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STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304 (S.C. Ct. App. filed March 18, 2015)
2007-GS-32-525, 2008-GS- 32-2652, 2008-GS-32-2653

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

PETITIONER

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Petitioner

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

J. ANTHONY MABRY
Assistant Attorney General
S.C. Bar No. 11973
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 East Main Street
Lexington, SC 29072

Attorneys for Respondent

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Kenneth Andrew Lynch, Appellant.

Appellate Case No. 2012-212547

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304
Heard February 3, 2015 – Filed March 18, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General J. Anthony Mabry, all of
Columbia; and Solicitor Donald V. Myers, of Lexington,
for Respondent.

LOCKEMY, J.: This case arises out of the disappearance of Portia Washington and her granddaughter, Angelica Livingston (collectively, the victims). The victims were last seen on June 10, 2006. Their bodies have never been recovered. The State indicted Kenneth Lynch with grand larceny of Portia's car and with the

murder of the victims. Lynch was convicted as indicted following a bench trial before the Honorable Eugene C. Griffith, Jr. The State sought the death penalty; however, the trial court sentenced Lynch to two terms of life imprisonment without the possibility of parole for the murders and ten years' imprisonment for grand larceny. Lynch appeals his convictions, arguing the trial court erred in (1) denying his motion for a directed verdict because the State failed to present substantial circumstantial evidence of his guilt; (2) not giving a jury instruction regarding how to use and evaluate circumstantial evidence; and (3) not suppressing evidence seized during his arrest because the arrest warrant was not supported by probable cause. We affirm.

FACTS

A. The State's Case

At trial, Linda Miller, Portia's friend, testified the victims lived together and Portia was Angelica's caretaker. Miller explained Portia enjoyed her job at Bob Bennett Ford, where she worked as a custodian. Portia had recently purchased a new car, which she loved. While working at Bob Bennett Ford, Portia developed a romantic relationship with Lynch, a fellow co-worker. According to Miller, Portia and Lynch were living together in June 2006, when the victims disappeared. Miller explained that before Portia met Lynch she was happy but that began to change. Miller admitted she had never met Lynch. Miller stated the last time she saw the victims was on Friday, June 9, 2006, and on that day, Portia did not tell her she was planning to take a trip.

Shyla Andrews, the victims' hair stylist, stated she last saw the victims on Saturday, June 10, 2006, when they were scheduled for a hair appointment. Andrews testified that on that day, Portia was acting nervous and was in a hurry to leave. Andrews stated Portia developed into a nervous person when she began dating Lynch, and she advised Portia to end the relationship. According to Andrews, Portia had a close relationship with her family, and she would not disappear without telling them where she was going.

Lela Green, another friend of Portia's, stated Portia called her on Saturday, June 10, 2006, around 6:00 p.m. and told her she was going to the grocery store to buy food to cook for Sunday lunch. Green stated she planned to have lunch with Portia on Sunday, June 11, 2006, but she never saw Portia again. According to Green, Portia enjoyed her job, and she never told her she was planning to leave South Carolina.

Carla Perry, Portia and Lynch's neighbor, testified she last saw the victims on the afternoon of Saturday, June 10, 2006. According to Perry, Portia was unloading laundry from her car, which was parked outside the apartment, and Lynch was with Portia standing outside the car. Perry further stated Angelica came by her apartment that afternoon wearing a wet bathing suit and appeared to have been swimming at the apartment complex's swimming pool. According to Perry, around 10:30 p.m. that night, she noticed Portia's car was missing and Portia's plants were outside her apartment, which Perry found strange because Portia always brought her plants inside on Saturday night.

Sallie Jones, Portia's mother, testified she had a close relationship with Portia and they talked every day. Jones claimed Portia loved Angelica, her job, and her new car. According to Jones, Portia would not allow anyone to drive her car, and Portia had given her the spare set of keys to her car and told her she did not want Lynch driving it. Jones, however, admitted that Lynch had previously driven Portia's car to drop off Angelica at her house. Jones explained that before Portia met Lynch, she was very happy and enjoyed spending time with her family; however, she became less involved with her family after meeting Lynch. Jones stated Portia had never gone more than one week without calling her. Jones stated Portia did not like to drive on the interstate and she rarely traveled outside South Carolina. Jones testified Portia planned to meet her on Sunday, June 11, 2006, but she never heard from her after Saturday, June 10, 2006.

Vernelle Bellamy, Portia's aunt, testified she last saw Portia on Saturday, June 10, 2006. After she had not heard from Portia for several days, she went to Portia's apartment and spoke with the apartment manager. Bellamy stated the apartment manager entered Portia's apartment and told her the apartment "looked like somebody was cleaning up."

Debra Hobgood, a manager at Bob Bennett Ford, testified Portia had worked as a custodian for five years and was a good employee. Hobgood described herself as Portia's friend and she helped Portia pick out her new car and loaned her money for a down payment. Hobgood stated Portia loved her car and would not let anyone drive it. Hobgood asserted that when Portia started dating Lynch, she began to have low self-esteem and was "always questioning what she did." Hobgood gave Portia \$650 to find a new apartment because she wanted her to get away from Lynch; however, at the time of the incident, Hobgood was unaware Portia was living with Lynch. Hobgood stated Angelica planned to attend summer camp in the summer of 2006 and was very excited. According to Hobgood, she last saw

Portia on Friday, June 9, 2006, and the last thing Portia said to her was, "I'll see you Monday."

Nancy Hyler, the former office manager at Bob Bennett Ford, testified the last pay check issued for Portia was on June 16, 2006, but it was never picked up. Carly Coviello, an employee with T-Mobile, testified the last call made from Portia's cell phone was at 9:26 p.m. on June 10, 2006, in West Columbia. Steven Newnom, an employee at TransUnion Credit Union, testified there had been no credit inquiries for Portia's records. Julia Price, of Ford Motor Credit Company, explained that Portia purchased a 2005 Ford Focus on June 22, 2005, pursuant to a financing agreement with Ford Motor Credit, and the last payment received by Ford was on June 12, 2006. Dawn Hurley testified Portia had checking and savings accounts with Bank of America. According to Hurley, the last transaction on the savings account was on June 10, 2006, at 9:50 a.m., and the last transaction for the checking account was an automatic draft to Ford Motor Credit on June 12, 2006.

Nicky Rodgers, an employee with Lexington County 911 who had access to a national database for drivers' licenses, found one driver's license for Portia and it was in South Carolina. James Hinton, an employee of Lexington School District Two, testified Angelica last attended school on June 1, 2006, which was the end of her second grade year. The school expected Angelica to return the next year but she never returned, and the school district had received no requests from other schools for Angelica's school transcripts.

Ola Mathis, the former apartment manager of Portia and Lynch's apartment, stated that on June 13, 2006, she entered the victims' apartment and found no signs of forced entry, but that it had been cleaned in a way that looked "staged." She found a girl's church clothes laid on one of the beds. According to Mathis, "the only thing missing" from the apartment were the victims and Portia's car. Mathis explained the lease for the apartment stated Lynch and Portia were married.

Takiesha Shelton, an employee of Motel 6, testified motel records showed Lynch arrived at a motel in Vicksburg, Mississippi, on June 12, 2006, and departed on June 13, 2006. Records also showed Lynch arriving on June 14, 2006, and departing on June 15, 2006, at a motel in Eloy, Arizona. One receipt listed Lynch's address as Florida, but a second receipt showed an address in Cayce.

Shane Ramirez, an officer with the Texas Highway Patrol, testified he stopped Lynch for speeding on June 14, 2006, in Fort Hancock, Texas. Lynch was driving a 2005 Ford Focus that was registered to Portia. There were no passengers in the

car but there was a child's car seat in the back. Ramirez described the car as "messy" like "someone had been living out of it." Lynch informed Ramirez that he was coming from Mississippi and was traveling to Arizona to pick up his wife.

Agent Nathan Bresee, formerly a customs and border protection agent in Blaine, Washington, testified he encountered Lynch on June 17, 2006, at 10:45 p.m. at the United States/Canada border. Agent Bresee explained Lynch had "refusal paperwork" indicating he had been refused entry into Canada. Because Lynch had been refused entry into Canada, Agent Bresee performed a criminal history check on Lynch, which revealed a positive NCIC alert indicating Lynch was a missing person. Agent Bresee contacted the West Columbia Police Department (WCPD) as the reporting agency, and Detective April Bayne of WCPD informed him that Lynch was a suspect in a double homicide. Upon learning this information, Agent Bresee directed border protection agents to conduct two searches of Lynch's person and a search of his two bags.

Agent Bresee found several items in Lynch's possession that he faxed to WCPD, including a Greyhound bus ticket from Seattle, Washington, to Vancouver, Canada, dated June 17, 2006; a Motel 6 receipt dated June 14, 2006; and a second Motel 6 receipt dated June 12, 2006. Agent Bresee stated that at 3:10 a.m. on June 18, 2006, WCPD informed him that an arrest warrant had been issued for Lynch on the charge of grand larceny. Agent Bresee contacted the Whatcom County, Washington Sheriff's Department, and a sheriff's deputy came and served Lynch with an arrest warrant.

Deputy Courtney Polinder served the arrest warrant on Lynch between 4:00 a.m. and 4:30 a.m. on June 18. Deputy Polinder informed Lynch of his *Miranda*¹ rights, retrieved Lynch's property from the border protection agents, and transported Lynch and his property to a county jail in Washington. On the way to jail, Deputy Polinder stated he did not interrogate Lynch, but Lynch made several statements. Lynch denied any involvement with Portia's car, which was listed in the arrest warrant. Lynch denied driving the vehicle to the west coast and stated he had traveled with a friend and then by bus. Lynch told Deputy Polinder he was planning to visit Vancouver, Canada, because he wanted "to see bears," which Deputy Polinder explained was strange because Vancouver is an urban area and bears live further north. Lynch told Deputy Polinder he lived with the victims, had recently quit his job, left to visit Canada, and planned to return to South Carolina.

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

Officer Bradley Richardson of the Seattle Police Department found Portia's car on June 18, 2006, near a Greyhound bus station in Seattle. According to Officer Bradley, the license plates had been removed, and the car was very clean and looked like a rental car. Thereafter, he searched the car and found nothing inside the car or in the trunk.

On June 19, 2006, Agent Brenda Wilson, of the Federal Bureau of Investigation, and Glen Hutchings, a local police officer, interviewed Lynch. During the interview, Lynch stated he quit his job at Bob Bennett Ford on Friday, June 9, 2010, but planned to return to South Carolina to attend a truck driving school. He admitted he and Portia had been in a romantic relationship but claimed their relationship had become "more like roommates" within the last year. Lynch stated he last saw Portia's car on Friday, June 10, 2006, when she drove him home from work. Lynch denied driving Portia's car outside of South Carolina. He stated he not seen Portia since June 10th because they had decided to "go their separate ways."

When Agent Wilson confronted Lynch with evidence that he had been stopped in Texas driving Portia's car, Lynch initially denied driving her car but then admitted it. He claimed Portia had allowed him to drive her car because she was in "over her head" with the payments. Lynch denied knowing the victims' whereabouts and stated it would be out of character for Portia to disappear because she "had a habit of going to the beauty salon and then church." According to Agent Wilson, Lynch acted "shocked" when he heard the victims were missing, and he stated he did not know anyone who would want to hurt them. Lynch further stated he had never seen other men at the apartment. When asked about Portia's car being found in Seattle, Lynch claimed he "just left it there and that he wanted to take the bus up to Canada." Agent Wilson then contacted WCPD with the information she learned from the interview.

Detective Glen Hutchings, formerly of the Bellingham, Washington Police Department, testified he was present during Lynch's interview with Agent Wilson. He claimed Lynch told him Portia was "head of maintenance" at Bob Bennett Ford and that Lynch "worked in the parts department." Detective Hutchings stated Lynch told him he planned to return to South Carolina to attend a 15-day truck driver training program with Werner Trucking Company. Detective Hutchings was familiar with Werner Trucking Company because his son worked for the company; however, he stated they did not have a 15-day truck driver training program. Detective Hutchings asserted Lynch initially denied driving Portia's car outside South Carolina and stated he had traveled with a friend to Georgia,

Louisiana, Mississippi, Texas, California, Oregon, and Washington. According to Detective Hutchings, when Lynch was informed the victims were missing, his response was "very flat" and he did not ask any questions or show any emotion. Detective Hutchings stated Lynch claimed he left the apartment in Portia's car on Friday, June 10. Detective Hutchings further stated Lynch eventually admitted he took Portia's car without her permission, but asserted "she wouldn't have cared anyway because she was going to lose the car."

On June 22, 2006, Rod Green, an agent with SLED, arrived in Seattle where he processed Portia's car pursuant to a search warrant. Green stated the car was empty and the glove box contained no vehicle registration, proof of insurance, or any other paperwork. Green did not find any blood, but he found three fingerprints that belonged to Lynch. Green also took a DNA swab from the steering wheel, which was later determined to belong to Lynch.

On August 3, 2006, Detective Matt Edwards of WCPD went to Washington and transported Lynch back to South Carolina. When he arrived, Detective Edwards took possession of Lynch's two pieces of luggage and transported them to WCPD. Investigator Charles Bramlett testified WCPD later obtained a search warrant for the two bags, and he conducted a search of the bags on September 25, 2006. The following items were found in Lynch's luggage: binoculars; banking documents; old receipts; a wallet; letters; a Greyhound bus ticket dated June 17, 2006; motel receipts; a raffle ticket; tax documents; torn notebook paper with phone numbers; business cards; two sets of keys; a Family Dollar receipt for toiletries dated June 13, 2006; a pay stub; an old traffic ticket; a South Carolina lottery ticket dated June 10, 2006; a car title; documentation from the Canadian border; jewelry; and clothing.

James Sullivan of WCPD conducted a photographic comparison of the key to Portia's car that Jones claimed Portia gave her, a key recovered from Lynch's luggage, and a key created using Portia's car's VIN. He concluded the keys had the same cuts. Additionally, Sullivan compared two sets of house and mailbox keys found on Lynch and concluded the keys had the same cuts as those for the victims' apartment. Sullivan, however, was unsuccessful in his attempt to use the house key on the apartment door.

Robin Taylor, a DNA analyst from SLED, took DNA samples from Theresa Brown, Angelica's mother, and Sallie Jones, Portia's mother. Taylor confirmed the DNA taken from the steering wheel of Portia's car matched Lynch. Taylor also took DNA samples from the hall bathroom of the apartment and determined that

Lynch could not be excluded as a contributor. Taylor explained that a section of the carpet seized from the apartment tested positive for blood and was a mixture of at least two individuals' DNA. The major contributor was consistent with a daughter of Brown. At the time the victims disappeared, Brown had only one daughter—Angelica. The minor contributor was a male, and Lynch could not be excluded as the contributor. Blood was also found on the bottom of a green chair in the apartment, on the master bedroom sink, and on a blue container found in the apartment. All three of these samples contained a mixture of DNA, with the major contributor being a daughter of Brown. Swabs from a different area of the green chair, carpet, and master bedroom door tested positive for blood and the DNA profiles were consistent with a daughter of Brown. Blood was also recovered on two other areas of the carpet and five sections of a sheet found near the green chair with the DNA being from a daughter of Brown.

Steven Derrick, an expert in blood stain analysis, analyzed the blood stains found in the apartment. Derrick opined the right arm of the green chair showed a "broken" droplet of blood with a transfer stain going down the arm. He concluded the three distinctive lines of blood going down the arm were made by three fingers making contact with the chair. The undercarriage of the green chair showed multiple patterns, including drops, transfers, and smears. The wood portion of the undercarriage of the green chair was broken, and Derrick found what he called a "hair transfer pattern" of blood. He opined the spatter was caused by a medium range of force based upon the size of the droplets, which was caused by a fist or other blunt object. Derrick further opined the chair was not upright when the blood spatter was distributed on the chair. In the hair transfer pattern, Derrick found a "conglomerate of blood" that indicated a wound in the hairline where bloodletting had occurred. Based upon his analysis of the blood, Derrick opined that "something other than a natural incident" occurred in the apartment, specifically an "act of violence." Derrick, however, admitted he could not determine when the incident occurred.

Detective Bayne testified WCPD conducted numerous investigations to locate the victims, with the help of SLED and the Secret Service, but they were unable to find them. Detective Bayne explained their investigation revealed that Lynch had stayed in a Motel 6 in Vicksburg, Mississippi, where he provided a false address. She contacted the Werner Trucking Company and they confirmed they did not have a truck driver training school in South Carolina. Detective Bayne explained that neither Lynch nor Portia picked up their last paychecks from Bob Bennett Ford, and no school district in the country had requested Angelica's school records.

On cross-examination, Detective Bayne testified regarding WCPD's failure to follow-up on tips indicating potential sightings of the victims. For example, a patron at a local ice cream shop claimed she saw "a black female and a little girl that matched the description . . . of [the victims]." Although WCPD followed up on the lead and inquired if the shop had video, no one spoke to the patron *until six years later*. WCPD also took a statement from one of Angelica's teachers who told police in 2006 that Angelica informed him in May 2006 that she was going to Texas; however, WCPD did not follow-up on this lead. In addition, a truck driver claimed he saw a "black female, possibly 50/50 of that being [Portia]" at a truck stop. The trucker said the woman approached him asking for help because she had been left at the truck stop by her boyfriend. Although the trucker was unsure of the exact date and city, he believed it was the week of June 17, 2006, at a truck stop near El Paso, Texas. Finally, Detective Bayne admitted WCPD did not follow up on six leads received from the National Center for Missing and Exploited Children even though five of the leads indicated sightings in California and one was for a sighting on an Amtrak between Seattle and Portland.

B. Lynch's Defense

Lynch presented the testimony of Rebecca Kilbride, a teacher at Angelica's school, who stated Lynch picked up Angelica from school two or three times per week. Additionally, George Mook, an employee at Bob Bennett Ford, stated he saw Lynch driving Portia's car "once in a while." Detective Page Moore of WCPD confirmed that a witness claimed to have seen the victims at an ice cream shop in Lexington County; however, WCPD waited six years to contact her. Matt Martin, an investigator for the State, testified that a credit report for Angelica's social security number showed a collection report for an unpaid credit balance under the name of "Sandra Livingston." The collection was for an unpaid medical bill in California in October 2008.

Dr. Kimberly Collins, an expert in forensic pathology, reviewed the photographs from the apartment and found no indication of dragging down the hallway of the apartment. According to Dr. Collins, the photos indicated there was no significant volume of blood to soak through the carpet because neither the bottom of the carpet nor the padding had blood on them. She was unable to form an opinion as to the quantity of blood on the green chair, finding it medically and scientifically impossible. She was also unable to determine the type of injury that may have occurred, how the injury happened, or the severity of the injury.

Following the bench trial, Lynch was convicted of one count of grand larceny and two counts of murder. The trial court sentenced him to ten years' imprisonment for grand larceny and life imprisonment without the possibility of parole for the murders. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

Lynch argues the trial court erred in denying his motion for a directed verdict because the State failed to present substantial circumstantial evidence that he killed the victims, that he was present at the scene of the crime, and that he stole Portia's car. We disagree.²

"On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Pearson*, 410 S.C. 392, 398, 764 S.E.2d 706, 710 (Ct. App. 2014), *cert granted* (internal quotation marks omitted). "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." *Id.* (internal quotation marks omitted); *see also State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (stating the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). "If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, an appellate court must find the trial court properly submitted the case to the jury." *Pearson*, 410 S.C. at 399, 764 S.E.2d at 710. "The [trial] court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

In *State v. Arnold*, our supreme court held fingerprint evidence placing Arnold with the victim on the day of the murder was not substantial and merely raised a suspicion of Arnold's guilt. 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004). In *Arnold*, the victim's body was discovered off a dirt road in Colleton County. *Id.* at

² At trial, Lynch conceded that the victims were murdered by criminal means.

388, 605 S.E.2d at 530. The victim was last seen alive three days earlier, when he borrowed a friend's BMW to go to a dentist appointment. *Id.* One of the State's witnesses testified he had introduced the victim to Arnold. *Id.* The witness indicated he had received a message from Arnold to call him at a phone number belonging to Arnold's father, who lived in Gray, Tennessee. *Id.* at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. *Id.* The BMW had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. *Id.* In concluding that the circumstantial evidence presented by the State was not sufficient to overcome a directed verdict motion, the court reasoned:

Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

The trial court did not err in denying the motion for a directed verdict because, viewing the evidence in the light most favorable to the State, there was substantial circumstantial evidence of Lynch's guilt. *See Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (recognizing that "[o]n appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State"); *id.* ("[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."). As to grand larceny, multiple witnesses testified Portia loved her car and would not allow anyone to drive it. In particular, Jones stated Portia gave her the spare set of keys to the car because she did not want Lynch driving it. In addition, Lynch was stopped for speeding while driving Portia's car alone in Texas, and according to Detective Hutchings, Lynch later admitted that he took Portia's car without her permission. Although Lynch presented evidence that he had previously driven Portia's car with her permission, this goes to the weight of the evidence.

As to the victims' murders, the State presented evidence that Lynch was the last person *seen* with the victims at the place where the State alleged the murders occurred. *See State v. Williams*, 303 S.C. 274, 276, 400 S.E.2d 131, 132-33 (1991) (finding "substantial evidence" to prove the defendant's guilt when the victim was employed by the defendant, was last seen alive with the defendant, and the victim's decomposed body was found); *cf. State v. Lane*, 406 S.C. 118, 120, 749 S.E.2d 165, 167 (Ct. App. 2013), *reversed by* 410 S.C. 505, 765 S.E.2d 557 (2014) (*per curiam*) (finding the State failed to present substantial circumstantial evidence that the defendant was guilty of burglary when papers with the defendant's name were found at the crime scene and a car similar to the defendant's was seen in the victim's driveway when the crime occurred). This is an important distinction from *Arnold* where the victim was last seen alone at his office, and although Arnold's fingerprint was found in the victim's car, there was no evidence Arnold was at the scene of the crime. Moreover, Lynch admitted to police he last saw Portia on Friday June 9, 2006—the day before the State alleged the murder occurred. In addition, the State presented forensic evidence that an assault occurred at the apartment where Lynch lived with the victims. Lynch also admitted to police that he did not know anyone that wanted to harm the victims. Other damaging evidence included the fact that a male's DNA was found in the victims' apartment, and Lynch told police that he had not seen other males in the apartment.

Importantly, the State also presented substantial evidence of flight, which further distinguishes this case from the cases Lynch relies on in his brief. *See State v. Ballenger*, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) ([F]light . . . is at least some evidence of guilt."); *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged."). As previously stated, when Lynch was stopped for speeding in Texas two days after the victims were last seen, he was driving Portia's car and he told the officer he was traveling to Arizona to see his wife, although he was not married. He checked into hotels in multiple states over a short period where he paid cash, once using a false address. He was stopped while trying to enter Canada a few days later, claiming he wanted to visit Vancouver to "see bears." He also repeatedly lied to police officers, initially claiming he had not driven Portia's car outside South Carolina and only admitting to it after he was confronted with evidence of his traffic stop in Texas. Finally, the State presented evidence that Lynch abandoned Portia's car in Seattle, removing the license plate and all identification. *See State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999) ("The attempted destruction of evidence is regarded as a relevant incriminating circumstance."). Viewing this evidence in a light most favorable to

the State, the evidence rose above mere suspicion and constituted substantial circumstantial evidence to prove Lynch was guilty of grand larceny of Portia's car and the victims' murders. *Cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (recognizing a motion for directed verdict should be granted "where the evidence merely raises a suspicion that the accused is guilty"). Accordingly, the trial court did not err in denying Lynch's motion for a directed verdict.

II. Jury Instruction

Lynch next argues the trial court erred in not giving a jury instruction regarding how to use and evaluate circumstantial evidence.³ We disagree.

"An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (internal quotation marks omitted). "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 270, 721 S.E.2d at 422 (internal quotation marks omitted). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

At the conclusion of the case, the parties engaged in a charge conference to discuss the standards the trial court would use to evaluate the evidence. Lynch moved for a circumstantial evidence charge found in *State v. Edwards*;⁴ specifically, that "in a circumstantial evidence case, if the factfinder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete."

Lynch argued that due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be "the old *Edwards* standard, which is any exception that would tend to disprove the case is sufficient to defeat the case." The trial court stated it would not "charge something that [was] not the law" and denied Lynch's request.

³ Because Lynch received a bench trial, he did not actually request a jury instruction; rather, he requested the trial court consider the "correct" law when evaluating whether there was substantial circumstantial evidence of guilt.

