STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Horry County
Honorable Edward B. Cottingham, Circuit Court Judge

RECEIVED
JUL 05 2017
S.C. SUPREME COURT

Opinion No. 2017-UP-119
(S.C. Ct. App. Filed March 15, 2017)

THE STATE,

RESPONDENT,

V.

JOSHUA GRIFFITH,

PETITIONER

APPELLATE CASE NO. 2017-001338

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

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

WILLIAM HARRY EHLIES, II
Ehlies Law Firm
310 Mills Avenue, Suite 201
Greenville, SC 29605

ATTORNEYS FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

1.

The Court of Appeals erred by holding the trial court did not abuse its discretion by refusing to direct a verdict of acquittal on the charge of murder since there was not direct or substantial circumstantial evidence that petitioner killed the victim with malice aforethought, since the evidence against the co-defendant having been the killer was overwhelming, and the stand-alone reply testimony of petitioner's former girlfriend that petitioner allegedly said he saw the victim die was not substantial circumstantial evidence of his guilt (facts of Issues 1 and 2) 4

Relevant facts 4
Directed verdict motion 10
Other evidence 11
Reply testimony 13
Directed verdict motion renewed 14
Opinion of the Court of Appeals 14
Discussion 14

2.

The Court of Appeals erred by holding the trial court did not abuse its discretion by refusing to direct a verdict on two counts of ABIK and criminal conspiracy since there was no direct or substantial circumstantial evidence petitioner committed the battery upon the injured victims 18

Relevant facts 18
Discussion 19

3.

The Court of Appeals erred by not finding reversible error in the refusal of the trial court to charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) circumstantial evidence charge, since that charge was needed and required after Logan, in this overwhelmingly circumstantial evidence case, and the judge had the duty to charge the law where it was applicable, as here....22

Relevant facts 22
Court of Appeals and rehearing....23
Discussion 23

4.

The Court of Appeals erred by failing to reverse the trial court's ruling which permitted petitioner's former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order, and her alleged accusations against petitioner, which were heard last by the jury was highly prejudicial sandbagging....26

Relevant facts 26
Court of Appeals and rehearing 29
Discussion....30

CONCLUSION 33

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 15, 2017.

QUESTION PRESENTED

1.

Whether the Court of Appeals erred by holding the trial court did not abuse its discretion by refusing to direct a verdict of acquittal on the charge of murder since there was not direct or substantial circumstantial evidence that petitioner killed the victim with malice aforethought, since the evidence against the co-defendant having been the killer was overwhelming, and the stand-alone reply testimony of petitioner's former girlfriend that petitioner allegedly said he saw the victim die was not substantial circumstantial evidence of his guilt?

2.

Whether the Court of Appeals erred by holding the trial court did not abuse its discretion by refusing to direct a verdict on two counts of ABIK and criminal conspiracy since there was no direct or substantial circumstantial evidence petitioner committed the battery upon the injured victims?

3.

Whether the Court of Appeals erred by not finding reversible error in the refusal of the trial court to charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) circumstantial evidence charge, since that charge was needed and required after Logan, in this overwhelmingly circumstantial evidence case, and the judge had the duty to charge the law where it was applicable, as here?

4.

Whether the Court of Appeals erred by failing to reverse the trial court's ruling which permitted petitioner's former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order, and her alleged accusations against petitioner, which were heard last by the jury were highly prejudicial sandbagging by the state?

STATEMENT OF THE CASE

Petitioner, Joshua "Blake" Griffith, was indicted by the Horry County Grand Jury for the offenses of murder, criminal conspiracy, and two counts of assault and battery with intent to kill (ABIK). Co-defendant Blake Brown was indicted for similar offenses. R. 711. Petitioner's case came on for trial from January 6-10, 2014, before the Honorable Edward B. Cottingham, and a jury. B. Alexander Hyman and Blake A. Hewitt, represented petitioner. Nancy R. Livesay, Martin D. Spratlin, and Carolina F. Fox were the assistant solicitors. R. 1.

On January 10, 2014, the jury found petitioner guilty on all counts. R. 695, ll. 1-17. Judge Cottingham sentenced petitioner to thirty years for murder and imposed concurrent sentences on the other counts.

Petitioner's conviction was affirmed by the Court of Appeals in State v. Joshua Griffith, 2017-UP-119 (March 15, 2017). App. 1-3. Petitioner sought rehearing. App. 4-27. Rehearing was denied. App. 28-29.

This petition for writ of certiorari follows.

ARGUMENT

1.

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

Relevant facts

Marianna Mays went to Myrtle Beach in September 2009 with petitioner Blake Griffith, her friend, Kayla Houck, and co-defendant Blake Brown. R. 25, l. 11 – 26. l. 23. They went to the beach on a Saturday and they planned to stay until Monday night. R. 27, ll. 2-17. The four young people stayed at the beach house on Sunday night, but when Mays and Houck awoke on Monday morning, their money was missing. Houck told the young men, Brown and petitioner Griffith that they had to leave. R. 31, l. 12 – 32, l. 17. Ms. Mays said, "I figured Blake Brown took it." However, Ms. Houck told petitioner that he also needed to leave. As will be seen clearly <u>infra</u>, Brown was widely thought to be "trouble." R. 32, ll. 21- 25.

The group got back together Monday night. Kayla Houck picked up petitioner Griffith and Blake Brown from Brown's house about 9:00 p.m. that evening. R. 35, ll. 4-9. The group went shopping, and the state would attempt to make much of the fact that petitioner purchased a knife at the Red Hot Shoppe that evening at about 11:00. R. 35, l. 13 – 36, l. 10. Mays said that both Brown and petitioner had knives that evening. "He [petitioner] wasn't flashing it or nothing like that. He just had it clipped on him." R. 36, ll. 3-24.

