ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA GRIFFITH,

APPELLANT

APPELLATE CASE NO. 2014-000066

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Joshua "Blake" Griffith, was indicted by the Horry County Grand Jury for the offenses of murder, criminal conspiracy, and two counts of assault and battery with intent to kill (ABIK). Co-defendant Blake Brown was indicted for similar offenses. R. *. Appellant's case came on for trial from January 6-10, 2014, before the Honorable Edward B. Cottingham, and a jury. B. Alexander Hyman and Blake A. Hewitt, represented appellant. Nancy R. Livesay, Martin D. Spratlin, and Carolina F. Fox were the assistant solicitors. Tr. 1.

On January 10, 2014, the jury found appellant guilty on all counts. Tr. 854, ll. 1-17. Judge Cottingham sentenced appellant to thirty years for murder and imposed concurrent sentences on the other counts.

This appeal follows.

ARGUMENT

1.

The Court erred by refusing to direct a verdict of acquittal on the charge of murder since there was not direct or substantial circumstantial evidence that appellant killed the victim with malice aforethought, where the evidence against the co-defendant having been the killer was overwhelming, and the stand-alone reply testimony of appellant's former girlfriend that appellant allegedly said he saw the victim die was not substantial circumstantial evidence of his guilt (facts of Issues 1 and 2).

Relevant Facts

Marianna Mays went to Myrtle Beach in September 2009 with appellant Blake Griffith, her friend, Kayla Houck, and co-defendant Blake Brown. Tr. 80, l. 11 - 81. l. 23. They went to the beach on a Saturday and they planned to stay until Monday night. Tr. 82, ll. 2-17. The four young people stayed at the beach house on Sunday night, but when Mays and Kayla woke up Monday morning, their money was missing. Kayla told Brown and appellant Griffith that they had to leave. Tr. 86, l. 12 - 87, l. 17. Mays said that "I figured Blake Brown took it." However, Kayla told appellant that he also needed to leave. As will be seen clearly infra, Brown was widely thought to be "trouble." Tr. 87, ll. 2- 2.

The group got back together Monday night. Kayla picked up appellant Griffith and Blake Brown from Brown's house about 9:00 p.m. that evening. Tr. 90, ll. 4 -9.

The group went shopping, and the state would attempt to make much of the fact that appellant purchased a knife at the Red Hot Shoppe that evening at about 11:00. Tr. 90, l. 13 - 91, l. 10. Mays said that both Brown and appellant had knives that evening. "He

[appellant] wasn't flashing it or nothing like that. He just had it clipped on him." Tr. 91, ll. 3-24.

Mays remembered that their intention was to go back to the beach house after going out that evening. However, when they passed the Afterdeck Bar next to the Doll House they saw that the bar was packed. Mays remembered they all thought: "It's our last night, so I made a U-turn and we went back to the Afterdeck, all four of us. It was about midnight." Tr. 92, ll. 2-14. Blake Brown was "patted down" before they went into the bar. However, they were allowed in a "side door because we didn't have any money to pay for the cover fee to get in." Tr. 92, ll. 15-23.

According to Mays, Blake Brown was the only person with ties to Myrtle Beach who knew people there. None of the three knew anyone at the Afterdeck that night. Tr. 93, ll. 10-24. Appellant went with Blake Brown into the bar that evening and "Kayla and [Mays] are dancing. We see [Brown and appellant] a couple of times. We danced a couple of times with them. I mean, everybody was having a fun time. Like, I didn't see Blake Brown or Blake Griffith get mad; I didn't see them frustrated with each other. I didn't see any altercations whatsoever, like all four of us really were just having a good time." Tr. 94, ll. 5-17.

The four of them stayed at the Afterdeck for an hour and a half to two hours. Both appellant Griffith and Blake Brown were wearing wife-beaters and shorts that evening. Mays and Kayla left the bar and went to the car first. Mays telephoned appellant on his cell phone, and he told her "we'll be out there in a minute." Tr. 95, l. 13 - 99, l. 21. As they were waiting in the car, after she talked to appellant on the phone, they saw "people were busting out the doors, one guy was actually being carried out." Mays said she was confused

about what was going on "then all of a sudden I see Blake Brown just run out the door and take off, doesn't hesitate to look around, just runs off." Mays saw two injured people coming out of the club. Tr. 102, ll. 6-24. One victim would die (murder count), and two were injured (ABIK counts).

Mays remembered that appellant Griffith came walking to the car very calmly. She was very worried about appellant. She asked him if he "had anything to do with this and he said 'yes' and that's when he took off running." Appellant did not appear to be injured at all, he did not have any blood on him, but he appeared angry just before he ran away. Tr. 103, l. 23 - 105, l. 25.

While Mays was worried about appellant, she did not care about Blake Brown. She asserted Brown, "was blowing my phone up, too" during this chaos. Tr. 107, ll. 3-25.

