STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

Appellate Case No: 2015-000340

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S.C. Supreme Court

THE STATE,

Respondent,

vs.

VICTOR WELDON,

Petitioner.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

ARGUMENTS

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Petitioner guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny 6

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Holland v. United States, 348 U.S. 121 (1955) 7-8

Jackson v. Virginia, 443 U.S. 307 (1979) 6, 7, 8

State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) 11, 12

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) 10, 11

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 7, 8

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013) 7, 8

State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013) 8

State v. Lane, 410 S.C. 505, 765 S.E.2d 557 (2014) 8

State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) 9, 10

State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001) 6

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) 12

State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) 12, 13

State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014) 8

State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) 6

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) 9, 10

State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002) 6

STATEMENT OF ISSUE ON APPEAL

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Petitioner guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

STATEMENT OF THE CASE

Petitioner Weldon was indicted by the Clarendon County Grand Jury for first degree burglary, armed robbery, kidnapping, and grand larceny. Weldon was tried with his co-defendant, Michael Pearson, before a jury on May 14-18, 2012. Both defendants were found guilty as charged. The Honorable Ralph F. Cothran sentenced Weldon to thirty years' imprisonment for burglary and armed robbery, to be served consecutively. In addition, Weldon was sentenced to concurrent sentences of twenty years' imprisonment for kidnapping and five years' imprisonment for grand larceny.

Weldon appealed the convictions and sentences. The Court of Appeals affirmed the conviction and sentence, without oral argument, in an unpublished opinion. State v. Victor Weldon, 2014-UP-463 (S.C. Ct. App., filed December 17, 2014).

STATEMENT OF FACTS

Small businessman Edward "Slick" Gibbons (Victim)[1] was about to leave for his auto parts store on the morning of May 15, 2010, a Saturday, when three men hidden in his carport jumped him, beat him, robbed him, and stole his El Camino. ROA. pp. 8-9.

Victim testified he was leaving his house around 6:00 to 6:30 a.m. when he bent over to put on his shoes outside his garage. Victim was jumped by three men who were hiding in the storage room in his carport. ROA. pp. 8-9. They took approximately $840 and beat him, asking where the rest of the money was. One of the men called him by his nickname. The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face.[2] Victim saw one man with what he thought was a gun, and he heard one of the robbers ask if they were going to shoot Victim. He heard the men leaving and rose to see what kind of car they had. One of the robbers said, "He's up, he's up," and a robber jumped out of the back of Victim's El Camino, beat Victim back down, and knocked him out. ROA. pp. 14-19; pp. 24-26; p. 162.

Victim testified his El Camino was worth approximately $6,500. ROA. p. 29. He travelled by ambulance to the Clarendon Memorial Hospital and by helicopter to Columbia where he was in intensive care for a week and a rehabilitation center for another week. ROA. pp. 31-32. Victim's hip was bruised, and the "bone where the hip hooks together" was cracked. Victim testified his doctor asked him if wanted to replace the hip or let it heal. His doctor told him he was "going to always limp. But [the doctor] said

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1 Victim owned Clarendon Auto Parts, a business he operated for forty-five years. His store is open six days a week and closed on Sunday, so naturally, he works six days a week. ROA. pp. 2-4; pp. 7-8.

2 All three robbers were engaged in the lynching. As Victim explained: "[O]ne jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and then the bigger guy was kicking me in the side and stomping me in the chest . . . ." ROA. p. 15, lines 9-13.

that's your option and [Victim] told him just to try to let it heal because I knew I had to go back to work." ROA. p. 20, line 23 – p. 21, line 3.

Victim's wife, Kay Gibbons, testified she was in bed that morning when she heard the doorbell ring. She opened the door to find her husband bloodied and wrapped in tape, struggling to stand. ROA. pp. 64-66. She called her daughter, who called 911 and came to their house. An ambulance and law enforcement arrived, and Victim was sent to the hospital. ROA. pp. 66-68.

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. The car was running and the passenger door was open at 6:40 a.m., a mile and half from Victim's store. Eaddy knew Victim and knew it was Victim's car. Eaddy pulled the car off the road and took the keys to Victim's store. An employee went with him back to the car to retrieve it. ROA. pp. 78-83.

