STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD GOODWIN,

APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by failing to include language in the jury instruction regarding circumstantial evidence indicating that "the State must exclude all other reasonable hypotheses when it relies upon circumstantial evidence," thereby leaving the jury confused regarding the legal relation of circumstantial evidence to the determination of guilt?

II. Whether the trial court reversibly erred by failing to grant a directed verdict where the evidence of the alleged offense against Appellant was circumstantial, and only rose to the level of "mere speculation" rather than "substantial circumstantial evidence."

III. Whether the trial court reversibly erred by failing to suppress two autopsy photographs graphically depicting maggot infested remains that had decomposed more than four days?

STATEMENT OF THE CASE

Appellant Leonard Goodwin was indicted by the Charleston County Grand Jury on January 13, 2010, for murder. Transcript Volume I (Tr. I), p. 11, lines 4-13; R.* (indictment). His case proceeded to trial before the Honorable Kristi L. Harrington and a jury from May 31 through June 3, 2011. Cassandra Winslow and Beattie Butler (collectively, "Counsel") represented Appellant, while Edward Kidd and Adam D. Young represented the State. Tr. I. 1-2; Transcript Volume II (Tr. II) p. 1-2; Transcript Volume III (Tr. III) p. 1-2; Transcript Volume IV (Tr. IV) p. 1-2. The jury found Appellant guilty as charged, and the trial court imposed a sentence of life. Tr. IV p. 97, line 22–Tr. IV p. 98, line 9; Tr. IV p. 112, lines 5-8.

STATEMENT OF THE FACTS

Appellant Leonard Goodwin was fifty-six years old in April 2006, and lived in a rented home in North Charleston, South Carolina, with his wife, Mary Ann Robinson (Wife),[1] and stepson Eric Robinson (Stepson). Tr. I p. 108, line 14–Tr. I p. 109, line 10; Tr, I p. 168, line 8–Tr. I p. 169, line 11; Tr. I p. 171, lines . Appellant and Stepson had a relationship that was at times rocky; however, although arguments may have occasionally occurred, there were never any physical altercations between the two over approximately twenty years. Tr. I p. 108, lines 8-10; Tr. I p. 172, line 10—Tr. 173, line 4; Tr. I p. 182, lines 3—Tr. I p. 183, line 12.

At approximately 8:30 to 9:00 pm on April 3, 2006, Stepson was speaking on the house telephone with his girlfriend, Latarshia Washington (Washington). Tr. I p. 112, line 21–Tr. I p. 113, line 18. She called Stepson again at approximately 9:30 pm. Tr. I p. 131, line 17–Tr. I p. 132, line 3. During the second conversation, Washington stated that she overheard an argument between Appellant and Stepson, and the call ended after about thirty minutes when she heard a loud "crash, like glass breaking." Tr. I p. 114, line 1–Tr. I p. 115, line 9; Tr. I p. 132, lines 18-22. Washington indicated that she never heard any mention of a gun or any weapon over the telephone, and that she never heard a gunshot; just something like glass breaking. Tr: I 133, lines 14-22. Washington called back three to six times to the house phone, and Appellant answered. When asked where Stepson was, Appellant

[1] By April 2006, Appellant and Wife had been married for approximately seventeen years. Tr. I p. 168, lines 16-23.

purportedly said that Stepson left to Russellville looking for weed. Tr. I 115, line 22—Tr. I p. 116, line10; Tr. I p. 140, lines 1-6.

Washington later contacted Stepson's cousins, Michael Phillips (Phillips) and Jessie Owens (Owens). She was picked up by Owens at approximately 11:00 pm, and the two drove to Appellant's home. Tr. I. p. 117, line 11–Tr. I p. 118, line 17; Tr. I. p. 134, lines 9-16; Tr. I p. 143, lines 9-11; Tr. I p. 145, line 9–Tr. I. p. 146, line 17. About one block from arriving at the house, the two saw Appellant riding his bicycle. They all stopped and spoke for a few moments. Although stained specks were noticed on the lower portion of Appellant's shirt that Washington would later claim was blood, Owens "didn't think nothing of it." Tr. I p. 119, lines 1-21; Tr. 135, lines 3-15; Tr. I. p. 146, line 18—Tr. I p. 147, line 19.

Owens and Washington arrived in front of Appellant's home where they eventually met with Phillips, and all three waited outside in the road. Appellant returned between five to thirty minutes after previously meeting Owens and Washington that night, and he went inside. Tr. I p. 120, lines 18–22; Tr. I p. 148, lines 7-8.

Wife also arrived home between 11:00 and 11:15 pm while Owens, Washington, and Phillips waited outside, and she saw Appellant calmly sitting on the couch watching television when she walked inside. Tr. I p. 121, lines 2-13; Tr. I. p. 122, lines 12-11; Tr. 148, lines 2-13; Tr. I p. 174, line 8–Tr. I p. 176, line 1; Tr. I p. 177, lines 14-16; Tr. I p. 184, lines 6-18. Soon after, Washington flagged down a passing police car, which was driven by Officer Arthur D. Armstead (Armstead) Tr. I. 121, lines 17-25; Tr. I p. 160, lines 4-10; Tr. II p. 42, lines 4-24.