⁴ 298 S.C. 272, 379 S.E.2d 888 (1989), *abrogated by State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

In *Edwards*, the supreme court approved the following charge as part of an appropriate circumstantial evidence charge:

every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven [must] be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming then to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

298 S.C. at 85, 489 S.E.2d at 465 (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) (alteration in original)).

In *State v. Grippon*, our supreme court found the trial court did not err when it refused to charge the phrase "to the exclusion of every other reasonable hypothesis" in its circumstantial evidence jury charge. 327 S.C. 79, 82, 489 S.E.2d 462, 463 (1997), *abrogated by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). The supreme court held that in a criminal case relying in whole or in part on circumstantial evidence, once a proper reasonable doubt instruction is given, the jury should be instructed as follows:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83-84, 489 S.E.2d at 464.

Justice Toal wrote a concurrence, finding no reason to adopt an entirely new circumstantial evidence charge and recommending trial courts not abandon "South Carolina's traditional charge as described in *State v. Edwards*." *Id.* at 84-85, 489 S.E.2d at 464-65 (Toal, J., concurring). Justice Toal opined juries need "detailed information about the relation of circumstantial evidence to determination of guilt" and "the *Edwards* charge clarifies the jury's responsibility to evaluate circumstantial evidence carefully." *Id.* at 88, 489 S.E.2d at 466-67.

In *State v. Cherry*, the defendant argued the trial court erred in refusing to give the *Edwards* charge. 361 S.C. at 595, 606 S.E.2d at 478-79. The supreme court disagreed, holding "*Grippon* is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence." *Id.* at 597, 606 S.E.2d at 480. Specifically, the court found,

[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not. The standard remains whether the evidence reflects proof of the defendant's guilt beyond a reasonable doubt. Accordingly, we hold that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction.

Id. at 601, 606 S.E.2d at 482 (footnotes omitted).

In *State v. Logan*, the supreme court held trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when requested by the defendant:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452. The court further noted, "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon and Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nevertheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8 (citations omitted).

The trial court did not err in refusing to issue Lynch's requested jury charge. Initially, we note that the *State v. Logan* decision applies to this case because Lynch's direct appeal was pending when *Logan* was released. *See State v. Jenkins*, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014), *cert pending* (finding *Logan* applies to cases "pending on appeal at the time the *Logan* opinion was published"). Nevertheless, we believe Lynch's argument is without merit because his requested circumstantial charge was based on the "reasonable hypothesis" language from *Edwards*, which the supreme court found unnecessary in *Logan*. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452; *Jenkins*, 408 S.C. at 572-73, 759 S.E.2d at 766 ("Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary."). Therefore, the trial court did not commit reversible error in refusing Lynch's requested charge. *See State v.*

Drayton, Op. No. 5294 (S.C. Ct. App. filed Feb. 4, 2015) (Shearouse Adv. Sh. No. 5 at 48, 51) (finding no reversible error in trial court's failure to include the *Edwards* "reasonable hypothesis" language in its circumstantial evidence jury charge when the trial court's instruction "as a whole, properly conveyed the applicable law").

III. Search and Seizure

Lynch next argues the trial court erred in not suppressing evidence seized in connection with his arrest because his arrest warrant for grand larceny was not supported by probable cause. Relying on *Franks v. Delaware*,⁵ Lynch argues the officer who obtained the arrest warrant for grand larceny failed to inform the magistrate that Lynch and Portia were in a relationship, had lived together, and that Lynch had previously driven Portia's car. He asserts that but for these omissions, the arrest warrant for grand larceny would not have been supported by probable cause. We disagree.

"There is . . . a presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In *Franks*, the Supreme Court of the United States held the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. *Id.* at 155-56.

To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (footnote omitted). "*Franks* addressed an act of *commission* in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit." *Id.*

⁵ 438 U.S. 154 (1978).

"Entitlement to a *Franks* hearing is a matter of law subject to *de novo* review." *Horton v. City of Columbia*, 408 S.C. 27, 36, 757 S.E.2d 537, 541 (Ct. App. 2014), *cert granted*.

While omissions may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit. The potential for endless rounds of *Franks* hearings to contest facially sufficient warrants is readily apparent.

United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990) (citations omitted).

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008). "[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead.'" *Id.* at 455 (citation omitted) (emphasis removed) (second alteration in original). "The defendant must also show that the omitted material was necessary to the finding of probable cause, *i.e.*, that the omitted material was such that its inclusion in the affidavit would defeat probable cause." *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003) (citations and internal quotation marks omitted). "Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence." *Id.* "If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *Colkley*, 899 F.2d at 300.

A. Border Search

During Lynch's detention at the United States/Canada border, Agent Bresee found several items in Lynch's possession, including a Greyhound bus ticket from Seattle to Vancouver dated June 17, 2006; a Motel 6 receipt dated June 14, 2006; and a second Motel 6 receipt dated June 12, 2006. Agent Bresee faxed copies of these

items to WCPD, and at 3:10 a.m. on June 18, 2006, WCPD confirmed to him that an arrest warrant had been issued for Lynch on the charge of grand larceny. Agent Bresee then called the Whatcom County, Washington Sheriff's Department to take Lynch into custody, and a sheriff's deputy served Lynch with an arrest warrant for grand larceny.

Following Bresee's testimony, Lynch moved to suppress the seizure of the documents by the border patrol agents and their subsequent transfer to WCPD. Lynch, however, conceded that he did not "have a problem with the Border Patrol agent checking into [Lynch]. There's an NCIC-for-a missing person. He checks his bags. If he checked them at that point, that's okay, too." The trial court denied Lynch's motion to suppress, finding the documents were seized lawfully under the border exception to the Fourth Amendment and that the documents were lawfully transmitted to WCPD "because they were seized properly and lawfully under the Border Patrol's authority."

Initially, we note that the trial court did not err in refusing to suppress the items seized by the border patrol. Lynch conceded the initial search of his bags by the border patrol was valid; therefore, any argument that his initial search was unlawful is unpreserved. Even if the argument is preserved, it is without merit because the contents of Lynch's luggage were lawfully seized under the border exception to the Fourth Amendment. See *United States v. Ramsey*, 431 U.S. 606, 616 (1977) ("[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border . . ."). Furthermore, once the items were properly seized by the border patrol agents, the agents could fax copies of those items to WCPD. See *Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983) ("[W]here law enforcement authorities are cooperating in an investigation, . . . the knowledge of one is presumed shared by all."); *State v. Muquit*, 381 S.C. 114, 118, 671 S.E.2d 643, 645 (Ct. App. 2009) ("When an arrestee's property is already in the custody of law enforcement as an incident of the arrest, the police may seize it at a later time as evidence relating to his offense."). Therefore, the trial court did not err in refusing to suppress the items seized during Lynch's search at the border.

B. Arrest Warrant/Franks Hearing

Lynch next moved to suppress any evidence seized from him after his arrest for grand larceny, arguing his arrest warrant for grand larceny was invalid. Detective Matt Edwards of WCPD testified he procured Lynch's arrest warrant for grand

larceny on June 18, 2006. Detective Edwards supplemented the affidavit for the warrant with sworn testimony to the magistrate. He orally "reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Lynch "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Lynch lied to the trooper in Texas when he said he was going to pick up his wife in Arizona because Lynch was unmarried, and that Lynch showed up in Washington alone.

On cross-examination, Detective Edwards testified he "passed on to [the magistrate] . . . what had been openly discussed . . . by coworkers and family, that [Lynch] would not have been allowed to" drive Portia's car. He further stated that at that time, he had not talked to Portia's mother and he "had seen no documents that indicated [Lynch and Portia] were husband and wife." Detective Edwards admitted he did not tell the magistrate (1) that Lynch and Portia had lived together in different residences for two years, (2) that they had an intimate relationship, and (3) that Portia was Lynch's live-in girlfriend.

Thereafter, Lynch argued Detective Edwards's omissions of information in the process of obtaining the warrant rendered the warrant defective. Lynch asserted the manner the warrant was presented to the magistrate implied that Lynch was a "random person" driving Portia's car when in fact he was her live-in boyfriend who had previously driven her car with permission. Specifically, Lynch argued that Detective Edwards failed to inform the magistrate that Lynch was driving a car that belonged to his live-in girlfriend of two years and that coworkers and family members informed police that Lynch would occasionally drive Portia's car.

The trial court ruled that even with the omitted information—that Lynch and the victim had been in a relationship but the relationship was troubled—the arrest warrant still was supported by probable cause. It found that "based upon the information that [WCPD] detectives had at that time," the information they presented to the magistrate was sufficient to establish probable cause. The court acknowledged that "certain facts [were] left out"; however, it denied any motion to suppress based on the allegation that the arrest warrant was not supported by probable cause.

Lynch has failed to show a *Franks* violation. First, Detective Edwards did not recklessly or intentionally omit the information that was not relayed to the magistrate. See *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397 ("To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in

reckless disregard of whether it made, the affidavit misleading to the issuing judge."). Lynch asserts that Detective Edwards recklessly or intentionally failed to inform the magistrate that Jones had seen Lynch driving Portia's car; however Detective Edwards testified that at the time he obtained the warrant, he had not spoken with Jones; therefore, he could not have conveyed this information to the magistrate. In addition, Detective Edwards stated that at that time, he "had seen no documents that indicated [Lynch and Portia] were husband and wife." Thus, he could not have informed the magistrate that Lynch and Portia's apartment lease indicated they were married. Accordingly, Lynch has not shown a *Franks* violation because he failed to make a preliminary showing that Detective Edwards intentionally or recklessly omitted the alleged exculpatory information.

Even if Detective Edwards acted recklessly in omitting this information, Lynch has still failed to show a *Franks* violation because the affidavit, including the omitted information, and Detective Edwards's oral testimony before the magistrate provided probable cause that Lynch was guilty of grand larceny. *See id.* ("There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause."). The arrest warrant affidavit stated:

[Detective Edwards] further state[s] that there is probable cause to believe that [Lynch] did commit [grand larceny] and that probable cause is based on the following facts:

In that on or about June 14th, 2006, at 200 N. 12th Street, in the city of West Columbia, County and State aforesaid, [the victims] were reported missing to the West Columbia Police Department. They had not been seen by anyone since June 10, 2006. On June 14th, 2006[,] [Lynch] was ticketed in El Paso, Texas, while driving alone in a 2005 Ford Focus (VIN Number 1FAFP34N25W228072) valued at \$12,000.00 which is registered to [Portia]. On June 18, 2006, [Lynch] was stopped while trying to cross the USA/Canadian [b]order on a bus. The whereabouts of the vehicle are unknown. Investigators with [WCPD] believe that [Lynch] did take, steal, and carry away the vehicle depriving the owner of its use and value. All of which constitutes the crime of grand larceny more than \$5000.00 and is in violation of the South Carolina Code of Laws of 1976 as Amended.

In addition, Detective Edwards properly supplemented the affidavit with sworn oral testimony before the magistrate. *See State v. Crane*, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988) ("[A] search warrant affidavit insufficient in itself to establish probable cause may be supplemented before a magistrate by sworn oral testimony."). Specifically, he told the magistrate "that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Lynch "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Lynch lied to the trooper in Texas when he said he was going to pick up his wife in Arizona because Lynch was unmarried, and that Lynch showed up in Washington alone. Even including the omitted information that Lynch and Portia were in an intimate relationship and had been living together for several years, the information would have also revealed that the relationship was troubled. Moreover, the omitted information would not have explained or negated the fact that at the time WCPD sought the arrest warrant, Portia had been reported missing for four days, and Lynch had been stopped in Texas alone driving a car that was registered to Portia. While evidence of a prior relationship might have offered an innocent explanation for Lynch's use of Portia's car, the exculpatory impact of this evidence was greatly diminished by the fact that Lynch was seen driving the car alone in Texas, and he arrived in Washington by bus without Portia. Further, the magistrate would have still known that the vehicle had not been located, and DMV records indicated that the vehicle belonged to Portia. Accordingly, the trial court did not err in not suppressing evidence seized during Lynch's arrest because the arrest warrant was valid and supported by probable cause.

CONCLUSION

Based on the foregoing, the trial court is

AFFIRMED.

SHORT and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

Appellate Case No. 2012-212547

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304

PETITION FOR REHEARING

On March 18, 2015, this Court affirmed Appellant's convictions and sentences in a published opinion. State v. Lynch, Op. No. 5304 (S.C. Ct. App. Mar. 18, 2015). Pursuant to Rule 221(a), Appellant seeks rehearing of the three issues presented in light of the significant points overlooked and/or misapprehended by this Court in arriving at its conclusion. Those points will be described in greater detail below.

Directed Verdict of Acquittal

In affirming the denial of Appellant's directed verdict motion, this Court stated that Appellant conceded the victims were murdered by criminal means at trial. The record disputes this finding. During the argument on the directed verdict motion, trial counsel responded to the state's argument as follows: "The no-body issue of corpus delicti is not what I'm standing on."

R. 1711, lines 7-8. Trial counsel elaborated, “I can concede it, and they can’t get past Arnold. It’s sort of a siren song and a red herring. That’s not the issue.” R. 1711, lines 11-13 (emphasis added). Thus, the record is clear that trial counsel never conceded that Portia and Angelica died by criminal means. Rather, trial counsel maintained that he could concede that point and still the state’s case would not survive the directed verdict motion.

This Court also relied upon testimony of Detective Glen Hutchings regarding the grand larceny of a motor vehicle charge. According to this Court, Hutchings testified that Appellant “eventually admitted he took Portia’s car without her permission, but asserted ‘she wouldn’t have cared anyway because she was going to lose the car.’” A careful examination of the record reveals inconsistencies in Hutchings’ testimony on this point. The exchange between Hutchings and the prosecutor revealed Appellant admitted to driving Portia’s car across the country, but Appellant indicated Portia would not mind if he did so.

Q. What did you confront him with?

A. I advised him that we had information that he had been stopped by law enforcement in the El Paso, Texas, area driving Portia Washington’s car.

Q. What was his response?

A. He said that he actually had driving Portia’s car, that Portia was having difficulty making the payments on the car and that she wouldn’t have - - she didn’t care if he took the car because she was going to return it to the dealership or he was going to have to start making payments on it.

R. 623, lines 2-12. Thus, the record demonstrates that Hutchings initially did not testify that Appellant admitted to taking Portia’s car without her permission. In fact, Hutchings testified that Appellant admitted to driving Portia’s car and that Portia did not care if he did so. Later, when the prosecutor asked if Appellant admitted whether had permission to take the car, Hutchings responded, “Yes, he eventually admitted that he did not have permission. And, of course, he did

add that she wouldn't have cared anyway because she was going to lose the car." R. 634, lines 17-22. This Court has read this as an admission that Appellant committed grand larceny. However, the record is clear that Appellant only admitted that he drove Portia's car and that she would not have cared if he had done so. This is the antithesis of larceny.

According to this Court, the state "presented evidence that [Appellant] was the last person seen with the victims at the place where the state alleged the murders occurred." This Court found this "fact" to be "an important distinction from Arnold where the victim was last seen alone at his office, and although Arnold's fingerprint was found in the victim's car, there was no evidence Arnold was at the scene of the crime." This Court's conclusion that Appellant was the last person seen with the victims at the place where the state alleged the murders occurred failed to consider the equivocal and ambiguous testimony in the record regarding the last person to see or hear from Portia and the lack of evidence of where the murders, if Portia and Angelica were murdered, occurred.

Carla Perry lived in the same apartment complex as Appellant, Portia, and Angelica in June 2006. R. 178, line 22 – R. 180, line 17. Perry last saw Portia, Angelica, and Appellant during the afternoon hours on June 10, 2006 when Portia was getting some things from her car. R. 180, line 21 – R. 181, line 21; R. 182, lines 17-25. At approximately 10:30 p.m., Perry noticed that Portia's car was not in the apartment complex parking lot and that Portia's apartment was dark. R. 184, line 11 – R. 185, line 11. However, the record is not clear that Perry was the last person to see Portia and Angelica alive on Saturday, June 10, 2006. In fact, Portia's aunt, Vernelle Bellamy, saw Portia twice on Saturday, June 10, 2006. The first time Portia gave money to Bellamy to use while in Sumter shopping. Bellamy purchased an \$80 pantsuit for Portia, which she gave to Portia later on Saturday. R. 235, line 22 - R. 237, line 1; R. 237, lines

2-8. The time when Bellamy saw Portia on Saturday was unclear. Thus, the record does not support this Court's conclusion that Appellant was the last person seen with the victims at the place where the state alleged the murders occurred.

Although the state presented evidence that an assault occurred at the apartment where Appellant lived with the victims, this evidence failed to demonstrate the assault was fatal or that the assault encompassed both Portia and Angelica. The DNA analysis pointed only to Angelica. Further, the fact that Appellant's DNA was found in the apartment was hardly surprising or incriminating as he lived in the apartment.

This Court further held the state presented substantial evidence of flight. While it is true the state presented evidence that Appellant had left South Carolina around the date Portia and Angelica went missing, the evidence did not show that Appellant had fled the state to avoid capture by the authorities. While "[e]vidence of flight has been held to constitute evidence of guilty knowledge and intent," "[t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999). There was no evidence that Appellant had knowledge that the authorities were looking for him. In fact, for the first few days of Appellant's cross-country trip, the authorities were not looking for him. The record was devoid of evidence that Appellant feared apprehension by the police. In fact, when the police initiated a traffic stop in Texas, Appellant cooperated fully and willingly. Later, when law enforcement agents at the border questioned him, Appellant again cooperated fully and willingly. These were not the actions of a man running from the law.

The evidence presented by the state could not rise above a mere suspicion to constitute substantial circumstantial evidence that Appellant was guilty of grand larceny and murder. Appellant reiterates the undisputed evidence that Appellant and Portia were involved in a long-term romantic relationship and living together. R. 107, line 15 – R. 108, line 12; R. 117, lines 3-8; R. 134, lines 19-21; R. 143, lines 6-7; R. 156, lines 3-13; R. 180, lines 15-16; R. 199, lines 8-11; R. 247, line 14 – R. 248, line 6; R. 265, lines 20-22; R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24; R. 799, lines 3-8. Appellant further reiterates the inconsistent testimony presented by the state regarding Portia's mental state. Although some witnesses testified that Portia was withdrawn and anxious while dating Appellant, other witnesses, including one of the last witnesses to speak to Portia, reported she was happy and looking forward to the future. Cf. R. 199, lines 11-20; R. 268, line 14 – R. 269, lines 9; R. 1673, line 24 - R. 1674, line 14; R. 1675, lines 15-24 with R. 177, lines 11-25; R. 278, lines 9-11; R. 792, lines 18-22; R. 1675, line 25 - R. 1676, line 11. Finally, Appellant reiterates the law governing directed verdict motions in South Carolina.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 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). The prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013)(citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

Appellant’s case is virtually indistinguishable from State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) where the Supreme Court granted a directed verdict of acquittal. Dr. Jennings Cox, who lived and worked in Savannah, was last seen alive on June 18, 1997 at his office. He borrowed a colleague’s car to go to a dentist appointment. Later, he called his secretary to cancel his remaining appointments for the day. Bank records indicated he withdrew money from an ATM in Hardeeville, South Carolina during the afternoon of June 18, 1997. During their investigation, the police interviewed Bobby Ray Ware.

Ware, a truck driver who lived in Savannah, had had a sexual relationship with Dr. Cox for more than a year. On the weekend of June 14-15, Ware introduced Dr. Cox to Arnold, who was staying with Ware. According to Ware, Dr. Cox and Arnold had sex that weekend. Ware also saw Arnold with a gun while he was staying with him. Id. at 388-389, 605 S.E.2d at 530.

Ware left at 6:00 a.m. on June 17, 1997 to drive to Chicago while Arnold remained at Ware's house. On June 19, 1997, Ware received a message to contact Arnold at a specific phone number. Later, Ware contacted Arnold at the phone number, which belonged to Arnold's father who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530

The borrowed car was found on June 20, 1997 in a parking lot in Johnson City, Tennessee. Although there was no blood in the car, there were some unspecified scratches on it. Additionally, police recovered a fingerprint from a coffee cup lid found in the center compartment of the car. The fingerprint was identified as Arnold's right thumbprint. Id. The body of Dr. Cox was found on June 21, 1997 in Colleton County. He had been shot. No additional evidence was found at the scene. Id. at 388, 605 S.E.2d at 530. On June 27, 1997, Arnold was arrested at his father's house in Tennessee. Id. at 389, 605 S.E.2d at 531.

According to the Court, the fingerprint evidence established only that Arnold was in the car on the same day Dr. Cox was last seen alive, the presence of the borrowed car in the same state where Arnold was after his stay in Savannah raised only a suspicion of guilt. The prosecution presented no evidence that Appellant was even at the scene of the crime in Colleton County. Therefore, the Court granted a directed verdict of acquittal to Arnold. Id. at 390, 605 S.E.2d at 531.

The Eleventh Circuit Solicitor's Office failed to present substantial circumstantial evidence that Appellant was guilty of murder and grand larceny. The prosecutor presented evidence that Portia and Angelica were no longer in Lexington County and had no contact with family and friends for six years, which was unusual. The prosecution presented evidence that Appellant lived with Portia and Angelica until shortly before their disappearance. The prosecution presented evidence that blood consistent with that of Theresa Brown's daughter was

in their shared apartment and was indicative of an assault. Finally, the prosecution presented evidence that Appellant left South Carolina around the time of Portia's and Angelica's disappearance.

What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant killed Portia and Angelica. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant was present at the crime scene, which the prosecution claimed was in Lexington County. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant stole Portia's car, especially in light of the evidence that Appellant frequently drove Portia's car with her permission, the two were involved in a romantic relationship, and the two lived together.

How to Consider Circumstantial Evidence

This Court held Appellant's argument regarding how the trial judge, who was also the fact finder, was required to consider the circumstantial evidence was without merit because "his requested circumstantial charge was based on the 'reasonable hypothesis' language from Edwards, which the Supreme Court found unnecessary in Logan." Respectfully, Appellant disagrees with this Court's reading of the record.

At the conclusion of the case, the parties engaged in a charge conference to discuss the standards the judge would use to evaluate the evidence. Appellant moved for an instruction consistent with the circumstantial evidence charge found in State v. Grippon 327 S.C. 79, 489 S.E.2d 462 (1997). R. 1752, line 17 – R. 1753, line 6. The judge then asked the state if the "charge on circumstantial evidence as outlined by Grippon is consistent with the appropriate law." R. 1753, lines 7-15. The state responded it would "be comfortable with any standard" used by the judge. R. 1753, lines 16-19. Appellant clarified for the record that he was asking for

“the old Edwards charge.” Specifically, he requested “in a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete.” R. 1753, line 20 – R. 1754, line 4. The state then objected to the trial court considering language found within a dissenting opinion of the Supreme Court. R. 1754, lines 7-9.

The trial judge, and fact finder, responded that he would not “charge something that [was] not the law.” R. 1755, lines 8-10. Appellant clarified that the language he relied upon was from a concurring opinion, not a dissent. Additionally, he argued that due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be “the old Edwards standard, which is any exception that would tend to disprove the case is sufficient to defeat the case.” R. 1755, line 19 – R. 1756, line 11. Nevertheless, the judge denied the request. R. 1756, lines 12-15.

In State v. Logan, 405 S.C. 83, 94-95, 747 S.E.2d 444, 450 (2013) the South Carolina Supreme Court “revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state’s burden and the jury’s responsibility.” As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. at 97, 747 S.E.2d at 451. Although direct and circumstantial evidence may carry the same weight, “a jury cannot accurately analyze these two types of evidence using identical approaches.” Id.

Specifically, circumstantial evidence, unlike direct evidence, “requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded.” Id. Thus, “[a]nalysis of circumstantial evidence is plainly a more intellectual

process.” Id. at 97-98, 747 S.E.2d at 451. In light of the differing analysis required when examining direct versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant’s case, the instruction directs the fact finders that “to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.” The instruction also provided that “[i]f these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.” Id. at 99, 747 S.E. 2d at 452.

Appellant’s request was for the trial judge and fact finder to apply the following standard: “[I]n a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete.” R. 1753, line 20 – R. 1754, line 4. Appellant’s request was not for “reasonable hypothesis” consideration. Rather, Appellant’s request was for the circumstantial evidence to be complete. As Logan held, “to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.” Appellant’s requested instruction merely wanted the state’s evidence to be held to the constitutional burden of showing complete circumstantial evidence that the defendant was guilty beyond a reasonable doubt based upon the consistency of the circumstances pointing conclusively to guilt.

Clear, cogent, and concise instructions directing even the trial judge on how to analyze the circumstantial evidence before it were necessary in Appellant’s case. The instruction concerning how to evaluate circumstantial evidence was necessary in Appellant’s trial due to the nature of the evidence presented by the prosecution, which was entirely circumstantial. Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a

conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs the fact finder regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts. The trial judge’s refusal to utilize the charge concerning how to use circumstantial evidence violated Appellant’s right to require the prosecution to prove his guilt beyond a reasonable doubt.