When Brown reached Mays on the telephone he said that he was back at the beach house. Mays agreed to let the police ride with her to the beach house. Appellant was not there, but as will be seen infra, Blake Brown was arrested by the police after they arrived at the beach house. Brown approached the car Mays was driving, and the police pulled their weapons on Brown. Tr. 107, l. 7 - 108, l. 6.

On cross-examination, Mays repeated that she thought Blake Brown stole their money that Sunday night. She also said that Brown "had a cocky attitude," and that Brown had gotten in a fight at the Waffle House that weekend. Appellant had nothing to do with Blake Brown's hostile actions. Tr. 119, l. 4 - 121, l. 23. Appellant was having a good time that evening, and she did not think appellant was not looking for "any trouble" at the Afterdeck or anywhere else that evening. Mays had the opposite opinion of Blake Brown.

Tr. 122, l. 1 - 124, l.1. Mays did not see appellant do anything improper that weekend but she knew that Blake Brown had cocaine with him. Tr. 128, l. 10 - 131, l. 17.

Ashley McNeill was at the Afterdeck on that September 8, 2009 evening. She remembered seeing "two boys in white wife-beater shirts and one was holding a knife. So we told the bouncer and we saw the boys throughout the floor." Tr. 140, l. 8 - 142, l. 7.

Ashley remembered that her friend, DJ (the decedent) bumped into one of the men in wife-beater shirts, and that a "big fight broke out." She did not know who stabbed DJ, but she said the knife was silver. Tr. 151, l. 7 - 170, l. 3. The defense told the jury in closing that Ashley was not believable. She testified she was eighteen-years-old, at this bar but not drinking, and that she saw appellant with a silver knife even though neither knife carried that night was silver. Further, the bouncer disputed the assertion that anyone him of the knives. Tr. 811, l. 5 – 813, l. 2.

Ryan Palmer, twenty years old, went to the Afterdeck on September 8, 2009 with about ten friends. Tr. 218, ll. 4-23. He saw the two men, Brown and appellant, together that evening. Palmer claimed both men stared at him as if there were a problem, and Palmer claimed both men "bumped him." A short time later he heard someone behind him say "you are about the get fucked up." Tr. 226, l. 9 - 228, l. 16. Palmer identified appellant in the courtroom as being "the shorter guy." Tr. 228, ll.10-16.

On cross-examination, Palmer admitted he gave a statement that Brown, the taller man, was the person he bumped into. It was Brown who "told him you are about to get fucked up." Tr. 245, l. 12 - 249, l. 1. Palmer thought Brown was the person who "cut him on the head because DJ and Griffith were next to him and he had just thrown a punch at

Griffith." Tr. 248, l. 16 - 249, l. 7. Appellant never touched him and he never saw appellant with a knife that evening. Tr. 256, l. 7 - 257, l. 12.

Robert Penna was one of the men stabbed (ABIK) that evening. He had first claimed that appellant, the shorter one, stabbed him that evening at the Afterdeck. Tr. 306, l. 17 -308, l. 9. However, Penna then repeatedly admitted that he did not know who actually stabbed him, and he was just making assumptions because "it happened so fast." Tr. 311, ll. 8-22.

Penna maintained: "It took me a long time to kinda of come to terms with myself to remember what happened that night." He said the more he thought about it, the more he assumed it must have been appellant who stabbed him. He remembered he was "throwing what [punches] I could at Brown at the time." Tr. 321, ll. 7-22.

At another point on cross-examination, Penna was asked how he could assert that appellant stabbed him and DJ that evening when he admitted he did not see who did the stabbing. Penna answered, "*I guess you are just going to have to take my word for it.*" Tr. 326, ll. 12-25. (emphasis added). On redirect examination by the solicitor, Penna even admitted: "I didn't see a knife at all." Tr. 328, ll. 3-5.

Penna acknowledged that he never saw appellant with a knife during the struggle. He also admitted he did not know who stabbed and killed DJ that night. He told the police that he remembered very little of what occurred that evening, Tr. 321, l.7-326, l. 25. Penna finally admitted that he did not even know he had been stabbed until "someone told me I was stabbed." Tr. 332, ll. 3-11.

Kenneth Lee Muth was the assistant manager at the Afterdeck and the Dollhouse on the night of the incident. Muth noticed Brown that evening, he remembered Brown, and he thought Brown was "trouble."

Muth recalled that the car that appellant was driving pulled up in front of the Dollhouse. "There was two females in front, two males in the back." He remembered co-defendant Brown because he leaned out the window, stuck his forearm out the window, and he said, "yeah, I'm local, right here it says 843" and "he had 843 tattooed on him." Tr. 344, l. 15 – 345, l. 4. After the incident, appellant ran from the scene towards the inter-coastal waterway. Tr. 346, l. 6 - 350, l. 3.

