STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

APPELLANT

APPELLATE CASE NO. 2012-212563

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict of acquittal on the charges of burglary in the first degree, armed robbery, kidnapping, and grand larceny, since the only evidence that appellant participated in this crime was his DNA was found on a piece of duct tape -- left at some point somehow -- since sending this case to the jury on that single shred of evidence invited a verdict based on speculation?

STATEMENT OF THE CASE

Appellant was indicted by the Clarendon County Grand Jury for the offenses of burglary in the first degree, armed robbery, kidnapping, and grand larceny. R. 361. Michael Pearson was the co-defendant in this case. He was indicted for the same offenses, and also possession of a weapon during a violent crime.

Their joint cases were called to trial on May 14, 2012 before the Honorable Ralph F. Cothran, and a jury. Ernest A Finney, III and Jason Corbett were the prosecutors. John Knobeloch and Laura Knobeloch represented appellant, Victor Weldon. Michael Pearson was represented by Harry Devoe. R. 1.

On May 18, 2012 the jury found Appellant Weldon and co-defendant Pearson guilty on all counts. R, 354, l. 10 – 355, l. 9. Co-defendant Pearson was also found guilty of possession of a weapon during a violent crime. R. 355, ll. 7-9.

Judge Cothran sentenced Appellant Weldon to thirty years imprisonment for burglary in the first degree, thirty years *consecutive* for armed robbery, twenty years concurrent for kidnapping, and five years concurrent for grand larceny. Co-defendant Pearson received the same sentence with an additional five years concurrent for possession of a weapon during a violent crime. R. 359, l. 6 – 360, l. 7.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict of acquittal on the charges of burglary in the first degree, armed robbery, kidnapping, and grand larceny, since the only evidence that appellant participated in this crime was his DNA was found on a piece of duct tape -- left at some point somehow -- since sending this case to the jury on that single shred of evidence invited a verdict based on speculation.

Relevant Facts

Edward "Slick" Gibbons owned the Clarendon Auto Parts store in Manning, South Carolina. He had operated that business for forty-five years. R. 2, l. 8 – 4, l. 11.

The front of the Gibbons home faced Country Club Drive and the back of his house faced a pond. The garage was separate from the house. Gibbons had neighbors on both sides of his house. R. 4, l. 3 – 6, l. 12.

The Auto Parts store was open six days a week and was closed on Sunday. That was also the victim's work schedule. He remembered on May 15, 2010, a Saturday, he was preparing to leave the house between 6:00 a.m. and 6:30 a.m. to go to work. R. 7, l. 14 – 8, l. 12.

That morning Gibbons went out in his garage to put his shoes on. He usually locked the door when he left for work because his wife was usually not out of bed. "When I shut the door and bent down three guys came out of that little closet room in there and that's when they jumped me; and it's a miracle I'm still here after that." R. 8, l. 8 – 9, l. 9.

The victim, Gibbons, said he saw three black men in his garage with masks over their faces. R. 12, ll. 2-17. He was robbed of his wallet -- which he said had about eight

hundred dollars in it -- and his money clip (with contained thirty to forty dollars). R. 13, l. 7 – 14, l. 19.

The victim was never able to identify the robbers. He was thrown to the ground "and one [of them] jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and the bigger guy was kicking me in the side and stomping me in the chest and . . ." R. 15, ll. 4-13.

He acknowledged he never saw a gun during the robbery. However, he speculated that one or more of the men could have been armed. At one point he saw something that could have been a weapon. He recalled: "They tried to put tape around you know, wrap it around my face . . . I kept kicking them - - I kept kick moving my legs and stuff. They never did get it wrapped around my feet so I could move. But they did get it around my face." R. 17, l. 8 – 18, l. 22.

Gibbons said one of the men said: "Slick, you know that [we] know that you got money and where is the rest of it? I said this is all I got. I said there's no use to beat me any more for money so just shoot me because this is all I got." R. 19, ll. 7-18.

The three unknown men stole his El Camino and drove away. R. 21, l. 16 – 30, l. 10. He remembered that he was taken to Clarendon Memorial Hospital and then taken by helicopter to a Columbia hospital where he was in intensive care before going to a rehabilitation center in Sumter for a week. R. 32, ll. 2-23.

On cross-examination Gibbons admitted he never saw a gun during the robbery. He also thought it was daylight outside when the robbery occurred "between 6 and 6:30 in the morning." R. 60, ll. 5-10.

Cecil Eaddy had lived in the Manning area his whole life. He knew Gibbons as "Slick." He found the stolen El Camino shortly after the incident that morning in the road near his farm. R. 78, l. 18 – 82, l. 5.

Eaddy said: "I knew it was Mr. Gibbons' car . . . then I called the store and Ken answered the phone. And I asked if he [the victim] was there and he said no, he wasn't there. And then I told him I found the car. And he told me he [the victim] had just been beaten up at his house. . . . so I pulled it out of the road and switched it off and took the keys out. That's when I took it on up there to the store." R. 81, l. 7 – 82, l. 18.