Armstead entered the house with Phillips walking behind. Tr. I 122, lines 12-24; Tr. I. 138, line 4—Tr. I 139, line 11; Tr. I p. 149, lines 1-5; Tr. I. 160, lines 12-24. Upon entry, Armstead made contact with the occupants. Appellant allegedly stated that he had a verbal argument with Stepson, and Stepson left with a female. Tr. II p. 45, lines 9-15. Armstead had Appellant stand in the middle of the house while he inspected the rooms. He walked in and out of the bedrooms, and checked the common areas. Tr. II p. 45, line 5–Tr. II p. 46, line 25. Armstead neither saw anything out of the ordinary, nor smelled anything out of the ordinary—including either the smell of a gunshot lingering inside the home, or the smell of cleaning chemicals. Tr. II p. 46, lines 2-25; Tr. II p. 49, line 2–Tr. II p. 50, line 18; Tr. II p. 52, lines 3-21. In fact, the only person who claims to have smelled anything was Wife, who indicated at trial that she smelled bleach and cleaning products in the bathroom.[2] Tr. I p. 176, line 17–Tr. I p. 177, line 7; Tr. I p. 188, line 7–Tr. I p. 189, line 2. Although she was the person in the household who most often cleaned the home, Wife indicated that Appellant did some cleaning as well. Tr. I p. 185, lines 2-4. She further testified that nothing was out of the ordinary, and everything seemed normal—which was the same observation echoed by both Phillips and Armstead. Tr. I p. 163, line 14–Tr. I p. 164, line 3; Tr. I p. 184, line 6–Tr. I p. 186, line 3; Tr. II p. 45, line 21–Tr. II p. 46, line 25; Tr. II p. 50, lines 2-18. Armstead left the home, and did not file a report because there was "nothing to report." Tr. II p. 51, line 14.

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[2] Wife never mentioned smelling bleach or cleaning products in her statements to law enforcement on either April 6, 2006, or April 27, 2006. Tr. I p. 186, line 4–Tr. I p. 189, line 3.

Over three weeks later, Wife smelled a foul odor, and informed Appellant og this while he was cutting the grass in a neighbor's yard. Appellant pointed to the back of the yard, and indicated it was a dead cat. Tr. I p. 178, lines 6-12. Wife called her sister, and then law enforcement about the odor, but was not sure whether she told Appellant that she called the police. Tr. I p. 178, lines 13-25. When officers arrived on April 27, 2006, Appellant was still cutting the neighbor's grass. Appellant was not seen thereafter until his arrest on September 6, 2009.[3] Tr. III p. 35, lines 8-22; Tr. III p. 42, line 24—Tr. III p. 43, line 7.

Stepson's body was found in the crawlspace beneath the home. The remains were found decomposed, covered in lime, and among a small amount of trash.[4] Tr. II p. 56, lines 2-23; Tr. II p. 58, lines 7-25; Tr. II p. 60, lines 5-20; Tr. II 67, lines 1-25; Tr. II p. 164, lines 4-21; A pair of socks were located in the front exterior garbage can with spatters later identified as Stepson's blood. Tr. II p. 71, line 25—Tr. II p. 71, line 3; Tr. II p. 91, line 1—Tr. II p. 92, line 11. Two bags of lime—one opened, one unopened— in packaging from True Value were also found in the back yard of the house beneath a tarp with other lawn equipment, such as a mower and gas cans.[5] Tr. II p. 84, line 4–Tr. II p. 85, line 22. Other

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[3] When arrested, Appellant stated to law enforcement that he was in New Jersey over the previous year, and indicated he was aware that he was wanted for murder. Tr. III p. 41, line 13—Tr. II p. 42, line 14.

[4] On May 4, 2011, the State sent an investigator back to the crawlspace of the house, and recovered eight empty alcohol bottles from this approximate location, one of which was an empty gin bottle with Appellant's DNA. Tr. III p. 53, line 8–Tr. III p. 56, line 15; Tr. III p. 61, line 1—Tr. III p. 62, line14; Tr. IV p. 96, lines 1-24.

[5] The State produced William Palmer (Palmer), an employee from True Value in North Charleston, to testify at trial. Palmer indicated Appellant regularly purchased one to two bags of lime per week over approximately six months prior to April 2006 when police

items were found in the back yard too, including "Fabreeze," "Odor Ban," and a cleaner. Tr. II p. 138, line 22–Tr. II p. 140, line 23. Using amido black, the back door and cement on the back porch revealed spots which tested positive for blood. Tr. II p. 76, lines 5-16; Tr. II p. 115, line 4—Tr. II p. 117, line 13. However, no blood was found anywhere inside the house even though amido black can reveal attempts to clean blood. Tr. II p. 126, line 6–Tr. II p. 127, line 16; Tr. II p. 135, lines 1-10; Tr. II p. 194, lines 11-24. Also, damage was found on the wood of the rear screen door of the house postulated to be from a gunshot. However, no gun of any caliber was ever found in the case. Tr. II p. 125, lines 2-8.