Detective Jim Chatfield with the Horry County Police Department responded to the Afterdeck on the morning of September 8, 2009. There were approximately 400 people there, and it was "basically out of control." Tr. 361, l.18 - 362, l. 19. Chatfield was told that two people were involved in the altercation. In the chaos at the Afterdeck, people were trampling over the crime scene and witnesses were leaving. He never saw Blake Brown or appellant Griffith at the scene. Tr. 363, l. 7 - 366, l. 20.

On September 8, 2009, Sergeant Randall Gant of the Horry Police learned that a person of interest -- appellant, had possibly swim in the inter-coastal waterway. The police dog tracked the footprints and found appellant laying on the ground. Tr. 370, l.13 - 376, l. 12. Gant estimated the length of the swim was at least "half a mile, three quarters of a mile." Tr. 389, ll. 9-16.

The pathologist, Dr. Edward Proctor, testified that the decedent, DJ, had a stab wound in his left chest area. He died of massive bleeding and blood loss. The victim did not appear to have any other injuries other than the stab wound. Tr. 429, l. 17 - 432, l. 14.

Crime Scene Investigator Robert Deal testified that the police had located a green mossy oak folding knife and swabbed it to take a DNA sample. Tr. 481, l. 12 - 482, l. 22. SLED DNA/Serology Fitts testified that the swab from the knife handle had the major contributor DNA of Blake Brown. Tr. 505, ll. 1-25. Fitts did not find anything on the knife linking it to appellant. Tr. 508, ll. 6-8.

Seth Rogers was drinking at the bar that evening. He saw Blake Brown, the taller white male, standing over the victim's body. He did not see appellant until appellant ran and said in an excited fashion: "We gotta go, we gotta go." Both men ran out of the parking lot, and then "I turned my attention back to my friends." Tr. 537, l. 23 - 544, l. 8.

Detective David "Rusty" Crocker, learned from the emergency room staff that the victim was dead. He went to the Afterdeck to assist in the investigation. Tr. 555, l. 11 - 556, l. 16. Crocker was told that Blake Brown was calling a female friend. Brown was requesting that she pick him up at the beach house where they were staying so he could get back to Greenville. Crocker got consent to use the young woman's vehicle and he drove her vehicle to the beach house in North Myrtle Beach. Tr. 556, l. 17 - 557, l. 12. When he turned into the driveway, a vehicle was parked there with two people inside. Crocker saw Blake Brown get out of the vehicle and approach the Jeep Cherokee. Crocker got out of the Cherokee and drew his weapon. He ordered Blake Brown to get on the ground. Crocker arrested both Brown and Brown's mother. He saw a Mossy Oak-style knife on the passenger floorboard. Tr. 556, l. 21 - 551, l. 2. This knife contained Brown's and the victim's DNA. Crocker had no contact with appellant Griffith. Tr. 565, ll. 16-21.

Directed verdict motion

Defense counsel Hewitt moved for a directed verdict noting there was no evidence that appellant Griffith was brandishing a knife that evening. This was a purely circumstantial evidence case. Counsel noted that the one witness that came the closest said "you will have to take my word for it." This did not meet state's burden of proof at the directed verdict stage. Tr. 577, l. 5 - 579, l. 11.

Defense counsel focused strongly on the fact that the state had utterly failed to prove that appellant did anything with malice aforethought as to both the murder and ABIK counts. Counsel argued that "eyeballing somebody" or even "talking trash" did not satisfy the state's duty to produce sufficient evidence of malice aforethought at the directed verdict stage, even with everything being accepted, as it must, in the light most favorable to the state. Tr. 569, l. 10 - 574, l, 2. Defense counsel noted that Blake Brown, whom the evidence pointed to as the guilty stabbing party, had pled guilty. Tr. 572, ll. 16-25.

The judge appeared to focus strongly on the fact that appellant purchased a knife that evening; that a jury could believe that appellant was acting with Brown, and that they wanted to start a fight. Tr. 575, l. 14 - 576, l. 11. Defense counsel Hewitt continued to focus on the fact that the state's burden in this circumstantial evidence case had not been met, and there was no evidence of a conspiracy. The judge continued to point out there was evidence of "trash talking" that evening. Defense counsel argued that the mere fact appellant purchased a knife, and that a person later died at the bar did not satisfy the state's burden of proof at the directed verdict stage. Tr. 576, l. 7 - 579, l. 11.

Other evidence

Kacie Henry testified she dated Blake Brown right after the incident in this case. She was aware of his arrest and the charges against him. Tr. 686, l. 15 - 687, l. 14. At one point appellant lived with her. Tr. 687, l. 12 - 688, l. 1.

Kacie Henry testified that she talked to Blake Brown about the incident at the Afterdeck. The following occurred:

Q. Ms. Henry, I'm not real sure where we were when we left off, but I believe that you had stated you were from Greenville and that you were the girlfriend of Blakely Brown; is that correct?