An employee from the Auto Parts store came and picked up the car "and rode back to the store and I went on out to the farm." R. 83, ll. 4-24.

According to a police witness co-defendant Pearson "adamantly denied knowing Mr. Gibbons." However, they stated their investigation led them to know that co-defendant Pearson had done yard work for Gibbons in the past. R. 115, l. 6 – 117, l. 18. Co-defendant Pearson's fingerprints -- his right thumb actually -- was matched to Gibbons' garage according to Marie Hodge of the Sumter Police Department. R. 124 l. 1 – 136, l. 18.

Appellant's fingerprints were *not* found anywhere on the property owned by Gibbons. The state's case against appellant was appellant's DNA was found on the same duct tape that had been tied around the head of Gibbons. R. 176, l. 17 -180, l. 2. The state also put in evidence that appellant said he did not know co-defendant Pearson, but appellant and Pearson allegedly worked briefly for a Vocational Rehabilitation sponsored facility for a short time. Again, this was in Manning, South Carolina and it appeared strangers were few. R. 174, l. 21 – 175, l. 17; R. 244, l. 17 – 245, l. 6.

Directed verdict motion

An extensive directed verdict motion was made in this case. Defense Counsel Knobeloch for appellant cited State v. Mitchell, State v. Bostick and State v. Arnold in support of his argument that a directed verdict should be granted in this case. Defense counsel noted that the state's case against Arnold was actually stronger than the evidence in this case against appellant. Yet the Supreme Court direct a verdict of acquittal for Arnold. R. 271, l. 19 – 278, l. 3. In Arnold the defendant was placed in the victim's car in another state a short time after the crime. R. 277, l. 22 – 278, l. 3.

The judge here ultimately ruled "it's a number of facts they've (the jury) has got to struggle with. But I'm going to let them make that call." The judge opined he thought there was more evidence in this case "than the Mitchell, Arnold, or Bostick cases." R. 283, l. 10 – 285, l. 3.

Discussion

The judge erred by deferring his duty to make the call on the directed verdict motion to the jury as seen above. The judge also incorrectly opined there was more evidence in this case against appellant than there was against the defendants in Mitchell, Arnold, or Bostick. "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).

The state's evidence against appellant is that his DNA at some point, somehow, got on the duct tape. From there the jury was asked to speculate that because appellant worked with Pearson at the same place for a short time, that appellant knew him, and participated in this violent crime with him. Therefore, appellant should be convicted based on that circumstantial evidence.

Where the state relies exclusively on circumstantial evidence, the trial judge is only required to submit the case to the jury if there is any **substantial** circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) If 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).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme 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 always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found the decedent'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 family burn pile.

The Supreme Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and *gasoline was the accelerant used to start the fire* at the Polite home. The 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.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) the Supreme 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, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

The Supreme Court held that this circumstantial evidence was not substantial 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 State v. Schrock, Schrock 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. The Supreme Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the Supreme Court affirmed the holding of this Court that a directed verdict should have been issued. The victim, Cox, was shot, and his body found off of a road *in Colleton County*. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. *The car*

was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car. The Supreme Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

Similarly, in State v. Mitchell, 341 S.C. 406, 409 535 S.E.2d 126 (2000) a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. Id. Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied y the circuit court. Id.

The Supreme Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. The Court wrote that the evidence presented was entirely circumstantial. "The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." Id. The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. Id." Accordingly, the Supreme Court agreed with this Court that Mitchell was entitled to a directed verdict.

In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to make much of the fact that appellant and Pearson knew each other. The state's witnesses admitted there was not any way too date when Pearson's fingerprint was placed, and no way too similarly date when appellant's

DNA got on the duct tape -- or how. If appellant's sweat or saliva or whatever else could cause a DNA "match" was transferred by Pearson onto the duct tape then appellant risked being convicted on this one false piece of seemingly damning evidence.

Unlike Mitchell, there was no evidence appellant had ever been to the victim's house. To the extent that cuts in the state's favor here in distinguishing Mitchell, it also differentiates appellant's case from the state's alleged case against Pearson as for notice, opportunity and prior presence in the victim's house and garage. The Supreme Court granted a directed verdict in yet another case where the evidence was stronger against the defendant than here in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

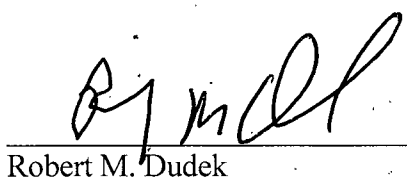
In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover from him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury.

Appellant was entitled to a directed verdict of acquittal. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

CONCLUSION

By reason of the foregoing arguments, a directed verdict of acquittal should be issued.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of March, 2014.

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APPELLATE CASE NO. 2012-212563

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of March, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.