Illegal Search and Seizure

This Court found Detective Matt Edwards “did not recklessly or intentionally omit the information that was not relayed to the magistrate.” First, this Court examined Edwards’ failure to tell the magistrate that Jones, Portia’s mother, had seen Appellant driving Portia’s car. This Court held Edwards could not have conveyed this information to the magistrate because he had not spoken with Jones at the time he obtained the arrest warrant. However, law enforcement had been in constant contact with Jones in the days following Jones’ report that Portia was missing. The state cannot be shielded from the Jones’ knowledge simply because law enforcement sent an officer who knew only what was told to him to obtain the arrest warrant. The knowledge of the entire police force must be imputed to Edwards despite what he knew personally. Second, this Court found that Edwards could not have informed the magistrate that Appellant and Portia’s apartment lease indicated they were married because he had not seen documents concerning their marital status when he obtained the arrest warrant. These conclusions are erroneous based on the facts in the record, and these conclusions omit several key considerations.

Appellant incorporates by reference the factual recitation presented in his final brief concerning this issue, including, but not limited to, Polinder serving the arrest warrant on Appellant in Washington, statements made by Appellant to Polinder, the interview of Appellant by the FBI agent, and Appellant’s extradition to South Carolina, which was based upon the

warrant for grand larceny, testimony by family and friends concerning Appellant having driven Portia's car.¹ Kevin Odell, an employee of Lexington County Sheriff's Department, booked Appellant into the jail. As part of the booking process, he took Appellant's fingerprints. R. 837, lines 19-20; R. 838, lines 1-22.

Matt Edwards, a detective with WCPD, procured the arrest warrant for Appellant on the charge of grand larceny. R. 449, lines 14-17.² The warrant affidavit contained the following information: on June 14, 2006, Portia and Angelica were reported missing having not been seen since June 10, 2006; on June 14, 2006, Appellant was ticketed in El Paso, Texas while driving alone in a 2005 Ford Focus valued at \$12,000 registered to Portia Washington; on June 18, 2006, Appellant was stopped while trying to cross the Canadian border on a bus; and the whereabouts of the vehicle were unknown. R. 451, line 14 – R. 452, line 12; R. 1813.

In addition to the written affidavit, Edwards orally supplemented the information. R. 452, line 25 – R. 453, line 1. Edwards orally "reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Appellant "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Appellant lied to the trooper when he said he was going to pick up his wife in Arizona because Appellant was unmarried, and that Appellant showed up in Washington alone. R. 453, lines 3 – 22.

Incredulously, Edwards failed to inform the magistrate that Appellant and Portia were involved in an intimate relationship. R. 460, line 21 – R. 461, line 7. Edwards failed to inform

¹ As evidenced by the fugitive complaint, order and warrant of arrest and detention on fugitive complaint, governor's warrant of arrest and extradition, the State of Washington detained Appellant and extradited him to South Carolina based upon the arrest warrant. R. 1815.

² The warrant was typed and signed by Edwards on June 18, 2006. R. 452, lines 18-20.

the magistrate that Appellant and Portia lived together and their lease listed them as husband and wife. R. 457, lines 4-7. Edwards failed to inform the magistrate that the registered owner of the car was Appellant's live-in girlfriend. R. 461, lines 10-12. Edwards failed to inform the magistrate that Appellant and Portia lived together in multiple residences over the past couple of years. R. 460, lines 17-20. Equally importantly, Edwards failed to inform the magistrate of any conversations with Portia's mother in which she stated that Appellant drove Portia's car to drop Angelica off at her house. R. 456, lines 14 – 25.

Our Supreme Court found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The Court found the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. The Court then examined the affidavit by excluding the false information and inserting the exculpatory information. Id. at 555, 524 S.E.2d at 397. The Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id.

The Court presumed that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit. However, the Court found the information omitted in Missouri's case went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The Court explained that the omitted information did more than create "some uncertainty," rather it created

“an affirmative hurdle which the remaining portions of the affidavit must overcome.” Id. at 555-556, 524 S.E.2d at 397-398. Although finding the case presented a “close call on the probable cause determination,” the Court held the combination of the officer’s false statement and omission of critical facts “pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant.” Id. at 556, 524 S.E.2d at 398.

Turning to Appellant’s case, Edwards sought and obtained an arrest warrant for grand larceny, which is the felonious taking and carrying away of goods of another of a certain monetary value. See State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002). Additionally, the taking must be done with the intent to deprive the true owner of his property and to convert it to the use of the offender. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). Thus Edwards was required to provide the magistrate with evidence to support a probable cause determination that Appellant feloniously took and carried away Portia’s car with the intent to deprive Portia of the use of the car and convert the car to his own use.

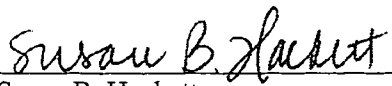
Edwards failed to inform the magistrate either in writing or orally that Appellant and Portia lived together in a romantic relationship, which included holding themselves out as husband and wife, and family members, friends, and co-workers had witnessed Appellant driving Portia’s car in the past. This Court failed to consider Appellant’s contention that Edwards was required to inform the magistrate that Appellant and Portia were involved in a romantic relationship and lived together. The omitted facts go to the “very heart of the affidavit’s purpose” because the information not relayed to the magistrate exculpate Appellant from having stolen Portia’s car, or at a minimum did more than create some uncertainty. A reasonable person would not believe Appellant was guilty of the crime of grand larceny of Portia’s vehicle knowing

Appellant and Portia lived together in a romantic relationship and Appellant had driven the car in the past.

This Court concluded that “[e]ven including the omitted information that [Appellant] and Portia were in an intimate relationship and had been living together for several years, the information would have also revealed that the relationship was troubled.” Although some evidence revealed a troubled relationship, other evidence indicated Portia was happy in her relationship with Appellant. Nevertheless, the inclusion of even a troubled relationship in the warrant was necessary in order for the magistrate to understand that the person in Portia’s car in Texas was someone with whom Portia had a very close relationship, not a stranger. The close relationship would tend to show permission to use the car, not larceny of the car. This Court admitted the evidence of a prior relationship “might have offered an innocent explanation” Appellant’s use of the car. Appellant submits the prior relationship absolutely offered an innocent explanation for why Appellant was in the car. The exculpatory impact of the relationship was not diminished by the fact that Appellant was driving alone in the car in Texas and had arrived in Washington without Portia. Those facts demonstrated no incriminating inferences.

Appellant respectfully requests rehearing of the matter in light of the significant points overlooked and/or misapprehended.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

This 2nd day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

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 J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kenneth Andrew Lynch #350750, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of April, 2015.

Susan B. Hackett
 Susan B. Hackett
 Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
 of April, 2015.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Kenneth Andrew Lynch, Appellant.

Appellate Case No. 2012-212547

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

James E. Becker J.
Stephanie L. McFarland J.

Columbia, South Carolina

cc:

Susan Barber Hackett, Esquire
 Alan McCrory Wilson, Esquire
 J. Anthony Mabry, Esquire
 John W. McIntosh, Esquire

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CLERK FOR
 APPELLATE DEFENSE

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Donald V. Myers, Esquire
The Honorable Eugene C. Griffith, Jr.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN - 5 2015

S.C. Supreme Court

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

APPELLATE CASE NO. 2012-212547

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor concerning two counts of murder and grand larceny because the prosecution failed to present substantial circumstantial evidence tending to prove Appellant's guilt.
- II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations as fact-finder violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.
- III. In violation of the Fourth Amendment to the United States Constitution and Article One, section ten of the South Carolina Constitution, the trial judge erred in failing to suppress evidence seized in connection with Appellant's arrest, including all of the items found in his luggage, and Appellant's extradition, where the arrest warrant issued was not supported by probable cause due to the officer's omission of vital information, which placed the scenario in an entirely different light.

STATEMENT OF THE CASE

On August 11, 2008, a Lexington County grand jury indicted Appellant for two counts of murder (2008-GS-32-2652 & 2008-GS-32-2653) and grand larceny of property having a value of five thousand dollars or more (2007-GS-32-525). R. 1871. The Eleventh Circuit Solicitor's Office served Appellant with its notice to seek of intent to seek the death penalty. The matter proceeded to a bench trial before the Honorable Eugene C. Griffith, Jr. on April 16, 2012. R. 1. Donald Myers, Samuel Hubbard, and David Graham prosecuted Appellant. William McGuire, Benjamin Stitely, and Eric Drylie represented Appellant. R. 1.

After a ten-day trial concerning the guilt-or-innocence of Appellant, Judge Griffith found Appellant guilty on both counts of murder and grand larceny. R. 1793, line 21 – R. 1794, line 3. At the conclusion of the sentencing proceeding, Judge Griffith, in a written sentencing order, found the prosecution proved two statutory aggravating circumstances beyond a reasonable doubt. Specifically, the judge found the prosecution proved Appellant committed the murders by one scheme or course of conduct and that one of the murders was that of a child less than eleven years of age. On May 8, 2012, Judge Griffith sentenced Appellant to two terms of life imprisonment, which he ordered to run consecutive to each other and to the sentence of ten years' imprisonment, which he imposed for the grand larceny conviction. R. 1797, line 9 – R. 1802, line 10; R. 1870. By a motion filed on May 17, 2012, Appellant moved for a new trial. R. 1868. Judge Griffith denied the motion by written order. R. 1870.

Appellant filed a timely notice of appeal. This brief follows.

I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor concerning two counts of murder and grand larceny because the prosecution failed to present substantial circumstantial evidence tending to prove Appellant's guilt.

Relevant facts

Appellant and Portia Washington were involved in a romantic relationship and were living together in 2006. R. 107, line 15 – R. 108, line 12; R. 117, lines 3-8; R. 134, lines 19-21; R. 143, lines 6-7; R. 156, lines 3-13; R. 180, lines 15-16; R. 199, lines 8-11; R. 247, line 14 – R. 248, line 6; R. 265, lines 20-22; R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24; R. 799, lines 3-8. Portia cared for her granddaughter, Angelica Livingston, who also lived with Appellant and Portia.¹ In 2006, Angelica was the only daughter of Theresa Brown, who was Portia's daughter. R. 1663, lines 5-13; R. 1666, lines 19-21.

Tonya Oree, Portia's cousin, testified that although she and Portia were very close, Oree did not know Appellant. R. 1662, line 22 – R. 1663, line 4; R. 1663, lines 23-24. Oree claimed Portia moved to a new apartment because she wanted to be alone. Oree maintained that Appellant was not supposed to move into the apartment. However, Appellant completed the lease agreement, and he, Portia, and Angelica moved there together. R. 1670, line 1 – R. 1671, line 22. At some unspecified time she had been on the phone with Portia and heard Appellant fussing about Portia's car because he wanted the car and Portia refused to give it to him. R. 1673, line 24 - R. 1674, line 14. Oree felt that Portia did not like Appellant, did not want to be with Appellant, and did not want

¹ Angelica's school records indicated that Angelica was in Portia's custody, rather than her biological mother's, because Portia did not know where the biological mother was. R. 928, lines 10-25.

Appellant driving her car. R. 1675, lines 15-24.² However, Portia was happy about the future because Appellant was supposed to move out and buy a car in June or July. R. 1675, line 25 - R. 1676, line 11.

Although Portia had used drugs and drank alcohol in the past, her mother, Sallie Jones, claimed Portia was no longer doing those things in 2006. R. 193, line 21 – R. 194, line 10.³ Jones allowed that Angelica's mother, Theresa, was "riding the streets" at the time. R. 194, lines 11-15. Jones further revealed that Portia was still married to Nathaniel Washington as the two had not divorced despite a lengthy separation. R. 194, lines 21-25. She felt that Portia was not happy in her relationship with Appellant. R. 199, lines 11-20. Supposedly, Portia had given Jones the second key to Portia's new car because she did not want Appellant driving her car anymore. R. 202, lines 5-6; R. 203, line 14 – R. 207, line 3. However, on cross-examination, it was established that Appellant had driven Angelica to her house in Portia's car on multiple occasions. R. 225, lines 15-23.

Evidence of Portia's and Angelica's disappearance

Portia's friend, Linda Miller last saw Portia and Angelica on June 9, 2006 between 6:00 p.m. and 7:30 p.m. R. 112, lines 11-17. Portia did not speak of traveling to Miller at that time. R. 115, lines 4 - 6.

In June 2006, Shyla Andrews was the hairstylist for Portia and Angelica, who had standing appointments on Saturday mornings. R. 132, line 4 – R. 133, line 3; R. 133,

² Portia's son, Samuel Brown, Jr., also testified that Portia did not want Appellant driving her car and no longer wanted to be in a relationship with Appellant. R. 1691, lines 13-24.

³ Portia's aunt, Vernelle Bellamy, also testified that Portia previously had a drug problem. R. 234, line 25 – R. 235, line 4.

lines 8-21. Andrews last saw Portia and Angelica on Saturday, June 10, 2006 for such an appointment. Andrews did Angelica's hair while Portia ran errands. Andrews recalled the two were in Portia's car. R. 133, line 22 – R. 135, line 12.

Lela Green, Portia's longtime friend, spoke to Portia by phone on June 10, 2006. R. 166, line 19 - R. 167, line 22. Portia indicated that she was going to the grocery store to pick up food to cook on Saturday for Sunday's dinner. R. 167, line 24 - R. 168, line 11. Additionally, Portia intended to help Green get her car fixed the following Wednesday. R. 165, line 11 – R. 166, line 14. Green testified that she and Portia planned to talk on Sunday, June 11, 2006, but never did. R. 172, lines 5-11. According to Green, Portia was happy and positive during their last conversation. R. 177, lines 11-25.

Carla Perry lived in the same apartment complex as Appellant, Portia, and Angelica in June 2006. R. 178, line 22 – R. 180, line 17. Perry last saw Portia, Angelica, and Appellant during the afternoon hours on June 10, 2006 when Portia was getting some things from her car. R. 180, line 21 – R. 181, line 21; R. 182, lines 17-25. At approximately 10:30 p.m., Perry noticed that Portia's car was not in the apartment complex parking lot and that Portia's apartment was dark. R. 184, line 11 – R. 185, line 11.

Portia's aunt, Vernelle Bellamy, saw Portia twice on Saturday, June 10, 2006. The first time Portia gave money to Bellamy to use while in Sumter shopping. Bellamy purchased an \$80 pantsuit for Portia, which she gave to Portia later on Saturday. R. 235, line 22 - R. 237, line 1; R. 237, lines 2-8. On Tuesday, June 13, 2006, Bellamy received a call from Portia's workplace, Bob Bennett Ford, indicating that Portia was not at work. R. 238, lines 7-24. Concerned, Bellamy went to the police department and to Appellant's

Portia's apartment. R. 241, lines 7-14; R. 242, lines 19-21. Although the apartment manager would not allow Bellamy into the apartment, the manager entered the apartment and found nothing out of the ordinary. R. 243, lines 1-18.⁴

Debra Hobgood worked with Portia and Appellant at Bob Bennett Ford. R. 262, lines 2-12; R. 265, line 23-24. Hobgood claimed that Portia did not allow Appellant to drive her car. R. 265, lines 15-19. Hobgood further claimed that Portia wanted to get away from Appellant. To assist Portia, in March 2006, Hobgood gave Portia money for an apartment on the condition that Appellant not move into the new apartment. R. 268, line 14 – R. 269, lines 9.⁵ Hobgood also testified that Angelica was supposed to attend summer camp in July 2006. R. 268, line 10 – R. 270, line 12.⁶ Hobgood became worried on Tuesday, June 13, 2006, when she learned that neither Portia nor Appellant were at work. Hobgood's boss contacted the police based on representations made by Hobgood, including her understanding that Portia had lied to her about no longer living with Appellant. R. 275, line 13 – R. 276, line 4; R. 277, lines 19-25. According to Hobgood, Portia was happy when she last saw her on Friday, June 9, 2006. R. 278, lines 9-11.

While working at Bob Bennett Ford, Annette Capilos and Portia became friends. R. 762, lines 4 - 24. Capilos believed Portia began dating Appellant in 2005. R. 763, lines 9-24. After Capilos resigned her position at Bob Bennett Ford, she and Portia

⁴ Ola Mathis was the property manager for the apartments where Portia and Appellant lived in 2006. R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24. On June 13, 2006, relatives of Portia arrived at the complex. R. 320, lines 2-11. Mathis entered the apartment and found everything to be in order. R. 320, line 23 – R. 323, line 5.

⁵ Hobgood also gave Portia \$800 as a down payment on her new car. R. 274, lines 6-9.

⁶ Harry Wertz, another employee at Bob Bennett Ford, also claimed Portia planned to send Angelica to church camp during the summer of 2006. R. 783, lines 7-10.

remained in contact. R. 764, lines 22-25. Based on a conversation with Portia, Capilos advised Portia to have a discussion with her bosses and to stay away from Appellant. R. 768, lines 5-20. Capilos claimed that a few days prior to June 13, 2006, she had called Portia about her upcoming birthday, but received no answer. R. 772, line 15 – R. 773, line 1.

Harry Wertz also worked with Portia and Appellant at Bob Bennett Ford. R. 781, lines 7-21; R. 788, lines 19-20. Wertz described Portia, who was a custodian, as a good employee, whose job was not in jeopardy. R. 784, line 18 – R. 785, line 10. He admitted that Portia was “wild” before, but she was no longer. R. 786, lines 6-13. Wertz was concerned on Monday, June 12, 2006 when Portia did not arrive at work. R. 787, lines 6-24. When Portia did not arrive for work on Tuesday, June 13, 2006, a co-worker drove by her apartment. R. 788, lines 5-18. He last saw Portia on Friday when she left work and she said she would see him on Monday. R. 788, line 23 – R. 789, line 7. Wertz admitted that Appellant was driving Portia’s car on Friday, June 9, 2006. R. 789, lines 13-16. Portia was “very happy” on Friday when she left work with Appellant. R. 792, lines 18-22.

Jack Clary, Portia’s supervisor at Bob Bennett Ford, described Portia as was very happy with her job and a “model” employee. R. 795, lines 13-14; R. 796, lines 16-22; R. 805, lines 14-22. Clary described Appellant as very quiet. R. 798, lines 15-23. Clary was aware of the relationship between Appellant and Portia. R. 799, lines 3-8. On Tuesday, June 13, 2006, Clary, concerned that Portia was not at work, got Portia’s address and drove to her apartment. He found her car was not there and he received no answer when he knocked on the door. R. 802, lines 1-11.

Nancy Hyler, the former office manager at Bob Bennett Ford, testified that Appellant and Portia were employees of Bob Bennett Ford in 2006. R. 744, lines 14-18; R. 745, lines 18-21; R. 746, lines 3-4. Payroll at Bob Bennett Ford ran from Thursday to Wednesday with paychecks issued on Friday. R. 746, lines 16-18. The last check issued for Portia was dated June 16, 2006, but was never picked up. R. 752, lines 1-4.⁷ According to Portia's time card, her last day of work was Wednesday, June 7, 2006. R. 746, lines 12-15; R. 749, lines 3 - 7; R. 749, lines 15-16. Although another timecard did not exist, Hyler testified that a check was cut for the week of June 8 through June 14 for Portia showing she worked eighteen hours, or approximately two days. R. 749, line 19 - R. 750, line 4. Based upon Hyler knowing that Portia did not show up for work on June 12, 2006 or thereafter, Hyler determined that the last two days of Portia's employment were Thursday and Friday of the previous week. R. 752, line 20 - R. 755, line 7. Portia did not provide notice of resigning or taking leave. R. 753, lines 5-10.

Carly Coviello, an employee with T-Mobile, testified regarding records of Portia's cell phone, which was in the name of Rosalyn Sumter. R. 688, lines 9-10; R. 690, lines 6-10.⁸ According to Coviello, the last call made by Portia's phone was at 9:26

⁷ Appellant's last paycheck was not picked up from Bob Bennett Ford. R. 757, lines 1-2. Appellant's last day working was Friday, June 9, 2006. R. 757, line 24 - R. 758, line 4. Appellant had not provided notice of resignation or leave. R. 757, lines 9-19.

⁸ Rosalyn Sumter, Portia's aunt, testified that Portia had a cell phone on Sumter's plan. Portia paid Sumter monthly. R. 806, lines 16-20; R. 808, lines 6-23. Additionally, Sumter helped Portia get her driver's license. R. 811, lines 2-21. Sumter claimed that when she visited Portia, Appellant would remain in a back room, rather than visit with Portia's visitors. As a result, Sumter never met Appellant. R. 814, line 5 - R. 815, line 14.

p.m. on June 10, 2006. The call was made using a cell tower on Leaphart Road in West Columbia. R. 690, line 15 – R. 692, line 2.

Based upon the credit records maintained by TransUnion Credit Union, Steven Newnom testified there had been no credit inquiries for Portia's records and only three addresses, all of which were in the Midlands. R. 699, lines 18 – 19; R. 701, lines 13-18; R. 702, lines 13 -20; R. 704, lines 4-17.

Portia had checking and savings accounts with Bank of America. R. 709, lines 5-20. On June 10, 2006 at 9:50 a.m., \$75 was withdrawn from the savings account at a bank in Cayce, leaving the account with a balance of \$0.72. There were no further transactions on the savings account. R. 710, lines 1- R. 713, line 4. Concerning the checking account, a check card purchase for \$20.09 to Eagle Express in West Columbia posted on June 6, 2010. On June 12, 2006, an automatic draft of \$266.77 was made to Ford. R. 713, line 5 – R. 714, line 14. On June 8, 2006, a purchase for \$8.45 at Hess was made. R. 714, lines 16-25. The account had a balance of \$214.39. R. 715, lines 4-7.

Stuart Darby was Portia's treating physician for several years. Portia's last visit was on May 23, 2006 when he treated her for an upper respiratory infection. R. 876, line 4 – R. 877, line 1. Portia had been under Dr. Darby's care for a sleep disorder and anxiety. He believed the sleep disorder was the result of stress from work and home. R. 877, line 1 – R. 878, line 22. Portia was scheduled for a follow-up visit in two months, but did not return. R. 879, line 22 – R. 880, line 22; R. 880, lines 17-21.

Portia purchased a 2005 Ford Focus on June 22, 2005, pursuant to a financing agreement with Ford Motor Credit. R. 898, line 1-899, line 18. Portia had been late on a payment only once. R. 899, line 24 – R. 900, line 1. The last payment received by Ford

Motor Credit was processed on June 12, 2006. R. 900, lines 2-3. The car was repossessed and sold at auction based upon failure to make additional payments. R. 900, lines 8-13.

Nicky Rodgers, an employee with Lexington County 911, who had access to a national database for drivers' licenses, found one driver's license for Portia and it was in South Carolina. R. 914, line 7 – R. 915, line 5. She also searched for known aliases for Portia, such as Portia Bracey and Portia Sumter, and found no other drivers' licenses. R. 917, lines 5-14.

Angelica last attended school on June 1, 2006, which was the end of her second grade year. R. 918, line 9 – R. 919, line 8. The school expected Angelica to return the next year. R. 919, line 22 – R. 920, line 4. The school district received no requests from other schools for Angelica's school transcripts. R. 921, lines 20-23.

Joe Grice was the pastor of a church in West Columbia where Portia and Angelica attended regularly in 2006. R. 930, line 18 – R. 931, line 11. The church was sponsoring a youth camp set for the week of July 4, 2006, which Portia had paid for Angelica to attend. R. 930, line 1 - R. 931, line 13.⁹ Angelica did not attend the camp, and neither Portia nor Angelica showed up at church again. R. 932, line 14 – R. 933, line 16.

Evidence of Appellant's Conduct

Takiesha Shelton, an employee of Motel 6, testified that the motel's records showed Appellant arrived at a motel in Vicksburg, Mississippi on June 12, 2009 and departed on June 13, 2009. Appellant paid cash for the room. R. 720, lines 15-16; R.

⁹ A check in the amount of \$75 had been written from Portia's account to Youth Camper on April 30, 2006. R. 716, lines 8-17; R. 717, line 25 – R. 718, line 6.

722, line 18 – R. 723, line 11; R. 724, lines 1-21; R. 725, lines 1-3. Records showed Appellant arriving on June 14, 2006 and departing on June 15, 2006 at a motel in Eloy, Arizona. Again, Appellant paid cash. R. 726, line 18 – R. 727, line 18. One receipt listed Appellant's address in Florida, but a second receipt showed his address in Cayce. R. 733, lines 16-23; R. 736, lines 14-19.¹⁰

In 2006, Appellant had two accounts with Wachovia/Wells Fargo bank – checking and savings. The records established that there were transactions occurring in both accounts originating from the Midlands of South Carolina from June 9, 2006 until June 11, 2006. R. 1191, lines 14-21; R. 1197, line 2 – R. 1201, line 6. Then, on June 13, 2006, there were three withdrawals totaling \$420 originating in Waskom, Texas. R. 1202, line 17 – R. 1203, line 24. On June 14, 2006, Appellant's savings account had a balance of \$2.23 and his checking account had a balance of \$0.08. R. 1201, lines 8-10; R. 1204, lines 3-7.