A. Yes.

Q. Did Mr. Brown live with you at some point when you were in Greenville?

A. Yes.

Q. Okay. And did you and Blakely Brown speak about this incident that occurred at the Afterdeck?

A. Yes.

Q. **Did Blakely Brown ever tell you that he stabbed someone?**

A. Yes, he did.

Q. How many people did he tell you that he stabbed.

A. Three.

Q. Did you tell you that he stabbed the young man that died?

A. Yes, he did.

Q. **Did he ever tell you that my client did the stabbing?**

A. No.

Q. So he freely admitted to you that he stabbed the boy that died?

A. Yes.

Q. As well as the other two men?

A. Yes, he did.

Q. Did he tell you that just once?

A. No, it was more than once.

Q. How many times do you think he may have told you that?

A. I'm, he would talk about it, I mean five, six, seven, I mean it could've been more.

Q. Okay. Do you know my client?

A. Yes.

Q. How long have you known my client?

A. For a couple of years, I mean, yes.

Q. As far as, as you knowing my client, if you're friends with my client, would that affect your testimony here at all?

A. No.

Q. Is what you're telling me the truth?

A. Yes.

Q. Would you get up here and lie for my client?

A. No.

Tr. 700, l. 2 - 701, l. 16. (emphasis added).

Christopher Whiteside was a good friend of appellant Griffith. He met Blake Brown at a party at a Hampton Inn in Travelers Rest. He heard Blake Brown admit that he stabbed three people, and that he had killed someone. Tr. 721, l. 14 – 723, l.7; Tr. 729, l. 18 - 730, l. 11.

Theron Nalley met Blake Brown at this same party at the Hampton Inn in Travelers Rest in the summer of 2010. He heard Blake Brown admit that he stabbed three people, and that someone died. Tr. 745, l. 9 - 746, l. 25. On cross-examination, Theron denied that appellant was at this party. Tr. 748, l. 19 - 749, l. 20.

Reply testimony

Over objection,[1] the state was allowed to offer the reply testimony of Kayla Houck. Houck testified that she talked to appellant two days after he made bond. Houck said that appellant told her that he was sorry for what had happened, and that he said he had seen someone die that evening. Houck said appellant did a "falling back" motion to apparently describe how the victim fell. She alleged that appellant said of the other knife: "That shit it [is] long gone." Houck said she did not tell anybody about this discussion because she was good friends with appellant's family. Tr. 767, l. 22 - 769, l. 9.

Houck testified that she interpreted appellant's expressions above as an apparent admission to murder. She offered that: "I don't want to be friends with a murderer." Tr. 769, ll. 7-24.

On cross-examination, Houck finally admitted that she had spoken with prosecution Investigator Carmen Mureddu, and that she never alleged that appellant admitted any involvement in the crime. Houck gave a full statement in 2010 to the investigator, and never mentioned any of her allegations she was making in court that day. Tr. 771, l. 9 - 772, l. 14.

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[1] See Issue 4 below.

Direct verdict motion renewed

Defense counsel renewed his previous motion for a directed verdict. The judge stated there was sufficient evidence to go forward to the jury, and that he was not going to direct a verdict. Tr. 780, l. 4 - 782, l. 1.

Discussion

The state failed to present any direct evidence or substantial circumstantial evidence that appellant killed the decedent in this case. As will be seen infra, the state also failed to present any direct or circumstantial evidence that appellant caused the injuries to the "ABIK" victims. The state's evidence placed appellant with Blake Brown where it was apparent Brown, "the local boy," was the bad actor and "trouble," as the manager of the Afterdeck immediately spotted when Brown arrived at the bar.

There was no substantial circumstantial evidence he caused injuries to the victims or the death of the decedent. The state's witnesses, as defense counsel Hewitt argued, did not provide the necessary circumstantial evidence to get beyond the directed verdict stage. One witness, when challenged about his obvious memory problems or inconsistent statements arrogantly asserted, "You have to take my word for it." Further, defense counsel also correctly argued that "eyeballing somebody" or even "trash talking" did not satisfy the state's burden of proof at the directed verdict stage, in the light most favorable to the state.

As seen, the trial judge focused much attention on the fact that appellant purchased the knife that evening. Brown already had a knife, and the only DNA found a knife belonged to Brown and the victim. Further, the judge's reasoning that the jury could believe that appellant was acting with Brown, and that both men wanted to start a fight that

evening was not substantial circumstantial evidence that appellant murdered the decedent or committed ABIK upon the two living victims.

Moreover, reply witness Houck's testimony that appellant told her he was sorry that what had happened, and that he had witnessed someone die that evening also fell far short of the substantial circumstantial evidence needed to get beyond the directed verdict stage. It was undisputed that appellant was at the bar, and the fact that he allegedly saw the victim die was also not substantial circumstantial evidence of appellant's guilt. It added precious little to the analysis. At best, this evidence only an raised impermissible suspicion of appellant's guilt.