Mays remembered that their intention was to go back to the beach house after going out that evening. However, when they passed the Afterdeck Bar next to the Doll House they saw that the bar was packed. Mays remembered they all thought: "It's our last night, so I made a U-turn and we went back to the Afterdeck, all four of us. It was about midnight." R. 37, ll. 2-14. Blake Brown was "patted down" before they went into the bar. However, they were allowed in a "side door because we didn't have any money to pay for the cover fee to get in." R. 37, ll. 15-23.

According to Mays, Blake Brown was the only person with ties to Myrtle Beach who knew people there. None of the other three knew anyone at the Afterdeck that night. R. 38, ll. 10-24. Kenneth Lee Muth, the assistant manager of the bar, and the adjoining strip club would later testify he spotted Brown as "trouble" from first sight. Petitioner went with Blake Brown into the bar. Mays recalled: "We see [Brown and petitioner] a couple of times. We danced a couple of times with them. I mean, everybody was having a fun time. Like, I didn't see Blake Brown or Blake Griffith get mad; I didn't see them frustrated with each other. I didn't see any altercations whatsoever, like all four of us really were just having a good time." R. 39, ll. 5-17.

The four of them stayed at the Afterdeck for an hour and a half to two hours. Both petitioner Griffith and Blake Brown were wearing "wife-beaters" and shorts. Mays and Kayla left the bar and went to the car first. Mays telephoned petitioner on his cell phone, and he told her "we'll be out there in a minute." R. 40, l. 13 – 44, l. 21. As they were waiting in the car, after she talked to petitioner on the phone, they saw "people were busting out the doors, one guy was actually being carried out." Mays was confused about what was going on "then all of a sudden I see Blake Brown just run out the door and take off, doesn't hesitate to look around, just runs off." Mays saw two injured people coming out of the club. R. 47, ll. 6-24. One victim would die (murder count), and two were injured (ABIK counts).

Mays remembered that petitioner Griffith came walking to the car very calmly. She was very worried about petitioner. She asked him if he "had anything to do with this and he said 'yes' and that's when he took off running." Petitioner did not appear to be injured at all, he did not have any blood on him, but he appeared angry just before he ran away. R. 48, l. 23 – 50, l. 25.

While Mays was worried about petitioner, she did not care about Blake Brown. She asserted Brown, "was blowing my phone up, too" during this chaos. R. 52, ll. 3-25.

When Brown reached Mays on the telephone he said that he was back at the beach house. Mays agreed to let the police ride with her to the beach house. Petitioner was not there, but as will be seen infra, Blake Brown was arrested by the police after they arrived at the beach house. Brown approached the car Mays was driving, and the police pulled their weapons on Brown. R. 52, l. 7 – 53, l. 6.

On cross-examination, Mays repeated that she thought Blake Brown stole their money that Sunday night. She also said that Brown "had a cocky attitude," and that Brown had gotten in a fight at the Waffle House that weekend. Petitioner had nothing to do with Blake Brown's hostile actions. R. 64, l. 4 – 66, l. 23. Petitioner was having a good time, and she did not think petitioner was looking for "any trouble" at the Afterdeck or anywhere else that evening. Mays had the opposite opinion of Blake Brown. R. 67, l. 1 – 69, l. 1. Mays did not see petitioner do anything improper that weekend but she knew that Blake Brown had cocaine with him. R. 73, l. 10 – 76, l. 17.

Ashley McNeill was at the Afterdeck on that September 8, 2009 evening. She remembered seeing "two boys in white wife-beater shirts and one was holding a knife. So we told the bouncer and we saw the boys throughout the floor." R. 85, l. 8 – 87, l. 7.

Ashley remembered that her friend, DJ (the decedent), bumped into one of the men in wife-beater shirts, and that a "big fight broke out." She did not know who stabbed DJ, but she said the

knife was silver. R. 96, l. 7 – 115, l. 3. The defense told the jury in closing that Ashley was not believable. She testified she was eighteen-years-old, at this bar but claimed to be not drinking, She maintained that she saw petitioner with a silver knife even though neither knife carried that night was silver. Further, the bouncer disputed the assertion that anyone told him about any alleged knives. R. 652, l. 5 – 654, l. 2.

Ryan Palmer, twenty years old, went to the Afterdeck on September 8, 2009 with about ten friends. R. 160, ll. 4-23. He saw the two men, Brown and petitioner, together there. Palmer claimed both men stared at him as if there were a problem, and Palmer claimed both men "bumped him." A short time later he heard someone behind him say "you are about the get fucked up." R. 168, l. 9 – 170, l. 16. Palmer identified petitioner in the courtroom as being "the shorter guy." R. 170, ll. 10-16.

On cross-examination, Palmer admitted he gave a statement that Brown, the taller man, was the person he bumped into. It was Brown who "told him you are about to get fucked up." R. 187, l. 12 – 191, l. 1. Palmer thought Brown was the person who "cut him on the head because DJ and Griffith were next to him and he had just thrown a punch at Griffith." R. 190, l. 16 – 191, l. 7. Petitioner never touched him and he never saw petitioner with a knife that evening. R. 198, l. 7 – 199, l. 12.

