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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

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SC Court of Appeals

Case No. 2011-GS-42-3015, 2011-GS-42-3016

The State, ...Respondent,

v.

Michael Anderson Manigan,.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Michael Anderson Manigan ("Manigan") hereby petitions for a rehearing of this Court's unpublished opinion affirming his convictions and sentences on charges of first-degree burglary and grand larceny. See State v. Manigan, Op. No. 2016-UP-022 (Ct. App. filed Jan. 20, 2016).

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220(b), SCACR.

As a preliminary matter, Manigan asserts that this Court overlooked the factually-intensive nature of Manigan's contention that the trial judge erred in denying his directed verdict

motion because there was no direct or substantial circumstantial evidence supporting the charges. Furthermore, Manigan avers that this Court misapprehended Manigan's argument that the trial judge erred in charging the jury on accomplice liability where, as here, no evidence supported the charge.

For each of these reasons, Manigan respectfully requests that this Court grant rehearing and reverse his convictions and sentences.

Factual and Procedural Background

On June 17, 2011, Manigan was indicted for first-degree burglary and grand larceny arising from a break-in at the home of Elizabeth Vandahm in Spartanburg, South Carolina. **R.pp.1-6.** At trial, the State relied solely on circumstantial evidence, namely: (1) Manigan's prints on Vandahm's computer monitor and printer within a black trash bag found in an area containing trash and other stuff on the other side of Vandahm's backyard fence; (2) Manigan's interactions with a neighbor prior to the burglary; and (3) Manigan's interactions with Vandahm after the burglary. After the State rested, Manigan moved for a directed verdict based on the lack of any direct or substantial circumstantial evidence tying Manigan to the crimes. **R.pp.149:1-154:17.** Manigan renewed the motion at the close of the evidence, and the trial judge denied both motions. **R.pp.194:13-195:11; pp.194:13-195:11.**

While the State's indictments did not charge Manigan with accomplice liability and while an investigating officer testified that there was no evidence tying Gary Manigan, a relative, to the crimes, the State also requested and received a jury charge on "the hand of one is the hand of all" over Manigan's objection. **R.pp.195:13-196:9; pp.228:20-229:18.** The jury found Manigan guilty, and the trial judge sentenced Manigan to forty years for first-degree burglary and ten years for grand larceny. **R. p.239:1-12, pp.244:25-245:10.**

On appeal, Manigan argued that the trial judge erred in denying his directed verdict motion because there was no direct or substantial circumstantial evidence identifying him as the perpetrator. In addition, Manigan asserted on appeal that the trial judge committed an error of law in charging the jury on the "hand of one is the hand of all" because there was no evidence supporting the charge. On January 20, 2016, this Court affirmed the trial judge pursuant to an unpublished decision.

ARGUMENT

I. This Court overlooked Manigan's argument that the trial judge erred in denying Manigan's directed verdict motion based on a lack of any direct or substantial circumstantial evidence tending to prove beyond reasonable doubt that Manigan committed the charged crimes.

The analysis of whether the State produced substantial circumstantial evidence supporting a criminal conviction often turns on the facts of each case: "We recognize in this area of ever-evolving jurisprudence our inquiry is necessarily fact-intensive; therefore, the holdings in [two previous appellate decisions] are limited to their peculiar facts." State v. Bennett, Op. No. 27600 (S.C. Sup. Ct. filed Jan. 6, 2016) (Shearouse Adv. Sh. No. 1 at 16, 20 note 1). Nevertheless, this Court's unpublished decision accurately recites the legal standards applicable to the Court's analysis, but omits any application of the law to the specific facts involved in the present case. Under these circumstances, rehearing should be granted.

Manigan respectfully contends that a factually-intensive review compels a directed verdict with respect to the State's charges against him. In Bennett, the Supreme Court of South Carolina clarified "the framework of a court's inquiry in determining whether substantial circumstantial evidence exists to require the denial of a directed verdict." Id. at 18. "On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." Id. "The Court's review is limited to considering the

existence or nonexistence of evidence, not its weight." Id.

"When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because *suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof.*" Id. (emphasis added). "Nevertheless, a court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." Id.

"Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. at 19. "This objective test is founded upon reasonableness." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Therefore, the dispositive issue in this appeal is whether the State produced sufficient evidence to allow a reasonable juror to conclude beyond a reasonable doubt that Manigan committed the crimes charged or whether the State failed to produce evidence rising above a mere suspicion of guilt. See State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict."); State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) ("By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.").