If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). "Mere suspicion" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), this Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon. The state presented evidence that investigators found the victim's personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

This Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and that gasoline was the accelerant used to start the fire at the Polite home. This Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) this Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar on the night of the murder, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

This Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. The Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In Schrock, the defendant admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's

was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. This Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

Brown was the "local boy" in this case, and proud of it as shown by him displaying his "843" tattoo to the Afterdeck assistant manager. Appellant was the outsider, the evidence in this case strongly showed that Brown was the culpable party. Brown got an incredible deal despite his obvious guilt.[2] In the final analysis as to appellant Blake Griffith the state failed to provide the trial judge with substantial circumstantial evidence that appellant murdered the decedent.

[2] The South Carolina Department of Corrections website, the inmate search detail report, shows Brown is serving an eight year sentence for accessory after the fact. He has already been eligible for parole in December, 2014, and he is scheduled to "max out" in November, 2017.

2.

The Court erred by refusing to direct a verdict on two counts of ABIK and criminal conspiracy since there was no direct or substantial circumstantial evidence appellant committed a battery upon the injured victims.

Relevant facts

The state also failed to present substantial circumstantial evidence that appellant stabbed Ryan Palmer or Robert Penna. Palmer and Penna went to the Afterdeck that evening with their friends D.J. (the decedent), Michael Parker, Tom Covino, Alex Assanto, Nick Williamson, "and several girls." Tr. 220, l. 9 – 25. Palmer remembered "when we first got there around midnight it probably wasn't as packed as it was toward around when this incident occurred. I'd say within a few hours, a lot more people had shown up throughout the night." Tr. 220, ll. 9–15.

Palmer testified he did not have any weapons with him, and he also said "as far as he knew," none of the people in his party had a weapon. Tr. 219, l. 18 – 220, l. 5. Palmer was twenty years old at the time, and he said he had "a little bit" to drink before he arrived at the Afterdeck, and he was allowed to drink at the bar despite the fact he was underage. Tr. 219, ll. 18–22.

Palmer remembered that he "bumped into" Brown "the taller one" that night. Tr. 223, ll. 10–19. Palmer claimed that both Brown and appellant then stared at him at that point "as if there was a problem." Tr. 223, l. 22 – 224, l. 1. On cross-examination, Palmer admitted that he told the investigator that Brown told him: "You're about to get fucked up." Palmer also acknowledged that an investigator's report prepared after the incident showed he thought Brown was the one who stabbed him on the head. Tr. 247, l. 10 – 249, l. 7.

Palmer admitted that appellant never touched him that night even though Palmer admitted throwing a punch at appellant. Palmer denied he "blindsided" appellant when he hit him, and he also denied he was "looking for a fight" that evening. Tr. 256, l. 21 – 258, l. 6.

Robert Penna, the other ABIK victim, as seen, repeatedly admitted he was making assumptions when he first claimed that appellant was the person that stabbed him. Tr. 306, l. 17 – 311, l. 22; 321, ll. 7–22. Penna was defiant when challenged about his assumptions, stating: "I guess you're just going to have to take my word for it." Penna also admitted he did not see appellant with a knife during the struggle, **he did not even see a knife at all, and he did not even know he was stabbed until someone told him.** Tr. 326, l. 12 – 332, l. 11.

Appellant incorporates the remainder of the evidence from the directed verdict argument in issue one above, including defense counsel's argument that "eyeballing somebody" or even "talking trash" did not satisfy the state's duty to produce sufficient evidence of malice aforethought at the directed verdict stage. Tr. 569, l. 10 - 574, l, 2.

Discussion

The state only presented circumstantial evidence attempting to show appellant stabbed Palmer or Penna. Similarly, the state only offered circumstantial evidence that appellant was acting in concert with Brown, that he had joined with Brown "to commit unlawful acts" that evening such that he could be held criminally responsible for Brown's actions under a theory of accomplice liability because they were the "probable or natural consequences of the acts" done by Brown. Tr. 791, l. 13 – 793, l. 4. The evidence in the case, at best, raised a suspicion of appellant's guilt to the crimes of ABIK, which was insufficient to withstand a directed verdict motion. See, State v. Lollis, 343 S.C. 580, 541

S.E.2d 254 (2001). Since the state failed to produce *substantial circumstantial evidence* that appellant was guilty of the ABIK counts in this case, appellant was entitled to a directed verdict. See, State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

The state's evidence in this case that appellant was allegedly responsible for the injuries to ABIK victim's Palmer and Penna was based on much less circumstantial evidence than the state offered against the defendant in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). That strong circumstantial evidence against Bostick is chronicled above. Our Supreme Court held that the considerable circumstantial evidence against Bostick did not rise to the level of "substantial circumstantial evidence" that Bostick was guilty of murder and arson.