Shane Ramirez, an officer with the Texas Highway Patrol, stopped Appellant for speeding on June 14, 2006 at 12:12 p.m. at milepost 72 on I-10 in Fort Hancock, Texas. R. 661, lines 19-21; R. 662, lines 11-15; R. 663, lines 8-12; R. 667, lines 9-12; State's Exhibit #29. Appellant was driving a 2005 Ford Focus that was registered to Portia. R. 664, lines 21-25; R. 665, lines 6-16. There were no passengers in the car, but there was a child's car seat in the back. R. 666, lines 19-21; R. 670, lines 19-25. Appellant informed Ramirez that he was going to Arizona to pick up his wife.¹¹ R. 671, line 21 – R. 672, line

¹⁰ Gail Heath, a forensic document examiner with SLED, testified that the signatures on the receipts were written by Appellant. R. 1146, lines 12-20; R. 1154, lines 16-20.

¹¹ According to the apartment lease, Appellant and Portia were married. R. 337, line 22 – R. 338, line 6.

1.

Nathan Bresee worked for Customs and Border Protection in Blaine, Washington in 2006. R. 356, lines 23-25. He encountered Appellant on June 17, 2006, at 10:45 p.m. at the border. R. 356, lines 9-17. Because Appellant had been refused entry into Canada, Bresee performed a criminal history check on Appellant. He received a positive NCIC alert indicating that Appellant was a missing person. R. 356, lines 18-22; R. 361, lines 12-23; R. 386, lines 7-22. Bresee contacted the West Columbia Police Department (WCPD) as the reporting agency. R. 363, lines 13-19. Although no warrant had been issued for Appellant's arrest, the WCPD told Bresee that Appellant was a suspect in a double homicide. R. 364, lines 3-5.

Upon learning this information, Bresee and other Border Protection agents conducted two searches of Appellant's person and a search of his two bags. R. 364, lines 5-7; R. 364, lines 23-25; R. 387, line 2 – R. 388, line 8; R. 394, line 11 – R. 395, line 1. Bresee found several items in Appellant's possession that he sent to WCPD, including a Greyhound bus ticket from Seattle to Vancouver dated June 17, 2006, a Motel 6 receipt dated June 14, 2006, and a second Motel 6 receipt dated June 12, 2006. R. 390, line 1 – R. 391, line 7; R. 395, lines 5-8; R. 409, line 7 – R. 411, line 8; R. 507, line 22 – R. 508, line 4. According to Bresee, at 3:10 a.m. on June 18, 2006, WCPD confirmed to him that an arrest warrant had been issued for Appellant on the charge of grand larceny. R. 395, lines 18-25.

Courtney Polinder, an officer with the Whatcom County Sheriff's Office in Washington, received a call from Border Protection at 3:30 a.m. indicating that a warrant had been issued and required service. R. 437, line 20 – R. 438, line 1. Polinder served a

fugitive warrant and an arrest warrant concerning grand larceny on Appellant who was being detained at the border. R. 438, line 2 – R. 439, line 14. He estimated that he served the warrant between 4:00 a.m. and 4:30 a.m. R. 439, lines 6-10. Polinder retrieved Appellant's property from Border Protection and transported it, along with Appellant, to the county jail. R. 439, lines 15-18; R. 441, line 24 – R. 442, line 21.

Although Polinder claimed he did not interrogate Appellant, he testified that Appellant denied any involvement with the vehicle, which was listed in the warrant. R. 527, lines 18-19; R. 529, lines 7-22. Further, Appellant denied driving the vehicle to the West Coast; rather, Appellant stated he travelled with a friend and then by bus. R. 529, line 23 – R. 530, line 6. Appellant confided in Polinder that he lived with Portia and Angelica, had quit his job, left to visit Canada, and planned to return to South Carolina. R. 531, line 16 – R. 532, line 23; R. 534, line 20 – R. 535, line 3.

On June 19, 2006, Brenda Wilson, an agent with the Federal Bureau of Investigation, and Glen Hutchings, a local police officer, interviewed Appellant. R. 542, lines 1-16. During the interview, Appellant stated he quit his job on Friday, June 9, 2010, but planned to return to South Carolina to attend a truck driving school. R. 591, line 12 – R. 592, line 8. He admitted he and Portia had a romantic relationship, but claimed the relationship had become more like roommates within the last year. R. 593, lines 4-9. Appellant stated he last saw Portia's car on Friday when the two went home. R. 595, lines 7-24. Appellant denied driving the car outside of South Carolina. R. 596, line 1-5. He had had no contact with Portia or Angelica since Friday because the two had decided to go their separate ways. R. 596, lines 6-19.

When Wilson confronted Appellant with evidence of his having driven the car outside of South Carolina, Appellant admitted doing so. R. 599, line 15 – R. 600, line 5. However, Appellant stated Portia was agreeable to him driving the car because she was in “over her head” with the payments. R. 600, lines 6-18. Wilson then called WCPD with the information. R. 607, lines 5-9.

Bradley Richardson, an officer with the Seattle Police Department, received a request on June 18, 2006 to look for Portia’s car. He looked near the Greyhound bus station and found the car. R. 646, line 23 – R. 647, line 18; R. 651, lines 18-24. He contacted WCPD with the information. R. 649, lines 12-18. Thereafter, he conducted a cursory search of the car and had it towed to a secure facility. R. 650, lines 1-16.

Police Investigation

Shane Phillips, an officer at West Columbia Police Department (WCPD), responded to a call for a possible missing person on June 14, 2006. At that time, he met with Sallie Jones, who indicated Portia was missing. R. 1158, lines 18-22; R. 1159, lines 12-24. Phillips was unsuccessful in his attempts to reach Portia by phone. R. 1160, lines 5-20. Phillips also learned that Appellant was not at work. R. 1161, lines 11-17. Phillips entered the apartment of Appellant and Portia on June 14, 2006 to conduct a welfare check. Phillips found “nothing was disheveled, nothing messed up, no sign of any kind of struggle or anything like that.” R. 1163, line 8 – R. 1165, line 16. As a result of his investigation, Phillips entered the information for Portia into the NCIC as a missing person. R. 1163, lines 2-7.

Later on June 14, 2006, Phillips returned to the apartment with another WCPD officer, April Bayne for what Bayne characterized as a second “welfare check.” R. 1220,

line 24 – R. 1221, line 1. Bayne looked in all of the rooms, opened drawers, and even removed items from the drawers. R. 1238, lines 12-15; R. 1241, lines 9-15; R. 1242, lines 17-20. Bayne took photographs of items throughout the apartment. She claimed she took photos of items that indicated the family was not traveling, photos of unusual items, and photos for liability purposes. R. 1243, line 18 – R. 1246, line 20; R. 1250, line 4 - R. 1251, line 11; R. 1253, line 4 - R. 1254, line 7. She admitted she saw no blood in the apartment on June 14, 2006. R. 1286, lines 4-8.

Ola Mathis, the apartment manager, recalled that the police arrived on Wednesday and entered the apartment. R. 330, lines 5-14. Approximately four months later, the police released the apartment and Mathis was allowed to enter the apartment to clean it for a new rental. While cleaning, she found guns under the couch and called the police. R. 332, lines 6-24. However, prior to cleaning the apartment, Mathis had also allowed family members to retrieve items from the apartment. R. 333, lines 8-12.

On June 22, 2006, Rod Green, an agent with SLED, arrived in Seattle, Washington, where he processed Portia's car. R. 842, lines 3-23. Green found no evidence of blood, but found two sets of fingerprints on the exterior of the car near the trunk. R. 847, line 14 – R. 848, line 10; R. 851, line 21 – R. 852, line 5. Green also took a swab from the steering wheel. R. 852, lines 17-21. Green examined the recovered prints, and rendered no opinion on one set due to the quality of Appellant's fingerprint card; however, he identified three fingerprints from the second set as belonging to Appellant. R. 860, line 19 – R. 862, line 17.¹² He explained the three fingerprints were

¹² Melissa Wallace with SLED compared the latent print that Green offered no opinion on with Appellant's major case prints, which showed Appellant's entire hand rather than just the fingertips. Wallace testified that the latent print from the car and Appellant's major

considered a simultaneous print, meaning they were made at the same time. R. 865, lines 2-9. When Green examined the trunk, it had a "new car smell" and did not smell strongly of cleaners or perfumes. R. 869, lines 9-12.

Matt Edwards with WCPD travelled to Washington on August 3, 2006 and transported Appellant back to South Carolina. In addition to transporting Appellant, he also transported Appellant's two pieces of luggage. R. 936, lines 5-22.

The following items were found in Appellant's luggage: binoculars, banking documents, old receipts, a wallet, letters, a Greyhound bus ticket dated June 17, 2006, motel receipts, a raffle ticket, tax documents, torn notebook paper with phone numbers, business cards, two sets of keys, a Family Dollar receipt for toiletries dated June 13, 2006, a pay stub, an old traffic ticket, a South Carolina lottery ticket dated June 10, 2006, a car title, documentation from the Canadian border, jewelry, and clothing. R. 1005, line 12 – R. 1039, line 15; R. 1048, line 5 – R. 1049, line 23.

James Sullivan of the WCPD conducted a photographic comparison of the key given to him by Jones, which she claimed Portia gave to her, a key from Appellant's luggage, and a key created using the car's VIN. He concluded the two keys had the same cuts. R. 1093, lines 16-17; R. 1094, line 16 – R. 1102, line 17. Additionally, Sullivan compared two sets of keys found among Appellant's possessions, which appeared to be house keys and mailbox keys. Sullivan concluded the keys had the same cuts. R. 1102, line 19 – R. 1108, line 2. However, Sullivan was unsuccessful in his attempt to use the

case prints matched. The major case prints were obtained using a court order. R. 1132, line 1-2; R. 1137, line 13 – R. 1139, line 18.

house key on the apartment door or any of the other 116 locks he tried at the apartment complex. R. 1108, lines 5-22; R. 1116, lines 9-12.

Robin Taylor, a DNA analyst from SLED, testified regarding multiple items of evidence she tested. R. 1496, lines 7-21. First, she developed a partial profile from the swab from the steering wheel, which matched Appellant. R. 1518, lines 8-19. Moving to the items of evidence recovered from the apartment, Taylor developed profiles from a mixture of DNA on a swab from the hall bathroom of the apartment, and could not exclude Appellant as a contributor. R. 1518, line 20 – R. 1519, line 17. A section of the carpet seized from the apartment tested positive for blood and was a mixture of at least two individuals' DNA. The major contributor was consistent with a daughter of Theresa Brown. The minor contributor was a male, but no further conclusions could be reached. R. 1520, line 6 – R. 1521, line 1. An area on the bottom of a green chair found in the apartment, a swab from the master bedroom sink, and a swab from a blue container found in the apartment tested positive for blood. All three also contained a mixture of DNA with the major contributor being consistent with a daughter of Theresa Brown, and unidentified minor contributors. Similarly, swabs from a different area of the green chair, carpet, and master bedroom door tested positive for blood and the DNA profiles were consistent with a daughter of Theresa Brown. R. 1521, line 13 – R. 1525, line 21. The same was true for two other areas of the carpet and five sections of a sheet found near the green chair. R. 1526, line 5 – R. 1528, line 3.

Steven Derrick, an expert in the field of blood stain analysis, analyzed the blood stains found in the apartment, some of which were visible with the naked eye and others were visibly only with the use of an enhancing agent. Derrick opined that the right arm

of the green chair showed a "broken" droplet of blood with a transfer stain going down the arm. He concluded the three distinctive lines of blood going down the arm were made by three fingers making contact with the chair. R. 1535, line 21 – R. 1538, line 6. The undercarriage of the green chair showed multiple patterns, including drops, transfers, and smears. On the wood portion of the undercarriage of the green chair, which was broken, Derrick found what he called a "hair transfer pattern" of blood. R. 1539, line 8 – R. 1540, line 5; R. 1546, lines 4-17. He opined that the spatter had to be caused by a medium range of force based upon the size of the droplets, which was caused by a fist or other blunt object. R. 1541, lines 1-7. Derrick further opined that the chair was not upright when the blood spatter was distributed on the chair. R. 1544, lines 3-19. In the hair transfer pattern, Derrick found a "conglomerate of blood" that he claimed indicated a wound in the hairline where bloodletting had occurred. R. 1546, line 14 – R. 1547, line 11. Based upon his analysis of the blood, Derrick opined that something other than a natural incident occurred, specifically an assault. R. 1549, lines 114; R. 1560, lines 2-15.

The blood spatter on the blue container showed the source of the bloodletting was between three and ten inches from the floor. R. 1550, line 21 – R. 1551, line 12. Additionally, Derrick opined that the blood on the floor had been wiped based on the patterns he detected. R. 1552, line 21 – R. 1554, line 1. The blood found on the master bedroom door was from an object with blood on it making contact with the door and then moving across the door. Derrick was "inclined to believe" a left hand left the blood. R. 1555, line 10 – R. 1556, line 18.

Bayne testified regarding WCPD's failure to follow-up on numerous leads and tips indicating sightings of Portia and/or Angelica. For example, a patron at a local ice

cream shop claimed she saw the two on July 1, 2006 and contacted the police. Although WCPD inquired if the shop had video, no one spoke to the patron until six years later. R. 1607, lines 10-24; R. 1612, line 10. WCPD took a statement from Angelica's P.E. teacher who told police in 2006 that Angelica informed him that she was going to Texas; WCPD conducted no follow-up regarding this lead. R. 1614, line 4 – R. 1615, line 25; R. 1620, line 14 – R. 1621, line 4; R. 1626, line 3 – R. 1627, line 20. A truck driver claimed he saw a woman fitting Portia's description at a truck stop near El Paso, Texas. The trucker said the woman approached him asking for help because she had been left at the truck stop by her boyfriend. The trucker gave the woman food coupons to be used at the truck stop. Although the trucker was not sure of the exact date and city, he narrowed it down to the week of June 17, 2006 and to a truck stop near El Paso. R. 1627, lines 21-25; R. 1631, line 6 – R. 1639, line 10; R. 1648, line 3 – R. 1649, line 19. Bayne was unaware that the prosecutor had secured receipts from Mullins in 2012, shortly before the trial, and that Mullins had narrowed down the truck stops to two, despite the fact that it was six years later. R. 1649, line 20 – R. 1650, line 18. Bayne admitted WCPD did not follow up on approximately six leads received from the National Center for Missing and Exploited Children even though five of the leads indicated sightings in California and one was for a sighting on Amtrak between Seattle and Portland. R. 1653, lines 7-23; R. 1655, line 9 – R. 1660, line 4.

Motion for Directed Verdict

At the conclusion of the state's case, Appellant moved for a directed verdict. Appellant explained that the primary circumstantial evidence against him "might be termed as flight." Although blood was found in the apartment shared by Appellant,

Portia, and Angelica, no evidence tied Appellant the alleged assault resulting in the blood evidence. R. 1699, lines 16-17; R. 1700, line 1 – R. 1707, line 21; R. 1711, line 11 – R. 1712, line 8.

Judge Griffith denied the motion for directed verdict. He “note[d] for the record that [he was] not certain every fact presented was circumstantial, but a large majority was circumstantial.” The judge was persuaded by “the circumstantial facts regarding the relationship among [Portia and Angelica], the extended testimony regarding their personal habits, routines, work area, their hair appointments, all that sort of thing” coupled with their “mysterious disappearance” with no communication. He found the evidence sufficient to survive a directed verdict motion. R. 1714, lines 3-20.

Appellant’s case-in-chief

Appellant then presented his case. Rebecca Kilbride, who was a teacher at Angelica’s school, knew Appellant because he, alone, picked Angelica up from school two or three times per week. R. 1716, line 4 – R. 1717, line 2. Additionally, George Mook, who worked at Bob Bennett Ford with Appellant and Portia, saw Appellant driving Portia’s car “once in a while.” R. 1718, line 20 – R. 1719, line 1.

Page Moore with WCPD also testified on Appellant’s behalf. On February 29, 2012, Moore followed up with Barbara Williams, who had called police in 2006 claiming to have seen Portia and Angelica at an ice cream shop in Lexington County. R. 1721, line 25 – R. 1722, line 6. Although Williams had called in 2006, the first contact WCPD had with her was six years later in 2012. R. 1723, lines 21-25.¹³

¹³ On cross-examination, Edwards admitted that WCPD responded to a tip on July 10, 2006 from Ms. Williams who claimed to have seen Portia at an ice cream shop in Pine Ridge on July 1, 2006 at 10 a.m. Although WCPD went to the ice cream shop, no one

Matt Martin, an investigator for the Eleventh Circuit Solicitor's Office, testified that the credit report using Angelica's social security number showed a collection report for an unpaid credit balance. R. 1727, lines 14-18; R. 1730, lines 4-9; R. 1731, line 20 – R. 1732, line 4. It appeared the collection was for an unpaid medical bill in California in October of 2008. R. 1732, lines 21-25.

Dr. Kimberly Collins, an expert in pathology and forensic pathology, reviewed the photographs from Appellant's and Portia's apartment. She found no indication of dragging down the hallway of the apartment. R. 1452, line 23- R. 1453, line 2. The photographs further indicated there was no significant volume of blood to soak through the carpet because neither the bottom of the carpet nor the padding had blood on them. R. 1453, line 24 – R. 1454, line 8. She was unable to form an opinion as to the quantity of blood on the green chair as such was medically and scientifically impossible. R. 1454, lines 14-19. Further, she was unable to form an opinion about the type of injury that may have been present, how the injury came to be, or the severity of the injury. R. 1456, line 18 – R. 1457, line 1.

Renewal of Motion for Directed Verdict

At the conclusion of Appellant's case, Appellant renewed his motion for directed verdict. R. 1751, lines 9-14. The judge again denied Appellant's motion. R. 1751, line 22 – R. 1752, line 5.

attempted to interview Ms. Williams or conduct any follow-up at that time. R. 954, line 14 – R. 956, line 16.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (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). The prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013)(citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

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. The Odems Court used the traditional circumstantial evidence jury charge in making its 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 Supreme Court granted a directed verdict of acquittal to the defendant in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). Dr. Jennings Cox, who lived and worked in Savannah, was last seen alive on June 18, 1997 at his office. He borrowed a colleague's car to go to a dentist appointment. Later, he called his secretary to cancel his remaining appointments for the day. Bank records indicated he withdrew money from an ATM in Hardeeville, South Carolina during the afternoon of June 18, 1997. During their investigation, the police interviewed Bobby Ray Ware.

Ware, a truck driver who lived in Savannah, had had a sexual relationship with Dr. Cox for more than a year. On the weekend of June 14-15, Ware introduced Dr. Cox

to Arnold, who was staying with Ware. According to Ware, Dr. Cox and Arnold had sex that weekend. Ware also saw Arnold with a gun while he was staying with him. Id. at 388-389, 605 S.E.2d at 530. Ware left at 6:00 a.m. on June 17, 1997 to drive to Chicago while Arnold remained at Ware's house. On June 19, 1997, Ware received a message to contact Arnold at a specific phone number. Later, Ware contacted Arnold at the phone number, which belonged to Arnold's father who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530

The borrowed car was found on June 20, 1997 in a parking lot in Johnson City, Tennessee. Although there was no blood in the car, there were some unspecified scratches on it. Additionally, police recovered a fingerprint from a coffee cup lid found in the center compartment of the car. The fingerprint was identified as Arnold's right thumbprint. Id. The body of Dr. Cox was found on June 21, 1997 in Colleton County. He had been shot. No additional evidence was found at the scene. Id. at 388, 605 S.E.2d at 530. On June 27, 1997, Arnold was arrested at his father's house in Tennessee. Id. at 389, 605 S.E.2d at 531.

According to the Court, the fingerprint evidence established only that Arnold was in the car on the same day Dr. Cox was last seen alive, the presence of the borrowed car in the same state where Arnold was after his stay in Savannah raised only a suspicion of guilt. The prosecution presented no evidence that Appellant was even at the scene of the crime in Colleton County. Therefore, the Court granted a directed verdict of acquittal to Arnold. Id. at 390, 605 S.E.2d at 531.

On October 9, 2013, this Court granted a directed verdict to Karl Lane on the charge of burglary in the first degree. On April 21, 2011, Mark McSwain discovered

several firearms were stolen from his safe. McSwain's neighbor saw a car carrying two people pull into McSwain's driveway at 3:20 p.m. that day. One of the individuals approached the front door of the home, return to the car, and then approach the back door. The neighbor described the car as red or burgundy with a paper tag and the front passenger panel was covered in gray primer. After police left the scene, McSwain noticed a folded piece of paper in the grass beside the driveway. The paper was from the unemployment office, where Lane had visited the day of the burglary and was located about three miles from McSwain's house. Lane, 406 S.C. at 119 – 120, 749 S.E.2d at 166 – 167.

The prosecution presented evidence that at times Lane drove a car matching the description provided by McSwain's neighbor and was driving the car the day of the burglary, that the folded piece of paper belonged to Lane, and that Lane did not want to talk to the police the day after the burglary. However, this Court found the evidence did not meet the standard of substantial circumstantial evidence. "At most, the evidence the state presented raise[d] only a mere suspicion that Lane committed the crime." Id.

The Eleventh Circuit Solicitor's Office failed to present substantial circumstantial evidence that Appellant was guilty of murder and grand larceny. The prosecutor presented evidence that Portia and Angelica were no longer in Lexington County and had no contact with family and friends for six years, which was unusual. The prosecution presented evidence that Appellant lived with Portia and Angelica until shortly before their disappearance. The prosecution presented evidence that blood consistent with that of Theresa Brown's daughter was in their shared apartment and was indicative of an

assault. Finally, the prosecution presented evidence that Appellant left South Carolina around the time of Portia's and Angelica's disappearance.

What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant killed Portia and Angelica. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant was present at the crime scene, which the prosecution claimed was in Lexington County. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant stole Portia's car, especially in light of the evidence that Appellant frequently drove Portia's car with her permission, the two were involved in a romantic relationship, and the two lived together.

II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations and evaluation of the evidence as fact-finder violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.

Relevant facts

At the conclusion of the case, the parties engaged in a charge conference to discuss the standards the judge would use to evaluate the evidence. Appellant moved for an instruction consistent with the circumstantial evidence charge found in State v. Grippon.¹⁴ R. 1752, line 17 – R. 1753, line 6. The judge then asked the state if the “charge on circumstantial evidence as outlined by Grippon is consistent with the appropriate law.” R. 1753, lines 7-15. The state responded it would “be comfortable with any standard” used by the judge. R. 1753, lines 16-19. Appellant clarified for the record that he was asking for “the old Edwards¹⁵ charge.” Specifically, he requested “in a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete.” R. 1753, line 20 – R. 1754, line 4. The state then objected to the trial court considering language found within a dissenting opinion of the Supreme Court. R. 1754, lines 7-9.

The trial judge, and fact finder, responded that he would not “charge something that [was] not the law.” R. 1755, lines 8-10. Appellant clarified that the language he relied upon was from a concurring opinion, not a dissent. Additionally, he argued that

¹⁴ State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be “the old Edwards standard, which is any exception that would tend to disprove the case is sufficient to defeat the case.” R. 1755, line 19 – R. 1756, line 11. Nevertheless, the judge denied the request. R. 1756, lines 12-15.

Discussion

On August 14, 2013, the South Carolina Supreme Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina. In State v. Logan, 405 S.C. 83, 94-95, 747 S.E.2d 444, 450 (2013) the Court “revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state’s burden and the jury’s responsibility.” As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. at 97, 747 S.E.2d at 451. Although direct and circumstantial evidence may carry the same weight, “a jury cannot accurately analyze these two types of evidence using identical approaches.” Id.

Specifically, circumstantial evidence, unlike direct evidence, “requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded.” Id. Thus, “[a]nalysis of circumstantial evidence is plainly a more intellectual process.” Id. at 97-98, 747 S.E.2d at 451. In light of the differing analysis required when examining direct versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant’s case, the instruction directs

¹⁵ State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).

the fact finders that “to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.” The instruction also provided that “[i]f these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.” Id. at 99, 747 S.E. 2d at 452.

Although the Court held that a trial judge use the circumstantial evidence instruction as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005), the Court held that a trial judge may not rely exclusively on that charge over a defendant’s objection. Id. at 100, 747 S.E.2d at 452-453.

As an initial matter, Appellant benefits from the Logan ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (“hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final”); Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule “to all cases in the ‘pipeline’ – i.e., cases which are pending in direct review or not yet final”)).

Second, clear, cogent, and concise instructions directing even the trial judge on how to analyze the circumstantial evidence before it were necessary in Appellant’s case. The instruction concerning how to evaluate circumstantial evidence was necessary in Appellant’s trial due to the nature of the evidence presented by the prosecution, which was entirely circumstantial.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs the fact finder regarding how to analyze circumstantial evidence — inferring main facts by making connections among collateral facts. The trial judge's refusal to utilize the charge concerning how to use circumstantial evidence violated Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt.

