

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Florence County

SC Court of Appeals

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRENDA BRATSCHI,

APPELLANT

APPELLATE CASE NO. 2012-211980

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred by failing to direct a verdict in favor of the appellant in a case where the State had no evidence of how, when, or where the decedent was killed and where no substantial circumstantial evidence supported appellant's conviction?

2.

Whether appellant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated when the trial court admitted a 911 call made by the decedent that contained testimonial evidence and the unfairly prejudicial nature of the evidence outweighed its probative value?

STATEMENT OF THE CASE

During its June term of 2010, a Florence County grand jury indicted Brenda Miles Bratschi for murder and burying a body without notice. On April 16-19, 2012, appellant was tried before the Honorable D. Craig Brown and a jury. R. 1. Matthew R. Ozment and Robert N. Wells represented the State. R. 1. H. Lee Herron and Kaye Fraley represented appellant. R. 1. The jury convicted appellant on both counts. R. 660, ll. 1 – 9. Judge Brown sentenced appellant to life imprisonment for murder and three years' imprisonment on the illegal burial charge. (R. 694 - 695). Appellant timely served and filed a notice of appeal and this appeal follows.

ARGUMENT

1.

The trial court erred by failing to direct a verdict in favor of the appellant in a case where the State had no evidence of how, when, or where the decedent was killed and where no substantial circumstantial evidence supported appellant's conviction.

Relevant Facts

2009: Human Remains are Found Beneath a Trailer

On July 16, 2009, Marty McDonald was having a trailer pulled off of his recently-purchased property. R. 108, ll. 19 – 23. The property formerly belonged to Randy Bratschi (“Randy”), where he lived with his wife, appellant Brenda Bratschi (“Brenda”). McDonald was cleaning up his property after the moving company removed the trailer. R. 109, ll. 5 – 9. He noticed something that he thought was a gourd. R. 109, l. 20 – 110, l. 5. On closer examination, it was a human skull. R. 110, ll. 6 – 8. McDonald notified the police and they began recovering human remains from where the trailer had been. R. 126, l. 7 – 129, l. 10.

Only skeletal remains and some clothing were found. R. 129, ll. 8 – 13. A pair of work boots were found with the body. R. 139, ll. 14 – 24. A pocket knife was found in the pants pocket with the remains. R. 142, ll. 15 – 18. The police did not find any weapons. R. 130, l. 23 – 131, l. 3. Nor did the police notice any injuries to the skull. R. 131, ll. 4 – 6.

The State's DNA expert testified that DNA extracted from the remains matched a sample of Randy's DNA that was obtained from SLED. R. 152, l. 5 – 153, l. 10. The State's DNA expert also testified that the DNA extracted from the remains was compared

to DNA samples obtained from Randy Bratschi's family. R. 153, ll. 11 – 155, l. 9. This comparison led her to the conclusion that the remains were Randy's. R. 155, ll. 6 – 9. The only DNA tests performed were to ensure that the remains were Randy's. R. 155, l. 18 – 157, l. 10. The State did not perform any DNA testing on any of the clothing or a blue tarp that were found with the remains to try to identify any suspects. R. 155, l. 18 – 157, l. 10.

Lieutenant Keith Von Lutcken ("Lutcken") was one of the head investigators working Randy's disappearance. R. 369, ll. 19 – 22. Lutcken was responsible for supervising the excavation of Randy's body in 2009. R. 357, l. 15 – 358, l. 5. Randy's body was found inside a blue tarp buried in a shallow grave approximately eight inches deep. R. 360, ll. 6 – 19. The following exchange occurred during the cross-examination of Lutcken:

Q. But as far as the investigation of the murder of one Randy Bratschi, you were pretty much the head guy or a head guy?

A. A head guy, yes, sir.

Q. Now, are you aware of any evidence that tells us how Randy Bratschi died?

A. No.

Q. Are you aware of any evidence that tells the jury where Randy Bratschi was killed?

A. No.

Q. Are you aware of any evidence that tells the jury when Randy Bratschi was killed?

A. No, Sir.

Q. Are you aware of any evidence whatsoever that would tell the jury who killed Randy Bratschi?

A. No, Sir.

R. 369, l. 19 – 370, l. 9. In addition to Lutcken, several other police witnesses admitted they had no physical evidence telling them how Randy died, where he was killed, or when he was killed. R. 121, l. 20 – 122, l. 4 (Jay McLaurin); R. 131, l. 24 – 132, l. 5 (Andrew Clendenin); R. 507, ll. 7 – 23 (Kathleen Streett). The forensic anthropologist who examined Randy's remains could not find any evidence showing how Randy died or when he was killed. R. 439, l. 17 – 440, l. 12; R. 442, ll. 16 – 25.

