No dispute exists about the only two pieces of evidence against Bennett: (1) the fingerprint on the television in the

community room; and (2) the drop of blood in the computer room which yielded Bennett's DNA. The dispute is whether these two pieces of evidence—collected from a public place where Bennett had a right to be—are sufficient to support a conviction. It was undisputed that the community center was open to the public from 6:00 am to 9:00 pm Monday through Friday and also on the weekends. R. 42, ll. 3 – 23. Bennett had been in the community center several times before the crime. R. 45, ll. 19 – 24. The doors to the room where Bennett's fingerprint was found on the television—the "community room"—were not always locked and events were frequently scheduled in that room. R. 44, ll. 16 – 25. Additional fingerprints were found on the television that were "insufficient" for comparison. R. 16, ll. 20 – 23. The police did not try to lift any fingerprints from the other television in the community room. R. 20, l. 20 – 21, l. 12.

The first policeman on the scene (who found the fingerprint) also looked for evidence in the computer room. R. 25, ll. 7 – 23. He did not notice any blood. R. 25, ll. 7 – 23. The officer charged with processing the computer room for evidence conducted an extensive examination, but did not notice any blood. R. 37, ll. 11 – 20. It was not until after 9:30 the next morning—six hours after the crime—that an officer with Spartanburg's burglary task force examined the community center that "two small droplets of blood" were found two inches below the mount for the television in the computer room. R. 56, ll. 2 – 17. This officer did not find any blood at the entry point where glass had been broken. R. 55, ll. 6 – 14. Two or three employees of the community center were already at work when the blood spots were found. R. 61, ll. 20 – 21. The Court of Appeals correctly reversed because this "evidence merely raises a suspicion that the accused is guilty." Odems, 395 S.C. 586, 720 S.E.2d 50 (citation omitted).

The circumstantial evidence in this case is similar to other appellate decisions finding directed verdicts were appropriate. The evidence in this case most resembles State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). In Mitchell, a burglary case, the only evidence that the defendant committed the crime was a fingerprint on a screen near a broken window. It was undisputed that the defendant had been in the victim's home on several prior occasions. Id. The Court concluded that the fingerprint was evidence only that the defendant had been "in and around the victim's house" and was insufficient to prove burglary. Id. Similarly, Bennett's fingerprint and DNA in a public place that he undisputedly frequented before the crime are insufficient to prove he committed a crime. Just like Mitchell, the evidence in this case merely proves that Bennett was in a place where he had a right to be and was known to be. As the Court of Appeals put it, the evidence "undoubtedly placed Bennett at the *location where a crime ultimately occurred.*" App. 186 (emphasis in original).

This Court's recent reversal of the Court of Appeals in a directed verdict case shows the distinction between evidence that a suspect was at the scene of the crime compared to evidence showing a suspect was at a place where a crime occurred. State v. Lane, ___ S.C. ___, 765 S.E.2d 557 (2014). In Lane, the evidence showed the defendant was in a place where he did not have a right to be at the time a crime occurred. Id. Firearms were stolen from the victim's home. Id. A neighbor saw a distinctively colored car that matched the defendant's car on the afternoon of the burglary. Id. The victim found a piece of paper with information that identified the defendant—who admitted the paper was his. Id. at 557-58. This evidence showed that the defendant was present **on the victim's private property** on the day the crime occurred. The defendant had no right to be at the victim's home. Unlike Lane, Bennett not only had a right to

be at the community center, he was seen there on multiple occasions when he attended his computer class.

Forensic evidence found in a public place or place where the defendant was known to be is routinely held insufficient—without evidence of when it was left—to uphold a conviction. See C.E. v. State, 665 So.2d 1097, 1098 (Fla. Dist. Ct. App. 1996) ("Where fingerprint evidence found at the scene is relied upon to establish identity, the evidence must be such that the print could have been made only when the crime was committed."); Lee v. State, 640 So.2d 126, 127 (1994) (holding fingerprints on broken window pane at burglarized church were insufficient to sustain a conviction); State v. Bass, 278 S.E.2d 209, 212 (N.C. 1981) ("[W]hen the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed."); Commonwealth v. Cichy, 323 A.2d 817, 818-19 (Pa. Super. Ct. 1974) (holding fingerprints on pack of cigarettes found near robbery site were insufficient); Graves v. State, 43 S.W.2d 953, 954 (Tex. Crim. App. 1931) (holding fingerprints in employer's office where employees other than defendant had access not shown to be made at time of burglary).

In C.E. v. State, the burglarized vehicle was parked inside the sheriff's parking lot. C.E. v. State, 665 So.2d at 1098. In a situation very similar to the community room in this case, only police personnel had permission to enter the lot, but it was not gated and anyone could drive into the lot. Id. The defendant's fingerprints were found on shattered glass on the vehicle. Id. In holding this evidence insufficient, the court stated, "Where the print is found in a place accessible to the general public, and there is no other evidence to show that the prints were made at the time of the crime, the defendant is entitled to a judgment of acquittal." Id.