Doctor Cynthia Anna Schandl (Schandl) testified at Appellant's trial as the forensic pathologist who performed the autopsy. She determined the cause of death was a gunshot wound to the head, and the hole measured .6 inches by .35 inches. Tr. II p. 223, line 17–Tr. II p. 226, line 12; Tr. II p. 230, lines 13-14. Additionally, Schandl explained that, although there was some discoloration on the surface of the skull, this was completely inconclusive of any soot from a gun being fired and the range that the gun was fired from the head could not be determined. Tr. II p. 226, line 13–Tr. II p. 227, line 20. In fact, the remains had decomposed to the point that the brain had liquefied, and Schandl could not even determine the path of the wound. Tr. II p. 229, lines 2-24.

Schandl also testified regarding the estimated time of death. First, she described changes to the body due to decomposition. Over Counsel's objection, the trial court admitted two autopsy photographs depicting Stepson's bloated, maggot infested remains. Tr. II p. 210, lines 8-19; Tr. II p. 265, line 13–Tr. II p. 266, line 20; R.* (State's Exhibit #

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first spoke with him. Tr. II p. 98, line 1–Tr. II p. 100, line 13; Tr. II p. 104, line 20–Tr. II p. 105, line 25; Tr. II p. 108, lines 2-23.

52); R.* (State's Exhibit # 54). The State then elicited further testimony regarding each photograph; yet, despite the State's efforts to have Schandl give a time of death based on the presence of maggots, the best the forensic pathologist could state was that death occurred more than four days prior, "but it's certainly not specific for a length of time between death and where we are now." Tr. 210 II, line 21—Tr. II p. 213, line 23. Schandl also testified that rigor mortis had already passed, sloughing and gloving of the skin was occurring, and that fluid in the eyes had already dissipated, indicating that the time of death was more than four days. Tr. II p. 214, lines 3-20; Tr. II p. 218, lines 1-25.

Moreover, the State's firearms identification expert, Kenneth H. Whitler (Whitler), also testified. Specifically, Whitler stated that the metal fragment—which was taken from Stepson's head—was either a piece of lead, or a projectile. In fact, the item was so "mashed up" that his testing consisted primarily on the remaining weight of the lead. Tr. III p. 74, line 14–Tr. III p. 75, line 18. As a result, Whitler could not even say it was a bullet; and even if it was a bullet, it could be anything from a .22 caliber rim-fired bullet, or a piece of a much larger caliber bullet. Tr. III p. 74, lines 14-18; Tr. III p. 78, lines 22-24.

At the close of evidence, Counsel moved for a directed verdict of acquittal. Tr. IV p. 29, lines 6-19. The trial court denied the motion, and cited to Washington's testimony as direct evidence of guilt, and to the following as substantial circumstantial evidence of the same: testimony from wife that Appellant explained the odor was a dead cat; testimony regarding Appellant's prior purchases of lime from True Value hardware; lime found from True Value under the a tarp in the back yard of the home; lime found on Stepson's remains; testimony regarding flight; testimony regarding odor-masking chemicals; testimony regarding the smell of bleach after Washington heard the argument; testimony regarding a

liquor bottle with Appellant's DNA near the area where Stepson's remains were found; and the overwhelming odor under the house. Tr. IV p. 33, line 2–Tr. IV p. 34, line 6.

Further, during the jury charge conference, Counsel asserted that the circumstantial evidence jury instruction should include an Edwards charge containing the following key language:

> The State must exclude all other reasonable hypotheses when it relies upon circumstantial evidence.

Tr. IV p. 38, line 19—Tr. IV p. 39, line 4. In light of recent South Carolina case law, Counsel also challenged the validity of the language of State v. Grippon[6] that states the "law makes absolutely no distinction between direct and circumstantial evidence."[7] Tr. IV p. 39, line 9–Tr. IV p. 40, line 22; Tr. IV p. 41, line 21–Tr. IV p. 42, line 12. The State opposed, and the trial court noted Counsel's exception. After instructing the jury on reasonable doubt, the trial court charged the following language relating to circumstantial evidence:

> There are two types of evidence 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. You should weigh all of the evidence in this case. After weighing all of the evidence, if you are not convinced that the State has proven each element of the charge beyond a reasonable doubt, you must find the defendant not guilty.

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[6] 327 S.C. 79, 489 S.E.2d 462 (1997).

[7] In an abundance of caution, Counsel also requested the trial court's permission to argue against precedent. Tr. IV p. 38, lines 19-22.

Tr. IV p. 85, line 21—Tr. IV p. 86, line 12. Counsel's objections were renewed out of the presence of the jury. Tr. IV p. 95, lines 4-13.