Robert Penna was one of the men stabbed (ABIK) that evening. He had first claimed that petitioner, the shorter one, stabbed him that evening at the Afterdeck. R. 248, l. 17 – 250, l. 9. However, Penna then repeatedly admitted that he did not know who actually stabbed him, and he was just making assumptions because "*it happened so fast.*" R. 253, ll. 8-22. (emphasis added).

Penna maintained: "It took me a long time to kinda of come to terms with myself to remember what happened that night." He said the more he thought about it, the more he assumed it

must have been petitioner who stabbed him. He remembered he was "throwing what [punches] I could at Brown at the time." R. 263, ll. 7-22.

At another point on cross-examination, Penna was asked how he could assert that petitioner stabbed him and DJ that evening when he admitted he did not see who did the stabbing. Penna answered, "*I guess you are just going to have to take my word for it.*" R. 268, ll. 12-25. (emphasis added). On redirect examination by the solicitor, Penna even admitted: "I didn't see a knife at all." R. 270, ll. 3-5.

Penna acknowledged that he never saw petitioner with a knife during the struggle. He also admitted he did not know who stabbed and killed DJ that night. He told the police that he remembered very little of what occurred that evening, R. 263, l.7 – 268, l. 25. Penna finally admitted that he did not even know he had been stabbed until "someone told me I was stabbed." R. 274, ll. 3-11.

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

Muth recalled that the car that petitioner was driving pulled up in front of the Dollhouse. "There was two females in front, two males in the back." He remembered co-defendant Brown because he leaned out the window, stuck his forearm out the window, and he said, "yeah, I'm local, right here it says 843" and "he had 843 tattooed on him." R. 284, l. 15 – 285, l. 4.

After the incident, petitioner ran from the scene towards the inter-coastal waterway. R. 286, l. 6 – 290, l. 3. Detective Jim Chatfield with the Horry County Police Department responded to the Afterdeck on the morning of September 8, 2009. There were approximately 400 people there, and it was "basically out of control." R. 301, l. 18 – 302, l. 19. Chatfield was told that two people were

involved in the altercation. In the chaos at the Afterdeck, people were trampling over the crime scene and witnesses were leaving. He never saw Blake Brown or petitioner Griffith at the scene. R. 303, l. 7 – 306, l. 20.

On September 8, 2009, Sergeant Randall Gant of the Horry Police learned that a person of interest – petitioner – had possibly swam across a portion of the inter-coastal waterway. The police dog tracked the footprints and found petitioner laying on the ground. R. 310, l. 13 – 316, l. 12. Gant estimated the length of the swim was at least "half a mile, three quarters of a mile." R. 329, ll. 9-16.

The pathologist, Dr. Edward Proctor, testified that the decedent, DJ, had a stab wound in his left chest area. He died of massive bleeding and blood loss. The victim did not appear to have any other injuries other than the stab wound. R. 362, l. 17 – 365, l. 14.

Crime Scene Investigator Robert Deal testified that the police had located a green mossy oak folding knife and swabbed it to take a DNA sample. R. 404, l. 12 – 405, l. 22. SLED DNA/Serology Fitts testified that the swab from the knife handle had the major contributor DNA of Blake Brown. R. 425, ll. 1-25. Fitts did not find anything on the knife linking it to petitioner. R. 428, ll. 6-8.

Seth Rogers was drinking at the bar that evening. He saw Blake Brown, the taller white male, standing over the victim's body. He did not see petitioner until petitioner ran and said in an excited fashion: "We gotta go, we gotta go." Both men ran out of the parking lot, and then "I turned my attention back to my friends." R. 457, l. 23 – 464, l. 8.

Detective David "Rusty" Crocker, learned from the emergency room staff that the victim was dead. He went to the Afterdeck to assist in the investigation. R. 473, l. 11 – 474, l. 16. Crocker was told that Blake Brown was calling a female friend. Brown was requesting that she pick

him up at the beach house where they were staying so he could get back to Greenville. Crocker got consent to use the young woman's vehicle and he drove her vehicle to the beach house in North Myrtle Beach. R. 474, l. 17 – 475, l. 12. When he turned into the driveway, a vehicle was parked there, and there were two people inside. Crocker saw Blake Brown get out of the vehicle and approach the Jeep Cherokee. Crocker got out of the Cherokee and drew his weapon. He ordered Blake Brown to get on the ground. Crocker arrested both Brown and Brown's mother. He saw a Mossy Oak-style knife on the passenger floorboard. R. 474, l. 21 – 479, l. 2. *This knife contained Brown's and the victim's DNA*. Crocker had no contact with petitioner Griffith. R. 483, ll. 16-21.

Directed verdict motion

Defense counsel Blake Hewitt moved for a directed verdict noting there was no evidence that petitioner Griffith was brandishing a knife that evening. *This was a purely circumstantial evidence case*. Counsel noted that the one witness that came the closest said "you will have to take my word for it." This did not meet state's burden of proof at the directed verdict stage. R. 495, l. 5 – 497, l. 11.

Defense counsel focused strongly on the fact that the state had utterly failed to prove that petitioner did anything with malice aforethought as to both the murder and ABIK counts. Counsel argued that "eyeballing somebody" or even "talking trash" did not satisfy the state's duty to produce sufficient evidence of malice aforethought at the directed verdict stage, even with everything being accepted, as it must, in the light most favorable to the state. R. 487, l. 10 – 492, l, 2. Defense counsel noted that Blake Brown, whom the evidence pointed to as the guilty stabbing party, had pled guilty. R. 490, ll. 16-25.