2004: Randy and Brenda Get Into a Fight

Five years earlier, on October 21, 2004, officer Michael Rhodes ("Rhodes") responded to a domestic violence call.¹ R. 181, l. 22 – 182, l. 5. He went to the Coward Police Department where one of the 911 callers was located. R. 182, ll. 6 – 15. The caller was Brenda. R. 182, ll. Brenda told Rhodes that she and her husband were going to a credit union. R. 182, ll. 16 – 19. As they were walking to the car, she looked behind her and saw her husband with a hoe in his hand. R. 182, ll. 19 – 22. Randy came at her with the hoe. R. 182, lines 21 – 22. He struck her on the hand. R. 182, ll. 22 – 24. Brenda grabbed a wooden tire thumper (that looked like a small baseball bat) from under the car seat and began hitting Randy "to get him away from her." R. 182, l. 25 – 183, ll. 4. Rhodes saw a laceration on Brenda's thumb. R. 183, ll. 5 – 7.

Rhodes then went to the Lake City emergency room. R. 183, ll. 13 – 15. Randy was at the emergency room. R. 183, ll. 16 – 20. Rhodes observed that Randy had

¹ Testimony regarding this fight between the Bratschis was admitted as a prior bad act pursuant to Rule 404(b) over Brenda's objection. That ruling is not on appeal here.

lacerations and swelling on his face, and bruising on his chest. R. 184, ll. 1 – 5. Randy's injuries, though not life-threatening, required a hospital stay.

Investigator Kathleen Streett ("Streett") worked the fight between Randy and Brenda. R. 447, ll. 1 – 9. She testified that she saw Randy "all beat up." R. 447, ll. 19 – 23. Streett spoke to Brenda who told her that she had a cut on her finger and a knot on her head as a result of being hit by Randy with a garden hoe. R. 448, l. 18 – 450, l. 25. Randy admitted using a garden hoe during the fight, but claimed it was only used to try to get away from Brenda. R. 450, ll. 10 – 17. Randy's bank account was overdrawn at the time of the fight as a result of cash withdrawals made by Brenda. R. 454, l. 19 – 456, l. 9. The account was overdrawn by approximately \$2,000.00. R. 461, l. 20 – 462, l. 7. Investigator Streett claimed that Randy was "terrified" of Brenda. R. 459, ll. 6 – 9. Randy got a restraining order against Brenda from the family court. R. 459, ll. 18 – 20. Investigator Streett charged Brenda with assault and battery with intent to kill. R. 459, l. 21 – 460, l. 1.

The trial court admitted the 911 calls of both Randy and Brenda. As will be shown in Argument 2, admission of Randy's 911 call violated Brenda's rights pursuant to the Confrontation Clause of the United States Constitution. The 911 call was not transcribed by the court reporter.² In the initial portion of the call, Randy told the 911 operator that Brenda tried to kill him with a club. (State's Ex. 24.)

Edward Jeffcoat ("Jeffcoat") worked with Randy. R. 279, ll. 8 – 17. Jeffcoat admitted that Randy had a drinking problem. R. 286, l. 24 – 287, l. 13. He said that he had seen Randy grab a beer first thing after getting out of bed in the morning. R. 287, ll.

² The CD of the 911 call is State's Exhibit 24 and has been transported to the Court.

2 – 5. He had seen him drink a couple of beers on the way to work. R. 287, ll. 6 – 8. He had seen him drink three or four beers on the way home from work. R. 287, ll. 9 – 10. Rusty Merrill, a/k/a “Squirrel,” who was Randy’s best friend, said that Randy kept beer in his cooler to drink at work. R. 320, ll. 4 – 17. Randy also had diabetes and problems with his pancreas. R. 466, ll. 20 – 23.

The crime scene investigator who responded to the Bratschis’ residence in 2004 collected seven guns from the house that belonged to Randy. R. 214, l. 7 – 215, l. 4. He also testified that Randy was bigger than Brenda. R. 215, ll. 15 – 17. Jeffcoat and Kathy Merrill, Squirrel’s wife, both said they had never seen Brenda and Randy fight. R. 287, l. 23 – 288, l. 4; R. 251, ll. 19 – 22. Squirrel said only once had he seen them have what he called a “verbal altercation.” R. 315, l. 23 – 316, l. 14.

Randy’s Affair with Susan Hill

Kathy Merrill knew both Randy and Brenda. R. 232, l. 13 – 233, l. 3. Brenda came over to Kathy Merrill’s house sometime after the fight with her husband. R. 236, ll. 4 – 9. Brenda knew Randy was cheating on her with another member of their social circle, Susan Hill (“Hill”). R. 241, ll. 8 – 10. Brenda told Kathy Merrill that “she had hired a private investigator and he had took pictures” of Randy and Hill. R. 236, ll. 13 – 18. Brenda was Randy’s third wife. R. 326, ll. 11 – 25.

Hill testified that she began having an affair with Randy after the Bratschis’ fight. R. 256, ll. 11 – 23. Hill claimed that the Sunday before Thanksgiving, Randy showed up at her house knocking on her back door. R. 258, ll. 8 – 16. He told her that Brenda was on the road near her house. R. 258, ll. 12 – 22. Hill did not actually see Brenda on the road. R. 259, ll. 9 – 10. Hill claimed that Brenda called her house, said, “Have fun with

my husband,” and hung up the phone. R. 259, ll. 15 – 17. After the phone call, Hill and Randy went to a bar called “Shingles” and stayed there until 11:00PM before returning together to her house. R. 259, l. 23 – 260, l. 8. The next day they went to another bar. R. 260, ll. 11 – 23.

Hill claimed that one night she came home and found her back door ajar. R. 264, ll. 11 – 16. Her dog had been let out of the house. R. 264, l. 19 – 265, l. 24. She called the police, but nothing was missing or disturbed. R. 264, l. 25 – 265, l. 9. Hill admitted that Brenda never threatened her and that she did not know what happened to Randy. R. 275, ll. 11 – 15.

Shortly after the Bratschis’ fight, Squirrel claimed that Brenda came over to his house and drank nearly an entire bottle of vodka. R. 307, l. 17 – 308, l. 14. She asked Squirrel and his wife questions about Randy and Hill. R. 308, ll. 2 – 19. Squirrel claimed that Brenda said, “I get really mean when I drink vodka.” R. 308, ll. 8 – 9.

Randy Disappears in 2004

The people in the Bratschis’ social circle hunted and went to “redneck beer joints.” R. 318, l. 14 – 319, l. 5. Squirrel said, “Brenda could fight a like man and shoot like a man. She kill deer and everything else.” R. 330, ll. 2 – 3. Inside of Randy’s trailer were several hunting pictures of Brenda including “one with a nice eight-point buck that she had killed showing the rack.” R. 468, ll. 10 – 17.

On the Friday after Thanksgiving, Squirrel, Kathy Merrill, Randy, and Hill planned to go to a turkey shoot. R. 237, ll. 6 – 18. R. 276, ll. 3 – 13. Kathy Merrill testified they went to Randy’s house to pick him up to go to the turkey shoot. R. 237, ll. 19 – 22. She noticed Randy’s black Isuzu Rodeo at the house. R. 238, ll. 1 – 5. Kathy

Merrill claimed that Brenda drove the Isuzu most of the time. R. 246, ll. 13 – 15. Kathy Merrill also admitted that both Randy and Brenda shared the Isuzu. R. 246, ll. 16 – 17.

Randy did not answer the door. R. 246, ll. 18 – 25. When Randy did not answer the door, neither Kathy Merrill nor Squirrel made any calls to anyone and continued on to the turkey shoot. R. 246, ll. 14 – 22. Squirrel looked in the window and saw that a makeshift alarm Randy made with butcher's twine and metal pots was not set. R. 309, l. 16 – 310, l. 17. Randy's dog was in the house. R. 310, l. 18 – 311, l. 14. Squirrel noticed a pile of dog feces in front of the refrigerator. R. 311, ll. 3 – 5. Squirrel felt this was unusual because Randy was normally "a real clean person." R. 311, ll. 5 – 6. Randy's truck was missing and his boat was gone. R. 344, line 1. His Isuzu Rodeo was there. R. 344, ll. 5 – 7. Squirrel went on to the turkey shoot and "had a big time." R. 312, ll. 3 – 6.

The next day, Saturday, Squirrel planned to cook oysters and said Randy "never missed oysters." R. 312, ll. 7 – 14. Randy did not come for oysters. R. 312, ll. 15 – 16. Hill and Brenda called Squirrel's house looking for Randy that weekend. R. 312, l. 20 – 313, l. 4. On Sunday, Squirrel contacted the police. R. 313, ll. 12 – 16.

Squirrel knew of two prior occasions when Randy's house was robbed. Randy was in the hospital in Charleston. Thieves broke in through his window and "stole the computer and a few other things." R. 317, ll. 15 – 25. Squirrel stated that Randy had more than five guns and would sometimes carry a 9mm pistol in a holster strapped to his hip. R. 324, ll. 12 – 23. Randy usually carried a pistol in his glove box. R. 325, ll. 2 – 4. Kathy Merrill also remembered that Randy had a gun stolen from his house. R. 250, l.

25 – 251, l. 2. She remembered that the Bratschis' had a friend over and when he left, the Bratschis' shotgun was gone. R. 251, ll. 3 – 7.

Investigator Streett first found out that Randy was missing when Squirrel contacted her. R. 462, ll. 18 – 20. Squirrel contacted her the Sunday after Thanksgiving. R. 462, ll. 21 – 22. The last time Randy worked was when he clocked out at 7:00 AM on Friday morning. R. 464, ll. 20 – 22.

The police searched Randy's property for clues to his disappearance. The underside of the trailer was examined and nothing was seen. R. 365, ll. 22 – 25. The police used cadaver dogs at the trailer in 2004. R. 368, ll. 12 – 15. Lutcken described cadaver dogs as "very good." R. 368, ll. 16 – 24. When a person is killed the body immediately begins decomposing and the cadaver dogs pick up the scent immediately. R. 368, l. 25 – 369, l. 6. Streett personally went underneath the trailer in 2004. R. 483, ll. 6 – 15. She did not see a shallow grave. R. 484, ll. 6 – 7.

The Black Isuzu Rodeo is Found by the Pee Dee River

The black Isuzu Rodeo was found on the Wednesday after Thanksgiving by a police officer at a public boat landing on the Pee Dee River in Pamplico. R. 346, l. 17 – 347, l. 15. When Randy would want to "get away from it all," he would sometimes drive to this landing. R. 519, l. 19 – 520, l. 1. Several witnesses for State testified that they saw the Isuzu Rodeo parked in the same spot over Thanksgiving weekend. R. 586, l. 21 – 612, l. 15. The officer who found the vehicle said there was no blood, hair, excessive dirt, or money on or in the vehicle. R. 348, l. 16 – 349, l. 1. When the crime scene technicians checked the interior of the vehicle, they found \$900 in cash in \$100 bill

denominations. R. 354, l. 25 – 355, l. 8. Surrounding the boat landing are open fields and the officer described it as being “in the boondocks.” R. 349, ll. 2 – 18.

Lutcken testified that small spots of Brenda's blood were found on the steering wheel, steering wheel column, dashboard, and gearshift of the Isuzu Rodeo. R. 355, lines 13 – 19. The blood spots were at least several days old and could have been as much as a week old. R. 355, ll. 20 – 24; R. 371, ll. 1 – 2. Lutcken admitted that if someone had a cut on their thumb, as Brenda received in the fight with Randy, that could have been a possible source for the blood in the car. R. 362, ll. 22 – 25.

The inside of the vehicle was clean and neat. R. 356, ll. 7 – 9. No weapons were found inside the car. R. 362, ll. 14 – 15. Other than the money, the police found a bag of feed, a road atlas, a camera, and a little bit of garbage in the car. R. 364, ll. 11 – 16. No usable fingerprints were found inside of the vehicle. R. 356, ll. 14 – 19. It did not appear that a body had been transported in the back of the vehicle. R. 356, ll. 10 – 13. The area around the vehicle and the river were searched thoroughly by the police including dogs and divers. R. 356, l. 20 – 357, l. 9. No evidence was found. R. 357 ll. 7 – 9. He stated that the Pee Dee River at this landing was “treacherous” and would be a good place to hide something. R. 363, ll. 15 – 364, l. 4.

The police searched Brenda's family's farm, which consisted of over 4,000 acres. R. 470, ll. 6 – 15. The only thing the police found was a rectangular hole dug near a deer stand. R. 470, ll. 16 – 25. No physical evidence was found in this hole. R. 483, ll. 9 – 22. The police also met with a psychic. R. 473, ll. 1 – 17. The psychic did not provide any useful information. R. 473, ll. 1 – 17.

A Woman Gets a Ride

Jerome Eaddy lived near the boat landing where the Isuzu was found. R. 373, ll. 2 – 9. One night around Thanksgiving, he returned home after working the night shift. R. 373, ll. 10 – 18. He got off work sometime after 11:00PM. R. 373, ll. 10 – 18. On his way home, he noticed somebody walking alongside the road. R. 373, l. 19 – 426, l. 2. The person was wearing “something like a camouflage army outfit” with a hood. R. 374, ll. 3 – 6. He saw the person walk over to his elderly neighbor’s house. R. 374, ll. 7 – 9.

After speaking with the neighbor, the person came over to Eaddy's house. R. 374, ll. 13 – 22. Even though he originally thought the person was a man, it turned out to be a woman. R. 374, l. 13 – 375, l. 6. She told Eaddy that she needed a ride home. Eaddy and his mother gave the woman a ride to Coward. R. 374, l. 13 – 375, l. 21. Eaddy dropped her off at a trailer home development on Friendfield Road near Randy’s trailer. R. 377, l. 10 – 378, l. 22. Eaddy was later shown a photo lineup and identified Brenda as the person to whom he gave a ride that evening. R. 380, l. 2 – 381, l. 21. He said the person he picked up did not seem nervous, nor angry, was not crying, was not bleeding, and seemed calm. R. 383, ll. 20 – 384, l. 8. He testified that he was not sure which night around Thanksgiving it was on which he gave this person a ride. R. 384, ll. 9 – 23. Eaddy did not make an in-court identification of Brenda.

William Rauch was a friend of Brenda and Randy's. R. 416, l. 22 – 417, l. 4. On either the Friday or Saturday after Thanksgiving, Rauch claimed he saw Brenda leaving Randy's property. R. 418, l. A – 422, l. 11. It was daylight when he saw Brenda.

in her car. R. 419, ll. 2 – 11. The car was “a little brown tannish car.” R. 419, ll. 12 – 16.

The Last Time Anybody Saw Randy Alive

The State’s theory of the case was that Brenda killed Randy immediately when he got home from work on Friday morning. R. 646, l. 11 – 647, l. 11. However, the last time Jeffcoat, a State’s witness, saw Randy was the Friday morning after Thanksgiving. R. 281, l. 4 – 282, l. 11. He testified that he borrowed some lifejackets from Randy. R. 281, l. 4 – 282, l. 11.

The defense presented several members of Brenda’s family whose testimony showed that Randy was alive after Friday. Keith Matthews testified that he heard Frankie Miles, Brenda’s son, talking to Randy on the telephone on Saturday morning. R. 557, ll. 16 – 558, l. 16. Matthews testified that he was “110 percent” certain that he heard Randy’s voice on Saturday morning. R. 558, ll. 10 – 16. Dennis Matthews testified that he saw Randy in the Isuzu Rodeo on Sunday afternoon. R. 566, ll. 6 – 21. William Miles testified that he saw Randy on Sunday afternoon. R. 579, l. 20 – 580, l. 11. The defense also called Frankie Miles, but he refused to answer any questions and asserted his Fifth Amendment rights. R. 583, l. 23 – 585, l. 8. The police charged him with misprison of a felony. R. 479, ll. 23 – 24.

After Randy’s death, Brenda was the heir to his property. To take over Randy’s trailer, all she had to do was move back into it. R. 531, ll. 9 – 22. The trailer had no mortgage on it, so Brenda would not have had to pay anything to live there. R. 531, l. 5 – 532, ll. 6. Instead, the property was sold at a tax sale. R. 531, ll. 5 – 22.

The Directed Verdict Motion

Brenda moved for a directed verdict at the close of the State's case claiming that the State did not have substantial circumstantial evidence to support a conviction. R. 533, l. 25 – 538, l. 12. The State relied primarily on the testimony from Eaddy that Brenda was seen in proximity to where the car was found and taken near the trailer. R. 537, l. 10 – 538, l. 12. The trial judge took the motion under advisement overnight. R. 538, ll. 15 – 19. The next morning, the court heard further argument on the directed verdict motion. R. 542, l. 23 – 548, l. 17. Citing the standard for circumstantial evidence cases, the court denied the defendant's directed verdict motion. R. 548, l. 18 – 550, l. 11. The trial judge said that he was “focusing solely upon the testimony of Mr. Eaddy” and believed that, under the “totality of the circumstances,” the evidence gave rise to “more than a mere suspicion.” R. 550, ll. 1 – 11. The defense renewed its motions after the close of the defense case, after the State's reply witnesses, and again after the jury's verdict. R. 585, l. 22 – 586, l. 2; R. 619, ll. 2 – 5; R. 661, l. 25 – 663, l. 17. These motions were denied. R. 619, ll. 2 – 5; R. 661, l. 25 – 663, l. 17.

Discussion

In this case where the State had no theory, much less evidence, of where Randy was killed, how Randy was killed, or when Randy was killed, the trial court should have directed a verdict for Brenda. The South Carolina Supreme Court “has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict.” State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). Specifically, the

trial court “should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.” Odems at 586, 720 S.E.2d at 50 (citation omitted).

Every circumstance relied upon by the State must be proved beyond a reasonable doubt and point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) *abrogated* by State v. Cherry, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004). Even though the Edwards “traditional circumstantial evidence definition” is no longer given as a jury charge, it remains a vital tool for judges examining the sufficiency of circumstantial evidence at the directed verdict stage. Odems at 590-91, 720 S.E.2d at 52-53.

Not only did the State not produce substantial circumstantial evidence, it failed to rule out other reasonable hypotheses. At this stage, the Court is required to view the evidence in the light most favorable to the State. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011). Viewing the evidence in this light, the State’s best evidence against Brenda was the following:

1. Brenda had overdrawn Randy’s checking account, leading to a fight with Randy in which Randy sustained more serious injuries than Brenda and Randy told a 911 operator that Brenda was trying to kill him;
2. Randy was afraid of Brenda and got a restraining order against her;
3. Brenda knew Randy was having an affair with Hill and, on one occasion, confronted them in a non-violent way;
4. On either Friday or Saturday night, Brenda, a known avid hunter, was wearing camouflage clothing near where the Isuzu Rodeo was found and was given a

ride by Eaddy to a trailer development near Randy's trailer, where Randy's body was found five years later;

5. Brenda was seen leaving Randy's property on either Friday or Saturday morning.

This evidence, especially when compared with other cases in which the circumstantial evidence was deemed insufficient, does not support a conviction.

In State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000), a burglary case, the only evidence that the defendant committed the crime was a fingerprint on a screen near a broken window. It was undisputed that the defendant had been in the victim's home on several prior occasions. Id. The Court concluded that the fingerprint was evidence only that the defendant had been "in and around the victim's house" and was insufficient to prove burglary. Id.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), another burglary case, the circumstantial evidence was as follows: (1) the defendant was found in a car with the burglars and the stolen goods, (2) the defendant fled from the police, and (3) the defendant "asked an uninvolved person to lie for him" to the police. The unconvincing reason the defendant supposedly fled was because the driver told him that he had a suspended license. Id. at 585, 720 S.E.2d at 49. The Supreme Court held that nothing placed Odems at the scene of the crime and reversed his conviction. Just as in these two cases, nothing places Brenda at the scene of the crime because the State could not prove where the crime scene was. No evidence existed that Randy was killed at his trailer. While his body was found there five years later, the search of the trailer was thorough after Randy's disappearance. The search even included cadaver dogs and officers going

underneath the trailer. Therefore, the evidence that Brenda was on or near Randy's property—at best—raises a suspicion and does not support an inference that she murdered Randy.

Similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), a vehicle resembling the one driven by the defendant on the night of the murder was parked in the apartment complex in front of the building where the murder occurred. Id. at 600, 533 S.E.2d at 573. However, this fact was not evidence identifying that car as the same black Mustang allegedly driven by the defendant. Id. at 602-03, 533 S.E.2d at 574-75. Even with the similarities described, the location of the vehicle, and the time of its sighting all coinciding with the murder, the Martin Court held that “the State failed to meet the ‘any substantial evidence’ standard.” As explained by the Court, “the possibility that it was the same car, without any other evidence placing the defendants at the scene, is not enough evidence to place [the] Defendant inside [the] Victim’s apartment.” Id. at 603, 533 S.E.2d at 575. Again, since the police did not know where Randy was killed, seeing Brenda on or near Randy’s property or near where the Isuzu Rodeo was found is not sufficient to support a conviction.

This case is very similar to another murder case in which a directed verdict was warranted. In State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), the defendant’s fingerprint was found on a coffee cup in a car borrowed by the victim. The victim disappeared after leaving his office in Savannah, Georgia, and his body was found three days later in Colleton County. Id. at 388, 605 S.E.2d at 530. The borrowed car was found in Johnson City, Tennessee near where the defendant called another witness the day after the crime. Id. at 388-89, 605 S.E.2d at 530. The defendant was a homosexual

hustler who had sex with truckers and the victim. Id. The Supreme Court held that a directed verdict should have been granted because the fingerprint only established that defendant “was in the borrowed [car] on the same day the victim was last seen alive.” Id. at 390, 605 S.E.2d at 531. The fact that the car was found in Tennessee near the defendant only raised “a suspicion of guilt.” Id.

The evidence in Arnold is much stronger than in Brenda’s case. The fact that the car was borrowed meant that the fingerprint placed the defendant in a car with the victim—a private place—on the day of the murder. In this case, since the State cannot prove when Randy was killed, the evidence does not place Brenda with Randy when he was killed. The fact that small spots of Brenda’s blood—that could have been as much as a week old—was found in a car they shared only establishes that Brenda was in the car at some point either prior to or after Randy disappeared. It does not definitely place Brenda in a car driven exclusively by a victim after his disappearance. Furthermore, the fact in Arnold that the car was taken out of state near the defendant’s home is far more suspicious than Randy’s car being found at a place he was known to frequent when he was troubled.

In Bostick, another murder case, the circumstantial evidence against Bostick exceeded what the State presented against Brenda. In Bostick, the victim was found bludgeoned in a house set ablaze with gasoline. Id. at 136-37, 708 S.E.2d at 775. The victim’s car keys and other items were found in a burn pile on Bostick’s property. Id. at 141-42, 708 S.E.2d at 778. Bostick’s shoes had gasoline on them and his clothes had blood on them. Id. at 142, 708 S.E.2d at 778. While the blood excluded 99% of the population other than the victim, the DNA expert would not testify as to a “match.” Id.

The Supreme Court held the above evidence was insufficient to convict Bostick and reversed. Id. Certainly this evidence far exceeds the case against Brenda as there was no physical evidence tying her to the crime.

The fight between Brenda and Randy also does not establish anything further than a possible motive, which in itself is legally insufficient. Brenda had never been known to be violent before. Spousal fights do not irrevocably lead to murder. The 911 call, which should not have been admitted, also adds nothing further of legal significance other than showing there was animosity. In any event, Randy and Brenda's stories differed and Brenda had no opportunity to cross-examine Randy concerning the fight.

The evidence credited by the trial judge—Eaddy giving a camouflage-wearing woman a ride at night—does not support a conviction under Arnold, Odems, or State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). In Schrok, the Supreme Court stated, “By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.” While, for the purposes of this appeal we must assume that Brenda was the woman to whom Eaddy gave a ride, the State did not show that she was present at the scene of the crime since it did not know where the crime scene was. Also, Eaddy was not sure of the evening when he gave Brenda a ride. Other witnesses testified they saw Randy alive after the ride with Eaddy. The fact that Brenda was wearing camouflage is of no material value. It was established that Brenda was a hunter. It was after Thanksgiving and cold. In the Bratschis' social milieu, camouflage apparel was *de rigeur*.

Finally, other reasonable hypotheses exist that cannot be excluded by the State's evidence. It was well-known that Randy owned many guns and his trailer had been

robbed in the past. Randy's wallet was not discovered with the body. Randy lived "in the boondocks" and the landing where the Isuzu Rodeo was found was in an isolated rural location. Randy had a drinking problem and was diabetic. It is certainly possible that Randy had a drunken altercation with someone. It is possible that someone tried to rob him or his trailer. It makes little sense that Brenda, had she known Randy's body was buried under this trailer, would have allowed it to be sold at a tax sale without first moving the body. Because the State's circumstantial evidence was not substantial and did not exclude other reasonable hypotheses, the trial court should have directed a verdict and Brenda's conviction should be reversed.

2.

Appellant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated when the trial court admitted a 911 call made by the decedent that contained testimonial evidence and the unfairly prejudicial nature of the evidence outweighed its probative value.

Relevant Facts

After their fight in October 2004, Randy called 911. The jury heard Randy's entire 911 call. R. 192, ll. 3 – 16; State's Ex. 24. The court reporter did not transcribe the 911 call. R. 192, ll. 3 – 16. The call begins with Randy telling the operator that his wife was trying to kill him. State's Ex. 24. He is breathing heavily and is upset. State's Ex. 24. The operator then gets Randy's name and address. State's Ex. 24. Randy tells the operator Brenda hit him with a club, he has a gun, and plans to shoot Brenda if she came in the trailer. State's Ex. 24. He asks for an ambulance and says he is bleeding. State's Ex. 24. The operator

asks Randy where his wife is and Randy tells her he does not know and that she ran. State's Ex. 24.

The operator then gets Randy to calm down and tells him to stay on the phone. State's Ex. 24. She tells him this at least two times. State's Ex. 24. There are several long pauses where all that can be heard is Randy breathing heavily. State's Ex. 24.

At this point, the operator begins to interrogate Randy about the fight. State's Ex. 24. She ask what kind of club it was. State's Ex. 24. Randy tells her it was a tire thumper. State's Ex. 24. The operator asks if it was made of iron and Randy tells her it was wooden. State's Ex. 24.

The operator then asks Randy if he and his wife had been fighting. State's Ex. 24. Randy tells her no, that they were going to a credit union, and when Brenda came out of a bathroom, they went to the car and she started hitting him with the club. State's Ex. 24. He makes statements to the effect that he does not know why she tried to hit him. State's Ex. 24.

The operator then asks Randy if he hit Brenda with a hoe. State's Ex. 24. Randy denied it, but then said he grabbed the hoe and then Brenda ran. State's Ex. 24. Since no hoe had been mentioned it is clear that by this point, the operator has heard Brenda's version of the story related during her 911 call or at the Coward police station. The operator continues to interrogate Randy about the fight and whether he hit Brenda with a hoe. State's Ex. 24. Randy continues to insist that she beat him with a club. State's Ex. 24.

The operator then tells Randy that Brenda is at the police department. State's Ex. 24. She tells Randy to put the gun away and he refuses, because he says he doesn't know for sure where Brenda is. State's Ex. 24. There are more long pauses and then the operator

continues interrogating Randy about the reason for the fight. State's Ex. 24. She asks whether Randy and Brenda were talking and she "all of a sudden," when Randy cuts her off and denies they were talking and says he was just on his way to the car when Brenda attacked him. State's Ex. 24. He tells the operator again they were going to his credit union. State's Ex. 24. He then insists that he had no idea why Brenda attacked him or "what's wrong with her." State's Ex. 24. He maintained that she just started hitting him with the club. State's Ex. 24. Soon after these statements, the police arrived at the trailer and the operator directed Randy to them. State's Ex. 24.

During pre-trial motions, Brenda argued that admission of the 911 call violated her rights under the Confrontation Clause of the United States. R. 74, l. 17 – 75, l. 9. Defense counsel specifically argued that he had no opportunity to cross-examine Randy. R. 74, l. 17 – 75, l. 9; R. 83, ll. 13 – 17. Defense counsel also argued that the prejudicial effect of the 911 call—a "voice from the grave" as he put it—outweighed its probative value. R. 74, l. 17 – 75, l. 9; R. 83, ll. 13 – 17. The trial judge ruled the 911 call was admissible. R. 91, l. 14 – 92, l. 13. Defense counsel renewed his objection on both the Confrontation Clause and Rule 403 grounds when the State offered the 911 call into evidence. R. 192, ll. 3 – 11.

Discussion

The question whether the admission of the 911 call violates the Confrontation Clause revolves around whether it is testimonial or non-testimonial evidence. See Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 547 U.S. 813 (2006). In Davis, the United States Supreme Court addressed this issue with respect to a 911 call made during a domestic violence situation. Id. at 817-18. During the call, the victim identified the defendant as her attacker. Id. The victim did not testify at trial. Id. at 819.

The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, “A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance.” Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, “This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance **cannot... evolve into testimonial statements once that purpose has been achieved.**” Id. at 828 (internal quotations and citations omitted) (emphasis added). The Court noted that after the operator told the victim to be quiet and “proceeded to pose a battery of questions,” those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts “should redact or exclude the portions of any statement that have become testimonial.” Id. at 829.

This case presents the exact problem anticipated by the Supreme Court in Davis. Once the operator obtained the necessary information regarding the state of the emergency from Randy, she interrogated him about the facts of the incident. State’s Ex. 24. The operator did this knowing full well that Brenda had already called 911, was at the police station, and posed no further threat to Randy. State’s Ex. 24. The fact that she asked Randy about a hoe, which was Brenda’s version of events, conclusively determines that the operator knew of Brenda’s whereabouts and had ended her function as the dispatcher of emergency personnel and begun her function as investigator of a crime. As anticipated in Davis, this 911 call evolved into testimonial evidence that is barred by the Confrontation Clause. Id. at 828.

The Connecticut Supreme Court ruled that the admission of a 911 call very similar to the call in this case violated the Confrontation Clause. State v. Kirby, 908 A.2d 506, 519-26 (Ct. 2006). In Kirby, the complainant escaped a kidnapper and returned to her house. Id. at 512-13. She and her husband jointly called 911. Id. During the 911 call, the operator asked for an identification, a description, and the facts of the incident. Id. at n.6. The Kirby court applied Davis and held the primary purpose of the call was investigative. Id. at 522-23. The court found that the complainant (who died before the trial) was no longer under any threat from the defendant. Id. Using Davis, the court found that since the complainant was relating past events and not describing a situation as it was occurring, her statements were testimonial and the Confrontation Clause barred their admission.

Just as in Kirby, Randy described past events in his 911 call. The police questioned him about the reasons for the fight, the actions immediately preceding the fight, and whether he used a hoe. Brenda was unable to cross-examine Randy about these statements, which destroyed her ability to fully contest Randy's version of the fight. The fight was the State's strongest evidence as to motive. Therefore, the admission of this evidence was profoundly prejudicial to Brenda. Since Brenda was deprived of her Sixth Amendment right to confront Randy, her conviction must be reversed.

The 911 call also should have been excluded because the danger of unfair prejudice outweighed its probative value. SCRE 403. The State already entered into evidence photographs of Randy after the fight and Investigator Streett's testimony regarding her investigation of the fight. These provided the State with the ability to argue motive to the jury. The admission of the phone call was calculated to arouse sympathy

for Randy and produce an unfair emotional response by forcing the jury to hear the words of a dead man describing his version of events. The fact that this evidence was not related to the charge for which Brenda was on trial, but to a prior bad act admitted under Rule 404(b), further attenuates its probative value. Even without considering the protections afforded Brenda under the Confrontation Clause, the trial judge abused his discretion by admitting the 911 call under Rule 403.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and a judgment of acquittal entered. In the alternative, appellant's convictions should be reversed and this case remanded for a new trial because of the violation of appellant's Sixth Amendment rights.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of April, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 23, 2014

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

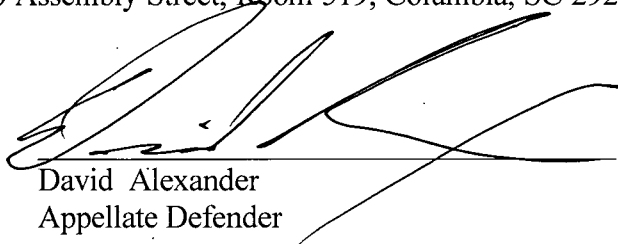
BRENDA BRATSCHI,

APPELLANT

APPELLATE CASE NO. 2012-211980

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 Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of April, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2014.

Rhonda Demetrius Zaxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.