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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Cherokee County
John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2012-207559

The State,

Respondent,

vs.

Kevin Tyrone Bennett,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in denying the motion for directed verdict on the charge of burglary.

STATEMENT OF THE CASE

Appellant Bennett was indicted for second degree burglary, petit larceny, and malicious damage to real property. Bennett was tried by jury and convicted as charged following trial on January 24-25, 2012. The Honorable John C. Hayes, III sentenced Bennett to ten years' imprisonment.

STATEMENT OF FACTS

Appellant Bennett was convicted for the nighttime burglary of the C.C. Woodson Community Center. He left his prints and DNA behind.

Officer Frank Osrechek was the first officer to respond after the alarm went off at the community center at about 3:30 a.m. He found a window smashed out and the door adjacent to the window broken. The glass was shattered "in thousands of pieces."¹ He found holes in the wall and mounting anchors on the floor where it appeared a television had been. Officer Osrechek applied fingerprint dust to a number of items. He was able to lift prints from a television mounted on the wall in the community room. It appeared the television was manipulated as if someone was trying to remove it. There were chairs placed below the television. ROA. pp. 7-15; p. 24; pp. 26-27.

Officer Steve McClure also responded to the Community Center. A computer appeared to be missing. There were two chairs out of place against the wall as if

¹ ROA. p. 11, lines 20-22.

someone was using them as leverage. They were underneath where a television had been. Officer McClure also recovered a tire iron from the computer room. ROA. pp. 27-31.

The director of the community center, Olivia Sartor testified. She confirmed that two televisions, a computer monitor, and keyboard were all stolen. She testified the community center's hours were 6 a.m. to 9 p.m. While the community center room is not locked when not in use, it is not a room open to the public or for people to merely sit and socialize. It is only used for scheduled events. Sartor saw Bennett in the community center several times before the burglary, but never in the community room. Usually there were group meetings at the time he was commonly at the center such as the senior citizens craft group or bridge group. He was not involved in any of the activities in the community room and the only program he was involved in at the center was in the computer lab. Sartor was monitoring him when he was in the hall or computer room. ROA. pp. 41-48.

She testified to the following:

Q: Do you routinely monitor people who are in the building?

A: Well, I usually monitor people who seem suspicious to me, that really don't have a purpose, and Mr. Bennett normally walked through the building and he actually ended up going to the computer lab because I suggested that he pick a particular program to be a part of.

ROA. p. 50, lines 11-15.

She noticed abrasions on the wall by the two television sets in the community room where it appeared something was used in an attempt to pry the television sets from

their mounts. ROA. p. 51.

Chris Banks from the Spartanburg Public Safety Department arrived at 9:30 a.m. for a follow up investigation to determine if anything was missed. He found two small droplets of blood located two inches below where the stolen television in the computer lab had been. It was about one and half to two feet above the chairs propped underneath the television. ROA. pp. 53-56.

The DNA analyst determined that the DNA in the blood was a one in seventeen quintillion match to Bennett's DNA. ROA. p. 95. The fingerprints on the television in the community center matched Bennett's prints. ROA. pp. 116-118; p. 136.

ARGUMENT

The trial court did not err in denying the motion for directed verdict on the charge of burglary.

Bennett claims that the trial court erred in denying his motion for directed verdict, arguing that although his DNA matched blood droplets found at the crime scene and his fingerprints were found on a television in the community room, there was insufficient evidence that the blood or fingerprints were not left at some other time he was present in the community center. However, Bennett's argument is based on a superficial view of the evidence.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must put the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

In the instant case, a window was shattered leaving a thousand pieces of glass. Droplets of Bennett's blood was found directly under a stolen television. This evidence creates a strong inference that Bennett cut himself with glass and left blood under the television set he stole. Additionally, the community room in which his fingerprints were found was not open to the public, but only available for meetings of groups he was uninvolved with. The State's evidence indicates he was never in the community room during regular operating hours and would not be allowed in the room merely to hang out or

watch television. The television he left his fingerprints on appeared to have been manipulated as if someone was attempting to remove it and two chairs were placed below the television as if the burglar was standing on them during the attempt to remove the television.

Bennett attempts to argue that evidence in this case is weaker than evidence in circumstantial evidence cases where directed verdict was granted. However, his analysis fails. Bennett relies on State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the appellant was present at the burglary victim's house on three prior occasions. The sole evidence regarding identity was a fingerprint found on a window screen propped up against the house near the broken window that was apparently the point of entry. No evidence was presented that the screen was on the window at the time the window was broken. The Supreme Court found "the fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house on at least three times prior to the burglary." Id., 341 S.C. at 409, 535 S.E.2d at 127.