The judge appeared to focus strongly on the fact that petitioner purchased a knife that evening; that a jury could believe that petitioner was acting with Brown, and that they wanted to

start a fight. R. 493, l. 14 – 494, l. 11. Defense counsel Hewitt continued to focus on the fact that the state's burden in this circumstantial evidence case had not been met, and there was no evidence of a conspiracy. The judge continued to point out there was evidence of "trash talking" that evening. Defense counsel argued that the mere fact petitioner purchased a knife, and that a person later died at the bar did not satisfy the state's burden of proof at the directed verdict stage. R. 417, l. 7 – 420, l. 11.

Other evidence

Kacie Henry testified she dated Blake Brown right after the incident in this case. She was aware of his arrest and the charges against him. R. 540, l. 15 – 541, l. 14. At one point petitioner lived with her. R. 541, l. 12 – 542, l. 1.

Kacie Henry testified that she talked to Blake Brown about the incident at the Afterdeck. The following occurred between petitioner's attorney and Henry:

> Q. Ms. Henry, I'm not real sure where we were when we left off, but I believe that you had stated you were from Greenville and that you were the girlfriend of Blakely Brown; is that correct?
>
> A. Yes.
>
> Q. Did Mr. Brown live with you at some point when you were in Greenville?
>
> A. Yes.
>
> Q. Okay. And did you and Blakely Brown speak about this incident that occurred at the Afterdeck?
>
> A. Yes.
>
> **Q. Did Blakely Brown ever tell you that he stabbed someone?**
>
> **A. Yes, he did.**
>
> **Q. How many people did he tell you that he stabbed?**

A. Three.

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

A. Yes, he did.

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

A. No.

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

A. Yes.

Q. As well as the other two men?

A. Yes, he did.

Q. Did he tell you that just once?

A. No, it was more than once.

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

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

Q. Okay. Do you know my client?

A. Yes.

Q. How long have you known my client?

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

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

A. No.

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

A. Yes.

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

A. No.

R. 544, l. 2 – 545, l. 16. (emphasis added).

Christopher Whiteside was a good friend of petitioner Griffith. He met Blake Brown at a party at a Hampton Inn in Travelers Rest. He heard Blake Brown admit that he stabbed three people, and that he had killed someone. R. 565, l. 14 – 567, l. 7; r. 573, l. 18 – 574, l. 11.

Theron Nalley met Blake Brown at this same party at the Hampton Inn in Travelers Rest in the summer of 2010. He heard Blake Brown admit that he stabbed three people, and that someone died. R. 589, l. 9 – 590, l. 25. On cross-examination, Theron denied that petitioner was at this party. R. 592, l. 19 – 593, l. 20.

Reply testimony

Over objection,[1] the state was allowed to offer the reply testimony of Kayla Houck, who, as will be seen infra, was in violated the sequestration order. Houck testified that she talked to petitioner two days after he made bond. Houck said that petitioner told her that he was sorry for what had happened, and that he said he had seen someone die that evening. Houck said petitioner did a "falling back" motion to apparently describe how the victim fell. She alleged that petitioner said of the other knife: "That shit it [is] long gone." Houck said she did not tell anybody about this discussion because she was good friends with petitioner's family. R. 608, l. 22 – 610, l. 9.

Houck testified that she interpreted petitioner's expressions above as an apparent admission to murder. She offered to the jury: "I don't want to be friends with a murderer." R. 610, ll. 7-24. On cross-examination, Houck finally admitted that she had spoken with prosecution Investigator Carmen Mureddu, and that she never alleged that petitioner admitted any involvement in the crime.

---

[1] See Issue 4 below.

Houck gave a full statement in 2010 to the investigator, and never mentioned any of her allegations she was making in court that day as the final witness the jury would hear. R. 612, l. 9 – 613, l. 14.

Direct verdict motion renewed

Defense counsel renewed his previous motion for a directed verdict. The judge stated there was sufficient evidence to go forward to the jury, and that he was not going to direct a verdict. R. 621, l. 4 – 623, l. 1.

Opinion of the Court of Appeals

This case was orally argued in the Court of Appeals on September 8, 2016. On March 15, 2017, the Court of Appeals dispatched of the directed verdict issues in a summary opinion which had a one paragraph holding which respectfully did not apply the facts to the law **at all.** App. 1-2.

Petitioner filed a very specific petition for rehearing which respectfully emphasized the deficiencies with the summary opinion. As will be seen infra, these deficiencies included the fact that two of the cases the Court cited for affirmance on the circumstantial evidence instruction issue were outdated cases. App. 4-6; app. 4-27.

Discussion

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

There was no substantial circumstantial evidence petitioner caused injuries to the victims or the death of the decedent. The state's witnesses, as defense counsel Hewitt argued, did not provide

the necessary circumstantial evidence to get beyond the directed verdict stage. One witness, when challenged about his obvious memory problems or inconsistent statements arrogantly asserted, "You have to take my word for it." Further, defense counsel also correctly argued to the trial judge that "eyeballing somebody" or even "trash talking" did not satisfy the state's burden of proof at the directed verdict stage, in the light most favorable to the state.

As seen, the trial judge focused much attention on the fact that petitioner purchased the knife that evening. Brown already had a knife, and the only DNA found a knife belonged to Brown and the victim. Further, the judge's reasoning that the jury could believe that petitioner was acting with Brown, and that both men wanted to start a fight that evening was not substantial circumstantial evidence that petitioner murdered the decedent or committed ABIK upon the two living victims.