III. In violation of the Fourth Amendment to the United States Constitution and Article One, Section Ten of the South Carolina Constitution, the trial judge erred in failing to suppress evidence seized in connection with Appellant's arrest, including all of the items found in his luggage, Appellant's statements, Appellant's fingerprints, and Appellant's extradition, where the arrest warrant issued was not supported by probable cause due to the officer's omission of vital information, which placed the scenario in an entirely different light.

Relevant facts

Appellant incorporates by reference the factual recitation presented in Issue I, supra, concerning Polinder serving the arrest warrant on Appellant in Washington, statements made by Appellant to Polinder, the interview of Appellant by the FBI agent, and Appellant's extradition to South Carolina, which was based upon the warrant for grand larceny, testimony by family and friends concerning Appellant having driven Portia's car.¹⁶ Kevin Odell, an employee of Lexington County Sheriff's Department, booked Appellant into the jail. As part of the booking process, he took Appellant's fingerprints. R. 837, lines 19-20; R. 838, lines 1-22.

Matt Edwards, a detective with WCPD, procured the arrest warrant for Appellant on the charge of grand larceny. R. 449, lines 14-17.¹⁷ The warrant affidavit contained the following information: on June 14, 2006, Portia and Angelica were reported missing

¹⁶ As evidenced by the fugitive complaint, order and warrant of arrest and detention on fugitive complaint, governor's warrant of arrest and extradition, the State of Washington detained Appellant and extradited him to South Carolina based upon the arrest warrant. R. 1815.

¹⁷ The warrant was typed and signed by Edwards on June 18, 2006. R. 452, lines 18-20.

having not been seen since June 10, 2006; on June 14, 2006, Appellant was ticketed in El Paso, Texas while driving alone in a 2005 Ford Focus valued at \$12,000 registered to Portia Washington; on June 18, 2006, Appellant was stopped while trying to cross the Canadian border on a bus; and the whereabouts of the vehicle were unknown. R. 451, line 14 – R. 452, line 12; R. 1813.

In addition to the written affidavit, Edwards orally supplemented the information. R. 452, line 25 – R. 453, line 1. Edwards orally “reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV,” that Appellant “would not have been allowed to take the vehicle at any time” based upon conversations with coworkers and family, that Appellant lied to the trooper when he said he was going to pick up his wife in Arizona because Appellant was unmarried, and that Appellant showed up in Washington alone. R. 453, lines 3 – 22.

Incredulously, Edwards failed to inform the magistrate that Appellant and Portia were involved in an intimate relationship. R. 460, line 21 – R. 461, line 7. Edwards failed to inform the magistrate that Appellant and Portia lived together and their lease listed them as husband and wife. R. 457, lines 4-7. Edwards failed to inform the magistrate that the registered owner of the car was Appellant’s live-in girlfriend. R. 461, lines 10-12. Edwards failed to inform the magistrate that Appellant and Portia lived together in multiple residences over the past couple of years. R. 460, lines 17-20. Equally importantly, Edwards failed to inform the magistrate of any conversations with Portia’s mother in which she stated that Appellant drove Portia’s car to drop Angelica off at her house. R. 456, lines 14 – 25.

In his argument to the trial court, Appellant emphasized the testimony of Portia's mother, Sallie Jones, who had testified the previous day that Appellant frequently drove Portia's car to drop Angelica off after school. R. 468, line 18 – R. 471, line 8. Appellant admitted that the face of the arrest warrant established probable cause, but argued the omissions rendered the warrant defective. Specifically, Appellant argued that he was driving a car belonging to his live-in girlfriend of two years and that co-workers and family members informed police that Appellant would drive Portia's car. R. 473, line 19 – R. 475, line 15. However, the information presented by law enforcement to the magistrate gave the impression that a "random person" was found driving Portia's car. R. 475, lines 16-24. The omission of important details rendered the warrant invalid. R. 475, line 25 – R. 476, line 12. Appellant summarized his argument as follows:

At the end of the day it's acting as a judge who would have been asked to sign that probable cause warrant, is the omission of the fact, even if their family didn't like it, that they had a relationship over two years where they lived together in the same home, more important than what on the face of that warrant appears like a stranger/stolen car case. And that's exactly how it was presented to the judge. Detective Edwards said he never made mention of [Portia and Appellant]'s relationship.

R. 487, lines 14-23.

The trial judge noted that "[o]n a probable cause warrant, I just don't think that's required, to tell everything they knew." R. 488, lines 20-21. Appellant clarified that it was not necessary "to tell everything," but it was improper to omit "the pink elephant in the room." Appellant explained "[i]t's not a stranger theft, and that's how that warrant's presented. It's presented as a random person and he's driving their car with no reason - - no reason in the world, Judge, why [Appellant] would have this car." R. 488, line 22 – R. 489, line 3.

Ultimately, the trial judge ruled that “based upon the information that the West Columbia Police detectives had at that time,” the information they presented to the magistrate was sufficient to establish probable cause. R. 491, lines 6-10. However, the judge acknowledged that “certain facts [were] left out.” R. 491, lines 11-17.

Discussion

Appellant’s right to be free from an arrest not based upon probable cause is rooted in the United States Constitution and the South Carolina Constitution. The Fourth Amendment to the United States Constitution provides for

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Additionally, the South Carolina Constitution provides similarly for “[t]he right of the people to be secure in their persons ... against unreasonable ... seizures” and for “no warrants [to] issue but upon probable cause, supported by oath or affirmation, and particularly describing ... the person or thing to be seized.” S.C. Const. Art. 1, § 10.

Thus, an arrest warrant must be based upon probable cause. “Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise.” Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff’s Dep’t, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish probable cause, it may be

supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)(citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court held that the Fourth and Fourteenth Amendments gave defendants the right to challenge the veracity of warrant affidavits after the warrants were issued and executed in certain circumstances, including where the affidavit omits necessary information. Our Supreme Court, applying Franks, found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The Court found the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. The Court then examined the affidavit by excluding the false information and inserting the exculpatory information. Id. at 555, 524 S.E.2d at 397. The Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id.

The Court presumed that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit. However, the Court found the information omitted in Missouri's case went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The Court explained that the omitted information did more than create "some uncertainty," rather it created "an affirmative hurdle which the remaining portions of the affidavit must overcome." *Id.* at 555-556, 524 S.E.2d at 397-398. Although finding the case presented a "close call on the probable cause determination," the Court held the combination of the officer's false statement and omission of critical facts "pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant." *Id.* at 556, 524 S.E.2d at 398.

Turning to Appellant's case Edwards sought and obtained an arrest warrant for grand larceny, which is the felonious taking and carrying away of goods of another of a certain monetary value. See State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002). Additionally, the taking must be done with the intent to deprive the true owner of his property and to convert it to the use of the offender. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). Thus Edwards was required to provide the magistrate with evidence to support a probable cause determination that Appellant feloniously took and carried away Portia's car with the intent to deprive Portia of the use of the car and convert the car to his own use.

Edwards failed to inform the magistrate either in writing or orally that Appellant and Portia lived together in a romantic relationship, which included holding themselves out as husband and wife, and family members, friends, and co-workers had witnessed

Appellant driving Portia's car in the past. The omitted facts go to the "very heart of the affidavit's purpose" because the information not relayed to the magistrate exculpate Appellant from having stolen Portia's car, or at a minimum did more than create some uncertainty. A reasonable person would not believe Appellant was guilty of the crime of grand larceny of Portia's vehicle knowing Appellant and Portia lived together in a romantic relationship and Appellant had driven the car in the past.

CONCLUSION

Appellant respectfully requests that this Court direct a verdict of acquittal as to all three charges concerning Issue I. Appellant respectfully requests that this Court reverse his convictions and order a new trial concerning Issues II, and III.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

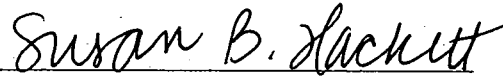
ATTORNEY FOR APPELLANT

This 25th day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 25th, 2014



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kenneth Lynch # 350750, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 25th day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of June, 2014.

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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S.C. Supreme Court

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

KENNETH ANDREW LYNCH,

Appellant.

Appellate Case No. 2012-212547

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
S.C. Bar No. 11973

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 East Main Street
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor concerning two counts of murder and grand larceny because the prosecution failed to present substantial circumstantial evidence tending to prove Appellant's guilt.
- II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations and evaluation of the evidence as fact-finder violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.
- III. In violation of the Fourth Amendment to the United States Constitution and Article One, Section Ten of the South Carolina Constitution, the trial judge erred in failing to suppress evidence seized in connection with Appellant's arrest, including all of the items found in his luggage, Appellant's statements, Appellant's fingerprints, and Appellant's extradition, where the arrest warrant issued was not supported by probable cause due to the officer's omission of vital information, which placed the scenario in an entirely different light.

STATEMENT OF THE CASE

On the night of June 10th, 2006, Portia Washington and Angelica Livingston were murdered in Lexington County, and Washington's automobile was stolen. (R. 1793-94). Appellant Kenneth Lynch was arrested on June 18, 2006 on the international border between the State of Washington and Canada, eventually returned to South Carolina, and charged with the grand larceny of Washington's automobile and eventually for the murders of Washington and Livingston. (R. 523-541, 1576-1586, 936, 1590-91). On August 11, 2008, the Lexington County grand jury indicted Lynch for Washington and Livingston's murders. (Indictments 2008-GS-32-2652, 2653). Lynch had already been indicted for the grand larceny of Washington's auto, i.e. grand larceny of property having a value greater than \$5,000 (2007-GS-32-525). The State sought the death penalty for the murders. Lynch was represented on the charges by Bill McGuire, Benjamin Stitely, and Eric Drylie, Esquires. (R. 75). Lynch proceeded to a *bench trial* before Circuit Court Judge Eugene C. Griffith, Jr., on April 16, 2012. (R. 75).¹ At the conclusion of the guilt phase, Judge Griffith found Lynch guilty of both murders and grand larceny greater than five thousand dollars (\$5,000). (R. 1793-94). At the conclusion of the penalty phase on May 8, 2012, in a written sentencing order, Judge Griffith found the State proved the existence of two (2) statutory aggravating circumstances.² Judge Griffith sentenced Lynch to two (2) terms of life imprisonment, which he ordered to run consecutive to each other, and to the ten (10) year sentence he imposed for grand larceny. (5/2012 Tr., R. 1797-1801; Sentencing Order). Judge Griffith denied Lynch's motion for a new trial. This appeal followed.

¹ The case was prosecuted by Solicitor Donald Meyers, Deputy Solicitor Rick Hubbard, and Assistant Solicitor Shawn Graham. (R. 75).

² (1) Lynch murdered two persons by one course of conduct, and (2) he murdered a child under the age of eleven (11) years old. See S.C. Code Ann. Section 16-3- 20(C)(a).

RESPONDENT'S STATEMENT OF FACTS

Portia Washington ("Portia") and her granddaughter, seven (7) year old Angelica Livingston ("Angelica"), were murdered in the late hours of June 10th, 2006. Their bodies were never recovered. However, Angelica's blood, which included her D.N.A., was found in several places in the apartment where appellant Kenneth Lynch ("Lynch") lived with the victims, including in Lynch's bedroom. Lynch resided with the victims at Park Place Apartments in West Columbia, located in Lexington County.³

Portia, the adult victim, was a fifty-four (54) year old mother of two (2) and grandmother of four (4) children at the time of her murder. She was employed at Bob Bennett Ford on Greystone Blvd. in Columbia, where she had served as the custodian since 2000. Portia was the legal guardian of her only granddaughter, Angelica, who lived with her. Except for a brief period of time Portia was married to her first husband, who was in the military, Portia had lived in the Columbia, S.C. area her entire life. In fact, Portia and her first husband separated and divorced because Portia wanted to return home to the Columbia area to be close to her family. Portia and her family were very close, and Portia did not like to travel.⁴

The physical evidence *and* the testimony at trial of friends, family, and co-workers established that Portia's life revolved around her family, friends, job, and church. Portia's life was centered on her granddaughter, Angelica. Portia also had two (2) grandsons that she loved, and a brand new baby grandson, Mason, who had recently been born.⁵ She visited them regularly. Family, friends, and co-workers testified if Portia was going to leave the Columbia

3 (R. 98-228, 230-355, 1348-1444, 1446-58, 1473-90, 1496-1528, 1528-63, 1564-1661, 1679-80, 1793-94).

4 (R. 98-228, 230-355, 806-823, 1662-65, 1678, 1682-83).

5 Portia was actually supposed to keep her new baby grandson the day she disappeared; however, Portia's daughter in law decided not to drop the baby off on her way from Fountain Inn to Orangeburg County.

area, she would have informed them. Portia did not tell any of her family, friends, or co-workers that she was leaving the area. All of Portia's activities stopped and her life ended on the night of June 10, 2006. So did Angelica's.⁶

Portia had only learned how to drive around the year 2003. She was not comfortable driving on the interstate. In fact, she would avoid driving on the interstate if she could. As a result, Portia rarely traveled outside the Columbia area, and the only vacation outside this state which she took prior to her disappearance was to Florida with a church group, which traveled to their destination by bus. The farthest Portia had personally driven was to her son's wedding in Bowman, S.C., and that was with Portia's mother in the car with her. Portia was a homebody.⁷

Portia had purchased a brand new car, a Ford Focus, through her work, approximately one (1) year before her disappearance and murder. A co-worker loaned her the money for the down payment, and employees at Bob Bennett assisted her with obtaining financing for the vehicle. Portia was the only person listed on the vehicle's title as the owner. Portia was making regular monthly payments on the new car. Portia loved her new car and was very possessive of it, because it was the only brand new car she had ever owned. Portia owned no other vehicles.⁸

Portia loved her job at Bob Bennett Ford. She was well liked and respected by her supervisors and co-employees. Portia had a small closet space where she kept her cleaning supplies and also personal items such as pictures of Angelica and her other family members. Portia was not in any danger of losing her job at the time of her disappearance.⁹

6 (R. 98-117, 159-178, 191-228, 230-261, 761-779, 780-806, 806-823, 823-831, 930-34, 1662-66, 1678-1692, 1683-1692).

7 (R. 98-117, 191-202, 230-261, 806-823, 823-831, 1570, 1678-79, 1682-83).

8 (R. 98-117, 159-177, 191-202, 261-314, 761-779, 780-806, 806-823, 823-831, 898-908, 1663-64, 1681).

9 (R. 98-117, 159-177, 261-314, 761-779, 780-792, 793-805, 823-831, 1663-64, 1681).

Portia and appellant Lynch were formerly involved in a romantic relationship, which was ending at the time of Portia and Angelica's disappearance and murders. However, Lynch was still residing in the same apartment with Portia and Angelica up to the date of the victims' disappearance and murders. Lynch was supposed to move out in July or August. Instead, on June 18, 2006, Lynch was captured alone trying to cross the international border into Canada.¹⁰

Relatives, friends, and co-workers of Portia established the relationship between Portia and Lynch had gone sour. Several months before her disappearance and murder, a co-worker had given Portia \$650 for Portia to move out of the residence she was sharing with Lynch and into a new apartment, the one she was living in at the time of her disappearance and murder. Family, friends, and co-workers also established over the course of the relationship with Lynch, Portia's happy demeanor had become increasingly sad, anxious, and depressed. Based on what Portia had shared with them about the relationship with Lynch, several family members and friends had advised Portia to end the relationship with Lynch and to get away from him. Portia had confided in one (1) friend she was also concerned about Angelica living in the same apartment as Lynch. One friend also testified that shortly before her disappearance, Portia related she was afraid of Lynch, and the friend advised her to report to her supervisor the problems in the relationship in hopes the supervisor could do something about the situation, because Lynch also worked at Bob Bennett Ford. The testimony at trial established Portia wanted out of the relationship with Lynch.¹¹

Toward the end of March, 2006, Portia moved to a new apartment, M-7, Park Place Apartments on Comanche Road, in West Columbia in Lexington County. Unknown to the friend

10 (R. 98-117, 191-218, 159-177, 315-355, 1576-78, 1662-1671, 1589, 1676-1692).

11 (R. 98-128; 132-158, 159-177, 191-228, 261-314, 761-779, 806-823, 823-31, 1568, 1662-76, 1679-81, 1691-92).

who had loaned Portia the \$650, Lynch also moved into this apartment with Portia and Angelica. Lynch had himself placed on the lease as Portia's "spouse," though they were not married. Portia still wanted out of the relationship with Lynch and to be on her own with Angelica.¹²

While Portia had allowed Lynch to use her car to drop Angelica off at Portia's mother's home [for daycare] in the past, and Portia allowed Lynch to drive her [Portia] home from work, Portia did not want Lynch driving her new car anymore. A few days before her disappearance and murder, Portia went to her mother's home and gave her mother the spare key to Portia's new car. Portia informed her mother she was giving her the key because she did not want Lynch driving her car anymore. Another friend, who called Portia a few days before her disappearance and murder, testified she could hear Lynch in the background during the phone conversation, and Lynch was fussing and cursing at Portia because Portia would not let Lynch use her car.¹³

On Friday evening, June 9, 2006, the night before the victims' murders, Portia was at a friend's home and related to the friend, she, Portia, was in dread of returning to the apartment she shared with Lynch, and the witness offered to let Portia and Angelica stay with her, rather than the two (2) victims returning to their apartment. Unfortunately, Portia declined the offer.¹⁴

On Saturday morning, June 10, 2006, Portia withdrew \$75.00 from her savings account. She and Angelica drove to an aunt's home, where Portia gave her aunt \$75.00 to buy her [Portia] a pants suit in Sumter, S.C. The aunt then left with others to go shopping. Portia and Angelica then went to a scheduled hair appointment on North Main Street in Columbia in Portia's car.¹⁵

While Angelica was getting her hair done, Portia left to run some errands. When she

12 (R. 261-314, 1589, 1662-1671, 1679-80, 1120, 1691).

13 (R. 159-177, 1672-73, 1675, 898-908, 1681).

14 (R. 98-130).

15 (R. 131-157, 230-261, 711-12).

returned, the hair dresser, Shyla Harris, was still working on Angelica's hair. Shyla ordered lunch for herself and Portia and Angelica. Portia became concerned that the hair appointment/lunch was taking too long. The hair dresser testified Portia appeared apprehensive, afraid, and in a hurry when lunch was late and related that to the hair dresser. The hair dresser also testified that Portia's appearance and demeanor had changed over the relationship with Lynch. She became more nervous and anxious toward the end of her relationship with Lynch. Portia had informed the hair dresser of her problems in the relationship with Lynch, and Shyla Harris had advised Portia to leave Lynch. On June 10th, Portia and Angelica left when Shyla Harris finished Angelica's hair around 1:30 p.m. Shyla Harris testified Portia and Angelica had a standing hair appointment with her every two (2) weeks. After June 10, 2006, Shyla never saw or heard from Portia or Angelica again.¹⁶

Portia and Angelica drove from the hair dresser's shop back at Portia's aunt's residence on Saturday afternoon, June 10th. Portia's aunt gave Portia the pant suit she had bought for her in Sumter. It was wrapped in clear plastic like clothes from the dry cleaners. Portia and Angelica then left together in Portia's new car. Portia's aunt never saw Portia or Angelica again.¹⁷

On the same day, Saturday, June 10, 2006, at approximately 4:30 p.m. in the afternoon, Carla Perry, Portia's next door neighbor, saw Portia and Angelica unloading what looked like laundry or dry cleaning from Portia's car at apartment M-7 Park Place Apartments. Ms. Perry also testified Lynch was present at this time on Saturday afternoon, June 10, 2006, near the car, with Portia and Angelica. Ms. Perry saw Angelica again a little later in the afternoon or

¹⁶ (R. 131-157).

¹⁷ (R. 230-261).

evening in her bathing suit. Angelica was soaking wet and had been playing in the apartment complex swimming pool. Carla Perry never saw Portia, Angelica, or Lynch again after Saturday afternoon/evening, June 10, 2006.¹⁸

At 4:53 p.m., Portia's mother, Sallie Jones, called Portia on her cell phone and spoke with her. Telephone records substantiated this call. This was the last time Portia's mother ever spoke to Portia. Portia's mother never saw Angelica or Portia again.¹⁹

At 6:17 p.m., on that same Saturday, June 10th, a check was written on Lynch's checking account at BiLo Store #442 in Columbia, S.C. The check was in the amount of \$22.89. There were also three (3) withdrawals from Lynch's savings account at an ATM near Dutch Square on that Saturday afternoon, June 10th, of approximately \$20.00 each.²⁰

On the same date, Saturday, June 10, 2006, Lela Green, a close friend of Portia, called Portia and spoke to her at 9:26 p.m. This phone call was also substantiated by telephone records. Portia was alive and well at that time, and Lela expected Portia to call her back on Sunday, and if not, she would see her on Wednesday, when Portia was supposed to help Lela get her car fixed at Bob Bennett Ford. Lela testified that during the phone conversation on Saturday night Portia was cooking for dinner the following day, which was Portia's habit, and Portia was laying out Angelica's clothes for church the following day. After this call ended, Lela Green never saw or heard from Portia again. Lela never saw Angelica again. Lela's phone calls to Portia went unanswered starting on Sunday, June 11, 2006.²¹

18 (R. 178-190).

19 (R. 191-228, 693, 806-823).

20 (R. 1196-1211).

21 (R. 159-177, 691, 806-823).

Around 10:00 to 10:30 p.m. that same Saturday night, June 10, 2006, Portia's neighbor, Carla Perry, was outside in the breezeway with friends. The breezeway is located between Ms. Perry's apartment and the apartment shared by Lynch, Portia, and Angelica. Ms. Perry noticed Portia's car, the new Ford Focus, was gone. Additionally, Portia's plants were outside the apartment, and the lights were off in Portia's apartment. The following morning, Portia's car was still gone, and Portia's plants were still outside, which was very unusual, because Portia always took her plants in before going to bed on Saturday nights.²²

On Sunday, June 11, 2006, Portia did not call anyone on her cellphone. Friends and family who tried to reach her were unable to reach her by phone. (R. 159-177, 191-213, 230-261, 688-698, 761-779, 806-823, 930-34).²³

At 8:02 p.m., that Sunday evening, June 11, 2006, Lynch made two (2) withdrawals from his checking account at an ATM machine on Knox Abbot Drive in Cayce, S.C. [the Columbia

22 (R. 178-190).

23 Portia's family and friends have not seen or heard from her since her disappearance on June 10th, 2006. She has not called or written any of her family or friends. She has not attended her church where she was a regular member. (R. 930-36). Angelica has not been heard from or seen since her disappearance on June 10th either. Angelica subsequently did not appear for a summer church camp in early July. Prior to Portia's disappearance and murder, Portia had already paid for Angelica to attend the church camp. (R. 717). Even though she was enrolled to begin school in the fall, Angelica did not appear for the start of 3rd grade and has not appeared since. No other school district in the United States or outside the United States has requested her school transcripts. (R. 918-929, 1587-88). Furthermore, Portia has not applied for a driver's license in any other state under her birth name or her former married names. (R. 914-17). Portia did not pay her car insurance again after June 10, 2006, and her driver's license was suspended as a result. (R. 909-913). A credit check determined Portia has no addresses listed outside the State of South Carolina, and no one has run a credit check on her. (R. 699-708). Portia also left over two hundred \$200.00 remaining in her checking account. (R. 709-19, 1587). Portia did not return to her doctor for her scheduled doctor's visit, nor did she call to cancel the visit. (R. 875-884). Angelica never returned to the Sterling Sharpe Pediatric Center where she was a patient and was receiving medication for attention deficit disorder. (R. 885-892). No one has ever requested their medical records. (R. 875-891, 885-892). There was no activity on Portia's checking account after June 8, 2006, except for the automatic draft for the new car payment. There was no activity on her savings account after June 10, 2006. (R. 709-719). There was no activity on her cell phone after June 10, 2006. (R. 688-698). Portia made all of the payments on her new car up until the last automatic draft on June 12, 2006. After that payment, no further payments were made, and Portia's new car was eventually repossessed. The value of the car was in excess of five thousand dollars (\$5,000). (R. 898-908).

area]. The withdrawals were for \$200 and \$20 respectively.²⁴

The following day, Monday, June 12, 2006, Portia did not appear for work at Bob Bennett Ford, which was unusual. Portia did not notify her employers she was ill, taking leave, or quitting her job. According to employees of Bob Bennett Ford, Portia always notified work if she was going to be absent for any reason. In fact, the last thing Portia told a co-worker upon leaving work Friday, June 9, 2006, before her disappearance and murder, was that she would see the co-worker on Monday. Additionally, Portia did not pick up her paycheck on Friday, June 17, 2013, even though she was in need of money to pay all of her bills. Portia never returned to work, and she never contacted Bob Bennett Ford after June 10, 2006. All of Portia's personal items, including photographs of Angelica and others she kept in her personal workspace, remained where she had left them on Friday, June 9, 2013, her last day of work.²⁵

Lynch, did not appear for work at Bob Bennett Ford on Monday June 12, 2006 either. Lynch provided no notice that he was quitting his job. Nor did Lynch call in sick or request vacation time. Lynch also did not pick up his paycheck on Friday, June 17, 2006. Instead of appearing for work on Monday, Lynch had fled from South Carolina, even though no one else knew at that time a crime had been committed in the apartment he shared with the victims.²⁶

The same Monday that Lynch was supposed to appear for work, Lynch checked into a Motel 6 in Vicksburg, Mississippi where he falsely listed his home address as being in Florida. He also falsely listed the street address of his home as an address at which he and Portia had lived before she moved to Park Place Apartments. He paid cash for the motel room. Lynch

24 (R. 1196-1204).