After deliberating for over two hours, the jury returned a verdict of guilty as charged. Tr. IV p. 96, line15—Tr. IV p. 97, line 10; Tr. IV p. 97, line 22–Tr. IV p. 98, line 7. The trial court sentenced Appellant to life imprisonment. Tr. IV p. 112, lines 5-8.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by failing to include language in the jury instruction regarding circumstantial evidence indicating that "the State must exclude all other reasonable hypotheses when it relies upon circumstantial evidence," thereby leaving the jury confused regarding the legal relation of circumstantial evidence to the determination of guilt.

The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair and proper verdict can be reached. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); see also State v. Blurton, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict."). It is error to give instructions which are calculated to confuse or mislead a jury. Blurton, 352 S.C. at 208, 573 S.E.2d at 804 (quoting Leonard, 292 S.C. at 137, 355 S.E.2d at 273). The law to be charged must be determined from the evidence presented at trial. Id.; see also State v. Lindler, 276 S.C. 304, 307, 278 S.E.2d 335, 337 (1981). In a criminal case, the judge must charge on all material issues raised by the indictment and evidence. State v. Fair, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946). It is reversible error to decline a criminal defendant's requested jury instruction where it (1) is a correct statement of the law, (2) was not substantially covered by other instructions, and (3) was important enough to the case that its omission impaired the defendant's ability to defend himself. United States v. Frazier-El, 204 F.3d 553, 562 (4th Cir. 2000) (quoting United States v. Queen, 132 F.3d 991, 1000 (4th Cir. 1997)). See also United States v. Dornhofer, 859 F.2d 1195, 1199 (4th Cir. 1988), cert. denied, 490 U.S. 1005 (holding that a trial court may not refuse a defense theory instruction if it has evidentiary support and is an accurate statement of the law).

In the present case, Counsel requested inclusion of the traditional language regarding the relation of circumstantial evidence to the determination of guilt, as embodied in State v. Edwards, as well as the concurring opinion in State v. Grippon, 327 S.C. 79, 85, 489 S.E.2d 462, 465 (1997) (Toal, C.J., concurring), wherein the Supreme Court held a jury could not convict unless:

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

State v Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989) abrogated by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (holding the "language in Grippon is the sole and exclusive charge to be given in circumstantial evidence cases in this state.") Specifically, Counsel indicated "the reasonable hypothesis language and the exclusion language" was key to his requested jury instruction. Tr. IV p. 40, lines 20-22.

Counsel also acknowledged that the traditional circumstantial evidence language he requested was abrogated beginning with Grippon, which allowed juries to be charged as follows:

> There are two types of evidence which are generally presented during a trial-direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of

> circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Grippon, 327 S.C. at 83-84, 489 S.E.2d at 464 (quoting 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 12.04 (4th ed.1992)). However, Counsel asserted that the Grippon charge itself was legally incorrect, and that recent South Carolina case law, such as State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), indicated it was no longer the proper standard regarding circumstantial evidence. R. IV p. 39, line –Tr. IV p. 40, line .

In Bostick, the Supreme Court examined the law regarding directed verdicts in circumstantial evidence cases. Relying on three seminal cases regarding the proof necessary in cases with circumstantial evidence—State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000)—the Court applied the following standard where no direct evidence is present: "A case should be submitted to the jury when evidence is circumstantial if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced." Bostick, 392 S.C. at 139-42, 708 S.E.2d at 776-78 (emphasis added). Thus, as Counsel asserted, the Bostick line of cases illustrates that the Supreme Court's view regarding differences or similarities between direct and circumstantial evidence has changed. Tr. IV p. 41, line 22—Tr. IV p. 42, line 3.

Indeed, evidence is growing that the underpinnings of Grippon and Cherry are being eroded *sub silentio* by the Supreme Court are growing. Grippon and Cherry essentially rely upon an adequate reasonable doubt instruction to provide the necessary guidance to jurors when circumstantial evidence is produced in the case. Further, Cherry in particular

suggested that any additional language explaining the relationship between circumstantial evidence to the determination of guilt was confusing to juries:

> [T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not.

Cherry, 361 S.C. at 601, 606 S.E.2d at 482.

However, in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the Supreme Court acknowledged its prior abandonment of the traditional circumstantial evidence language used in the Edwards charge, but went on to state that "the definition illustrates the lack of evidence against petitioner." Id. 395 S.C. at 590, 720 S.E.2d at 52. Additionally, the Court expounded on that matter in footnote four as follows:

> However, the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion, and this process is not required when evaluating direct evidence. Thus, the traditional circumstantial evidence definition provides more detailed information about the relation of circumstantial evidence to the determination of guilt. The definition does not, however, change the standard evaluating evidence: every circumstance must be proved beyond a reasonable doubt.