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

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

This Court is obviously very aware of the facts of State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). In Bostick, this Court held the state failed to produce substantial circumstantial

evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and she always brought the collection proceeds home on Sunday afternoon. Investigators found the victim's personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

This Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and that gasoline was the accelerant used to start the fire at the Polite home. This Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.[2]

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

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs. When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar on the night of the murder, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight." This Court held that this circumstantial evidence was *not substantial*

---

[2] Petitioner is aware that this Court wrote in State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 807, n. 5 (2016) that directed verdict cases such as Bostick are necessarily very fact intensive and limited to their peculiar facts. Petitioner respectfully submits that a proper application of the intensive facts of this case *to the law of directed verdicts* reveals the state did not offer substantial circumstantial evidence of petitioner's guilt, the trial judge should have directed a verdict, and the Court of Appeals should have reversed on appeal.

circumstantial evidence, and it was insufficient to take the case to the jury. The Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In Schrock, the defendant admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. This Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

Brown was the "local boy" in this case, and proud of it as shown by him displaying his "843" tattoo to the Afterdeck assistant manager. Petitioner was the outsider, the evidence in this case strongly showed that Brown was the culpable party. Brown got an incredible deal despite his obvious guilt.[3] In the final analysis as to petitioner Blake Griffith the state failed to provide the trial judge with substantial circumstantial evidence that petitioner murdered the decedent.

---

3 A prior search of the South Carolina Department of Corrections website, the inmate search detail report, showed Brown was serving an eight year sentence for accessory after the fact. He had already been eligible for parole in December, 2014, and he was scheduled to "max out" in November, 2017 – this year, if he has already not been paroled. Petitioner understood that Brown pled guilty, but petitioner Griffith is not scheduled for release from his thirty year sentence for murder until 2039, twenty-two years into the future after already having served seven years in a case where the state, respectfully, failed to present substantial circumstantial evidence of his guilt in a case where Brown was the bad actor, and the trouble maker, and where, as argued above, petitioner did not receive a fair trial.

2.

The Court of Appeals erred by holding the trial court did not abuse its discretion by refusing to direct a verdict on two counts of ABIK and criminal conspiracy since there was no direct or substantial circumstantial evidence petitioner committed the battery upon the injured victims

Relevant facts

The state also failed to present substantial circumstantial evidence that petitioner stabbed Ryan Palmer or Robert Penna. Palmer and Penna went to the Afterdeck that evening with their friends D.J. (the decedent), Michael Parker, Tom Covino, Alex Assanto, Nick Williamson, "and several girls." R. 162, l. 9-25. Palmer remembered "when we first got there around midnight it probably wasn't as packed as it was toward around when this incident occurred. I'd say within a few hours, a lot more people had shown up throughout the night." R. 162, ll. 9-15.

Palmer testified he did not have any weapons with him, and he also said "as far as he knew," none of the people in his party had a weapon. R. 161, l. 18 – 162, l. 5. Palmer was twenty years old at the time, and he said he had "a little bit" to drink before he arrived at the Afterdeck, and he was allowed to drink at the bar despite the fact he was underage. R. 161, ll. 18-22.

Palmer remembered that he "bumped into" Brown "the taller one" that night. R. 165, ll. 10-19. Palmer claimed that both Brown and petitioner then stared at him at that point "as if there was a problem." R. 165, l. 22 – 166, l. 1. On cross-examination, Palmer admitted that he told the investigator that Brown told him: "You're about to get fucked up." Palmer also acknowledged that an investigator's report prepared after the incident showed he thought Brown was the one who stabbed him on the head. R. 189, l. 10 – 191, l. 7. Palmer admitted that petitioner never touched him that night even though Palmer admitted throwing a punch at petitioner. Palmer denied he

"blindsided" petitioner when he hit him, and he also denied he was "looking for a fight" that evening. R. 198, l. 21 – 200, l. 6.

Robert Penna, the other ABIK victim, as seen, repeatedly admitted he was making assumptions when he first claimed that petitioner was the person that stabbed him. R. 248, l. 17 – 253, l. 22; r. 263, ll. 7-22. Penna was defiant when challenged about his assumptions, stating: "I guess you're just going to have to take my word for it." Penna also admitted he did not see petitioner with a knife during the struggle, **he did not even see a knife at all, and he did not even know he was stabbed until someone told him.** R. 268, l. 12 – 274, l. 11.

Petitioner incorporates the remainder of the evidence from the directed verdict argument in issue one above, including defense counsel's argument that "eyeballing somebody" or even "talking trash" did not satisfy the state's duty to produce sufficient evidence of malice aforethought at the directed verdict stage. R. 487, l. 10 – 492, l. 2.

Discussion

The state only presented circumstantial evidence attempting to show petitioner stabbed Palmer or Penna. Similarly, the state only offered circumstantial evidence that petitioner was acting in concert with Brown, that he had joined with Brown "to commit unlawful acts" that evening such that he could be held criminally responsible for Brown's actions under a theory of accomplice liability because they were the "probable or natural consequences of the acts" done by Brown. R. 632, l. 13 – 634, l. 4. The evidence in the case, at best, raised a suspicion of petitioner's guilt to the crimes of ABIK and criminal conspiracy which was insufficient to withstand a directed verdict motion. See, State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). Since the state failed to produce *substantial circumstantial evidence* that petitioner was guilty of the ABIK counts in this case, and conspiracy, petitioner was entitled to a directed verdict. See, State v. Barroso, 320 S.C. 1, 30, 462

S.E.2d 862, 880 (Ct App. 1995)(directed verdict for James Smith where the state did not prove his guilt of conspiracy or the substantive offense, *rev on other grounds* State v. Barroso, 328 S.C. 268, 93 493 S.E.2d 54 (1997)). See, also, State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

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

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

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

The testimony of Palmer and Penna, and other state's witnesses cannot be deemed substantial circumstantial evidence necessary to withstand a directed verdict motion given this Court's precedents discussed above of State v. Martin, 340 S.C. 597, 533 S.E.2d 532 (2000), and

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), and State v. Bostick, supra, and State v. Odems, supra. The standard in a circumstantial evidence case is **substantial circumstantial evidence**, the state failed to meet that standard, and an application of the law to fact intensive facts of this case -- which was not done below App. 2 -- respectfully reveals the conclusion that justice requires a directed verdict for petitioner Griffith under the highly unusual facts of this case.