25 (R. 214, 744-761, 761-779, 780-792, 793-806, 1587).

26 (R. 744-761, 780-792, 1161-62, 1587).

indicated he would be staying in the motel alone. Lynch left Vicksburg, Mississippi the following day June 13, 2006 after staying overnight at the Motel 6.²⁷

Employees and friends who knew Portia became concerned when she did not appear for work and notified Portia's family. The family was already concerned because they had not heard from Portia since Saturday, June 10th. Portia's mother went to the police station and filed a missing persons report. Fellow employees, friends, and family went to her apartment complex and had the apartment manager go into her apartment for a welfare check. The manager of Park Place Apartments testified that in the past when Portia was going to be away for any period of time she would notify the Apartment Complex so they could pick up her mail. Portia had not notified the Apartment Complex that she was leaving or going out of town.²⁸

When the Apartment Complex Manager went to the apartment, it was locked. She entered the apartment with the use of pass key. No one was in the apartment, and Portia's new automobile, which she had purchased from Bob Bennett, was missing from the complex parking lot. The manager did not notice any blood in the apartment.²⁹

Subsequently, an *automatic draft* on Portia's bank account paid the next car payment; however, Portia made no further payments on the brand new car, which she loved. Angelica did not appear for a church camp the first week of July, which Portia had already paid for.³⁰

Portia owned a cell phone she purchased with her aunt's assistance. Before her disappearance and murder, Portia regularly called friends and family throughout each day. After

27 (R. 720, 722-25, 1579-1581, see generally 720-744).

28 (R. 213-15, 315-355).

29 (R. 315-355, 1163-64).

30 (R. 709-720, 1691, 930-34).

June 10, Portia did not call any of her friends or relatives on her cell phone as she had habitually done in the past. All calls to friends and family stopped on June 10th at 9:36 p.m. Nor did she return the numerous phone calls that were made to her by friends, family, and co-workers.³¹

When the management of Park Place Apartments in West Columbia and police entered the apartment formerly shared by Portia, Angelica, and Lynch, to check on their status, they found all of the furniture still in the apartment. Again, the door was locked, and the apartment manager used a pass key to enter the apartment. Portia's CPAP machine, which she needed to sleep because of diagnosed sleep apnea, was also still in the apartment. Toiletries and prescription medicine were still present in the bathroom. A fresh steak was marinating in the refrigerator, and there was other food that had been recently prepared. In Angelica's room, a child's Sunday dress and shoes were laid out on the child's bed. All of Angelica's toys remained in her bedroom, including her favorite stuffed bear, which she would normally take with her when she visited relatives. Several kitchen chairs were stacked on the kitchen table, and it appeared the kitchen and dining room floor, which was linoleum, had recently been mopped. The carpet had also been vacuumed. Based on personal items found in the apartment, including clothes in the closets, and prescribed medications, there was no indication the occupants had gone on a planned vacation or trip.³²

When forensic experts processed the apartment formerly shared by Lynch and the two (2) victims [Portia and Angelica], they discovered human blood located in several places in the apartment.³³ Eventually, it was determined the blood contained the DNA of Angelica.³⁴ A blood

31 (R. 806-823, 688-698, 159-177, 191-228, 230-261, 98-228, 230-355, 1662-1676).

32 (R. 315-355, 875-884, 1158-1193, 1662-69, 1120).

33 Police re-entered the apartment with a search warrant. (R. 1599).

spatter expert testified Angelica's blood was deposited on the underside of a recliner chair found sitting upright in the master bedroom, and the chair would had to have been overturned when some of Angelica's blood was spattered on the underneath portion of the recliner. Blood spatter was also found on an object sitting on the floor. The spatter was caused by someone striking the child with medium velocity force, such as with a fist or a blunt object. The victim would had to have been at least as high as the chair when some of the spatter occurred, and low to the floor when some of the other spatter occurred. Blood was also found on the carpet, which had soaked through the carpet to the floor underneath. There was significant bloodletting or pooling of blood. Blood was also found on a sheet or blanket, and in a smear on a bedroom door caused by a hand covered in blood touching the door. Blood was also found on a bedroom sink. Blood was also found in a bathroom sink. Almost all of the blood contained at least some of Angelica's blood (D.N.A.). There were some blood stains that contained Angelica's DNA and an unknown male's DNA. This DNA was not of sufficient quantity to identify it specifically to Lynch, but Lynch could not be excluded. It was also clear that someone had previously attempted, unsuccessfully, to clean up much of the blood.³⁵

On Wednesday, June 13, 2006, around 11:55 a.m., Lynch withdrew \$420 dollars from his checking account at a Citizens National Bank in *Waskom, Texas*. This left only 8 cents in his checking account. On the same day, at 12:43 p.m., Lynch entered a Family Dollar Store in *Texas*

34 The blood was determined to be Angelica's because DNA testing showed the blood belonged to a biological daughter of Theresa Brown, Angelica's mother and Portia's daughter. (R. 216-17, 220-21, 1348-1445, 1458-1527, 1528, 1529-1564, 1589, 1677). At the time of Angelica's murder, her mother, Theresa Brown, had only one (1) daughter, Angelica. (R. 1589, 1663, 1677).

35 (R. 1348-1445, 1458-1528, 1529-1564).

and purchased Mouthwash, T-Shirts, a razor, shaving cream, and hair gel, i.e. toiletries.³⁶

On Thursday, June 14, 2006, Lynch was stopped for speeding by a Texas Highway Patrolman outside *El Paso, Texas* and given a traffic citation. At the time, Lynch was alone and driving the victim *Portia Washington's brand new Ford Focus*. Lynch told the Texas Highway Patrolman that he was on his way to Arizona to pick up his wife, the owner of the car. Lynch was not married to Portia. While there was no one in the car with Lynch at the time he was stopped for speeding, a child restraint seat was seen in the back seat of the car. The location where Lynch was stopped, in West Texas, was just a few miles from the Mexican Border.³⁷

Also on Thursday, June 14, Lynch checked into a Motel 6 in Eloy, Arizona. He paid cash for this room as well. Unlike the Motel 6 in Vicksburg, Mississippi, this Motel 6 was corporate owned and required Lynch to provide a picture I.D. The address listed on the motel receipt for this Motel 6, was not Florida, but the address contained on Lynch's South Carolina driver's license. Lynch listed the vehicle he was traveling in as a 1989 brown Ford. Portia's vehicle which Lynch was actually traveling in was a 2005 tan Ford Focus. Lynch checked out of the Eloy, Arizona Motel 6 on Friday, June 15, 2006. [A forensic handwriting expert testified the signature on both the Vicksburg and Eloy motel receipts was Lynch's handwriting.]³⁸

On June 17, 2006, Lynch made his way to Seattle, Washington, where he purchased a one-way bus ticket for a trip to Vancouver, Canada. Lynch paid cash for the bus ticket.³⁹

When Lynch attempted to cross the international border into Canada, he was denied entry by Canadian Border Patrol Agents and told to return to the U.S. Border Patrol/Customs Office

36 (R. 1196-1204).

37 (R. 661-679, 1581-82).

38 (R. 1149-1158, 720-744, 116-61).

39 (R. 390-91, 1876-78).

and fill out appropriate paperwork. Once, there, United States Border Patrol/Customs agents, by running a computer check, discovered Lynch was wanted as a missing person from West Columbia, S.C. West Columbia police were notified, and they notified the Border Patrol agents Lynch was a suspect in a double murder case. Border patrol agents seized Lynch's bags, searched them, and held Lynch. They also faxed to West Columbia police a copy of Lynch's bus ticket to Canada and motel receipts contained in his luggage. The Border patrol agents notified West Columbia they had Lynch, and the West Columbia police in turn notified Border patrol agents a warrant had been issued for Lynch's arrest for the grand larceny of Portia's vehicle. The warrant was faxed to the Border patrol agents. A Whatcom County, Washington deputy sheriff was dispatched who arrested Lynch and transported him to a jail there in Washington.⁴⁰

While being transported to a Washington state jail, Lynch began asking questions about the larceny charge. He denied he had been in the victim Portia Washington's vehicle. He stated he had traveled to the west coast with a friend in a newer model Cadillac. Lynch refused to say who the friend was. Lynch claimed that when he had gotten to Portland, Oregon, he had *taken a bus* to Seattle and was then trying to travel to Vancouver by bus when he was stopped at the International Border. Lynch indicated he was going to Vancouver to see "bears," which struck the deputy who transported him as unusual because Vancouver is a large metropolitan area, and any bears are located further north. Lynch did mention he had once lived with a woman named Portia Washington and her granddaughter, but he decided to leave for a while to see Canada. Lynch stated he quit his job a few days previously and was going to go back home after he had seen Canada. When Lynch was booked at the Whatcom jail, he gave his home address as No. 7-

40 (R. 356-411, 437-448, 449-463, 506-541, 1576-78).

*M, Park Place Apartments, Apache Road, West Cayce, S.C., 29033. When Lynch was booked, he had no cash on his person and only some loose change was in his luggage.*⁴¹

On June 19, 2009, FBI Special Agent Brenda Wilson and Detective Glen Hutchings of Washington State interviewed Lynch in Washington State. Lynch again gave his home address as Apartment 7-M, Park Place Apartments, West Cayce, South Carolina, 29033. Lynch said he quit his job at Bob Bennett Ford on Friday, June 9, 2006. He stated he was going to attend a 15-day truck driving school, "Warner Truck Driving," in Newberry, S.C. Lynch claimed *he did not know whose car he was supposed to have taken*. He claimed he had gone across the country with friends, that they had driven him, and he had stayed at their houses and gone up to Portland, Oregon, and then caught a bus from Portland to Seattle, and then a bus from Seattle and was trying to get into Canada. Lynch refused to identify the friends. Lynch stated that he and Portia Washington were boyfriend/girlfriend approximately two (2) years prior, but about a year prior, they had become more like roommates. He stated Portia also worked at Bob Bennett Ford. He stated **the last time he saw Portia was on Friday, June 9, 2006**, when he quit his job at Bob Bennett Ford. Lynch stated that he told Portia on the ride home from work that he had quit his job and that he wasn't going to be coming back to work on Monday. **Lynch denied he had driven Portia's vehicle anywhere outside of South Carolina.** He claimed he caught a ride on Friday night June 9, 2006 to Georgia, and then left Georgia and traveled west.⁴²

Only when confronted with the fact he had been stopped for speeding in Portia's car in Texas, did Lynch admit he did have possession of Portia's car and had driven it outside of South Carolina. He claimed Portia could not make the payments on the car, which was not true, and

41 (R. 437-449; 524-541).

42 (R. 590-644, 1583-85).

she had given it to him. He also claimed Portia was in over her head at work with her job, and she was about to lose her job, which was also false. When told the victims were missing, Lynch admitted it would be very unusual for Portia to leave the Columbia area without telling anyone she was leaving or where she was going. Lynch queried the investigators whether police had searched his apartment yet. Lynch continued to claim he left Columbia on Friday night, June 9, 2006, not Sunday June 11, 2006. He denied he was in the Columbia, S.C. area after June 9, 2006. Lynch eventually admitted he did not have permission to take Portia's car.⁴³

Police eventually searched the parking lot of the bus station in Seattle, Washington, where Lynch had purchased his one-way bus ticket to Canada. There, police found Portia's brand new car abandoned in a metered parking space. Pursuant to a search warrant obtained there, Lynch's D.N.A. was found on the steering wheel, and his fingerprints were found on the outside of Portia's new car, on the hood of the trunk. When Seattle police found the abandoned Ford Focus, the car had been stripped of any identification. The license plate or tag had been removed from the car. All identifying paperwork had been removed from the glove box. The only way police could identify the vehicle and who owned it was by reference to the vehicle's VIN number. The car was described as being clean inside, like a rental car.⁴⁴

Lynch's carry-on bags were returned to South Carolina by West Columbia Detective Matt Edwards. Once here, police obtained two (2) separate search warrants for the bags he was arrested with at the Canadian border and which were seized by Border Patrol/Customs agents. These are the same bags Lynch signed over to Washington State authorities during the interview with the FBI and the Washington State detective. At the time of his arrest on the Canadian

⁴³ (R. 590-644).

⁴⁴ (R. 645-659, 682-87, 837-874, 1131-1149, 1576-78, 1583).

border, Lynch had in his possession *Portia's* car keys which contained a key consistent with the key that would have opened Apartment M-7, Park Place Apts. Lynch also had his own set of keys including keys consistent with the key to open the lock of Apartment M-7, Park Place Apts., and a key consistent with the key to open the apartment mailbox.⁴⁵

ARGUMENT I.

Lynch's argument the trial court erred in not directing a verdict because the State failed to prove the victims were murdered is not preserved for appellate review, and his apparent argument the State failed to prove venue is not preserved for appellate review, and, regardless, the trial court did not err in denying the motion(s) for a directed verdict made at the close of State's case and at the close of Lynch's case.

What Occurred Below

At the close of the State's case, Lynch moved for a directed verdict. Judge Griffith denied the motion for a directed verdict. (R. 1699-1713, 1714). Lynch renewed his original motion for a directed verdict at the close of his case; and Judge Griffith denied the same. (R. 1751-52). Lynch now argues Judge Griffith erred in denying his motion(s) for a directed verdict on all charges. (BOA). There is no merit to this ground.

The Unpreserved Issues

Lynch now argues on appeal that the State failed to prove the victims were murdered. Lynch conceded below the State had proved *the corpus delicti* of the murders, i.e. the victims Portia and Angelica are dead and they were murdered by criminal means. (R. 1711, ll. 11-13).⁴⁶ Lynch's argument in his brief the State failed to prove Portia and Angelica were murdered is not preserved for appellate review. Lynch cannot argue one basis below for a directed verdict and

⁴⁵ (R. 1681-82, 1026, 1088-92, State's Ex. 24, State's Ex. 84, 1093-1108, 1114-16, 1121-31, 1681-82, 1005-1075).

⁴⁶ What Lynch argued below in his directed verdict motion was that there was no evidence that Lynch committed the murders, other than some evidence of flight, and evidence of false statements about whether he had permission to use Portia's automobile. (R. 1711).

then a different basis on appeal. Roberts v. State, Shearhouse Advance Sheets, Opinion No. 5223 (Ct. App. 2014), *not yet released for publication*; State v. Sterling, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012); State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) State v. Frieburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); State v. Adams, 332 S.C. 139; 144, 504 S.E.2d 124, 126 (1998). Lynch completely abandoned this issue. (R. 1711). This portion of this appellate ground must be dismissed.⁴⁷ Regardless, there is no merit to any directed verdict issue Lynch raises in his appellate brief.

***Standard of Review / Directed Verdict
(Appellate)***

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).⁴⁸ In reviewing a denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence *and* all reasonable inferences in the light most favorable to the State. State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing* State v. Weston, 367 S.C. 279,

⁴⁷ Lynch also appears to argue on appeal that the State failed to prove the crimes were committed in Lexington County, i.e. lack of proof of venue. [See Brief of Appellant] This argument is also not preserved for appellate review. An objection by the defense, that the State had not proved venue, must be first made in a motion to direct a verdict for the accused. State v. McCain, 118 S.C. 26, 110 S.E. 70 (1921); State v. Daniel, 83 S.C. 310, 65 S.E. 236 (1909). Lynch did not argue this issue as a basis for his motion(s) for a directed verdict below at the close of the State's case or the close of his case. (R. 1699-1713; 1714; 1751-52). As a result, this issue is not preserved for appellate review. Roberts, ; Sterling; Jennings; Frieburger; Adams. This appellate ground must be dismissed.

⁴⁸ See also State v. Tyner, 258 S.E. 2d 559 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978).

292, 625 S.E.2d 641, 648 (2006).⁴⁹ If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the fact finder. State v. Rogers 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013), *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). This Court considers only the existence or non-existence of evidence, not witness credibility, in reviewing the denial of a directed verdict. Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5.⁵⁰ Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the fact finder. Rogers *supra*.⁵¹ If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the fact finder. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).⁵² "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005).

Trial Court's Standard

When ruling on a directed verdict motion, the trial court is concerned with the existence

⁴⁹ See also State v. Palmer, 2014 WL 551581 (Ct. App. 2014).

⁵⁰ See State v. Cherry, 348 S.C. 281, 286, 559 S.E.2d 297, 299 (Ct. App. 2001)(en banc), *aff'd in result*, 361 S.C. at 594, 606 S.E.2d at 478; State v. Scott, 330 S.C. 125, 131, n. 4, 497 S.E.2d 735, 738, n. 4 (Ct. App. 1998).

⁵¹ See State v. Frazier, 386 S.C. 526, 532-33, 689 S.E.2d 610, 613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); Cherry, 361 S.C. at 595, 606 S.E.2d at 478 (finding circumstantial evidence, when combined, was sufficient to for the fact finder to infer guilt); State v. Buckmon, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001).

⁵² Furthermore, when the defendant offers proof in his case in chief, the appellate court is to consider all of the evidence in ruling on whether a directed verdict motion at the close of the defendant's case was properly denied. See Hepburn, 406 S.C. at 429-42, 753 S.E.2d 402, *adopting* State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf.* State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

or nonexistence of evidence, not its weight. Cope, 405 S.C. 317, 748 S.E.2d 194; Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78.⁵³ A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Hepburn, 406 S.C. 416, 753 S.E.2d 402.⁵⁴ The trial judge is required to deny the motion for a directed verdict and submit the case to the fact finder if there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402, *quoting* State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126, 127 (2000).⁵⁵

The Lack of Merit of Lynch's Argument

The State more than satisfied the standard to overcome the motion(s) for a directed verdict on the two (2) murder charges and the charge of grand larceny. Judge Griffith appropriately denied the motion(s) for a directed verdict.

It is not necessary for the State to produce the body or bodies of the victim(s) to prove murder, when the defendant has secreted, destroyed, or hidden the bodies. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987). Nor is the State required to prove the exact cause of death in such a situation. *See* Brown v. State, 307 S.C. 465, 415 S.E.2d 811 (1992)(body found but

⁵³ See also State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); see Rule 19(a), SCRCrP.

⁵⁴ See Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis removed).

⁵⁵ If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the case must be submitted to the fact finder. Freiburger, 366 S.C. at 136, 620 S.E.2d at 743; Weston, 367 S.C. at 292, 625 S.E.2d at 648.

condition made determination of cause of death impossible).⁵⁶ The State may prove the victim(s)' murder(s) by showing the victim(s)' personal habits and relationships as circumstantial evidence from which an inference could be drawn that the victim(s)' sudden disappearance was the result of death by a criminal act. Owens, supra.⁵⁷ As the Court stated in

Owens:

The circumstantial evidence surrounding [victim's] sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships, is sufficient to establish the *corpus delicti* of murder or that the victim is dead by the criminal act of another. See *State v. Streights*, 263 S.C. 127, 208 S.E.2d 43 (1974).

293 S.C. at 168; 359 S.E.2d 275; Weston, 367 S.C. at 293, 625 S.E.2d at 648. See also Saltz, 346 S.C. at 137-38, 551 S.E.2d at 253. The evidence in this case is exactly the same.

In order to overcome a motion for a directed verdict there must have been evidence in the record establishing the victims were murdered and appellant was the person who murdered them. The State introduced more than sufficient evidence proving both that the victims were murdered and appellant Lynch was the person who murdered them.

The victims Portia Washington and Angelica Livingston disappeared on the night of June 10, 2006. Portia regularly talked with her family members and friends in person and by phone. After the night of June 10, 2006, there was no further contact by her with family and friends, which was out of the ordinary and suspicious given her regular habits and lifestyle.⁵⁸ Portia

⁵⁶ See State v. Howard, 295 S.C. 462, 466, 369 S.E.2d 132, 134 (1988) ("The body was partially decomposed and the exact cause of death could not be determined."). See State v. Saltz, 346 S.C. 114, 137-38, 551 S.E.2d 240, 253 (2001) ("[C]ircumstantial evidence may be sufficient to establish the *corpus delicti* of murder even though the cause of death cannot be determined.").

⁵⁷ Citing State v. Head, 79 N.C. 1, 338 S.E.2d 908 (Ct. App. 1986); Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882 (1982).

⁵⁸ See State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926) (evidence of habit of victim admissible to prove fact in issue); State v. Hart, 94 S.C. 214, 77 S.E. 862 (1913) (similar).

never visited her three (3) grandsons again, including a newborn infant grandson. Family members, co-workers, and friends testified if Portia was going to leave town she would have notified them of the same, and she did not. She did not appear for work on Monday, did not contact her work and inform them she would not be able to make it to work, which was not her normal habit, and did not even pick up her check at work even though she needed money to pay her bills. Further, she failed to appear at planned meetings with others without making any contact with those individuals. There was no further activity on her cell phone, and no personal activity on her bank account, which contained money, after the day of her disappearance. Further, she was never seen by anyone after the date of her disappearance, and she was not in the company of appellant Lynch when he was arrested on the Canadian border. Furthermore, Portia's only means of transportation, her new car, was in the possession of appellant Lynch. Finally, Portia's belongings, including her CPAP machine that she needed to sleep, her clothing, and her prescription medication, were still in her apartment, and personal items remained in her work space at Bob Bennett Ford. The testimony at trial firmly established Portia Washington's activities and her life ceased on the night of June 10, 2006, and she was murdered.

Angelica was not seen or heard from again either after the afternoon of June 10, 2007. She did not appear for church, and she did not appear for a church camp that Portia had already paid for. Further, Angelica's blood was found in her home in various places, including medium velocity blood spatter under a chair in the master bedroom, which revealed she had been criminally assaulted. Furthermore, Angelica never appeared again for her scheduled hair appointment, never appeared for the start of school, and never appeared at her doctor's office where she was being treated for attention deficit disorder. No school, whether inside the United

States or outside this country, has ever requested her school records. And, no one has requested her medical records from her treating physician.

Based on the evidence presented at trial, there is no question Portia Washington and Angelica Livingston were murdered. Owens, *supra*. Lynch conceded below the State had proved *the corpus delicti* of the murders. (R. 1711, ll. 11-13).⁵⁹ The victims are dead, and they were killed by criminal means. Id.

Lynch also appears to argue in his brief that the State failed to prove the victims were murdered in Lexington County. There is no merit to this argument.⁶⁰ As the evidence showed, and as conceded by Lynch at the end of the case, the State proved the victims were murdered and they were murdered in Lexington County.⁶¹

⁵⁹ What Lynch argued below in his directed verdict motion was that there was no evidence that Lynch committed the murders, other than some evidence of flight. (R. 1711).

⁶⁰ A criminal defendant is entitled to a directed verdict when the prosecution fails to prove the offense was committed in the county alleged in the indictment. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992); State v. McCoy, 98 S.C. 133, 82 S.E.2d 280 (1914). Although an accused has the right to be tried in the county where the offense is committed, this right is not jurisdictional. Evans, *supra*. For the purpose of establishing venue in a criminal prosecution, it is not necessary that the county in which the crime was committed be proved affirmatively if there is sufficient evidence from which it can be inferred. State v. McCleod, 303 S.C. 420, 402 S.E.2d 175 (1991); State v. Wharton, 263 S.C. 437, 211 S.E.2d 211 (1975); State v. Henderson, 285 S.C. 320, 329 S.E.2d 448 (Ct. App. 1985). Venue, like jurisdiction, need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient. Wray v. State, 288 S.C. 474, 343 S.E.2d 617 (1986). For example, in a murder prosecution, venue can be inferred that the crime was committed in the county based on where the body was found. State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Even where a body is not recovered, venue may be established in a murder prosecution by the facts and circumstances of the case. Where some facts material to the offense, and requisite to its consummation occur in more than one county, venue is proper in either county. Venue in a murder case is established where the victim's body was never found where there was evidence of a violent struggle in the victim's home. State v. Owens, 293 S.C. 161, 359 S.E.2d 257 (1987). Further, where the victim was last seen alive in Lexington County with the defendant and blood stained items were found at the defendant's workplace consistent with the victim's blood, but the body was found in Lee County, venue was proper in either county. State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996); McCleod, *supra* (where victim's body was found in Beaufort, but there was a sign of a struggle at her residence in Colleton County, venue was proper in either county).

