ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

RECEIVED
JUL 24 2015
SC Court of Appeals

Case No. 2012-GS-29-00636
Appellate Case No. 2014-000603

State of South Carolina, ...Respondent,

v.

Al Martinez Green,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

Jane H. Merrill
Hawthorne Merrill Law, LLC
410 Main Street
Greenwood, SC 29646
864-229-1010

Robert M. Dudek
South Carolina Commission on Indigent Defense
Appellate Division
PO Box 11589 | Columbia, SC 29201-1589
803-734-1330

Attorneys for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

Did the trial court err by refusing to direct a verdict for Al Green when the State failed to present direct or substantial circumstantial evidence that Mr. Green was an accomplice to murder?

An accused is entitled to a directed verdict when the state's case is built wholly on circumstantial evidence, and the state fails to present substantial circumstantial evidence the defendant committed a particular crime. *State v. Bennett*, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct. App. 2014) (citing *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011)). In its brief, the state concedes it only presented "circumstantial evidence of the presence of Green and McDow."

This reply brief will first address that state's claim that Mr. Green relied on one theory at trial and a different theory on appeal. This assertion mischaracterizes Mr. Green's argument. Essentially, the state argues that Mr. Green cannot dispute the judge's reasons for denying his directed verdict motion if he didn't argue against each of these reasons at trial without acknowledging that it would have been improper for trial counsel to continue arguing the directed verdict motion after the judge made his ruling. Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the

court has been pronounced."); *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993) ("So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon defense counsel to harass the judge by parading the issue before him again.'").

The present case is distinguishable from the three cases to which the state cited to support its assertion. Mr. Green clearly moved for a directed verdict during the trial, while the appellant in *State v. Bailey* failed to move for a directed verdict. (R. p. 508, line 19 – p. 512, line 11).

In *State v. Prioleau*, our supreme court reversed the court of appeals and affirmed the conviction "[b]ecause the Court of Appeals considered a basis for reversal which was neither presented below nor argued on appeal...." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216-17 (2001) (citing *State v. Prioleau*, 339 S.C. 605, 615, 529 S.E.2d 561, 566 (Ct. App. 2000)). This case does not apply because the appellate court has not yet ruled.

In *State v. Watts*, the trial court did not rule on appellant's motions for continuance and mistrial, and therefore those issues were not preserved. 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). The trial

court unequivocally ruled on Mr. Green's motion for directed verdict. (R. p. 508, line 19 – p. 512, line 11; p. 514, line 18 – p. 521, line 2).

Since it would have been improper for Mr. Green's trial counsel to continue arguing after the judge ruled and impossible to anticipate every possible reason the judge might give for his ruling, Mr. Green's directed verdict motion issue is properly before this court.

In its brief, Respondent incorrectly stated that witness Vivian Stradford saw Mr. Clinton at the Hole in the Wall Club on January 19th. The record is clear the Ms. Stradford saw Mr. Clinton at the Crenco convenience store, and not at the Hole in the Wall club. (R. p. 368, line 12 – p. 375, line 8).

This reply brief now addresses the state's remaining arguments. It will discuss witness Jamal Twitty's opinion testimony. It will then distinguish *State v. Ziegler*, a case on which the state relies. *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). Lastly, it will address DNA evidence.

The state cites Jamal Twitty's testimony to bolster its argument that Mr. Green was "down for [the robbery]." (R. p. 109, lines 8-9). It is merely Mr. Twitty's opinion that Mr. Green "was down for it. ... [H]e was like, yeah, he's ready." (R. p. 109, lines 8-9). Mr. Twitty stated that both he and

Mr. Green replied "yeah, whatever" when Clinton asked them if they "wanted to go on a lick," but the state did not ask Mr. Twitty if he also meant he was "down for it" and "ready" when he himself responded "yeah, whatever" to Mr. Clinton's request. (R. pp. 101-103; pp. 107-108). Mr. Twitty admitted he did not know what Mr. Green did after this conversation or the following day because he was not with Mr. Green. (R. p. 109, lines 18-19).

Respondent cites *State v. Ziegler* to support its argument that Clinton's statement , "I shot the bitch," was an act "clearly in furtherance of the previously established conspiracy," and therefore, the trial judge properly considered it in deciding Mr. Green's directed verdict motion. 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005).

Mr. Clinton's statement did not further a conspiracy. Mr. Clinton made this statement to Mr. Blakeney in the car after the remaining passengers were out of the car and hours after he shot Ms. Jones. (R. pp. 426-427). Casual admissions of culpability after committing a crime are not statements furthering a conspiracy. *State v. Anders*, 331 S.C. 474, 477, 503 S.E.2d 443, 444 (1998) (citing *United States v. Posner*, 764 F.2d 1535 (11th Cir. 1985), (although statements made to "allay suspicions" may be "in furtherance" of conspiracy, "spilling the beans" does not further

conspiracy); *United States v. Pallais*, 921 F.2d 684 (7th Cir. 1990), (casual admissions of culpability are not "in furtherance" of conspiracy and are insufficiently reliable to be considered by the jury).