Odems, 395 S.C. at 591 n.4, 720 S.E.2d at 53 n.4. Therefore, the Supreme Court has acknowledged, post-Cherry, (1) that proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, (2) that the traditional circumstantial evidence language is informative regarding the relation between circumstantial evidence and guilt, and (3) that this process is not necessary for evaluating direct evidence. Moreover, the Odems Court clearly stated that such an understanding of the law regarding circumstantial evidence does not change the reasonable doubt standard. As a result, the critical

rationalization underpinning Cherry has been abrogated. Simply stated, an instruction on the traditional circumstantial evidence would not confuse a jury; rather, such a jury instruction would serve to enlighten the jury and aid it in arriving at a correct verdict. See, e.g., Blurton, 352 S.C. at 207, 573 S.E.2d at 804; Leonard, 292 S.C. at 137, 355 S.E.2d at 273; see also Hampton v. State of Indiana, 961 N.E.2d 480, 486-87 (Ind. 2012) ("[P]roviding the jury with an additional cautionary instruction in evaluating circumstantial evidence not only supports but further enhances the concept of requiring proof beyond a reasonable doubt. It admonishes the jury to tread lightly where the evidentiary gap between logical certainty and guilt is more tenuous."). Therefore, the trial court erred by failing to instruct the jury regarding the traditional circumstantial evidence charge.

Appellant was also prejudiced by the trial court's failure to instruct the jury regarding the traditional circumstantial evidence charge. As indicated in Section II below, the evidence against Appellant in the present case was circumstantial in nature. Under such conditions, the need to enlighten the jury regarding the relation between circumstantial evidence and the determination of guilt was acute, as it would aid the jury in reaching at a just, fair and proper verdict. Here, the jury was without any such instruction or guidance. Instead, the trial court provided the following instruction relating to circumstantial evidence:

> There are two types of evidence 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. You should weigh all of the evidence in this case. After weighing all of the evidence, if you are not

> convinced that the State has proven each element of the charge beyond a reasonable doubt, you must find the defendant not guilty.

Tr. IV p. 85, line 21—Tr. IV p. 86, line 12. In short, the trial court's instruction left the jury without any guidance or enlightenment regarding the traditional circumstantial evidence charge (particularly the "reasonable hypothesis" language); thus the jury was without guidance or enlightenment on the relationship between circumstantial evidence and the determination of guilt. As a result, it is entirely likely that the jury—which deliberated for over two hours without such an instruction—would have arrived at a different result had it been properly charged with the traditional circumstantial evidence instruction. Accordingly, Appellant was prejudiced by the trial court's error.

II. The trial court reversibly erred by failing to grant a directed verdict where the evidence of the alleged offense against Appellant was circumstantial, and only rose to the level of "mere speculation" rather than "substantial circumstantial evidence."

The trial court erroneously denied Appellant's directed verdict motion where the evidence produced by the State was circumstantial, and amounted to mere speculation. At the close of evidence, Counsel moved for a directed verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure, State v. Bostick,[8] State v. Schrock,[9] and State v. Arnold.[10] Tr. IV p. 29, lines 6-19. The State responded by asserting direct evidence of the offense existed based on Washington's testimony that she overheard a loud noise. The State also pointed to the circumstantial evidence in the case, and claimed it all pointed toward Appellant's guilt. Tr. IV p. 30, line 23–Tr. IV p. 32, line 12. After reciting several points of evidence in the record, the trial court denied Appellant's motion. This was error, as the facts relied upon by the trial court amounted to mere speculation of whether Appellant committed the charged offense rather than substantial circumstantial evidence of the same.

A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also In re Winship,

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[8] 392 S.C. 134, 708 S.E.2d 774 (2011).

[9] 83 S.C. 129, 322 S.E.2d 450 (1984).

[10] 361 S.C. 386, 605 S.E.2d 529 (2004).

397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Rule 19(a), SCRCrimP (West, Westlaw current through Dec. 1, 2011) ("[O]n motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged . . . if there is a failure of competent evidence tending to prove the charge in the indictment."). When considering a motion for directed verdict of acquittal, "the trial court is concerned the existence or non-existence of evidence, not its weight." Brown, 360 S.C. at 586, 602 S.E.2d at 395.

A case based solely upon circumstantial evidence should be submitted to the jury only "if there is 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. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). The trial court "should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984)); State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) (citing State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978)); see also State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) ("The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty."). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not

amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing State v. Lollis, 343 S.C. 580, 541 S.C.2d 254 (2001).

In the present case, the evidence that Appellant committed the offense alleged against him was entirely circumstantial. Contrary to the State's contention, Washington's testimony regarding what she overheard during her telephone conversation with Stepson constituted circumstantial evidence. First, although Washington indicated she heard Appellant and Stepson argue, including a purported statement by Appellant to "put you on ice," there was no mention at all of a gun or a weapon. Second, the sound Washington repeatedly said she heard was a loud crash, like glass breaking, not a gunshot. Thus, Washington's testimony of what she purportedly overheard on the house telephone was not a murder. In fact, the State's own theory was that Appellant allegedly shot Stepson after the telephone conversation ended:

> With those hands folded in [Appellant's] lap, he grabbed a twenty-two caliber pistol, put it to [Stepson's] head, and pulled the trigger.
>
> . . . . .
>
> It was boiling up and the anger inside of [Appellant] is building, building through a culmination that occurred during that phone call.
>
> And when they went and had that back and forth, he had had enough and he pulled a gun on [Stepson]. [Stepson] took off and ran to that back door, <u>drops the phone</u>. Gets to the back door opens up inside. [Appellant] fires that first shot. It misses. It goes through that screen door. You saw that bullet hole. . . . [Stepson] freezes. [Appellant] puts him on his knees and puts the gun to his head and executes him. That's why he has the blood spatter on his shirt. That's why the blood spatter is waist high on that door.