The trial judge erred by refusing to direct a verdict of acquittal on the two counts of ABIK and conspiracy since the state failed to offer substantial circumstantial evidence of petitioner's guilt. This Court therefore should also grant certiorari as to the directed verdict issue on those remaining counts.

3.

The Court of Appeals erred by not finding reversible error in the refusal of the trial court to charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) circumstantial evidence charge, since that charge was needed and required after Logan, in this overwhelmingly circumstantial evidence case, and the judge had the duty to charge the law where it was applicable, as here, and where it was mandated.

Relevant facts

At the close of the evidence, and prior to closing arguments, the trial judge told the jury that his law clerk would instruct them on the law due to some health problems he was suffering at the time. Both sides agreed that the law clerk could read the instructions to the jury. R. 623, l. 2 – 625, l. 5.

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

> There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. **The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.** You should weigh all of the evidence in this case. After weighing all the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

R. 629, ll. 6-23 (emphasis added).

Defense counsel Hewitt took exception to this instruction on circumstantial evidence, and he requested that the judge charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) jury instruction. The judge refused to give the State v. Logan circumstantial evidence instruction ruling: "I have given you the circumstantial evidence that has previously been approved by the courts." R. 647, l. 10-23.

Court of Appeals and rehearing

The Court of Appeals, in a summary paragraph, found the failure to instruct the requested Logan circumstantial evidence instruction, in this circumstantial evidence case, despite the mandate of Logan was not reversible error. App. 2-3. Petitioner noted on rehearing that:

> This Court should grant rehearing because it overlooked the fact that State v. Drayton, 411 S.C. 533, 543-46, 769 S.E.2d 254, 259-61 (Ct.App. 2015) and State v. Jenkins, 408 S.C. 560, 572-73, 759 S.E.2d 759, 766 (Ct.App. 2014), which are the foundations of its affirmance on the jury charge issue in this case, were both tried before State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), was decided, and therefore the Logan circumstantial evidence instruction could not have been requested in those cases. In State v. Logan the Supreme Court held, *when requested, as in this case,* the trial court *should provide* the Logan circumstantial evidence instruction.
>
> The Logan Court also held that trial courts *may not rely on the former circumstantial evidence charge over objection.* Trial counsel here requested the Logan instruction, and he objected to the trial court's reliance on the former circumstantial evidence charge. This was an overwhelmingly circumstantial evidence case where the judge had the duty under Logan to charge the Logan instruction, where it was applicable, as here.

App. 4-5; app. 15-20.

Discussion

In State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013), this Court stated that when requested to do so by a defendant, as here, "We **hold** that the trial court **should provide** the

following language as a circumstantial evidence charge, in addition to the proper reasonable doubt instruction:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, *however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Defense counsel correctly argued to the judge at the directed verdict stage that this was a circumstantial evidence case, and that the state had failed to offer sufficient circumstantial evidence against petitioner for this case to go to the jury. Once the case did go to the jury, the manner in which circumstantial evidence was analyzed by the jury became critical. The jury was instructed that: "The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." R. 629, ll. 6-23.

It is clear beyond cavil that if the jury had analyzed the circumstantial evidence in this case under the correct Logan standard that "to the extent the State relies on circumstantial evidence, **all of the circumstances must be consistent with each other, and when taken together**, *point conclusively to the guilt of the accused beyond a reasonable doubt,*" there is every reason to

believe the jury would have determined that the state had failed in its burden of proving petitioner guilty of murder and the other crimes in this case beyond a reasonable doubt. State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013).

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

In the final analysis, petitioner most respectfully submits that if a directed verdict is not granted in this case, petitioner should at least be granted a new trial where the jury is properly instructed on the law – the manner of analyzing – circumstantial evidence. If ever there was a case where that analysis was critical, it was this case.

4.

The Court of Appeals erred by failing to reverse the trial court's ruling which permitted petitioner's former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order, and her alleged accusations against petitioner, which were heard last by the jury was highly prejudicial sandbagging.