Manigan contends that several appellate decisions in South Carolina compel a directed verdict under factual circumstances which are similar to and sometimes stronger than the facts

relied upon by the State to convict Manigan. See, e.g., State v. Gilliam, 245 S.C. 311, 315, 140 S.E.2d 480, 482 (1965) ("We are convinced that the circumstances relied upon by the State, considered together, did not furnish such substantial evidence of the guilt of the defendant as to justify submission of the case to the jury."); State v. Woods, 273 S.C. 266, 267, 255 S.E.2d 680, 681 (1979) ("In the instant case there is evidence sufficient to raise a strong suspicion of appellants' guilt. However, we are not convinced that there is any substantial evidence which reasonably tends to prove their guilt or from which their guilt may be fairly and logically deduced. Suspicion, however strong, does not suffice to sustain a conviction."); State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) ("The fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house as least three times prior to the burglary."); State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (evidence creates only suspicion of guilt); State v. Walker, 349 S.C. 49, 54, 562 S.E.2d 313, 315 (2002) ("[A]part from his presence in the area, there is no evidence connecting Petitioner with the cultivation of the marijuana."); State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987) ("Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting.").

On the other hand, the cases relied upon by this Court in its unpublished decision include far more factual support of the guilt of the accused than the evidence relied upon by the State in the present case. See State v. Weston, 367 S.C 279, 625 S.E.2d 641 (2006) (emphasizing the following evidence supported the *corpus delicti* of murder and the defendant's involvement in the crime: (1) victim's active social life, and interactions and communications with friends, neighbors and family; (2) victim had not been seen or heard from by anyone since August 6, 1998; (3) victim's change in attitude once defendant began living with her; (4) testimony that

victim planned to ask defendant to move out; (5) defendant's handling of his vehicle on the day victim disappeared, which was consistent with disposal of a body; (6) items missing from victim's apartment after her disappearance; (7) defendant's use of victim's property soon after she disappeared; (8) inconsistencies between defendant's statements and other evidence; and (9) defendant's apparent personal injuries shortly after victim's disappearance); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015) (conviction supported by defendant's use of victim's property after the crime, testimony that defendant was last person to see victim alive, defendant's inconsistent statements, and defendant's actions in fleeing the police); State v. Lane, 410 S.C. 505, 765 S.E.2d 557 (2014) (evidence sufficient to withstand directed verdict where defendant acknowledged driving vehicle associated with crime and where piece of paper issued to defendant from local unemployment office found at crime scene).

In this case, Manigan did not flee police, but instead offered his sympathy to Vandahm while the police were conducting their investigation. There was no testimony tying Manigan to a getaway vehicle or to the Vandahm residence where the break-in occurred. Manigan did not make inconsistent statements to the police or other witnesses. There is no evidence Manigan exercised control over Vandahm's property after the break-in—the stolen items were not found in his possession or on premises under his control. While Manigan's prints were located on computer equipment belonging to Vandahm, this equipment was found in a trash bag in an area with trash and other debris outside of the fence enclosing most of Vandahm's back yard.[1]

While the State also contends that Manigan's conduct prior to and after the break-in was

[1] Viewed in a light most favorable to the State, the testimony established that the trash bag was located within Vandahm's back yard; however, it is undisputed that the trash bag lay in the small portion of her back yard which was outside the fence. Objectively, it is undisputed that there was no discernable difference between this area and the vacant lot lying behind Vandahm's house, which contained trash and other debris.

suspicious, appellate courts have consistently recognized that a mere suspicion is insufficient to allow a reasonable juror to find a defendant guilty beyond a reasonable doubt. See Odems, 395 S.C. at 590, 720 S.E.2d at 52 ("Petitioner's overall actions may appear suspicious, but mere suspicion is insufficient to support a guilty verdict."). Likewise, the only evidence tying Manigan to Gary Manigan, who was in possession of Vandahm's earrings after the crime, was a nieghbor's testimony that she interacted with both Gary and Michael Manigan a few hours prior to the break-in.

As an additional matter, this Court relies on State v. Larmand, Op. No. 27562 (S.C. Sup. Ct. filed Aug. 12, 2015) to affirm Manigan's convictions. In Larmand, unlike the present case, the State produced *competing testimony* regarding defendant's explanations for the evidence against him: "Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' *competing explanations*." Id. (emphasis added). Furthermore, while the Supreme Court of South Carolina in Larmand warned against citing *primarily* to the testimony of the defendant in reversing the decision to deny a directed verdict, the Larmand decision does not purport to require a defendant's testimony to be disregarded entirely: "While the court of appeals should have considered the evidence in the light most favorable to the State, it instead *primarily* cited to Respondent's and Lemire's testimony, including their explanations for their actions." Id. (emphasis added). "In doing so, the court of appeals incorrectly *minimized the circumstantial evidence the State presented regarding premeditation and an agreement between Respondent and Lemire*." Id. (emphasis added).