> <u>But the phone is ringing now in the background</u>. He's just committed murder.

Tr. IV p. 52, lines 23-25; Tr. IV p. 63, lines 4-19 (emphasis added). Thus, even under the State's own theory of the offense, Washington heard the telephone crash to the floor, not the crime of murder.

The vast majority of the remaining information supplied by the State's argument was to fill glaring gaps in the circumstantial evidence actually produced. For example, the State's postulation that Appellant pulled out a .22 caliber pistol was purely speculative, as was its notion that Appellant put Stepson on his knees and shot him through the head at point blank range. First and most obviously, no firearm of any caliber was ever found in this case. Second, it is unknown what caliber bullet actually struck Stepson. According to the only expert in firearms to testify at trial, if the lead fragment from Stepson was indeed a projectile, it could have been anything from a .22 caliber bullet to a fragment from a much larger caliber bullet. Tr. III p. 74, lines 14-18; Tr. III p. 78, lines 22-24. Thus, it was never proven exactly what the fragment was that struck Stepson in the head, or what instrument caused it to get there.

Third, according to the only forensic pathologist to testify at trial, there was no soot from a gunshot on the skin or skull of Stepson: although there was some discoloration on the surface of the skull, it was completely inconclusive of any soot from a gun being fired, and the range that the gun was fired from the head could not be determined.[11] Tr. II p. 226, line

[11] Although officer Al Hallman of the North Charleston Police Department testified as a nonexpert witness and postulated that he thought the discoloration he saw on Stepson's skull could have been gunshot stippling, he readily conceded that he could not definitely say it was gunpowder stippling. Tr. II p. 169, lines 2-18.

13–Tr. II p. 227, line 20. Thus, assuming the lead fragment was a bullet or bullet fragment, the State did not prove from what range it was shot.

Fourth, the State failed to prove when the time of death occurred. Dr. Schandl repeatedly indicated that determining the time of death was "a very inexact science." Based on her observations that rigor mortis had already passed, sloughing of the skin was occurring, and that fluid in the eyes had already dissipated, the best she could estimate the time of death was at more than four days. . Tr. II p. 214, lines 3-20. Yet, Stepson's remains were found approximately three weeks after the alleged argument. As a result, the State's theory of the offense itself amounted to gross speculation as to exactly what the lead fragment was that entered the .6 inch by .35 inch hole in Stepson's skull, much less when it even got there or by what instrument.

Further, the remaining evidence in the case relied upon by the trial court was undeniably circumstantial in nature. Moreover, it amounted to mere speculation of guilt rather than substantial circumstantial evidence of the same. For example, although lime was found on Stepson's remains, and Appellant possessed lime, his possession and use of lime was a longstanding part of his lawn maintenance work. Indeed, as the True Value employee testified, Appellant regularly purchased one to two bags of lime per week over a six month period before April 2006. Tr. II p. 98, line 1–Tr. II p. 100, line 13; Tr. II p. 104, line 20–Tr. II p. 105, line 25; Tr. II p. 108, lines 2-23. Additionally, there was no proof it was Appellant that applied lime to the remains. As such, evidence regarding Appellant's purchase of lime, and its presence among Appellant's lawn care equipment amounts to mere speculation.

Additionally, the gin bottle with Appellant's DNA was found among the trash in the crawlspace was of no moment. The presence of an item with a person's DNA or fingerprints on that person's property is unsurprising. In the present case, household garbage was also present in the crawlspace, including eight other bottles, and the ATM card of Stepsons mother. Therefore, the gin bottle with Appellant's DNA was likewise merely speculative evidence.

Reliance on Wife's testimony regarding both the smell of bleach on the night of April 3, 2006, also does not amount to substantial circumstantial evidence. First, although Wife stated she did most of the cleaning in the home, she also indicated that Appellant did clean sometimes as well. Tr. I p. 185, lines 2-4. Further, Officer Armstead neither saw anything out of the ordinary, nor smelled anything out of the ordinary—including either the smell of a gunshot lingering inside the home, or the smell of cleaning chemicals. Tr. II p. 46, lines 2-25; Tr. II p. 49, line 2–Tr. II p. 50, line 18; Tr. II p. 52, lines 3-21.

Also, although the presence of other household air fresheners may be suspicious, it does not rise to anything more where nothing links the defendant to the use of in connection with the offense. In the case at bar, the State made no such showing.