⁶¹ The victims were last seen alive together with Lynch beside the apartment Lynch shared with the victims in Lexington County on June 10, 2006. Angelica was seen shortly thereafter after having played in the apartment pool but returning to the same apartment, M-7 Park Place Apartments. Portia was alive at 9:26 p.m., on June 10, 2006, and Portia was laying out Angelica's clothes for church the following morning and preparing food for Sunday dinner. When police searched the apartment several days later, Angelica's Sunday clothes and shoes were laid out

Lynch also contends the State did not produce sufficient evidence that it was he who committed the murders. Lynch is wrong.

The evidence at trial showed that the victim Portia and appellant Lynch had previously been in a romantic relationship that had turned bad. And, the relationship was ending. The victim wanted to get away from Lynch, but he followed her to her new apartment, where he had himself placed on the lease as her "spouse." The two (2) were never married.

Portia had confided in others that she was afraid of Lynch; she confided in one (1) person she was concerned about Angelica living in the same apartment as Lynch, and witnesses described Portia as being in fear of Lynch during the last days before her disappearance and murder, including the day of her disappearance. One witness, who spoke with Portia in person on Friday night, the night before her disappearance and murder, related that based on her conversation with Portia, Portia was in dread of returning to the apartment she shared with Lynch, and the witness offered to let Portia and Angelica stay with her at her home, rather than them returning to the apartment Portia shared with Lynch.

Similarly, on Saturday, June 10, 2006, the day of Portia's disappearance and murder, Portia was nervous, and indicated to her hair dresser she was nervous and apprehensive that lunch was taking too long. This indicated not only her fear of Lynch, but also that he was still

on Angelica's bed and prepared food was found in the kitchen. Portia's car was last seen parked at Portia's apartment, M-7 Park Place Apartments on the afternoon of June 10, 2006. Portia's car was gone from the apartment at approximately 10:30 p.m. that night and the lights were off in her apartment. Portia's plants were outside her apartment and remained outside the following morning. Her car was not seen again until Lynch was stopped in the car in Texas several days later alone. Portia disappeared from apartment M-7 Park Place Apartments in Lexington County. The forensic evidence shows the minor child was criminally assaulted in Lynch's bedroom in Apartment M-7, Park Place Apartments in Lexington County, and there was significant blood-letting according to the State's experts. Further, whoever committed the crimes attempted to clean up the crime scene. Angelica also disappeared from Apartment M-7, Park Place Apartments. Neither victim was heard from or seen after the night of June 10, 2006. The victims' bodies were never recovered. Venue was firmly established in Lexington County.

present in the Columbia area and at the apartment they shared on June 10, 2006. Portia had previously shared with the hair dresser her problems in her relationship with Lynch, and the hair dresser advised Portia to leave Lynch. The hair dresser also testified over the course of Portia's relationship with Lynch, Portia became more nervous and anxious and did not talk as much. Portia drove her car to the hair dresser's on June 10th, and left there in her car with Angelica about 1:30 p.m. on Saturday afternoon.

Lynch was *the last person seen with the victims together on Saturday afternoon*, the date of their disappearance and murder, **June 10, 2006**. The two (2) victims, Portia and Angelica, were seen unloading laundry/dry cleaning from Portia's car's trunk that Saturday afternoon, and Lynch was there present with the victims next to the apartment they shared together. The victim's brand new car was also present there with Lynch, Portia, and Angelica. Lynch later falsely told police he had left the Columbia area on *Friday, June 9, 2006*, traveled to Georgia, and had not returned. However, an eyewitness placed Lynch there at the apartment with the victims on Saturday afternoon, June 10, 2006, and Lynch's bank account records show a check was written on his account on Saturday afternoon, several withdrawals were made on Saturday afternoon from Lynch's account, and on Sunday afternoon, Lynch withdrew \$220 dollars from his checking account at an ATM machine in the Columbia area. State v. Williams, 303 S.C. 274, 400 S.E.2d 131(1991) (affirming denial of directed verdict where victim was employed by and last seen with the defendant and victim's decomposed body was found 7 ½ months later).

Further, Lynch later admitted he left South Carolina in Portia's car, but falsely claimed it was on Friday, June 9, 2006, after Portia had *allegedly* given it to him. However, the State's evidence at trial showed the car did not leave the apartment complex until Saturday, June 10,

2006, the day of the victims' murders, not *Friday night* as Lynch claimed. And, the State's evidence showed Lynch did not leave the Columbia area until at least Sunday night, the day after the victims' disappearance and murder.

When family and friends responded to the apartment looking for Portia and Angelica, the door to the apartment Lynch shared with the victims was locked, and the manager to the apartment complex had to unlock Lynch's apartment door with a pass key to get in and check on the victims' well-being. Lynch was later found in possession of two (2) sets of keys, one set was Portia's, and both sets of keys contained keys consistent with the locks on the door of Apartment M-7, Park Place Apartments. When the manager searched the apartment, nothing was missing from the apartment, except the occupants, Lynch, Portia, and Angelica. Furniture was there; clothes were there, prescription medications were there, and toiletries were there. However, the manager testified the apartment looked staged, and someone had cleaned the apartment immaculately. The apartment manager did not notice any blood. The linoleum floors had been mopped and the carpet had been vacuumed. When Lynch was arrested, he admitted the only clothes he took with him when he left the apartment were the clothes he had on his back, indicating he had hurriedly fled from the apartment. He bought another pair of clothes in Seattle, Washington, at a consignment store. A receipt shows he bought toiletries in Texas.

Subsequently, forensic experts, who examined *the apartment Lynch shared with Portia and Angelica*, found human blood and medium velocity blood spatter. Some of this human blood belonged to the child victim Angelica as confirmed by DNA analysis, and the blood spatter showed she had been criminally assaulted with an object consistent with a fist or blunt object. The assault took place in Lynch's bedroom. There was also evidence whoever committed

the assault washed up after committing the assault and also cleaned up the apartment, including mopping the kitchen floor, vacuuming the carpet, and attempting to clean or cover-up the blood. Rubber cleaning gloves were found in the bedroom. Some of the blood deposited in the apartment also soaked through the carpet to the padding and floor underneath, indicating a significant amount of blood-letting. Furthermore, the person who committed the murders had placed the reclining chair upright before leaving the apartment. And, the person who washed up was male, consistent with Lynch. Lynch, being the only person who shared the apartment with the victims, had a motive to attempt to clean up the scene, even though it was unsuccessful.

The evidence showed the day following the victims' disappearance and murder, Sunday, June 11, 2006, Lynch was still in the Columbia area and withdrew money from his bank account at an ATM, in Cayce, and fled the State of South Carolina. At that time, no one, including police, were aware Portia and her granddaughter Angelica had been murdered or that Lynch had committed a criminal act. However, Lynch fled from the State of South Carolina when no one was pursuing him showing consciousness of guilt. He fled driving the victim's new Ford Focus, Portia's only means of transportation. A vehicle Portia had specifically instructed her mother she did not want Lynch driving.⁶²

Lynch then failed to appear at work on Monday morning. Lynch did not call in to work and notify them he was going to be absent or that he was resigning his job. Lynch failed to pick up his paycheck from work on Friday even though he needed the money. He did not contact Bob

62 "[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent." State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (evidence of flight has been held to constitute evidence of guilty knowledge and intent); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) ("flight... is at least some evidence of guilt"); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

Bennett Ford and provide a forwarding address or provide any information where he was located or where he could be found.

Lynch appeared shortly thereafter in Vicksburg, Mississippi, and paid [untraceable] cash for a motel room and *falsely* listed his home address as *Florida* on the motel registration, when his actual address was Apartment M-7, Park Place Apartments, West Columbia, the location where Angelica was criminally assaulted and the location from which Portia disappeared. Lynch also gave a false street address, a former address at which he and Portia had resided together, not the address at which he was actually living and from which the victims disappeared.

Lynch then appeared even further west in Texas buying toiletries at a store. He was then pulled over for speeding near the Mexican border. Lynch was alone and *in the victim Portia Washington's new car*. A child's restraint seat was in the back seat of Portia's car. Lynch also withdrew and cleaned out the remaining cash in his bank account while in Texas.

Lynch then appeared at a motel in Arizona where he again paid cash for the room. However, this time, he was forced to list his South Carolina address off of his driver's license.

Lynch then fled even further west to Seattle Washington, and purchased a *one way* ticket to Vancouver, Canada with untraceable cash. Lynch did not take a bus from Portland, Oregon to Seattle, Washington as he initially told police, but drove Portia's car from Arizona to Seattle. Lynch made this false statement in an attempt to stop police from finding the vehicle at the Seattle bus station. Police found the vehicle anyway, and it contained Lynch's DNA on the steering wheel and his fingerprints on the trunk. The vehicle also contained evidence Lynch had attempted to conceal from authorities, the owner of the vehicle.

Before leaving on the bus in Seattle, Lynch abandoned the victim's new Ford Focus in

the parking lot of the bus station, and removed the identifying license plate from the car and any identifying paperwork from the glove box. Beckham, supra (attempted destruction of evidence is regarded as relevant incriminating circumstance). Lynch had also removed the child restraint seat from the car and discarded it before arriving at the bus station or before he left the car abandoned there.

Lynch then attempted to cross the international border into Canada by bus and would have continued to flee except for the fact he was stopped by Canadian and U.S. Border Patrol/Customs agents. "[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent." Grant, 275 S.C. at 407, 272 S.E.2d at 171; Beckham, (evidence of flight has been held to constitute evidence of guilty knowledge and intent); Ballenger, 322 S.C. at 200, 470 S.E.2d at 854 ("flight... is at least some evidence of guilt"); Thompson, (flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

At the time of his arrest on the Canadian Border, Lynch claimed he was going to Canada on a vacation type trip. However, Lynch had no money, other than a bag with some loose change in it. Lynch then made several false statements to authorities at the border and in Washington State, including that he had not had possession of the victim's car and that he had traveled to the Northwest with friends in a Cadillac. He also falsely stated he had stayed at friends' residences during his trip across the United States, when in fact he had stayed at motels alone paying for the rooms in untraceable cash. Lynch intentionally concealed he had taken Portia's automobile from South Carolina and stayed by himself at several hotels as he fled west across the country. Lynch made these false statements because he knew he had stolen Portia's car, and his theft of Portia's car would link him directly back to his apartment and the murders of Portia and Angelica.

Lynch also falsely told police he had left West Columbia and the State of South Carolina on Friday night, June 9, 2006, with a friend, when in fact he did not leave the Columbia area or South Carolina until at least Sunday, June 11, 2006, the day after Portia and Angelica were murdered. Lynch lied about when he left the Columbia area, because he knew the victims were murdered on Saturday night, June 10, 2006. And, the only reason he would know that was that he was the person who murdered them.⁶³

Only when confronted with the fact police knew he had been stopped in Texas for speeding and could prove he was driving Portia's new car, did Lynch admit he took Portia's car and drove across the entire United States and almost to Canada. Lynch then falsely claimed Portia gave him the car, because she was in over her head at work and could not make the payments on the car. Portia was not in over her head at work and had made all of the payments on the new car. Lynch eventually admitted he did not have permission to take Portia's car.

When arrested, Lynch had possession of the victim's car keys, and keys consistent with the lock that was on the apartment he shared with Portia and Angelica, M-7, Park Place Apartments, the same apartment where Angelica was brutally assaulted, the same apartment from which Portia disappeared.

When Lynch reached Seattle, he did not continue on to Canada with the victim's car, but abandoned the car, stripped it of all identification, and purchased a one-way bus ticket, again with untraceable cash, to Vancouver, British Columbia. Beckham (attempted destruction of evidence is regarded as relevant incriminating circumstance); State v. Wells, 162 S.C. 509, 161

⁶³ Lynch also falsely told authorities he quit Bob Bennett Ford because he planned on attending a truck driving school. That truck driving school did not exist. (R. 1584-85). Lynch made this false statement to give an innocent explanation for not reporting to work, rather than admit he had not appeared for work because he was fleeing because he committed the murders.

S.E. 177 (1931)(similar). See also State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009)(where defendant was being tried for several crimes including grand larceny, fact that defendant was arrested on unrelated crime a month later was admissible where he had in his possession fruits of the crime (grand larceny) and his blood was found on the stolen property to establish identity and reason police obtained custody of stolen property). This act of abandoning Portia's car and stripping it, indicated Lynch did not flee across the United States to steal Portia's car alone, but to escape from the United States because of another more heinous act he had committed, the murders of Portia and Angelica.

The evidence taken as a whole established Lynch murdered the victims, and therefore it was Lynch who disposed of the victims' bodies. State v. Al Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003)(Concealment of the body of a person is a circumstance which tends to show guilt and should go to the jury to weigh the evidence.); State v. Ridgely, 251 S.C. 556, 164 S.E.2d 439 (1968); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946); 2 A.L.R. 1227; *Wigmore on Evidence*, 2d Ed., Secs. 32, 172, 267, 272 and 276.64 As stated in Al-Amin: "[t]hese facts, especially Al-Amin's apparent attempt to conceal the body and his flight from the scene, constitute substantial circumstantial evidence presented by the State to warrant submission of the case to the jury." Al Amin, 353 S.C. at 413.

The testimony and evidence at trial established Portia was the sole owner of her new car. The testimony and evidence at trial established that on the day of Portia and Angelica's

64 "The action of the appellant in concealing the body of his wife so as to divert suspicion from himself, was a relevant circumstance tending to show guilt, and it was for the jury to estimate its weight, and it was for the jury to determine whether his explanation and the motive he assigned were truthful or otherwise." Epes, 209 S.E.2d at 265. See 40A Am Jur.2d *Homicide* section 462 (1999) (concealment or attempted destruction of body of murder victim is regarded as incriminating circumstance..., an inference of guilt may be drawn therefrom).

disappearance and murder, Lynch was no longer allowed to use Portia's car. In fact, Portia had given her mother the spare key and specifically instructed her she did not want Lynch driving her car anymore. Another witness overheard Lynch fussing and cursing at Portia just days before her disappearance and murder because Portia would not let Lynch use the car. Portia's car was only approximately one (1) year old and its value was in excess of \$5,000. Lynch denied he had been in Portia's car when first questioned and denied he had taken the car outside of South Carolina. However, Lynch was stopped in Texas alone in Portia's new car. Lynch falsely told the officer who stopped him in Texas that he was going to Arizona to pick up his "wife," the owner of the car. Portia and Lynch were not married, and Portia was already dead. And, Lynch abandoned the car at the bus station in Seattle and stripped it of what identification he could strip from the car so it and he could not be traced. When confronted with the fact he had been stopped in Texas alone in Portia's car, only then did Lynch admit he had driven Portia's car outside the State of South Carolina, but Lynch falsely claimed Portia had given him the car because she was in over her head at work and could not make the payments on the car, both of which were false. Lynch finally admitted he did not have permission to take Portia's car.

Viewing the evidence as a whole, there was more than substantial circumstantial evidence Lynch was the person who murdered Portia Washington and Angelica Livingston, and there was direct and substantial circumstantial evidence Lynch stole Portia's automobile. As a result, Judge Griffith did not err in denying the motion(s) for a directed verdict made at the close of the State's case and at the close of Lynch's case. This appellate ground must be dismissed.

ARGUMENT II.

The trial judge did not err in its consideration of the appropriate law in reaching its verdicts.

At the close of the guilt phase, Lynch sought for Judge Griffith (the fact finder) to follow the law of circumstantial evidence as set forth in State v. Edwards, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989). Judge Griffith stated he would follow the law of circumstantial evidence, as he was required to do, as handed down by the South Carolina Supreme Court in its precedent. (Tr. 2055-59). Lynch now argues Judge Griffith incorrectly considered the law of circumstantial evidence in reaching his verdict of guilty of each count of murder and grand larceny. There is absolutely no merit to this ground. As Judge Griffith pointed out during the discussion of this request, this was a bench trial, and he was not instructing a jury, who had no knowledge of the law, what the law was. He was the fact finder, a Circuit Judge, who knows the law. See Ray v. State, 310 S.C. 431, 437, 427 S.E.2d 171, 174-75 (1993)(judges are presumed to know the law).⁶⁵ Further, Judge Griffith ruled he would follow the law of circumstantial evidence as handed down by the South Carolina Supreme Court. See generally State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)(trial judge is only required to charge the current and correct law of South Carolina); State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998)(a judge is not required to charge an incorrect statement of the law). Further, the argument Lynch is making has no merit. In State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004), our Supreme Court held the

⁶⁵ See also Woodford v. Visciotti, 537 U.S. 19, 24 (2002)(*per curiam*)("[T]he Court of Appeals' readiness to attribute error is inconsistent with the presumption that state courts know and follow the law"); Parker v. Duggar, 498 U.S. 308, 314-16 (1991); Walton v. Arizona, 497 U.S. 639, 653 (1990)("trial judges are presumed to know the law"), *overruled on other grounds*, Ring v. Arizona, 536 U.S. 584 (2002); Lavellee v. Delle Rose, 410 U.S. 690, 694-95, 93 S.Ct. 1203 (1973)(*per curiam*).

instruction on direct and circumstantial evidence approved in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997), is the sole instruction to be given. That instruction is not what Lynch asked Judge Griffith to follow. Lynch wanted the old Edwards charge on circumstantial evidence, which was not the law. Subsequent to this trial, in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), the Court rejected a challenge similar to the one raised here. Id.; *See also* Holland v. United States, 348 U.S. 121 (1954)(finding the language requested here is confusing). As a result, this appellate ground has absolutely no merit and must be dismissed.

ARGUMENT III.

The trial judge did not err in denying the various motions to suppress.

Lynch alleges Judge Griffith erred in failing to suppress evidence seized in connection with his arrest and extradition including all of the items found in his luggage, his statements to law enforcement, his major case prints matched to his fingerprints on the trunk of the victim's car, and other items. He alleges the arrest warrant was not supported by probable cause to arrest due to an officer's omission of information when presenting the arrest warrant to the magistrate, i.e. a Franks v. Delaware, 438 U.S. 154, 171-72 (1978), issue. He is wrong for several reasons.

What Occurred Below

Prior to the bench trial beginning, Lynch made motions to suppress certain evidence including physical evidence and statements made by Lynch. Lynch alleged police did not have probable cause to search his person and luggage at the Canadian Border and fax copies of what was seized from him to the West Columbia Police Department. Lynch also alleged the arrest warrant for which Lynch was detained at the Canadian Border did not contain sufficient probable cause because it omitted alleged exculpatory material. As a result, he alleged all evidence

thereafter should be suppressed. (Tr. 51).⁶⁶

The suppression issues were first taken up when the State called Border Patrol Agent Nathan Breese. (R. 356-forward). Breese established Lynch had crossed into Canada on June 18th, been denied entry because of an outstanding warrant from New York, and was attempting to re-enter the United States through the Border Patrol Office. When Lynch's identity was checked by computer, he was found to be a missing person from West Columbia, S.C. He was immediately taken into custody and his bags were searched without a warrant pursuant to the agents' border search authority. (R. 386-395).⁶⁷ Lynch moved to suppress what the agents found in his luggage at the border and faxed to West Columbia. After lengthy argument, Judge Griffith found the search was reasonable and lawful under the border search exception to the warrant requirement. The items forwarded to West Columbia via fax machine were therefore admitted in evidence. (R. 431-32).

The Court next moved to Lynch's contention any evidence seized from Lynch post-arrest (i.e. service of the grand larceny warrant and the transfer of custody to Whatcom County). (R. 432-forward). Deputy Courtney Pollinder testified he received a call to transport Lynch pursuant to a warrant from the Customs facility about 3:30 a.m. He served Lynch with the grand larceny warrant after arriving at the border crossing, and being given the warrant by the border agents.

⁶⁶ The Court and the parties agreed, since this was a bench trial, to handle these motions immediately before the State sought to introduce the items of evidence Lynch sought suppressed. (R. 52-54, 95-96).

⁶⁷ Items found in the bag such as motel receipts and Lynch's bus ticket from Seattle to Vancouver were faxed to the West Columbia Police by Agent Breese. (R. 395, 409). Keys were also found in Lynch's bags. (R. 390-91). No cash was found in the bags. (R. 397). The Border Patrol agent contacted West Columbia and spoke with Investigator Bayne, who informed the agent that Lynch may have been involved in a double homicide in Lexington County. (R. 405). At approximately 3:10 a.m., agents confirmed with West Columbia police there was an arrest warrant for Lynch for grand larceny for the theft of Portia Washington's automobile. (R. 395). A copy of the warrant was faxed to the Border Patrol Agents. The Border Patrol Agents contacted the Whatcom County, Washington's Sheriff's Office. When the Whatcom Sheriff's Office deputy arrived at the border, he served the warrant on Lynch and custody was transferred to the Sheriff's Office who transported Lynch to jail. (R. 406-07).

The warrant was for grand larceny greater than \$5,000 from South Carolina.⁶⁸ Pollinder was also handed Lynch's two (2) bags that had already been searched by the border agents. He took them into his custody as well. He then transported Lynch to the Whatcom County Jail, and placed Lynch's bags in evidence at the Sheriff's Office. (R. 437-448). On the way to the jail, without being questioned, Lynch began talking and made several incriminating statements. (R. 437-448; 524-541).

Detective Matt Edwards of the West Columbia Police Department then testified. He was the agent who actually went and procured the arrest warrant for grand larceny.⁶⁹ Edwards obtained the arrest warrant on June 18, 2006. In addition to the sworn affidavit, Edwards supplemented the sworn affidavit with sworn oral testimony. (R. 452-53).⁷⁰ Edwards obtained the warrant late during the night of June 18, 2006, around 5:00 a.m. but his records actually reflected the warrant was issued at 6:30 a.m. eastern standard time (E.S.T.). (R. 454). The magistrate signed the warrant. He then drove the warrant back to the police department, and investigator Bayne had it entered into NCIC or faxed to the authorities in Washington State. (R. p. 454). Washington State is three (3) hours behind South Carolina. (R. 462-63).⁷¹

68 He read Lynch his Miranda rights. Lynch stated he understood his rights. He was not under the influence of any substance and was rational and carrying on a normal conversation. He was not promised anything or threatened in any way.

69 He was not the lead agent on the case. He was lieutenant over investigations at that time. Courtney Bayne was the case detective. Edwards assisted in the investigation. The investigation was a collective effort between approximately ten (10) investigators. The information contained in the arrest warrant affidavit came from several different sources.

70 Edwards informed the magistrate police knew the vehicle in question belonged to Portia Washington and Portia alone. This was verified through DMV records. Police knew through the investigation and talking to co-workers of Portia and her family that Lynch would not have been allowed to take the vehicle at any time. That was the general understanding amongst everyone police had talked to. Lynch was stopped in Texas in the vehicle. Lynch told the highway patrolman in Texas that he was going to pick up his wife in the vehicle. And, police knew Lynch did not have a wife at the time, so that was a lie that was being told to the trooper out in Texas at the time. Finally, Lynch showed up at the Canadian border in Washington alone, so he did not pick up a wife or anyone else.

71 Detective Edwards testified he did not inform the magistrate that Lynch had been allowed to use the car in the

After extensive argument on the issue, Judge Griffith held even with the omitted information, that Lynch and the victim were in a troubled relationship, the arrest warrant still was supported by probable cause. (R. 463-505). As a result, he denied any motion to suppress based on the allegation that the arrest warrant was without sufficient probable cause.

The Lack of Merit of Lynch's Argument

First, evidence was seized from Lynch's luggage at the international border during a lawful border search, regardless of the validity of any arrest warrant. Second, the affidavit and the sworn testimony supplementing the arrest warrant affidavit constituted sufficient probable cause to issue the warrant, and even if the alleged exculpatory information that Lynch alleges had been included, the warrant still contained sufficient probable cause to justify issuance of the arrest warrant for grand larceny. Further, police obtained Lynch's consent to seize and search his luggage. Further, police in West Columbia obtained valid search warrants to search Lynch's luggage once the luggage was in their possession. Regardless, the evidence against Lynch was overwhelming without reference to the evidence obtained or seized from Lynch or Lynch's luggage after the lawful border search; therefore the admission of this evidence was harmless.

Standard of Review

The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of

past to drop off Angelica at her grandmothers, because he had never talked to the grandmother, and this information was not shared with him during any of the investigation. (R. 456-57). He shared with the magistrate the information that he was aware of, that co-workers and friends had informed police Lynch would not have been allowed to take the vehicle. (R. 456-57). He did not share with the magistrate that Lynch and Portia were listed on an apartment lease as husband and wife, because he had not seen any such document. (R. 457-500). He did not share with the magistrate Lynch and Portia had lived together. (R. 457). He did not tell the magistrate this was the only car of Lynch and Portia, because the investigators believed Lynch owned several cars because several cars were registered to him according to Driver's Registration Records. (R. 501).

discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). The standard of review of Fourth Amendment search and seizure issues on appeal is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the finding of a trial judge where there is clear error. State v. Missouri, 352 S.C. 121, 572 S.E.2d 467 (Ct. App. 2002); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002).