Relevant facts

The defense made a motion to sequester all lay witnesses R. 3, ll. 5-10. The court actually appears to have suggested a sequestration of *all* witnesses, R. 3, ll. 11-12, and ultimately granted the motion. R. 3, ll. 15-16. The state requested that a few witnesses be permitted to remain in the courtroom during the trial. R. 3, ll. 17-25; R. 4, ll. 2-19. The judge permitted several witnesses to remain in the courtroom despite the sequestration order, but Houck was not one of them. R. 3, ll. 17-20.[4]

As part of the motion to sequester witnesses, the defense asked that eyewitnesses who did testify be remanded to the courtroom or elsewhere out of the courthouse and not permitted to re-enter the same room with the other sequestered eyewitnesses who had not yet testified. R. 4, ll. 20-25; R. 5, ll. 1-22. Defense counsel made this additional request because many statements were made that did not correlate with one another. R. 4, ll. 23-25. The judge granted this

[4] See, e.g., R. 136, ll. 8-17 (solicitor acknowledged the existence and binding character of the court's sequestration order); R. 138, ll. 10-25, R. 139, ll. 1-10 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order); R. 208, ll. 6-7 (court repeated enforcement of the sequestration, as well as its purpose, via instructing the State's witness not to discuss his testimony with any of the other witnesses); R. 281A, ll. 8-11 (court granted defense counsel's request that witnesses be instructed not to discuss their testimony with other witnesses); R. 514A, ll. 8-19 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order).

request. R. 5, ll. 11-12; R. 14, 20–21. He also informed the defense that he would instruct the witnesses not to discuss their testimony with other witnesses. R. 5, ll. 14-16.

The state called Houck in reply. R. 604, ll. 6-9. The solicitor avered that Houck would "be saying that Blake Griffith told her that he stabbed the deceased boy." (The evidence falls woefully short of this assertion). R. 604, l. 25 – 605, l. 1. The Defense objected because Houck had remained in the courtroom throughout the trial violating sequestration. R. 605, ll. 7-8; R. 605, ll. 20-23. R. 603, l. 25, R. 604, l. 1; R. 605, ll. 7–8. Argument was heard outside the presence of the jury; however, counsel even attempted to note this objection in the presence of the jurors before they were sent out. R. 603, l. 25 – 604, l. 1.

The state argued that the court's sequestration order did not apply to Houck because she was not testifying as a "fact witness—" R. 605, ll. 11-18. The court ultimately allowed Houck's testimony, reasoning that she would not be testifying as to the events on the evening of the altercation. Her testimony would be limited to a response to the petitioner's defense of third-party guilt. R. 605, ll. 24-25; R. 606, ll. 1-12.

Houck claimed to have had a conversation with Griffith about the incident a couple of days after he bonded out. R. 608, ll. 19-24. This conversation allegedly occurred at Griffith's home when Houck went there to pick him up and take him to a nearby shopping center. R. 609, ll. 2-3. Griffith said something like: "I can't -- I can't believe this happened. I'm sorry that I got you guys into this, but I saw the life come out of that guy's eyes" R. 609, ll. 4-7. As Griffith said this, immediately thereafter, he made a motion of falling backward. R. 609, l. 9. Houck also claimed another conversation with Griffith about the "weapon." R. 609, ll. 9-10. Griffith said, "that shit is long gone." R. 609, ll. 10-11.

Houck admitted to speaking with Carmen Mureddu, state's investigator, in October 2010—after the conversations with Griffith, but she did not mention these conversations during the interview. R. 612, ll. 9-25; R. 613, ll. 1-14; R. 617, ll. 3-5. According to Mureddu's summary notes from this interview, Houck stated that "Griffith told her he saw Brown stab one guy in the head and he saw Brown pin another down and stab him in his side rib cage area" R. 615, ll. 14-16, and that Griffith was "hit and kicked during the fight." R. 615, ll. 17-18. In context, Houck claimed that Griffith had actually told her these other things about the weapon being gone, and the victim falling backward, and seeing the life come out of him, *which Houck apparently decided was an admission that petitioner was a "murderer."* The solicitor cleverly worded his question: "But you're also *trying to say* that he also said that he stabbed this guy." She answered: "He did tell me that." R. 617, l. 22 – 618, l. 7.

Houck actually waited two years to tell authorities this story. R. 609, ll. 12-14. When asked why she did not do so immediately, she answered that she had been "really good friends with his family" and was "on the fence whether [she] wanted to mess that relationship up with them or get involved in something that [she] necessarily didn't want to be involved in and do the right thing." R. 609, ll. 15-20. By ultimately choosing to come forward regarding these alleged conversations, she believed she had "chose[n] to do the right thing" R. 609, ll. 20-21. She was no longer friends with Griffith and she did not "want to [be] friends with a murderer." R. 610, l. 15.

Defense counsel made a post-trial motion for a new trial based on this adverse ruling, arguing that Houck's reply testimony was in violation of the court's sequestration order. R. 698, ll. 23–25. In the alternative, defense counsel argued that Houck's testimony was "not responsive" to the evidence that Griffith's former co-defendant, Blakely Brown, said that he had

stabbed the deceased victim at the Afterdeck. R. 699, ll. 1-3. According to defense counsel, if the judge was going to admit Houck's testimony despite the sequestration order, he should have limited this testimony to "whether anyone made statements that were inconsistent with Blakely Brown's statement." R. 699, ll. 3-5.

To this argument, the state responded that Houck's testimony was "a proper rebuttal" because "the Defendant had admitted to her that he had done the killing" and "there was evidence presented in the Defense's case that the Codefendant had been the stabber." R. 701, ll. 13-17. Furthermore, the state argued that the decision of whether to allow rebuttal testimony is "in the discretion of the Court." R. 700, ll. 12-13.

Defense counsel then preserved this issue for appeal again in an explicit manner, and the court acknowledged and accepted this preservation. R. 702, ll. 18-21. Despite the argument, the court ruled "[t]he verdicts will stand as indicated." R. 703, ll. 12-13.

Court of Appeals and rehearing

In a short paragraph in a summary opinion the Court of Appeals affirmed on this issue as well. App. 3. In its summary opinion the Court of Appeals held that to permit a witness to testify as a reply witness when she violated the sequestration order, and to exempt a witness from a sequestration order were both matters within the discretion of the trial court. State v. Joshua Griffith, 2017-UP-119 (March 15, 2017) at p. 2. App. 3.