The same failing in the State's evidence is present with the socks with Stepson's speckled blood found in the front outside trashcan. There was no indication of how or when the socks were put into the front trashcan, who put them there, or how or when the blood got on them. Thus, there was nothing linking the socks to the present offense, or more pointedly to Appellant, and their presence in evidence amounts to mere speculation of guilt.

Finally, although flight may be inferred as evidence of guilt, and Appellant was missing from April 27, 2006, to September 9, 2009, such circumstantial evidence in the present case was readily explained by Counsel. As Counsel stated in closing argument, Appellant ran because he did not want to go to jail for a crime he did not commit. Tr. IV p. 74, lines 1-5. Further, it is also notable that Appellant was cooperative with law enforcement on April 3, 2006, when Armstead inspected the house, and that Appellant stayed at the house for approximately three weeks after the alleged incident itself. Therefore, Appellant's flight likewise amounts to mere speculation of guilt rather than substantial circumstantial evidence of the same.

In sum, the State failed to produce any direct or substantial circumstantial evidence that Appellant committed the offense of murder. The circumstances relied upon by the State was not substantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. Rather, the evidence merely raised a suspicion that Appellant was guilty. Odems, 395 S.C. at 586, 720 S.E.2d at 50 (citing Schrock, 283 S.C. at 132, 322 S.E.2d at 451-52); Bostick, 392 S.C. at 139, 708 S.E.2d at 776; Martin, 340 S.C. at 602, 533 S.E.2d at 574; see also Arnold, 361 S.C. at 390, 605 S.E.2d at 531. Although the facts produced and entered into evidence may appear suspicious, mere suspicion is insufficient to support a guilty verdict. Id. 395 S.C. at 590, 720 S.E.2d at 52 (citing Arnold, 361 S.C. at 389-90; 605 S.E.2d at 531). Accordingly, the trial court reversibly erred by failing to grant a directed verdict of acquittal.

III. The trial court reversibly erred by failing to suppress two autopsy photographs graphically depicting maggot infested remains that had decomposed more than four days.

The trial court erroneously admitted two "disturbing and unsettling" photographs into evidence depicting a medium range, and close-up of Stepson's decomposed remains that were infested with parasitic maggots. R.* (State's Exhibit # 52); R.* (State's Exhibit # 54). Counsel timely objected, and later placed on the record that the photographs did not make any material fact more or less likely, and that any probative value of the photographs was far outweighed by their prejudicial effect Tr. 210 II, line 21—Tr. II p. 213, line 23; Tr. II p. 265, line 13–Tr. II p. 266, line 20. The trial court ruled overruled Appellant's objection, stating that the pictures were not more prejudicial, and that there was "extensive testimony that she used the larva and the stages of the larva to identify the time—or the stage of death, four days or more." Tr. II p. 266, line21—Tr. II p. 267, line 2 . This was error as the photographs were not necessary to substantiate material facts or conditions, and their probative value was substantially outweighed by the danger of unfair prejudice by creating a tendency to suggest a decision on an improper basis.

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C.

12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence). Stated differently, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not *necessary* to substantiate *material* facts or conditions." State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012) (emphasis in original) (internal quotations omitted) (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010)).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting Alexander, 303 S.C. at 382, 401 S.E.2d at 149).

In the present case, the State was allowed to admit two autopsy pictures of Stepson's grotesque maggot infested remains. The State specifically elicited testimony from Dr. Schandyl, who reluctantly testified as to the contents of the photos. The State further focused on the presence of maggots, ostensibly to determine the time of death. However, although Dr. Schandyl indicated the presence of the sizes of maggots present and multiple cycles of egg laying "is suggestive of a longer time period where flies had laid eggs in succession over time," she qualified her statement by saying "it's certainly

not specific for a length of time between death and where we are now." Tr. II p. 213, lines 19-23. Thus, the presence of maggots and fly eggs was not particularly helpful as to the time of Stepson's death.

In fact, Dr. Schandyl's ultimate finding that the time of death was more than four days was based upon the lack of fluid in the eyes of Stepson's remains, not the presence of maggots. When asked by the State about determining time of death by examining eyes, Dr. Schandyl first reiterated that "determining the time of death is very—a very inexact science." Tr. II p. 214, lines 3-4. Based on dissipation of vitriolic fluid in the eyes in the present case, Dr. Schandyl testified as follows regarding the time of death:

> That gives us very general idea that it was probably more than four days. Which, again, doesn't tell us how much more than four days it was, but sometime after that.
>
> So, again, our estimate of when the individual died is very inexact but we have a couple of guidelines to know that it's more than four days, certainly.