Investigator Ricky Richards, from the Clarendon County Sheriff's Office, testified he processed the vehicle after it was found. Investigator Richards found fingerprints on the rear quarter on the driver's side of the car, and also on the driver's side door jamb. He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. ROA. pp. 90-92. Hodge testified she examined the latent print sent by Investigator Richards and determined it matched Pearson's right thumb. ROA. p. 131, p. 135, pp. 138-139.

Investigator Thomas "Lin" Ham, also from the Clarendon County Sheriff's Office, testified he was called to the scene on May 15, 2010. He knew Victim all his life. ROA. III, p. 103. Investigator Ham identified photographs from the crime scene depicting the black duct tape that was used and Victim at the hospital while duct tape was still wrapped

around his head. ROA. p. 107. Ham wore gloves to assist the nurse in removing the duct tape from Victim. The tape was put in a bag as evidence for SLED to process. ROA. pp. 108-109.

Pearson was interviewed by Investigator Kenneth Clark. Investigator Ham testified he was present for the interview. Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. ROA. pp. 115-116.

Investigator Kenneth Clark testified Victim described the robbers as three black males, of mid-age and medium build, who wore dark clothing and masks. ROA. pp. 160-162. Investigator Clark testified as to law enforcement's diligent efforts to find the perpetrators of the heinous crime. The first big break was a phone call about three individuals that were spending a lot of money. ROA. p. 164.

Investigator Clark testified he interviewed Pearson, and Pearson denied being around Victim's property or vehicle. ROA. p. 167 A month later, a positive DNA hit was found which made Weldon a suspect. ROA. p. 173.

Investigator Clark subsequently interviewed Weldon, who prior to the DNA match had not been a suspect. Weldon denied knowing Victim, denied being around the scene, and denied knowledge of the robbery. He also claimed not to know Pearson. ROA. pp. 174-175. Weldon was arrested, and a DNA sample was taken. Testing once again matched Weldon's DNA to the DNA left on the duct tape wrapped around Victim's head. ROA. pp. 176-177.

Investigator Clark discovered from landscaper Richard Gamble that Pearson had

been to Victim's house when he did landscaping work for Victim. ROA. pp. 178-179. While Pearson and Weldon claimed to not know each other, Investigator Clark discovered that both men worked at the South Carolina Vocational Rehabilitation Center (Voc Rehab) in Sumter for an overlapping period of time. ROA. pp. 180-181.

John Hornsby testified that Pearson and Weldon worked at Voc Rehab during an overlapping time period of December 9-12, 2008. He described the facility as a metal warehouse about 150 feet by 250 feet facility with an open floor plan split into two sides. About twenty-five people work at the facility from 8:30 a.m. to 2:30 or 3:00 p.m. ROA. pp. 234-235.

Gamble testified he took Pearson with him to Victim's house to do yard work. Pearson worked with Gamble on landscaping projects at Victim's home and next door, where Victim's son lived. Gamble estimated they worked at both homes for about a week during the spring of 2010. Gamble recalled that Pearson went into Victim's garage to retrieve tools when working. ROA. pp. 221-225.

The duct tape removed from Victim's head was tested and found to be a one in 670 billion match with Weldon's DNA. ROA. pp. 244-245; p. 249.

Weldon's directed verdict motion was based solely on whether the State provided substantial circumstantial evidence to establish his identity as the perpetrator. Judge Cothran found: "The fact that [Weldon's DNA] is on the victim's head in his garage that morning gets to the jury." ROA. p. 282, lines 2-4.

ARGUMENT

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Petitioner guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

Duct tape wrapped around Victim's head by one of the robbers contained Weldon's DNA. This evidence is some of the strongest circumstantial evidence possible to establish Weldon's presence and participation in the robbery. The trial court ruled: "The fact that [Weldon's DNA is] on the duct tape on the victim's head in his garage that morning gets to the jury." ROA. p. 282, lines 2-4. The trial court's ruling is not error as the DNA evidence is more than sufficient to establish Weldon's identity as one of the robbers.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. 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. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443

U.S. 307 (1979)).

The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)) (citations and internal quotations omitted). This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in* Jackson, at 317 n.9.