Similarly, the circumstantial evidence against the defendant in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) was much stronger than it was in this case. Nonetheless, the Supreme Court granted a directed verdict where Odems was in a car with the stolen property from the burglary, he fled from the police when they tried to apprehend him, and he lied to attempt to have a bystander claim she was his wife so he could avoid arrest. The Supreme Court held Odem's very suspicious behavior was not "substantial circumstantial evidence" sufficient for the case to go to the jury.

If ever there was a case where the prosecution was asking the jury to convict appellant of murder and two counts of ABIK based on surmise, conjecture, and speculation, it was this case. Appellant essentially had the misfortune of being on a double date with bad actor Blake Brown on a weekend that Brown was looking for trouble in his own backyard of Horry County.

The testimony of Palmer and Penna, and other state's witnesses cannot be deemed substantial circumstantial evidence necessary to withstand a directed verdict motion given the Supreme Court precedents discussed above of State v. Martin, 340 S.C. 597, 533 S.E.2d 532 (2000), and State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), and State v. Bostick, supra, and State v. Odems, supra.

The trial judge erred by refusing to direct a verdict of acquittal on the two counts of ABIK since the state failed to offer substantial circumstantial evidence of appellant's guilt. This Court therefore should issue an order of acquittal on those two counts.

3.

The Court erred by refusing to charge the State v. Logan, circumstantial evidence charge, since that charge was needed in this overwhelmingly circumstantial evidence case, and the judge had the duty to charge the law where it was applicable, as here.

Relevant Facts

At the close of the evidence, and prior to closing arguments, as was Judge Cottingham's style, the trial judge told the jury that his law clerk would instruct them on the law due to some health problems he was suffering. Both sides agreed that the law clerk could read the instructions to the jury. Tr. 782, l. 2 – 784, l. 5.

The charge on the law in this case told the jurors as to direct and circumstantial evidence:

> 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 claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. **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 of the evidence in this 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.

Tr. 788, ll. 6–23 (emphasis added).

Defense counsel Hewitt took exception to the judge's instruction on circumstantial evidence, and he requested the judge charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) jury instruction. The judge refused to give the State v. Logan circumstantial evidence instruction ruling: "I have given you the circumstantial evidence that has previously been approved by the courts." Tr. 806, l. 10 – 23.

Discussion

In State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013), the Supreme Court stated that when requested to do so by a defendant, as here, "We hold that the trial court should provide the following language as a circumstantial evidence charge, in addition to the proper reasonable doubt instruction:

> 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.

Defense counsel correctly argued to the judge at the directed verdict stage that this was a circumstantial evidence case, and that the state had failed to offer sufficient circumstantial evidence against appellant for this case to go to the jury. Once the case did go to the jury, the manner in which circumstantial evidence was analyzed by the jury became critical. The jury was instructed that: "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." Tr. 788, ll. 6–23.

It is clear beyond cavil that if the jury had analyzed the circumstantial evidence in this case under the correct Logan standard 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,*" there is every reason to believe the jury would have determined that the state had failed in its burden of proving appellant guilty of murder and ABIK in this case beyond a reasonable doubt. State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013).

The state largely sought to lump appellant and Brown together even though Brown was the instigator of trouble at the beach house, the Waffle House, and the Afterdeck. This was Brown's weekend for trouble, and all of the circumstances of circumstantial evidence in this case was not consistent with appellant acting in concert with Brown, and it did not point conclusively to appellant's guilt as a murderer and a batterer who also attempted to kill the two living victims.

If a directed verdict is not granted in this case, appellant should at least be granted a new trial where the jury is properly instructed on the law – the manner of analyzing – circumstantial evidence.

4.

The Court erred by permitting appellant's former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order.

Relevant facts

Defense made a motion to sequester all lay witnesses Tr. 20, ll. 5–10. The court actually appears to have suggested a sequestration of *all* witnesses Tr. 20, ll. 11–12, and ultimately granted the motion Tr. 20, ll. 15–16. The state requested that a few witnesses be permitted to remain in the courtroom during the trial Tr. 20, ll. 17–25; Tr. 21, ll. 2–19. The judge permitted several witnesses to remain in the courtroom despite the sequestration order, but Houck was not one of them. Tr. 20, ll. 17 - 20.[3]

As part of the motion to sequester witnesses, the defense asked that eyewitnesses who did testify be remanded to the courtroom or elsewhere out of the courthouse and not permitted to re-enter the same room with the other sequestered eyewitnesses who had not yet testified Tr. 21, ll. 20–25; Tr. 22, ll. 1–22. Defense counsel made this additional request because many statements were made that did not correlate with one another Tr. 21, ll. 23–25. The judge granted this request Tr. 22, ll. 11–12, 14, 20–21; he also

[3] See, e.g., Tr. 194, ll. 8–17 (solicitor acknowledged the existence and binding character of the court's sequestration order); Tr. 196, ll. 10–25, Tr. 197, ll. 1–10 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order); Tr. 266, ll. 6–7 (court repeated enforcement of the sequestration, as well as its purpose, via instructing the State's witness not to discuss his testimony with any of the other witnesses); Tr. 339, ll. 8–11 (court granted defense counsel's request that witnesses be instructed not to discuss their testimony with other witnesses); Tr. 660, ll. 8–19 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order).

informed the defense that he would instruct the witnesses not to discuss their testimony with other witnesses Tr. 22, ll. 14–16.