In a recent case, the Fourth Circuit found a fingerprint insufficient to sustain a robbery conviction. United States v. Strayhorn, 743 F.3d 917, 924 (2014). In Strayhorn, the court dealt with a fingerprint found on a moveable object—duct tape. Id. The defendant's fingerprint was found on duct tape used to bind the robbery victims' feet. Id. at 921. The government's expert testified that a fingerprint could remain on duct tape for as long as a year. Id. The defendant was also apprehended in a car with a firearm stolen during the robbery. Id. at 920-21. The Fourth Circuit analyzed fingerprints on moveable objects and determined that evidence of the timing of when the fingerprint was left was necessary. Id. at 921-23. The court reversed the defendant's conviction. Id. at 924. The moveable object analysis from Strayhorn is applicable to this case because of the timing element. Because Bennett had a right to be in the community center and was frequently seen there, it is not unexpected that his DNA and fingerprints would be found there. No evidence of when this evidence was left was presented by the State and, like in Strayhorn, the evidence is therefore lacking. See also United States v. Corso, 439 F.2d 956, 957 (1971) (holding evidence consisting solely of the defendant's fingerprint on a book of matches found near a jimmied door was insufficient to sustain a larceny conviction).

In Odems, another burglary case, the circumstantial evidence was as follows: (1) the defendant was found in a car with the burglars and the stolen goods, (2) the defendant fled from the police, and (3) the defendant "asked an uninvolved person to lie for him" to the police. The unconvincing reason the defendant supposedly fled was because the driver told him that he had a suspended license. Odems at 585, 720 S.E.2d at 49. The evidence against the defendant in Odems is much greater than the scant evidence against Bennett. This Court held that nothing placed Odems at the scene of the crime and reversed his conviction.

Even in murder cases, this Court has reversed convictions where the circumstantial evidence was greater than in Bennett's case. In State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), the defendant's fingerprint was found on a coffee cup in a car borrowed by the victim. The victim disappeared after leaving his office in Savannah, Georgia, and his body was found three days later in Colleton County. Id. at 388, 605 S.E.2d at 530. The borrowed car was found in Johnson City, Tennessee near where the defendant called another witness the day after the crime. Id. at 388-89, 605 S.E.2d at 530. The defendant and the victim had been sexual partners. Id. This Court held that a directed verdict should have been granted because the fingerprint only established that defendant "was in the borrowed [car] on the same day the victim was last seen alive." Id. at 390, 605 S.E.2d at 531. The fact that the car was found in Tennessee near the defendant only raised "a suspicion of guilt." Id. The evidence in Arnold is much stronger than in Bennett's case. The fact that the car was borrowed meant that the fingerprint placed the defendant in a car with the victim—a private place—on the day of the murder. In Bennett's case, no one could testify when the fingerprint and blood were left in the community center—a public place frequented by Bennett.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), another murder case, the circumstantial evidence against Bostick exceeded what the State presented against Bennett. In Bostick, the victim was found bludgeoned in a house set ablaze with gasoline. Id. at 136-37, 708 S.E.2d at 775. The victim's car keys and other items were found in a burn pile on Bostick's property. Id. at 141-42, 708 S.E.2d at 778. Bostick's shoes had gasoline on them and his clothes had blood on them. Id. at 142, 708 S.E.2d at 778. While the blood excluded 99% of the population other than the victim, the DNA expert would not testify as to a "match." Id. This

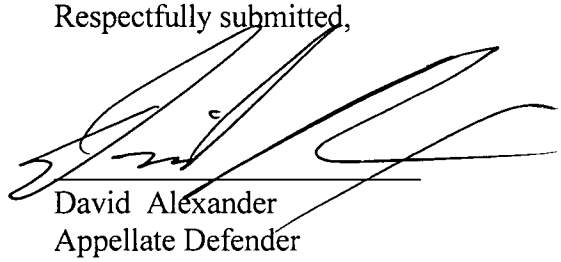
Court held the above evidence was insufficient to convict Bostick and reversed. Id. Certainly the evidence in Bostick far exceeds the case against Bennett.

Ultimately, the State's evidence in this case only proves an undisputed fact: that Bennett was in the community center at some point in time before the burglary. Even viewing this evidence in a light most favorable to the State, this evidence barely raises a suspicion that Bennett committed this crime. No "substantial" circumstantial evidence ties Bennett to this crime. When compared to the above-cited cases, it is clear that the trial court erred in not granting a directed verdict.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed and Bennett's convictions should be reversed.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of January, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kevin Tyrone Bennett #167238, Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 12th day of January, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.