Petitioner argued at length on rehearing why the Court's holding on this issue was error, and why rehearing should have been granted. "Rehearing should be granted in this case because the state strategically used Houck as reply witness, who had violated the sequestration order, to prejudice Petitioner to the maximum degree. Houck was the last witness heard by the jury, and

she completed the state's case-in-chief giving the state an incredible unfair procedural advantage." R. 607-620. See Rehearing petition. App. 20-27.

Discussion

If a witness violates a sequestration order, the court may subject the offending witness to discipline, or exclude the testimony of the offending witness. See United States v. Leggett, 326 F.2d 613, 614 (4th Cir. 1964). The discretion of the court with regard to such exemptions and exceptions from sequestration cannot be *arbitrary*. State v. O'Neal, 210 S.C. 305, 42 S.E.2d 523 (1947). The exclusion rule serves to prevent one witness from shaping his or her testimony to match the testimony given by other witnesses at trial. Leggett, 326 F.2d at 613–14. The trial court's decision to admit the testimony of a reply witness who violated a sequestration order will be overturned if the appellate court finds this decision to be *an abuse of discretion* and if the testimony of the offending witness *prejudiced the defendant at trial*. See State v. Carmack, 388 S.C. 190, 197–98, 694 S.E.2d 224, 227-228 (Ct. App. 2010) (citing State v. Sullivan, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981)[5]; State v. Jackson, 265 S.C. 278, 282, 217 S.E.2d 794, 796, (1975)).

- Houck had no reason or valid purpose to be in the courtroom and was thus seriously blameworthy. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).
- The solicitor never denied a violation of the order, but only argued she was not a fact witness. R. 605, l. 6 – 606, l. 12. State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961).[6]

---

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

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

- Houck was not sequestered. State v. Simmons, supra.
- The solicitor well knew she may need to call the witness. The prosecution knew that Houck, now the former girlfriend, had formed her "conclusions" from Petitioner's alleged statements as shown above. State v. Cabbagesgtalk, 281 S.C. 35, 314 S.E.2d 10 (1984).
- While her testimony involved a purported discussion with Petitioner after the melee, it was directed to what happened then as discussed by the witnesses who were present. It came right after the defense witnesses who testified strongly for Petitioner. Cf. State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App 2011). (Reply testimony not admitted to complete the story).
- The solicitor was aware of what Houck conclusions she had drawn from her discussion with Petitioner, and what she was going to say before trial. State v. Simmons, supra.
- Defense counsel had, as a practical matter, no real ability to demonstrate Houck's testimony would be different absent sequestration. State v. Miokovich, 257 S.C. 225, 227-28, 185 S.E.2d 360, 361 (1971).
- There was no violation of sequestration by defense witnesses. State v. Cabbagestalk, supra.
- The testimony far exceeded the scope of legitimate reply. Houck's testimony was sandbagged. Her observation that she did not like to associate with murderers was highly prejudicial and not in reply to the defense case, as were her self-serving reasons for withholding evidence. Also, her testimony *was not that "Blake Griffith told her that he stabbed the deceased boy" as the solicitor*

claimed. R. 604, l. 25 – 605, l. 1. Cf. State v. Hall, 268 S.C. 524-529, 235 S.E.2d 112, 114 (1977).[7] (Legitimate limited real reply testimony not an abuse of discretion.

The judge ruled her testimony did not violate the sequestration order because she was not a fact witness. There was no finding that she had been properly sequestered. R. 605, ll. 8-12. The judge's ruling that Houck could testify was **wholly arbitrary**. He granted sequestration on the state's motion, R. 571, ll. 8-13, as to defense witnesses Whiteside and Nalley, who were in the exact same posture as Houck – testimony as non-eyewitnesses to discussions after the fact. Arbitrary is defined in the American Heritage Dictionary, 2nd College Edition (1983) as: Determined by whim or impulse, not by reason or law. This ruling is a text book example. The last witness the jurors heard edified that "I don't want to be friends with a murderer." R. 610, l. 15. This testimony invited the jury to draw spurious and unwarranted inferences concerning Petitioner's unproven guilt.

The Houck evidence here was, *de facto*, admitted to complete the state's case-in-chief. State v. Huckabee, 388 S.C. 236, 243, 694 S.E.2d 781, 786 (Ct.App. 2010), and it was sandbagging at its worst 3.

Certiorari should be granted on this issue as well.

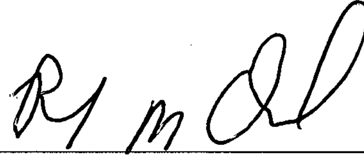
---

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

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on these four issues.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable Edward B. Cottingham, Circuit Court Judge

Opinion No. 2017-UP-119
(S.C. Ct. App. Filed March 15, 2017)

THE STATE,

RESPONDENT,

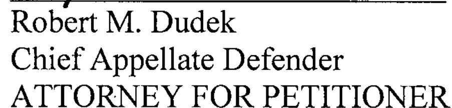
V.

JOSHUA GRIFFITH,

PETITIONER

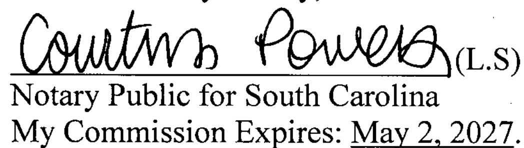
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joshua Griffith, #358482, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 5th day of July, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of July, 2017.


(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.