The state called Houck in reply. Tr. 763, ll. 6–9. The solicitor avered that Houck would "be saying that Blake Griffith told her that he stabbed the deceased boy." (The evidence falls woefully short of this assertion). Tr. 763, line 25, Tr. 764, line 1. The Defense objected because Houck had remained in the courtroom throughout the trial violating sequestration. Tr. 764, ll. 7–8; Tr. 764, ll. 20–23. Tr. 762, line 25, Tr. 763, line 1; Tr. 764, ll. 7–8. Argument was heard outside the presence of the jury; however, counsel even attempted to note this objection in the presence of the jurors before they were sent out. Tr. 762, line 25, Tr. 763, line 1.

The state argued that the court's sequestration order did not apply to Houck because she was not testifying as a "fact witness—"Tr. 764, ll. 11–18. The court ultimately allowed Houck's testimony, reasoning that she would not be testifying as to the events on the evening of the altercation. Her testimony would be limited to a response to the appellant's defense of third-party guilt. Tr. 764, ll. 24–25, Tr. 765, ll. 1–12.

Houck claimed to have had a conversation with Griffith about the incident a couple of days after he bonded out. Tr. 767, ll. 19–24. This conversation allegedly occurred at Griffith's home when Houck went there to pick him up and take him to a nearby shopping center Tr. 768, ll. 2–3. Griffith said something like: "I can't -- I can't believe this happened. I'm sorry that I got you guys into this, but I saw the life come out of that guy's eyes" Tr. 768, ll. 4–7. As Griffith said this, immediately thereafter, he made a motion of falling backward Tr. 768, line 9. Houck also claimed another conversation

with Griffith about the "weapon." Tr. 768, ll. 9–10. Griffith said, "that shit is long gone." Tr. 786, ll. 10–11.

Houck admitted to speaking with Carmen Mureddu, state's investigator, in October 2010—after the conversations with Griffith, but she did not mention these conversations during the interview. Tr. 771, ll. 9–25, Tr. 772, ll. 1–14; Tr. 776, ll. 3–5. According to Mureddu's summary notes from this interview, Houck stated that "Griffith told her he saw Brown stab one guy in the head and he saw Brown pin another down and stab him in his side rib cage area" Tr. 774, ll. 14–16 and that Griffith was "hit and kicked during the fight." Tr. 774, ll. 17–18. In context, Houck claimed that Griffith had actually told her these other things about the weapon being gone, and the victim falling backward, and seeing the life come out of him, *which Houck apparently decided was an admission that appellant was a "murderer."* The solicitor cleverly worded his question: "But you're also *trying to say* that he also said that he stabbed this guy." She answered: "He did tell me that." Tr. 776, l. 22 – 777, l. 7.

Houck actually waited two years to tell authorities this story. Tr. 768, ll. 12–14. When asked why she did not do so immediately, she answered that she had been "really good friends with his family" and was "on the fence whether [she] wanted to mess that relationship up with them or get involved in something that [she] necessarily didn't want to be involved in and do the right thing" Tr. 768, ll. 15–20. By ultimately choosing to come forward regarding these alleged conversations, she believed she had "chose[n] to do the right thing" Tr. 768, ll. 20–21. She was no longer friends with Griffith and she did not "want to [be] friends with a murderer." Tr. 769, line 15.

Defense counsel made a post-trial motion for a new trial based on this adverse ruling, arguing that Houck's reply testimony was in violation of the court's sequestration order Tr. 862, ll. 23–25. In the alternative, defense counsel argued that Houck's testimony was "not responsive" to the evidence that Griffith's former co-defendant, Blakely Brown, said that he had stabbed the deceased victim at the Afterdeck. Tr. 863, ll. 1–3. According to defense counsel, if the judge was going to admit Houck's testimony despite the sequestration order, he should have limited this testimony to "whether anyone made statements that were inconsistent with Blakely Brown's statement." Tr. 863, ll. 3–5.

To this argument, the state responded that Houck's testimony was "a proper rebuttal" because "the Defendant had admitted to her that he had done the killing" and "there was evidence presented in the Defense's case that the Codefendant had been the stabber." Tr. 865, ll. 13–17. Furthermore, the state argued that the decision of whether to allow rebuttal testimony is "in the discretion of the Court." Tr. 864, ll. 12 – 13.