"The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." See State v. Lane, 406 S.C. 118, 749 S.E.2d 165, 167 (Ct. App. 2013).[3] Weldon's DNA is on the duct tape cruelly wrapped around Victim's head during the robbery. The most obvious inference from this evidence is that Weldon was one of the three robbers atop Victim during the crime. Hepburn and Cherry advise that the trial court does not need to find the evidence infers guilt to the exclusion of any other reasonable hypothesis.[4] This Court does not need to pursue alternate theories of how Weldon's DNA ended up on the duct tape. The most obvious inference readily supports the charges going to the jury.[5]

Sticking to the custom of appellants as of late, Weldon argues his directed verdict case by arguing the evidence was "stronger" in other cases where the Supreme Court has reversed a conviction based on the failure to grant a directed verdict. This analysis misses the point. The determination is whether evidence supports each and every element of the offense, including the element of identity. Lane, supra. The presence of Weldon's DNA

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3 The Court of Appeals' opinion in Lane was reversed because this Court found evidence sufficient to withstand directed verdict. State v. Lane, 410 S.C. 505, 765 S.E.2d 557 (2014).

4 Weldon complains that the Court of Appeals shifted the burden of proof when it stated guilt was the only logical explanation for Weldon's DNA being on the duct tape. This misses the point. The trial court does not have to exclude every other reasonable hypothesis of guilt in order to find the issue should be decided by the jury. However, Respondent agrees there is no other reasonable explanation for Weldon's DNA being found on the duct tape.

5 Pearson's convictions were reversed by the Court of Appeals. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014). The Court of Appeals in that opinion observed: "Despite the fact Weldon was tied to the crimes because of his DNA on the duct tape, nothing tied Pearson to the crime scene." Id. 410 S.C. at 402, 764 S.E.2d at 712. The State has petitioned this Court for writ of certiorari to review the Court of Appeals' decision in Pearson.

on duct tape left on Victim's head **during** the commission of the crime establishes substantial circumstantial evidence that he was one of the three robbers. In the cases Weldon relies on, there was a lack of evidence placing those appellants at the crime scene during the commission of the crime. Not so in the present case.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), Martin borrowed his girlfriend's car the day before the murder and a similar car was seen near the murder scene, around the time of the murder. By the bar where Martin and his co-defendant picked up Martin's girlfriend, a restaurant manager found several bags of garbage containing items belonging to the victim and latex gloves similar to those Martin's girlfriend used. Martin told his girlfriend "some shit happened" and his co-defendant added "someone may have died tonight" when asked why they were late picking her up from the bar. Id., 340 S.C. at 600-01, 533 S.E.2d at 573-74.

In finding the evidence was insufficient to constitute substantial circumstantial evidence of Martin's guilt, the Supreme Court noted the following:

> Most significantly, the State's evidence failed to place either defendant inside the apartment. The Solicitor himself summed up the State's failure of proof by confessing to the trial judge "we don't know which person actually held [Victim's] head in the pan of water" and "Your Honor, the whole point is we don't know if they acted in concert." Put another way, unlike the usual accomplice liability case or aiding and abetting situation, here the State had no proof that either defendant held Victim's head under water and the State had no proof that the defendants were working together to bring about the Victim's death.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

Further, the Supreme Court then compared Martin to State v. Schrock, 283 S.C.

129, 322 S.E.2d 450 (1984), as follows:

> In Schrock, the State presented evidence the defendant was in the area of the murders and that footprints at the scene of the crime were similar to footprints found in the area which Schrock admitted he had been walking. In this case, the black car seen at the apartment is not identified as [girlfriend's] car. Like the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendants at the scene is not enough evidence to place Defendant inside Victim's apartment.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

While the State's admissions at trial, as noted in the Martin opinion, expose the possibility of Martin being not present or merely present during the murder, in the instant case, the reasonable inference is Weldon was present and participating in the crime. The one piece of evidence, Weldon's DNA on the duct tape, accomplishes far more than the various pieces of evidence presented in Martin to establish Weldon's presence and participation.

Martin's analysis of Schrock also exposes how the evidence in the present case is stronger than Schrock. Schrock admitted being **near** the crime scene and footprints were similar to footprints in the area where Schrock was walking. No evidence put Schrock at the crime scene. Schrock, supra. Weldon's DNA puts him at the scene **during** the robbery. Weldon's DNA left on the duct tape is far stronger evidence than the claim of "similar" footwear found in Schrock.