Unlike Mitchell, Bennett's fingerprint was in a room that evidence established Bennett would not have otherwise been in except if he was the burglar. This case is further distinguished from Mitchell because there was fingerprint evidence **and** DNA evidence linking Bennett to the burglary. Additionally, evidence was presented that Bennett was loitering around the facility for no apparent purpose before the director suggested he become involved in some activity. This suspicious activity does not seem to have been present in the case against Mitchell.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), there was no evidence presented that Odems was even at the scene of the burglary – instead he was found in a car with stolen goods and two burglars, and fled. The burglars testified they picked him up at a gas station after the burglary. The burglars’ prints were found on stolen items, but no fingerprints matching Odems were found. Id. So evidence in the instant case is much stronger than in Odems, upon which Bennett relies. Unlike Odems, Bennett is linked to the crime scene by fingerprint evidence, as well as DNA evidence. The fingerprint was found on an item that evidence tended to show the burglar attempted to steal – the television in the community room. Evidence in this case is considerably stronger than the evidence presented in Odems.

This case also bears little resemblance to State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). In that case, the murder victim, a doctor, had a clandestine affair, first with the State’s chief witness and then with Arnold, in Savannah. The victim borrowed a BMW that day from a co-worker and then disappeared and was subsequently found dead off a road in Colleton County. The BMW was found abandoned in Tennessee. Arnold’s thumbprint was found on a coffee cup lid found in the BMW. At the time these events occurred, Arnold travelled from Savannah to Tennessee, although the State failed to present any evidence to the jury of how close to where he was staying the abandoned car was found. Accordingly the only evidence the jury had was that Arnold had a sexual relationship with the victim, he was in the BMW the day that the victim went missing, and he was in the same state where the BMW was found. Id., 361 S.C. at 389-90, 605 S.E.2d at 530-31.

In the instant case, the fingerprint was found on an item that the burglar attempted to steal, in a room that Bennett was not previously in, so the location of the print is far more probative; and the DNA evidence was found inches away from where the other television was stolen. The majority in Arnold noted that no evidence placed Arnold at the scene of the crime in Colleton County. Id., 361 S.C. at 390, 605 S.E.2d at 531. The evidence is far stronger in the instant case.

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) offers little assistance to the present case. In Bostick, the victim died of carbon monoxide poisoning from an arson in her house, but she had also been struck by a blunt force object. Some of her items were found in a burn pile in the yard of Bostick's mother, but no evidence established his control over the pile. His mother's yard was about a quarter mile away from the victim's house. He had blood on a pair of jeans. However, when analyzed for DNA evidence, the expert was able to exclude ninety-nine percent of the population, but could not actually match the blood to the victim. Accelerant was used in the arson and on the items in the burn pile, and traces of fresh gasoline were found on Bostick's shoes. Id.

The instant case is stronger than Bostick because there was an actual DNA match and also, fingerprint evidence, implicating Bennett. Additionally, unlike Bostick, the evidence placed Bennett at the scene of the crime.

Instead, more useful for analysis is Mutcherson v. State, 696 So.2d 420 (Fla. Dist Ct. App. 1997). In that case, fingerprint evidence was found on three different gumball machines that were separately vandalized at three separate locations in a neighborhood. The fingerprints were found on the side and back of the gumball machines where

customers' fingerprints would not be expected to be found. The Mutcherson court opined as follows:

First, we recognize that a single fingerprint in a public location is not sufficient to establish the identity of the burglar. . . . Unless there is other evidence of identity, the state must show that the prints could have been made only at the time the crime was committed. . . . This case involves three sets of fingerprints on vandalized machines under circumstances strongly suggesting that they were not the prints of a customer, but of a thief. Although we have located no precedent directly on point, we conclude that this cumulative evidence is sufficient to establish that Mr. Mutcherson committed the burglaries. Had the prints been on the front of all three machines, the outcome might be different.

Id., 696 So.2d at 422. See also Hutchinson v. State, 347 S.E.2d 315 (Ga. Ct. App. 1996) (finding that directed verdict was not warranted where no evidence presenting a reasonable explanation of how appellant's fingerprint's came to be on broken piece of glass near point of entry was presented other than the conclusion he was the burglar).

The fact that Bennett's fingerprint was on a television intended to be taken by the burglar is further bolstered by the DNA evidence found immediately below a television that was taken, amplifying the evidence of identification against Bennett. These two pieces of evidence were discovered in separate rooms that both happened to be burglarized resulting in a cumulative effect between the two pieces of evidence.

Accordingly, substantial circumstantial evidence indicates Bennett was the burglar and accordingly, the trial court did not err in allowing the jury to determine Bennett's guilt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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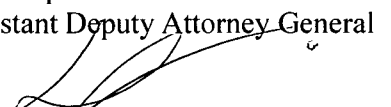
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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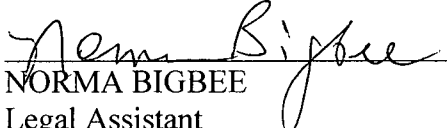
APPELLANT.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 21st day of June, 2013


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