The present case differs from the facts in *Ziegler*. Troy Ziegler said "[he] kicked that nigger to death." 364 S.C. at 105, 610 S.E.2d at 865. Appellant, Troy's brother Antwan Ziegler, then said, "He deserved it." *Id.* The court of appeals referenced Troy's statement in affirming the trial court's denial of Antwan's motion for directed verdict. *Id.* Unlike Troy and Atwan Ziegler, Mr. Green and Mr. Clinton were not together when Mr. Clinton made the statement incriminating himself as the shooter. Moreover, there is no evidence that Mr. Green affirmed Mr. Clinton's statement, as Antwan did when he said the "[victim] deserved it" after Troy's statement about kicking the victim to death. *Id.*

Our supreme court addressed DNA evidence in *State v. Bostick*. 392 S.C. 134, 708 S.E.2d 774 (2011). DNA results could not conclusively determine if blood found on Bostick's jeans matched the victim's, although the results excluded 99% of the population and the victim's DNA existed in the remaining 1%. 392 S.C. at 142, 708 S.E.2d at 778.

The evidence against Bostick included narrowing the DNA results to 1% of the population from the blood found on Bostick's jeans, gasoline

was found on Bostick's shoes, and gasoline was the same accelerant used in the Bostick family burn pile where some of the victim's personal items were found, Bostick's family did not normally use any accelerant for their burn pile, the state did not introduce a murder weapon into evidence, and no evidence demonstrated Bostick knew the victim had money in a briefcase at her house on that particular Sunday. *Id.* The court held that this evidence merely raised a suspicion of Bostick's guilt. *Id.* The court reversed the trial court's denial of Mr. Bostick's motion for directed verdict. *Id.*

The state relies on "Blakeney's testimony and the DNA from the screen door handle" to argue one could reasonably infer Mr. Green was in the home when Mr. Clinton murdered Ms. Jones. The DNA results on which the state relies explicitly exclude Mr. Green as a contributor to the DNA found on the screen door handle. (R. p. 340, line 5 – p. 341, line 18; pp. 651 – 652).

The state does not discuss that the DNA results exclude Mr. Green from the DNA found on the screen door handle, but the SLED report and trial testimony plainly show Mr. Green is excluded from contributing to the DNA on the screen door handle. (R. p. 340, line 5 – p. 341, line 18; pp.

651 - 655). Moreover, this exculpatory evidence refutes the State's position and supports Mr. Green's.

As in *Bostick*, *Odems*, and *Bennett*, the state did not present direct evidence or substantial circumstantial evidence against Mr. Green. In viewing the evidence in the light most favorable to the state, the trial judge improperly denied Mr. Green's motion for directed verdict. The state's entire circumstantial evidence case against Mr. Green is testimony from two inconsistent witnesses, Ms. Davis and Mr. Twitty, and Mr. Blakeney's testimony that Mr. Green rode with him to Roseanna Lane, got out of the car with Mr. Clinton and Mr. McDow, and returned "ten minutes" later, and said "go." (R. p. 87, lines 7-11; p. 102, lines 10-24; p. 421, line 6; p. 422, lines 2-3;).

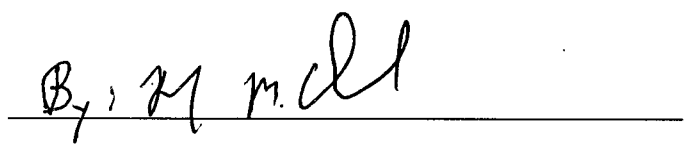
The circumstantial evidence against Mr. Green merely raises a suspicion of guilt. "It is not sufficient that [the state] create a probability, though a strong one . . . ." *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984).

When the evidence merely raises a suspicion the accused is guilty, a circuit judge should grant a directed verdict motion. *State v. Lollis*, 343 S.C. 580, 585, 541 S.E.2d 254, 257 (2001); *State v. Odems*, 395 S.C. 582, 586, 720

S.E.2d 48, 50 (2011) (citing *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)).

CONCLUSION

The trial court erred in denying Mr. Green's motion for directed verdict. The state did not present substantial circumstantial evidence; at most, the state's evidence merely raised a suspicion of guilt. This court should reverse the trial court's denial of Mr. Green's motion for directed verdict.



Jane H. Merrill
Hawthorne Merrill Law, LLC
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hmlawsc.com

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

July 24, 2015

Columbia, South Carolina

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply 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."

July 24, 2015.

Robert M. Dudek
Appellate Defender

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case No. 2012-GS-29-00636
Appellate Case No. 2014-000603

State of South Carolina, ... Respondent,

v.

Al Martinez Green, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and accurate copy of the Final Brief of Appellant and Final Reply Brief in the above referenced case has been served upon Donald Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of July, 2015.

(Signature Page Follows)

By: JM McD

Jane H. Merrill
Hawthorne Merrill Law, LLC
410 Main St. | Greenwood, SC 29646
864-229-1010 | jane@hmlawsc.com

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

Subscribed and Sworn to before me
this 24th day of July, 2015.

Maria Marshall (L.S.)

Notary Public for South Carolina

My Commission expires: July 3, 2023.