The Initial Search at the International Border was Lawful

Lynch argues the fruits of the search of his luggage at the Canadian Border should be suppressed. Lynch is wrong. The United States Supreme Court has repeatedly held that searches made at the international border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing the border, are reasonable simply by virtue of the fact that they occur at the border. United States v. Flores-Montano, 54 U.S. 149, 124 S.Ct. 1582 (2004); United States v. Ramsey, 431 U.S. 606 (1977); United States v. De Hernandez, 473 U.S. 531, 105 S.Ct. 3304 (1985). In fact, Lynch conceded below that the search of his bags at the border by the Border Patrol Agent was lawful. (R. 426, ll. 12-15). Instead, he argues the transmittal of the contents of his luggage to the West Columbia Police Department by fax was unlawful. There is no merit to this issue. The contents of the luggage were in the lawful custody of the Border Patrol after the lawful border search. Flores-Montano, *supra*; Ramsey, *supra*; De Hernandez, *supra*. The agents could fax copies of those items to West Columbia police.⁷² The evidence seized from the luggage, which included Lynch's birth

⁷² Further, the agents found upon an NCIC check that Lynch, who had been rejected by Canada, was a missing

certificate, Motel 6 receipts, a set of keys, and his bus ticket from Seattle to Canada, did not have to be suppressed, or any other evidence found and seized by the border patrol agents. Flores-Montano; Ramsey; De Hernandez. As a result, Judge Griffith did not err in refusing to suppress the items seized from Lynch's bags by Border Patrol agents including those faxed to the West Columbia police.

There is no merit to Lynch's argument regarding the arrest warrant

Lynch relies on Franks v. Delaware; however, Franks addressed an act of commission in which false information had been included in the warrant affidavit. That did not occur here. The Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). However, to be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. Id. (footnote omitted). Entitlement to a Franks hearing is a matter of law subject to *de novo* review. United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008).

While omission may not be per se immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included have redounded to defendant's benefit. The potential of endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

United States v. Colkey, 899 F.2d 297, 301 (4th Cir. 1990)(citations omitted). "Inferring bad

person, and subsequently were informed he was a suspect in a double homicide in South Carolina.

motives from an officer's omission of information "collapses into a single inquiry the two elements —'intentionality' and materiality'—which Franks states are independently necessary."

Id. A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. Tate, 524 F3d at 454. "[M]ere [] neglig[en]ce in ...recording the facts relevant to a probable-cause determination' is not enough." Colkey, 899 F.2d 301 (*quoting* Franks, 438 U.S. at 170). In this case, Lynch offered no evidence Officer Edwards omitted information with the intent to mislead the magistrate. In fact, Judge Griffith specifically found: "...Judge Reinhart, considering what was presented to him, acted properly, and I don't think the detective omitted the relationship to conceal the fact." (R. 491, ll. 18-21). The facts elicited during the *in camera* hearing show police were in the middle of a missing person/homicide investigation. The arrest warrant was obtained by one of the members of a large investigation team late at night/early in the morning. The affidavit was prepared by Detective Edwards based on the information he was aware of from the investigation, and the warrant was then driven to the magistrate for presentation at a location in Peak, S.C. (R. 449-463). "Colkey makes clear the Fourth Circuit's disdain for the notation that bad motive can be inferred from the materiality of the omitted information." Horton v. City of Columbia, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 775441 (Ct. App. 2014) *not yet released for publication*.

The Fourth Circuit has clearly set a very high standard for establishing entitlement to a Franks hearing. Id. Therefore, we agree with the circuit court that Horton did not establish her entitlement to a Franks hearing. Officer Tyler's affidavit and the arrest warrants are therefore reviewed without the inclusions of Smith's statements and provide probable cause for Horton's arrest. Consequently, her arrest was lawful,....

Horton, *supra*. Lynch was not even entitled to a Franks hearing, and has not made a sufficient

showing to include his alleged exculpatory evidence.

Further, the arrest warrant along with the sworn supplemental testimony to the magistrate supplies ample probable cause for the issuance of the warrant for grand larceny of Portia Washington's automobile. Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984).⁷³ Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, 540 U.S. 366; Gates, 462 U.S. 213. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). Probable cause “does not demand any showing that such a belief be correct or more likely true than false.” State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742. The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be seized. Ybarra v. Illinois, 444 U.S. 85 (1979).⁷⁴ As the U.S. Supreme Court

⁷³ See also State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978); State v. Williams, 262 S.C. 186, 203 S.E.2d 436 (1974).

⁷⁴ When determining the constitutional validity of an arrest, a court must consider whether, at the moment the arrest was made, the officer had probable cause to make it, i.e. whether at that moment the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, was sufficient to warrant a

recognized in Gates, and as here, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no proper place. See United States v. Ventresca, 380 U.S. 102 (1965); Bowie, *supra* ("Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion."), *citing Sullivan, supra; Dupree*, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented, not the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The arrest warrant affidavit in the present case states as follows:

Personally appeared before the affiant [W.M. Edwards] being duly sworn deposes and says that defendant [Kenneth Andrew Lynch] did in this count and state on [June 10, 2006] violate the criminal laws of the State of South Carolina (or ordinance of the [municipality] of West Columbia in the following particulars: Description of Offense: Grand Larceny \$5,000 or More -16-13-30(B)(2)I further state that there is probable cause to believe that he defendant named above Did commit the crime set forth and that probable cause is based on the following facts: In that on or about June 14th, 2006, at 200 N. 12th Street, in the city of West Columbia, County and State aforesaid, Portia Washington and Angelica Livingston were reported Missing to the West Columbia Police Department. They had not been seen by anyone since June 10, 2006. On June 14th, 2006 Kenneth Andrew Lynch, was ticketed in El Paso, Texas, while driving alone in a 2005 Ford Focus (VIN Number 1FAFP34N25W228072) valued at \$12,000.00 which is registered to Portia Washington. On June 18, 2006, Kenneth Andrew Lynch was stopped while trying to cross the USA/Canadian Border on a bus. The whereabouts of the vehicle are unknown. Investigators with the West Columbia Police Department believe that Kenneth Andrew Lynch did take, steal, and carry away the vehicle depriving the owner of its use and value. All of which constitutes the crime of grand larceny more than \$5,0000.00 and is in violation of

prudent man in believing that the suspect had committed a criminal offense. Pringle, supra; Beck v. Ohio, 379 U.S. 89 (1964); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Pruitt, 260 S.C. 396, 196 S.E.2d 107 (1973); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). Stated another more familiar way, whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal at the time of the arrest. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979); State v. Moultrie, 316 S.C. 457, 451 S.E.2d 34 (Ct. App. 1994).

the South Carolina Code of Laws of 1976 as Amended. Case Number 0612335.

(Court's Ex. 24; Arrest Warrant J-030721). The arrest warrant affidavit was executed by Detective Edwards. Edwards also supplemented the affidavit with the following sworn testimony:

It was reiterated that we knew the vehicle belonged to Portia, and Portia alone, through DMV. We knew through investigation and talking to his co-worker - - his and her co-workers, Portia's co-workers, talking to the family, that Mr. Lynch would have not been allowed to take the vehicle at any time. And, that was a general understanding amongst everybody we talked to. We knew that he was stopped in Texas, which I believe, that's -

Q: It is in there.

A. --specifically listed.

What I also told the judge about is that he -- what he told the judge [sic][trooper] he was doing, which was going to pick his wife up in Arizona.

Number one, we knew that he didn't have a wife at the time, so that was a lie that was being told to the trooper that was out there.

Number two, we knew that he showed her - I guess, lastly, we knew that he show --you know, showed up in Washington alone, so he didn't -

Q: Okay.

A: --pick up a wife or anyone.

(R. 452-54). (See also R. 455-462). A warrant affidavit may be supplemented by sworn oral testimony before the magistrate.⁷⁵

Based on the affidavit and sworn supplemental testimony, the issuing magistrate knew the victims Portia Washington and Angelica Livingston disappeared on June 10, 2006; they had not been seen by anyone since June 10, 2006. Portia was the owner of a Ford Focus automobile titled solely in her name. According to family members and co-workers police had spoken to during the investigation, appellant Lynch did not have permission or authority to drive the vehicle at any time, and certainly not to take it to Texas. Lynch was stopped and ticketed in El

75 S.C. Code Ann. Section 22-3-710; Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006); State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975); Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999).

Paso, Texas alone driving the vehicle registered to Portia. And, Lynch falsely told the trooper who stopped him that he was going to pick up his wife, and Lynch had no wife. Further, Lynch then showed up at the Canadian border alone, trying to cross into Canada on a bus. And, the vehicle could not be found. Finally, Portia's vehicle was valued in excess of five thousand dollars (\$5,000). (Court's Ex. 2, R. 452-462). As a result, the affidavit and sworn supplemental testimony supported **probable cause, i.e. there was reasonable grounds to believe** that Lynch stole the victim's new car, which constituted the crime of grand larceny. State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).

Further, as Judge Griffith correctly pointed out below, Lynch would not be entitled to include the alleged exculpatory information in the affidavit as he interprets it, but the information that would be included in the affidavit for a Franks analysis would be the alleged exculpatory information in possession of law enforcement at the time that they sought the arrest warrant.⁷⁶ (R. 459-60, 488, 491). What law enforcement knew and the record shows was that Lynch and Portia Washington had been in a romantic relationship, but the relationship had turned sour and was ending. Lynch was supposed to be moving out of the residence; the two were no longer romantically involved. Portia was afraid of Lynch and afraid of Angelica living with Lynch. Lynch and Portia were breaking up, and Lynch was not allowed to use Portia's vehicle, and

⁷⁶ In his brief, Lynch refers to testimony of witnesses at trial that during their relationship Portia had allowed Lynch to drive the car on occasion, for example to drop Angelica off at her grandmother's for daycare or to drive Portia home from work. This testimony was developed *during the trial* itself. Detective Edwards testified this information was not provided to police during the investigation before he presented the affidavit to the magistrate. Family, friends, and co-workers had informed police before Detective Edwards presented the affidavit for the arrest warrant that Lynch would not have been allowed to take or drive the car. (R. 453, 456-57). Further, Lynch fails to mention the testimony developed at trial that shortly before Portia's disappearance and murder, Portia gave her mother the spare key to her car and informed her mother she did not want Lynch driving her car anymore. And, Lynch fails to mention the testimony developed at trial that several days before Portia's disappearance and murder another witness heard Lynch fussing and cursing at Portia because she would not let him use her car.

Lynch should not be in Portia's vehicle or using Portia's vehicle.⁷⁷ Franks. As a result, even including the actual alleged exculpatory information in the arrest warrant affidavit, there was still probable cause that Lynch had committed the offense of grand larceny. Franks. As a result, there is no merit to this ground. Lynch is not entitled to have any evidence, including the contents of his luggage or his incriminating statements, suppressed on this basis. Id. The contents of Lynch's luggage were discovered pursuant to a lawful search incident to arrest. West Columbia police faxed the arrest warrant for grand larceny to the Border Patrol/Customs agents, and Lynch was served with the warrant and taken into custody by Whatcom County, Washington police. United States v. Edwards, 415 U.S. 800 (1974); Illinois v. Lafayette, 462 U.S. 640 (1983); State v. Muquit, 381 S.C. 114, 671 S.E.2d 643 (Ct. App. 2009)(items in defendant's belongings when arrested can be seized without a warrant and used in evidence at trial). As a result, Judge Griffith did not err in refusing to suppress the contents of Lynch's luggage.⁷⁸

Further, Lynch's statements to the Whatcom County Deputy on the way to the Washington State jail were admissible because Lynch was not being questioned by the Deputy at

77 Even including the alleged exculpatory information developed *during the trial*, which police did not know about at the time they sought the arrest warrant, the warrant would still contain probable cause that Lynch had stolen Portia's new car. Lynch and Portia's relationship had turned bad and was ending. Portia wanted out of the relationship and wanted Lynch out of her life. While Portia had let Lynch drive her car selectively in the past, however, shortly before she disappeared she gave her mother the spare key to her auto and informed her she no longer wanted Lynch driving her car, and another witness overheard Lynch fussing and cursing at the victim because she would not let him use her car. And, several other witnesses testified Lynch would not have been allowed to use Portia's car.

78 Further, the contents of Lynch's luggage would have been inevitably discovered pursuant to a consent search. When Lynch was questioned by the FBI agent and the Washington Detective, he consented to the search of his luggage, and he signed over all of his property to Washington authorities. (R. 629-30). They had the lawful right to search and inventory all of the belongings in Lynch's luggage. Finally, the contents of Lynch's luggage would have been inevitably discovered because the bags were lawfully seized by the Border Patrol agents, handed over to Whatcom County, signed over by Lynch, and returned to West Columbia police by Detective Edwards, whereupon West Columbia police obtained two (2) separate search warrants for Lynch's luggage. (R. 936-951, 960-1064, Court's Ex. 32). As a result, the contents of Lynch's bags were lawfully obtained pursuant to proper *search warrant(s)* issued by a neutral and detached magistrate. Judge Griffith did not err in refusing to suppress the contents of Lynch's luggage. And, officers in West Columbia relied in good faith on those *warrants* in searching Lynch's luggage originally seized at the Canadian Border. United States v. Leon, 469 U.S. 897, 918 (1984).

that time and Lynch completely and independently volunteered those statements. See United States v. Seidman, 156 F.3d 542 (4th Cir. 1998). Furthermore, Lynch's statements to the FBI Agent and Washington Detective were admissible because Lynch's arrest was not illegal but based on a warrant supported by sufficient probable cause. Finally, Lynch's major case prints were also admissible because they were obtained pursuant to a lawful arrest. Further, Lynch's major case prints were obtained pursuant to a Schmerber Order issued by Judge Griffith. There was no objection to the admission of those major case prints in evidence at Lynch's trial. (R. 1064-68). Therefore, Lynch's motion to suppress his fingerprints received after extradition is either not preserved or irrelevant.⁷⁹

The Exclusionary Rule Should Not Apply

Even if this Court determines Judge Griffith erred, the exclusionary rule should not apply. Davis v. United States, 131 S.Ct. 2419 (2011).⁸⁰ Under the circumstances of this case,

79 And, Lynch's DNA was obtained pursuant to a Schmerber Order of Judge Griffith. There was no objection to the admission of his buccal DNA sample when admitted for identification purposes. (R. 1070-75). And, Lynch is not raising any issue with regard to the Schmerber Order on appeal.

80 The Court fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the 4th Amendment. Id. at 2423. "Exclusion is not a 'personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." Id. at 2426. "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." Id. This Court and our state Supreme Court have recognized the same principle. "[T]he exclusionary rule was not designed to apply to every violation of the Fourth Amendment." State v. Jenkins, 398 S.C. 215, 229, 727 S.E.2d 761 (Ct. App. 2012); See State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 ("Suppression is appropriate in only a few situations. . ."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued."), citing State v. Sachs 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975). In Sachs our Supreme Court observed "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where deterrence is subserved." 264 S.C. at 566, 216 S.E.2d at 514. Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the U.S. Supreme Court and our state Supreme Court have stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. Davis, at 2427; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis, at 2427, citing Hudson v. Michigan, 547 U.S. 586, 596, (2006). United States v. Herring, 555 U.S. 135,140, (2009) citing Leon, 468 U.S. at 923, n. 24. Police practices trigger the harsh sanction of

exclusion would not further the purposes of the exclusionary rule, and suppression is not proper.

Id.⁸¹ The conduct of the investigators here did not violate Lynch's 4th Amendment rights deliberately, recklessly, or with gross negligence. Herring. Nor has Lynch shown this case involves any "recurring or systematic negligence" on the part of law enforcement. Id. In fact, exclusion would only punish the victims' family. *See Id.* (no evidence county investigators committed misconduct where they relied on neighboring counties database showing outstanding warrant existed in arresting and searching defendant and search would not be suppressed).⁸²

Harmless Error

Further, even assuming *arguendo* Judge Griffith somehow erred, it was harmless given the overwhelming evidence of Lynch's guilt apart from the contested evidence.⁸³ In making a determination regarding harmless error, this Court will look at **the entire record**. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when **guilt is conclusively proven by competent**

exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S. at 144. The conduct of the officers here was neither of these things.

81 State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(recognizing the main purpose of the exclusionary rule is deterrence of police misconduct). *See* Gates, 462 U.S. 213 (affidavits are drafted by non-lawyers in the midst and haste of a criminal investigation).

82 Further, under the facts of this case, suppression of the evidence would make no sense where there is no evidence of police misconduct. Judge Griffith specifically found Detective Edwards did not intentionally mislead or hide Lynch's previous relationship to the victim from the magistrate, and Edwards did not have any information from the investigation that Lynch was authorized to use Portia's car from June 10, 2006 through June 14, 2006, but quite the opposite. Border patrol agents initially searched Lynch's bags pursuant to a lawful border search. And, police thereafter waited until they had lawful search warrants from a neutral and detached magistrate before searching Lynch's luggage. *See* Illinois v. McArthur, 531 U.S. 326 (2001). The application of the exclusionary rule would make no sense under the facts of this case. Davis, *supra*; Brown, *supra*. The evidence seized from Lynch's luggage by West Columbia police should not be excluded. Id.

83 State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006).

evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The evidence against Lynch was overwhelming. His guilt was conclusively proven, and no other rational conclusion could have been reached, independent of the challengeable evidence.⁸⁴ Even removing the evidence seized or obtained *after the lawful border search*, including Lynch's statements, the evidence of his guilt is still overwhelming.⁸⁵

⁸⁴ Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

⁸⁵ Lynch resided with the two (2) victims in apartment M-7 Park Place Apartments up until the date of their disappearance and death. Lynch was the last person seen with the victims before their disappearance and murders. He was seen with them the afternoon of their disappearance and murder, June 10th, outside apartment M-7 Park Place Apartments. Lynch had previously had himself placed on the lease as Portia's spouse, even though the two (2) were never married. The evidence established prior to that Saturday night, June 10th, Lynch and Portia's romantic relationship was disintegrating. Portia was afraid of Lynch; she wanted him out of her apartment and life; and friends, relatives and co-workers had urged her to get away from him and even report what he was doing to her to the management at which she and Lynch worked. The following morning, Sunday morning, June 11th, Portia did not call or contact anyone, as was her regular habit. From June 10th forward, Portia and Angelica disappeared from the face of the earth. Portia's car was also missing beginning June 10th, and the following day, Sunday, June 11th. Even though Lynch was still in town on Sunday, Lynch did not report either Portia or Angelica missing. Instead, he withdrew a large amount of cash from his checking account at an ATM in Cayce. Instead of reporting for work on Monday, Lynch fled South Carolina, in Portia's automobile, a vehicle Portia had specifically instructed her mother not to allow Lynch to drive, and she did not want him driving. Lynch fled South Carolina in Portia's automobile before police or anyone else knew a crime had been committed in the apartment he shared with the victims. Lynch never reported the criminal assault on Angelica which took place in his bedroom. When Lynch arrived in Vicksburg, Mississippi, he falsely gave his home address as the State of Florida, checked into the motel alone, and paid for the room with untraceable cash. Lynch then continued to flee westward across the country and withdrew all of the remaining cash from his checking account while in Texas, i.e. emptying his checking account, and was stopped by a highway patrolman for speeding in Portia's new car near the Mexican Border. Lynch was alone and falsely told the highway patrolman there he was going to pick up his wife, the owner of the car, in Arizona. Portia Washington was not his wife, and she was not in Arizona but had already been murdered. Lynch then checked in to another motel alone, in Arizona, but this time was required to list his home address from his driver's license, which was correctly South Carolina. He again paid with untraceable cash. The following day, he left the motel and continued his flight across the country to Seattle, Washington, where he purchased a one way bus ticket out of the country. Before leaving, Lynch removed any identifying marks from Portia's stolen car, including the license plate and all paperwork from the glove box. Lynch continued his flight by trying to leave the country on a Greyhound bus, but was stopped by Canadian authorities. When he returned to the U.S. Customs Office, he was lawfully searched and his one way bus ticket to Vancouver and his motel receipts were found in his luggage. No cash however was located. When Portia did not appear for work and continued to be missing, it was her family and co-workers who reported her missing, not Lynch, and it was her family and co-workers who went to check on her whereabouts and welfare. When the manager of the apartment complex entered the apartment Lynch shared with the two (2) victims using a pass key, she found the linoleum and carpet had been cleaned. When police subsequently searched the residence more carefully, with a warrant, they discovered Angelica's blood underneath a reclining chair in the bedroom, and Angelica's blood intermingled with blood from a male contributor on two (2) different sinks. Lynch could not be excluded as the male contributor. Police also found medium velocity blood spatter containing Angelica's DNA indicating she had been criminally assaulted within the apartment. The spatter was found

Even assuming *arguendo*, error in the admission of evidence, the admission was harmless. Fulminante; Franklin; Miller; Kelley. The evidence against Lynch was overwhelming. Guilt was conclusively proven, and no other rational conclusion could have been reached. Even removing the evidence seized or obtained *after the lawful border search*, including Lynch's statements, the evidence of Lynch's guilt is still overwhelming. Haselden; Braxton; Blackburn.

Lynch's Prosecution and Conviction is Not Barred

Lynch also argues in his brief that his prosecution and conviction is barred because his extradition was improper. There is no merit to this argument. State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954).⁸⁶ The exclusionary rule, when it is applied, only applies to evidence seized in violation of the Fourth Amendment, and does not apply to the person. United States Crews, 445 U.S. 463, 474 ("Respondent is not

underneath the bedroom recliner, and would had to have been deposited when the recliner was overturned, not upright as police found it. Someone had also tried to clean up the blood in the apartment. It was Lynch, the other occupant of the apartment, who fled from South Carolina before anyone knew Portia or Angelica had been murdered. Lynch's DNA was found on the steering wheel of Portia's abandoned car in Seattle. Lynch does not challenge the search of the apartment (crime scene) on appeal. It was searched with a search warrant. Further, Lynch had abandoned the apartment taking all personal identification paperwork with him. Portia's car was searched by Washington police after obtaining a lawful search warrant. Further, Lynch had abandoned the car at the bus terminal. Lynch does not contest the search of Portia's car on appeal.

86 As previously set forth, there is no merit to Lynch's argument the arrest warrant was not sufficiently supported by probable cause. Further, even assuming *arguendo* it was not, it would not bar his prosecution and conviction for murder and grand larceny. Lynch was indicted by the Lexington County grand jury for two (2) counts of murder and grand larceny, a separate finding of probable cause. State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Willing, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958) (when the initial process which is used to effect an arrest has been improperly issued, such impropriety or irregularity may be cured by an indictment by a grand jury having proper jurisdiction). The indictments were what Lynch was tried on not the grand larceny warrant. Further, if a person is arrested out of state, and brought back in violation of extradition laws, it will not invalidate the subsequent prosecution of the defendant. State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). This is consistent with views expressed by the U.S. Supreme Court in Frisbee v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952). See also Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225 (1886). The principle rests on the sound basis due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards. Cf. Ramirez v. Indiana, 471 U.S. 147, 105 S.Ct. 1860 (1985) (per curiam). There is no merit to Lynch's argument. Mahon v. Justice, 127 U.S. 700, 8 S.Ct. 1204 (1888); Pettibone v. Nichols, 203 U.S. 192, 27 S.Ct. 148 (1906); Lascelles v. Georgia, 148 U.S. 537, 13 S.Ct. 687 (1893); Cook v. Hart, 146 U.S. 183, 13 S.Ct. 30 (1892); State v. Smith, 1 Baily 283 (S.C. 1829). See also 7 S.C. Dig. 409.

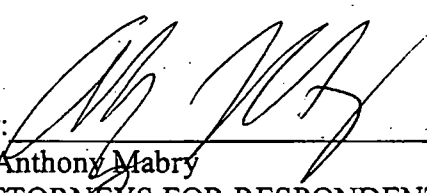
himself suppressible fruit, and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct.”).

CONCLUSION

Based on the foregoing, Lynch’s convictions and sentences for the murders of Portia Washington and Angelica Livingston and the grand larceny of Portia Washington’s automobile must be affirmed and this appeal dismissed.

Respectfully submitted,

J. ANTHONY MABRY
Assistant Attorney General

By: 

J. Anthony Mabry
ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, SC 29211

June 19, 2014

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

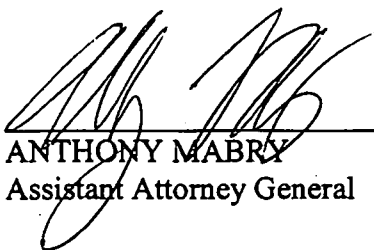
v.

KENNETH ANDREW LYNCH,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled A Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



ANTHONY MABRY
Assistant Attorney General

June 19, 2014

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the InterAgency Mail to Susan B. Hackett, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 19th day of June, 2014.



ANTHONY MABRY
Assistant Attorney General