Tr. II p. 214, lines 12-18. Dr. Schandyl further confirmed on cross-examination that the four-day time period she gave was based on the lack of vitriolic fluid in the eyes. Tr. II p. 233, lines 1-13. As a result, no time of death was or could be given.[12]

Therefore, based on the testimony of the State's own forensic pathologist, the time frame for Stepson's death was roughly established by the lack of fluid in the eyes of Stepson's remains, not on the presence of maggots on and in the bloated, decomposing

[12] Schandyl agreed on cross-examination that, based on her examination of the remains, she could not rule out a time frame for Stepson's death from six days to some point beyond twenty-four days; indeed, the expert conceded that she could not give a definitive time frame. Tr. II p. 234, lines 10-22.

flesh. Accordingly, the two grotesque photographs depicting Stepson's maggot infested corpse were not necessary to substantiate material facts or conditions in the case

Additionally, the photographs were not needed to prove the elements of murder.[13] The cause of death by a gunshot wound to the head was established by Dr. Schandyl through the use of her autopsy report. Therefore, the photographs of Stepson's remains were not necessary to substantiate material facts: "the photos in this case are hardly 'necessary,'" and are of little significance to the State's case. Collins, 398 S.C. at 202, 727 S.E.2d at 754 (citing Torres, 390 S.C. at 623, 703 S.E.2d at 228). Accordingly, the probative value of the photographs in question was, at best, minimal.

Additionally, the photographs of Stepson served to create an unfair prejudice against Appellant. The photographs displayed to the jury close-up imagery of Stepson's decomposed body with severe maggot infestation. As in Waitus, the information contained in these photos was not disputed, and was established by testimony. 224 S.C. 12, 77 S.E.2d at 263 (reversing where four pictures of the victim at the crime scene that showed marks, bruises and abrasions, and the condition of the victim's clothes, were admitted into evidence even though that those facts were not disputed and were already established by testimony); see also Collins, 398 S.C. at 203-04, 727 S.E.2d at 755. Therefore, the only remaining value of the two photographs of Stepson's maggot infested remains was to arouse the sympathies and the prejudices of the jury. Middleton, 288 S.C. at 24, 339 S.E.2d at 693.

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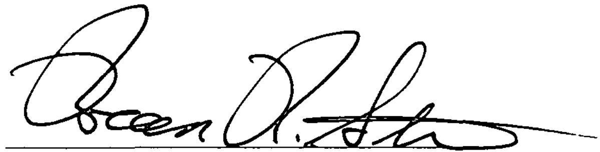
[13] Murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (West, Westlaw current through end of 2011 Sess; see also State v Dickerson, 395 S.C. 101, 119 n.5, 716 S.E.2d 895, 905 n.5 (2011).

Accordingly, the trial court erred in admitting the two autopsy photographs in Appellant's trial, and Appellant was prejudiced by the erroneous admission as "[t]he prejudice created by the photographs clearly outweighed *any* evidentiary value." Id. (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940). Appellant therefore seeks reversal of his conviction, and remand of his case.

CONCLUSION

For the foregoing reasons, Appellant Leonard Goodwin respectfully requests that this Court reverse his conviction, and remand his case for a new trial pursuant to Issues I and III, and entry of a directed verdict of acquittal pursuant to Issue II.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD GOODWIN,

APPELLANT

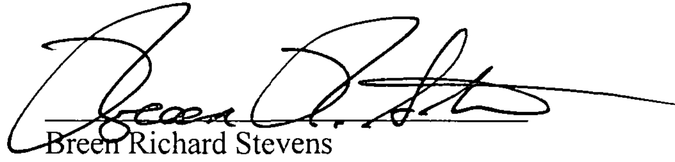
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Trial transcript volume I (May 31, 2011), pp. 1-11; pg 47; pp. 54-83; pp. 93-164; pp. 167-194; pg. 198;
(3) Trial transcript volume II (June 1, 2011), pp. 1-8; pp. 39-52; pp. 54-88; pp. 90-234; pp. 255-262; pp. 265-267;
(4) Trial transcript volume III (June 2, 2011), pp. 1-5; pp. 34-46; pp. 52-65; pp. 68-89; pp. 92-113; pp. 116-117;
(5) Trial transcript volume IV (June 3, 2011), pp. 1-4; pp. 10-27; pp. 29-47; pp. 52-113;
(6) State's Exhibit Number 52 (photograph);
(7) State's Exhibit Number 54 (photograph);
(8) Court's Exhibit #4 (Request to Charge);
(9) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 15th, 2012



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

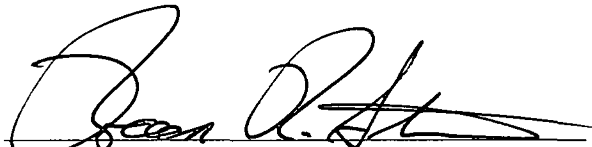
V.

LEONARD GOODWIN,

APPELLANT

CERTIFICATE OF SERVICE

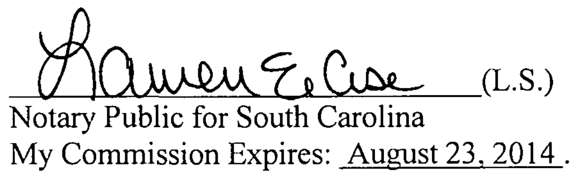
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of October, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.