For similar reasons, Weldon's reliance on State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) is misplaced. In Bostick, the Supreme Court found the State failed to show substantial circumstantial evidence of guilt. The victim died of carbon monoxide

poisoning from arson in her house, but she had also been struck by a blunt force object. Some of her items were found in a burn pile in the yard of Bostick's mother. His mother's yard was about a quarter mile away from the victim's house. He had blood on a pair of jeans. However, when analyzed for DNA evidence, the expert was able to exclude ninety-nine percent of the population and could not actually match the blood to the victim. Accelerant was used in the arson and on the items in the burn pile, and traces of fresh gasoline were found on Bostick's shoes. The Supreme Court noted no evidence established Bostick's control over the burn pile. Id.

In the instant case, unlike Bostick, DNA evidence matches Weldon and puts him at the crime scene. The burned items could not be linked to Bostick, but the duct tape is linked to Weldon. The instant case is both markedly different and stronger than Bostick.

The evidence presented in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), likewise suffers from the inability to place the defendant at the murder scene. In that case, the murder victim, a doctor, had a clandestine affair, first with the State's chief witness and then with Arnold, in Savannah. The victim borrowed a BMW that day from a co-worker and then disappeared and was subsequently found dead off a road in Colleton County. The BMW was found abandoned in Tennessee. Arnold's thumbprint was found on a coffee cup lid found in the BMW. At the time these events occurred, Arnold travelled from Savannah to Tennessee, although the State failed to present any evidence to the jury of how close to where he was staying the abandoned car was found. Accordingly, the only evidence the jury had was that Arnold had a sexual relationship with the victim, he was in the BMW the day that the victim went missing, and he was in the same state where the

BMW was found. Id., 361 S.C. at 389-90, 605 S.E.2d at 530-31.

The majority in Arnold noted that no evidence placed Arnold at the scene of the crime in Colleton County. Id., 361 S.C. at 390, 605 S.E.2d at 531. The evidence in the present case puts Weldon at the scene of the crime during the crime. The evidence is far stronger in the instant case.

Weldon also compares this case to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the appellant was present at the burglary victim's house on three prior occasions. The sole evidence regarding identity was a fingerprint found on a window screen propped up against the house near the broken window that was apparently the point of entry. No evidence was presented that the screen was on the window at the time the window was broken. The Supreme Court found "the fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house on at least three times prior to the burglary." Id., 341 S.C. at 409, 535 S.E.2d at 127.

Unlike Mitchell, no evidence suggests Weldon was ever present at Victim's house for an innocent reason. Further, because the DNA was on the duct tape wrapped around Victim's head during the crime, and not some random item outside the house, it is clear that the DNA was left during the commission of the crime.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), the last case analyzed by Weldon, no evidence was presented that Odems was even at the scene of the burglary – instead he was found by law enforcement in a car with stolen goods and two burglars, and he fled. The burglars testified they picked Odems up at a gas station **after**

the burglary. The burglars' prints were found on stolen items, but no fingerprints matching Odems were found. Id. Unlike Odems, Weldon is linked to the scene by DNA evidence. Evidence in this case is considerably stronger than the evidence presented in Odems.

The trial court did not err in denying the motion for directed verdict because as the trial court aptly noted, Weldon's DNA was wrapped around Victim's head during the robbery. This evidence leads to the more than reasonable inference that Weldon was one of the three participants in this horrific crime.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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March 2, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

Appellate Case No: 2015-000340

THE STATE,

Respondent,

vs.

VICTOR WELDON,

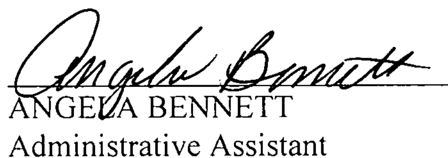
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of March, 2015.



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March 2, 2015

The Honorable Daniel E. Shearouse
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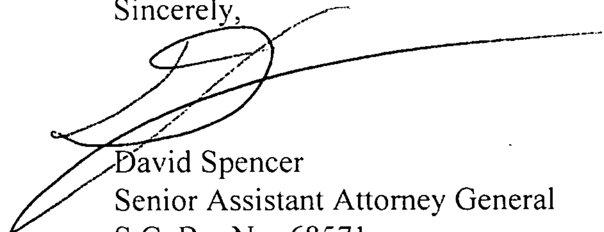
RECEIVED
MAR - 2 2015
S.C. Supreme Court

Re: The State v. Victor Weldon
Appellate Case No: 2015-000340

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,



David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/ab
Enclosures

cc: Robert M. Dudek, Esquire
Ms. Trisha Allen