THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM YORK COUNTY
In the Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case № 2013-001143
Opinion No. 27562
Heard February 3, 2015 - Filed August 12, 2015

ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS

The State, ... Petitioner,

vs

Francis Larmand, ... Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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1. This Court erred in stating and reviewing the evidence in this case by an improper standard of review. This Court stated "A defendant is only entitled to a directed verdict if the State fails to produce any evidence of the offense charged." *State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. filed August 12, 2015)(Shearouse Adv.Sh. № 31 at31, 35). The proper standard of review is if there is any *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. 1

2. The Court failed to consider the appellate standard of review of whether the state has excluded any other reasonable hypothesis other than the guilt of the accused when two recent cases in South Carolina support this standard of review. 5

3. The Court erred in failing to recognize that by finding that Francis Larmand "presented a plausible explanation of each of these facts, ..." (*State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. filed August 12, 2015)(Shearouse Adv.Sh. № 31 at31, 37) this Court has found that the State has not proven the case beyond a reasonable doubt. 9

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1. This Court erred in stating and reviewing the evidence in this case by an improper standard of review. This Court stated "A defendant is only entitled to a directed verdict if the State fails to produce any evidence of the offense charged." ***State v. Larmand*,** **Op. № 27562 (S.C.Sup.Ct. filed August 12, 2015)(Shearouse Adv.Sh. № 31 at31, 35). The proper standard of review is if there is any *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.**

This Court has long recognized that the proper standard of appellate review in a circumstantial evidence case is substantial circumstantial evidence. *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004); *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Martin*, 343 S.C. 580, 541 S.E.2d 254 (2000); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989); *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955). "The circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury." *State v. Odems*, 395 S.C. 582, 592, 720 S.E.2d 48, 53 (2011). "The United States Supreme Court specifically rejected the "any evidence" standard in *Jackson v. Virginia*, 443 U.S. 307 (1979). As the Court said "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, . . . could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. *Jackson* establishes a federal constitutional floor below which no state may go. An "any evidence" standard of review is below that floor.

In reviewing the evidence an appellate court is required to review all the evidence, including the evidence produced by the defendant. "[I]f it is found that upon the record evidence adduced at the trial" (*Jackson* at 324) that the evidence is not sufficient then an appellate court must reverse the conviction. "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Sterling*, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012)(review not limited to just state's evidence); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011)(court recites state and defense evidence in finding no substantial circumstantial evidence). To say that a court does not weigh evidence is simply to say an appellate court does not pass upon the credibility of witnesses who provided the evidence. The Respondent has not and does not argue as to the basic facts of this case and accepts the state's testimony at face value as is required under an appellate review standard.

In reciting the facts, this Court acknowledged that Mr. Larmand and his brother - in-law had been to the former Knights Stadium in an attempt to determine if Mike Taylor was in fact stealing customers from the business from the wife of Mr. Larmand.[1] Knights stadium is slightly less than 20 miles from the residence of Mr. Lochbaum.[2] Making that short drive is not unreasonable. None of the facts cited by the Court support a proposition that Mr. Larmand and Mr. Lemire had a premeditated plan to attack and beat up Mr. Lochbaum. In fact, as the Court acknowledged in the opinion, Mr. Lemire made the comment about "his" family and not "our"

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[1] For some reason never explained, Mr. Lochbaum testified he thought there was an attempt to lure him to Knight's Stadium. Rec. on App. at 129, ll 7-10; 169, ll 10-13.

[2] *See* Google Earth, directions from Knights Stadium, Fort Mill, SC to Gentle Breeze Lane, Rock Hill, SC. Visited August 21, 2015

family. This Court placed emphasis on the fact that Mr. Larmand left the scene when such an action was most reasonable considering that the state's case establishes they were told to leave, (Rec. on App. at 123, ll 18-250, the gun had been taken from Mr. Lemire, (Rec. on App. at 74, ll 8-15) and Mr. Lochbaum had a shotgun, (Rec. on App. at 109, ll 9-11). The shotgun was not actually displayed by Mr. Lochbaum until after Mr. Larmand left. While one witness did testify that Mr. Larmand was pushing Mr. Lochbaum, Mr. Lochbaum denied he was ever touched before Mr. Lemire appeared. Rec. on App. at 106, ll 18-20; 142, ll 12-14; 143, ll 5–6. According to the exhibit used at trial, the distance was about 1,089 feet and not more than 1/4 mile. State's Exhibit № 5. All the factors listed by the Court in this case simply do not support a premeditated, planned intent to inflict injury upon Mr. Lochbaum. No one can reasonably infer that because one of two people have a firearm in an automobile that they both intend to inflict bodily injury to a third person. Wearing black clothes is simply not a basis to infer that Mr. Larmand agreed to inflict bodily injury upon a third person. One of the witnesses testified he was wearing similar clothing on that night. Rec. on App. at 80, ll 12-14. This Court simply made the sum of the parts greater than the individual parts. As the South Carolina Court of Appeals has said "Premeditation connotes 'willful deliberation and planning' or 'conscious consideration' preceding a particular act. Black's Law Dictionary 1199 (7th ed.1999); see also Webster's New World College Dictionary 1134 (4th ed.1999) (defining legal definition of premeditation as 'a degree of planning and forethought sufficient to show intent to commit an act'). By definition then, the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous." *State v. Smith*, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002). This Court failed to explain how the factors listed established substantial circumstantial evidence

of such premeditation and planning. The circumstantial facts equally support no plan or a plan and intent of only Mr. Lemire to attack Mr. Lochbaum. Speculation is not and never has been substantial circumstantial evidence to support a conviction.

In civil cases this Court has held that circumstantial evidence must be proven with reasonable certainty. *Gastineau v. Murphy*, 331 S.C. 565, 570-571, 503 S.E.2d 712, 714-715 (1998) ("Viewing the evidence in the light most favorable to Gastineau, the circumstances under which other inspections were performed do not lead with reasonable certainty to the conclusion that Hudson would have told anybody he was there because of Gastineau's report.") If "reasonable certainty" is required in a civil case, then a higher standard is required for a criminal case. The United States Supreme Court has said that a conviction cannot be sustained "without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship,* 397 U.S. 358, 364 (1970). Again this constitutional floor exceeds the "any evidence" standard of review. As this Court said over ninety years ago " Neither the evidence nor the circumstances warrant his conviction; while the whole case raised a suspicion, and a grave one at that, it does not warrant a verdict of guilty." *State v. Turner*, 117 S.C. 470, ___, 109 S.E. 119, 120 (1921). At the most the evidence here raises a grave suspicion.

This Court further erred in finding that the Court of Appeals applied an improper standard. The Court of Appeals relied upon virtually the same facts cited by this Court. The Court of Appeals in reversing the conviction stated "The State argued it presented the following evidence of premeditation: Larmand and Lemire drove together to Lochbaum's house; at midnight; were uninvited; parked down the street from Lochbaum's house; wore dark clothing; and separately approached Lochbaum's house on foot with Lemire carrying a loaded gun pointed

at Lochbaum. The court denied Larmand's motion, finding it was an issue for the jury." *State v. Larmand,* 402 S.C. 184, 191, 739 S.E.2d 898, 902 (Ct. App. 2013), rev'd, No. 2013 001143, 2015 WL 4751033 (S C. Aug. 12, 2015). The Court of Appeals found those facts not sufficient to established a premeditated intent to commit an act of lynching. In citing the testimony of the defendants the Court of Appeals was simply illustrating that no testimony of the defendants gave any support of a finding of premeditation. They properly considered the "record evidence adduced at the trial." *Jackson,* 443 U.S. at 324. If the Court of Appeals committed any error in its standard of review, the error was also using the incorrect "any evidence" standard. But obviously if the Court of Appeals did not find "any evidence" they would also have reversed the conviction under the correct "substantial circumstantial evidence" standard.

To sustain this conviction under the proper standard of review this Court should state why the facts of this case support a finding of premeditated intent greater than the civil standard of to a reasonable degree of certainty. Substantial circumstantial evidence means more than a fifty-fifty chance of being right. Such odds are hardly "a subjective state of certitude of the facts in issue." *In re Winship*, 397 U.S. at 364. If honorable people honestly trying to do justice can disagree as to whether the state has produced sufficient evidence to prove the case, then the case has not been proven beyond a reasonable doubt. This case illustrates that honorable people can disagree as to the conclusion to be drawn from the facts of this case.

2. The Court failed to consider the appellate standard of review of whether the state has excluded any other reasonable hypothesis other than the guilt of the accused when two recent cases in South Carolina support this standard of review.

Over seventy-five years ago our state had a standard of review in circumstantial

evidence cases that arguably was greater than "substantial circumstantial evidence."[3] "All of the facts proved must be consistent with each other, and, taken together, should be of a conclusive nature and tendency, producing a reasonable and moral certainty that the appellant and no one else committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true, which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of appellant, then the proof fails. The reason for this is that all presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty. As has often been stated, it is not sufficient to establish a probability of guilt arising from the doctrine of chances that the fact charged is likely to be true." *State v. Kimbrell*, 191 S.C. 238, ___, 4 S.E.2d 121, 122 (1939). *See, also, State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949) *overruled by State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) This standard of review became firmly entrenched until *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) which held the standard is whether there is substantial circumstantial evidence. In *Edwards* this Court held a judge "should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury *if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.*" *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989)(emphasis in original). The Court did not, however, provide any definition of "substantial circumstantial evidence." The term remains undefined today.

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[3] Arguably "substantial circumstantial evidence" would have to exclude another reasonable hypothesis to be substantial. As mentioned earlier, if both hypothesis are close to equal the evidence is not substantial.

Recently, this court applied the *Kimbrell* and *Mains* standard in affirming a conviction. As Justice Toal stated in her concurring opinion "Put another way, the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels*, 401 S.C. 251, 263, 737 S.E.2d 473, 479 (2012). Support for this standard of review is also found in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) where in footnote 2, after citing the "to the exclusion of every other reasonable hypophysis" standard, this Court stated "it nonetheless illustrates the lack of evidence against Petitioners." *Id.* at 626, 677 S.E.2d at 606. The same principle applies in this case. Applying the "to the exclusion of every other reasonable hypophysis" standard illustrates the lack of evidence against Mr. Larmand.

This Court should affirm the Court of Appeals under the recently used standard of appellate review that requires this Court to review the evidence to find if the state has exlcuded every reasonable hypothesis of innocence. As stated by one author:

> As evidenced by the standards of review currently applied in the federal courts, there has been an apparent shift from a standard tailored to ensuring unjust convictions are overturned to a standard that ensures proper convictions are upheld. This shift implies a value shift from warranting that the innocent are not convicted to ensuring that the guilty are. If the standards causing this shift have been inadvertently implemented, the federal courts should reconsider the purpose of these standards. If the courts aim to follow the Fourteenth Amendment and In re Winship, they need to fully assess reasonable doubt under circumstantial evidence by consideration of every reasonable hypothesis of innocence and not which theory fashioned by the evidence preponderates.
> Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 253 (2007)

On three occasions this Court has cited with approval the law review article Irene Merker, Rosenberg, Yale L. Rosenberg, *"Perhaps What Ye Say is Based Only on Conjecture" - - Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995). In that article the authors stated:

> In the case of circumstantial evidence, however, the ultimate determination of guilt is based also on inferences from the evidence, and the court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt. Thus, use of the reasonable hypothesis standard for appellate sufficiency review would preserve the appropriate roles of judge and jury in circumstantial evidence cases.
> *Id.* at 1416

In *Holland v. U.S.*, 348 U.S. 121 (1954), frequently cited as a basis for not giving a circumstantial evidence charge, the Court cautioned appellate courts to review circumstantial evidence case with great caution. The Court said " Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Id.* at 129. The reason for such caution, while not discussed in the opinion, is obvious. A circumstantial evidence case is the only type of case tried in our courts where every witness can tell the truth, but an innocent person be convicted. We should be reminded of the comments of Judge G. Duncan Bellinger in his concurring opinion when he stated "The maxim of the law is that it is better that many guilty should escape than that one innocent should suffer, and while I am far from expressing the opinion that the person involved is innocent, I think it consistent with the rules by which this Court is governed in like cases that the defendant should have the benefit of

the doubt." *State v. Baker*, 208 S.C. 195, 207, 37 S.E.2d 525, 530 (1946)(concurring opinion)

Such a standard of review is used in many states. *New Hampshire v. Roy*, 167 N.H. 276, ___, 111 A.2d 1061, 1075 (2015) ("[T]he reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt."); *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) ("This heightened scrutiny requires us to consider 'whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.'"); *U.S. v. Spradlen*, 662 F.2d 724 (1981) ("When reviewing the sufficiency of the evidence supporting a criminal conviction, the standard of review is whether, viewing the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence."); *Garcia v. State,* 227 So.2d 209, 210 (1969) ("[T]he circumstances relied upon must be not only consistent with guilt, but inconsistent with innocence; and must even go further by excluding every reasonable hypothesis except that of guilt.); *LaPrade v. Commonwealth*, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950) ("[I]f the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence.")

3. The Court erred in failing to recognize that by finding that Francis Larmand "presented a plausible explanation of each of these facts, ..." (*State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. filed August 12, 2015)(Shearouse Adv.Sh. № 31 at 31, 37) this Court has found that the State has not proven the case beyond a reasonable doubt.

In the opinion, this Court found the defense presented was plausible. *State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. filed August 12, 2015)(Shearouse Adv.Sh. № 31 at31, 37. A standard dictionary definition of "plausible" is "worthy of being accepted as true or reasonable" http://www.merriam-webster.com/thesaurus/plausible (Visited August 23, 2015). If a defense is found on appellate review to be "worthy of being accepted or true" then no court should find that the state has proven its case by either a substantial circumstantial evidence standard or that the state has excluded another reasonable hypothesis.

In *State v. Lollis,* 343 S.C. 580, 541 S.E.2d 254 (2001) this Court reversed the conviction of the defendant for arson. In reviewing the evidence this Court examined all the evidence, including the testimony of the Mr. Lollis. The circumstantial evidence was indeed suspicious. Lollis's wife, the co-defendant, had removed much personal property from the house several days before the fire. The co-defendant, who admitted setting the fire, but denied that Lollis was involved, testified that the fire was set to relieve Lollis of his debts. The key to the storage room was found in Lollis's possession. While the testimony from the finance companies, presumably presented in the defendant's case, established he was current, he did owe several finance companies. In reversing the conviction this court said " Finally, Lollis presented a plausible explanation for placing valuables in the storage room on the day of the fire—he was trying to protect them from drywall dust as he remodeled his home." *Id.* at 585, 541 S.E.2d at 257.[4] This Court gave credit to a plausible explanation offered by the

[4] This Court in *Lollis*, as did the Court of Appeals in this case, discussed in some detail the evidence presented by the defense. As discussed earlier, *Jackson* requires that an appellate court review the entire record.

defendant to hold that the state had not proven the case based upon substantial circumstantial evidence.

If an appellate court finds in the record a plausible explanation, then obviously the trial jury did not follow the instruction that "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." *State v. Logan,* 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013).[5] A plausible explanation is simply inconsistent with the state establishing the guilt of the defendant beyond a reasonable doubt. Several other states have held that when a plausible explanation is presented the state has failed as a matter of law to prove its case beyond a reasonable doubt. *Bevins v. State*, 291 Ga. 814, 733 S.E.2d 744 (2012)("Jones's blood on Blevins's shirt, links him to the crimes, and Blevins provides no plausible explanation for the presence of Jones's blood that is consistent with his innocence."); *Cherry v. U.S.,* 78 F.2d 334 (7th Cir. 1935) (In reversing the conviction the court said "The explanation offered by appellant is not disputed. It is not inherently unreasonable, and we are unable for that reason to reject it. In fact it was perfectly plausible."); *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) ("An alternative theory does not justify a new trial if that theory is not plausible or supported by the evidence."); *State v. Allen,* 139 W. Va. 818, 822, 82 S.E.2d 423, 425 (1954) ("When two inferences, equally plausible, may be drawn from evidence, the law does not permit the jury to adopt the one more unfavorable to the accused.); *State v. Clemmons*, 579 S.W.2d 682, 685 (Mo. Ct. App. 1979) ("For submission of a criminal offense on circumstantial proof, the prosecution evidence need

[5] In this case, unfortunately, this or any other circumstantial evidence charge was not given or requested.

not preclusively refute every conceivable hypothesis of innocence, but only those plausible and reasonable under the evidence.")

4. The Court failed to consider a remand to the en banc Court of Appeals to address the issues not discussed by the Court of Appeals as the Court of Appeals reversed the conviction on the ground the facts were not sufficient to convict and therefore did not need to address the other issues.

In the Return to the Petition for Writ of Certiorari filed by the state, Francis Larmand asked this Court, in the event the decision of the Court of Appeals is reversed, to remand the matter to the en banc panel of the Court of Appeals to address the issues not addressed by the Court of Appeals opinion. This is the only fair and logical manner to dispose of this case in the event this Court does not rehear this case. Our state has no rules as to the obligation of the winning party to file a Petition for Certiorari to address issues not addressed by the Court of Appeals. Obviously a petition for rehearing to the Court of Appeals would have been dismissed because they had no reason to rule on the remaining issues based upon their reversal based upon the lack of evidence. If this Court does not remand, Mr. Larmand will have no court that will have reviewed his other issues and rendered an opinion on those issues.

Suggestion for rescheduling Oral Argument

Francis Larmand suggests this Court reschedule an oral argument in this matter so that this Court can rule on the issue of the standard of review and the impact of this Court finding that the defense of Mr. Larmand was plausible.

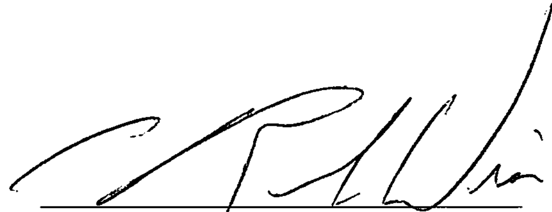
Conclusion

For the foregoing reasons, this Court should:

1. Withdraw the opinion previously entered in this matter and affirm the decision of the South Carolina Court of Appeals.

2. In the alternative reschedule oral argument in this matter so that the issues involved in this matter can be fully discussed before the Court.

3. In the alternative, in the event this Court affirms the prior decision, this matter should be remanded to the South Carolina Court of Appeals to address the issues that the Court of Appeals did not rule upon.



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