Thus, Larmand applies the same standard articulated by the Court in Bennett: The appellate court should view the evidence in a light most favorable to the State. Nothing in Larmand or Bennett requires an appellate court to ignore undisputed testimony. Here, Manigan's

explanation was undisputed. There was no competing testimony.

Put simply, the State's evidence of Manigan's guilt is entirely circumstantial. At most, it raises a mere suspicion of Manigan's guilt. It does not rise to the level of substantial circumstantial evidence as required under Bennett. Consequently, this Court should grant rehearing and reverse Manigan's convictions.

II. This Court misapprehended Manigan's argument that the trial judge erred in charging the jury that "the hand of one is the hand of all." No evidence supported such a charge.

"The evidence presented at trial determines the charged jury instruction." State v. Blurton, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002). "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "It is error to give instructions which are calculated to confuse or mislead the jury." Id. "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." Blurton, 352 S.C. at 208, 573 S.E.2d at 804. "Only law applicable to the case should be charged to the jury." Id. "Instructions that do not fit the facts of the case may serve only to confuse the jury." Id.

Under the "hand of one is the hand of all" theory of accomplice liability, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). "To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown." Id.

Here, a neighbor testified that she spoke with Manigan and his relative, Gary Manigan, while cutting her grass prior to the burglary. Gary Manigan later deposited Vandahm's diamond earrings with a pawn shop in return for a loan. Nevertheless, the officer investigating Gary

Manigan refused to serve warrants for burglary or larceny on Gary Manigan, explaining that there was no evidence tying Gary Manigan to the burglary. Under these circumstances, the trial judge should not have charged the jury on accomplice liability. The investigating officer conceded that Gary Manigan was not involved in the crimes and, in any event, there is no evidence supporting a common plan or scheme by Gary and Michael Manigan.

Manigan respectfully contends that the cases cited by this Court do not change this analysis or the result. For instance, while Manigan contends that the evidence did not support the charge, Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004) and State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) address whether the jury charges improperly involved a comment on the facts (Sheppard) or whether the charges were properly worded (Adkins)—not whether they should have been given in the first place. The decision in State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013) did not involve the sufficiency of the evidence or accomplice liability, but instead recognized that a charge on the inference of malice from use of a deadly weapon was no longer supported by the law.

While this Court also relies upon State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), the facts in Langley emphasize the lack of substantial circumstantial evidence supporting an accomplice liability charge in the present case: "The State used the following evidence to establish appellant's guilt: appellant and Derrick left the house together; appellant's cellular telephone was found at the crime scene; Simon testified either appellant or Derrick shot the victim; and Tyrone testified that immediately after the incident, Simon told him appellant shot the victim." Here, the State relies solely on a neighbor's conversation with Michael and Gary Manigan prior to the crime to support an accomplice liability charge. See also State v. Gibson, 390 S.C. 347 701 S.E.2d 766 (Ct. App. 2010) ("In order to demonstrate that Adams and Jacques

intended to join together in a common design to achieve an illegal purpose, the State maintains: (1) Adams called Jacques to the scene; (2) when Jacques arrived he went inside the bar and Adams pointed out the group of Winnsboro men, rather than leaving straight away; (3) Williams testified Adams approached Jacques's white sedan in the parking lot and retrieved a gun moments before the shooting; and (4) although separately, the two men fled the scene after the shooting.").

Finally, State v. Dewitt, 254 S.C. 527, 176 S.E.2d 143 (1970), does not involve accomplice liability and, in any event, there is no evidence that Michael Manigan was in possession of any stolen good—unlike the line of cases which include DeWitt, there is no evidence that the goods were found within Manigan's exclusive possession or that they were found on premises controlled by him. With respect to Gary Manigan, the investigating officer conceded that Gary Manigan was not involved in the crime. As a result, the "hand of one is the hand of all" charge could serve only to confuse and mislead the jury.

Under these circumstances, this Court should respectfully grant Manigan's petition for rehearing and reverse the trial judge's decision to charge that the "hand of one is the hand of all."

Conclusion

For the foregoing reasons, this Court should grant rehearing and reverse Manigan's convictions.

Respectfully Submitted,

By: _____

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February 4, 2016
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PROOF OF SERVICE

I certify that I have served Appellant's **Petition for Rehearing** on Respondent The State of South Carolina, by hand delivery and/or depositing a copy in the United States Mail, postage prepaid, on February 4, 2016, addressed to its counsel of record, Attorney General Alan McCrory Wilson, Assistant Attorney General Julie Kate Keeney, Assistant Attorney General Mary Williams Leddon, and Staff Attorney Susannah Rawl Cole at Post Office Box 11549, Columbia, SC 29211-1549.

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SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.