Defense counsel then preserved this issue for appeal again in an explicit manner, and the court acknowledged and accepted this preservation. Tr. 866, ll. 18–21. Despite the argument, the court ruled "[t]he verdicts will stand as indicated." Tr. 867, ll. 12–13.

Discussion

If a witness violates a sequestration order, the court may subject the offending witness to discipline, or exclude the testimony of the offending witness. See United States v. Leggett, 326 F.2d 613, 614 (4th Cir. 1964).

The discretion of the court with regard to such exemptions and exceptions from sequestration is not arbitrary. State v. O'Neal, 210 S.C. 305, 42 S.E.2d 523 (1947). The exclusion rule serves to prevent one witness from shaping his or her testimony to match

the testimony given by other witnesses at trial. Leggett, 326 F.2d at 613–14. The trial court's decision to admit the testimony of a reply witness who violated a sequestration order will be overturned if the appellate court finds this decision to be an abuse of discretion and if the testimony of the offending witness prejudiced the defendant at trial. See State v. Carmack, 388 S.C. 190, 197–98, 694 S.E.2d 224, 227-228 (Ct. App. 2010) (citing State v. Sullivan, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981)[4]; State v. Jackson, 265 S.C. 278, 282, 217 S.E.2d 794, 796, (1975)).

- Houck had no reason or valid purpose to be in the courtroom and was thus seriously blameworthy. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).
- The solicitor never denied a violation of the order, but only argued she was not a fact witness. Tr. 764, l. 6 – 765, l. 12. State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961).[5]
- Houck was not sequestered. State v. Simmons, supra.
- The solicitor well knew she may need to call the witness. The prosecution knew that Houck had formed her "conclusions" from appellant's statements as shown above. State v. Cabbagesgtalk, 281 S.C. 35, 314 S.E.2d 10 (1984).
- While her testimony involved a purported discussion with appellant after the melee, it was directed to what happened then as discussed by the witnesses who were present. It came right after the defense

[4] Overruled on other grounds, State v. Brown, 389 S.C. 84, 697 S.E.2d 622 (Ct.App. 2010).

witnesses who testified strongly for appellant. CF. State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App 2011). (Reply testimony not admitted to complete the story).

- The solicitor was aware of what Houck conclusions she had drawn from her discussion with appellant, and what she was going to say before trial. State v. Simmons, supra.
- Defense counsel had, as a practical matter, no real ability to demonstrate Houck's testimony would be different absent sequestration. State v. Miokovich, 257 S.C. 225, 227-28, 185 S.E.2d 360, 361 (1971).
- There was no violation of sequestration by defense witnesses. State v. Cabbagestalk, supra.
- The testimony far exceeded the scope of legitimate reply. Houck's testimony was sandbagged. Her observation that she did not like to associate with murderers was highly prejudicial and not in reply to the defense case, as were her self-serving reasons for withholding evidence. Also, her testimony was not that "Blake Griffith told her that he stabbed the deceased boy" as the solicitor claimed. Tr. 763, l. 25 – 764, l. 1. CF. State v. Hall, 268 S.C. 524-529, 235 S.E.2d 112, 114

[5] Overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

(1977).[6] (Legitimate limited real reply testimony not an abuse of discretion.

The judge ruled her testimony did not violate the sequestration order because she was not a fact witness. There was no finding that she had been properly sequestered. Tr. 765, ll. 8-12. The judge's ruling that Houck could testify is wholly arbitrary. He granted sequestration on the state's motion, Tr. 727, ll. 8–13, as to defense witnesses Whiteside and Nalley, who were in the exact same posture as Houck – testimony as non-eyewitnesses to discussions after the fact. Arbitrary is defined in the American Heritage Dictionary, 2nd College Edition (1983) as: Determined by whim or impulse, not by reason or law. This ruling is a text book example. The last witness the jurors heard edified that "I don't want to be friends with a murderer." Tr. 769, l. 15. This testimony invited the jury to draw spurious and unwarranted inferences concerning appellant's unproven guilt.

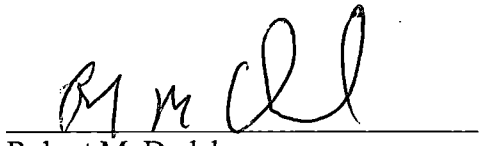
The Houck evidence here was, *de facto*, admitted to complete the state's case-in-chief. State v. Huckabee, 388 S.C. 236, 243, 694 S.E.2d 781, 786 (Ct.App. 2010). The instant case demonstrates abuse of discretion, and appellant should receive a new trial.

[6] Abrogated by State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) on other grounds.

CONCLUSION

By reason of arguments one and two, directed verdicts of acquittal should be issued. In the alternative, by reason of arguments three and four, appellant's convictions should be reversed, and this case remanded the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

This 12th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA GRIFFITH,

APPELLANT

APPELLATE CASE NO. 2014-000066

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of June, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 12th day of June, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .