STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

APPELLATE CASE NO. 2012-212547

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor concerning two counts of murder and grand larceny because the prosecution failed to present substantial circumstantial evidence tending to prove Appellant's guilt.

II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations as fact-finder violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.

III. In violation of the Fourth Amendment to the United States Constitution and Article One, section ten of the South Carolina Constitution, the trial judge erred in failing to suppress evidence seized in connection with Appellant's arrest, including all of the items found in his luggage, and Appellant's extradition, where the arrest warrant issued was not supported by probable cause due to the officer's omission of vital information, which placed the scenario in an entirely different light.

STATEMENT OF THE CASE

On August 11, 2008, a Lexington County grand jury indicted Appellant for two counts of murder (2008-GS-32-2652 & 2008-GS-32-2653) and grand larceny of property having a value of five thousand dollars or more (2007-GS-32-525). R. 1871. The Eleventh Circuit Solicitor's Office served Appellant with its notice to seek of intent to seek the death penalty. The matter proceeded to a bench trial before the Honorable Eugene C. Griffith, Jr. on April 16, 2012. R. 1. Donald Myers, Samuel Hubbard, and David Graham prosecuted Appellant. William McGuire, Benjamin Stitely, and Eric Drylie represented Appellant. R. 1.

After a ten-day trial concerning the guilt-or-innocence of Appellant, Judge Griffith found Appellant guilty on both counts of murder and grand larceny. R. 1793, line 21 – R. 1794, line 3. At the conclusion of the sentencing proceeding, Judge Griffith, in a written sentencing order, found the prosecution proved two statutory aggravating circumstances beyond a reasonable doubt. Specifically, the judge found the prosecution proved Appellant committed the murders by one scheme or course of conduct and that one of the murders was that of a child less than eleven years of age. On May 8, 2012, Judge Griffith sentenced Appellant to two terms of life imprisonment, which he ordered to run consecutive to each other and to the sentence of ten years' imprisonment, which he imposed for the grand larceny conviction. R. 1797, line 9 – R. 1802, line 10; R. 1870. By a motion filed on May 17, 2012, Appellant moved for a new trial. R. 1868. Judge Griffith denied the motion by written order. R. 1870.

Appellant filed a timely notice of appeal. This brief follows.

I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor concerning two counts of murder and grand larceny because the prosecution failed to present substantial circumstantial evidence tending to prove Appellant's guilt.

Relevant facts

Appellant and Portia Washington were involved in a romantic relationship and were living together in 2006. R. 107, line 15 – R. 108, line 12; R. 117, lines 3-8; R. 134, lines 19-21; R. 143, lines 6-7; R. 156, lines 3-13; R. 180, lines 15-16; R. 199, lines 8-11; R. 247, line 14 – R. 248, line 6; R. 265, lines 20-22; R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24; R. 799, lines 3-8. Portia cared for her granddaughter, Angelica Livingston, who also lived with Appellant and Portia.[1] In 2006, Angelica was the only daughter of Theresa Brown, who was Portia's daughter. R. 1663, lines 5-13; R. 1666, lines 19-21.

Tonya Oree, Portia's cousin, testified that although she and Portia were very close, Oree did not know Appellant. R. 1662, line 22 – R. 1663, line 4; R. 1663, lines 23-24. Oree claimed Portia moved to a new apartment because she wanted to be alone. Oree maintained that Appellant was not supposed to move into the apartment. However, Appellant completed the lease agreement, and he, Portia, and Angelica moved there together. R. 1670, line 1 – R. 1671, line 22. At some unspecified time she had been on the phone with Portia and heard Appellant fussing about Portia's car because he wanted the car and Portia refused to give it to him. R. 1673, line 24 - R. 1674, line 14. Oree felt that Portia did not like Appellant, did not want to be with Appellant, and did not want

[1] Angelica's school records indicated that Angelica was in Portia's custody, rather than her biological mother's, because Portia did not know where the biological mother was. R. 928, lines 10-25.

Appellant driving her car. R. 1675, lines 15-24.[2] However, Portia was happy about the future because Appellant was supposed to move out and buy a car in June or July. R. 1675, line 25 - R. 1676, line 11.

Although Portia had used drugs and drank alcohol in the past, her mother, Sallie Jones, claimed Portia was no longer doing those things in 2006. R. 193, line 21 – R. 194, line 10.[3] Jones allowed that Angelica's mother, Theresa, was "riding the streets" at the time. R. 194, lines 11-15. Jones further revealed that Portia was still married to Nathaniel Washington as the two had not divorced despite a lengthy separation. R. 194, lines 21-25. She felt that Portia was not happy in her relationship with Appellant. R. 199, lines 11-20. Supposedly, Portia had given Jones the second key to Portia's new car because she did not want Appellant driving her car anymore. R. 202, lines 5-6; R. 203, line 14 – R. 207, line3. However, on cross-examination, it was established that Appellant had driven Angelica to her house in Portia's car on multiple occasions. R. 225, lines 15-23.

Evidence of Portia's and Angelica's disappearance

Portia's friend, Linda Miller last saw Portia and Angelica on June 9, 2006 between 6:00 p.m. and 7:30 p.m. R. 112, lines 11-17. Portia did not speak of traveling to Miller at that time. R. 115, lines 4 - 6.

In June 2006, Shyla Andrews was the hairstylist for Portia and Angelica, who had standing appointments on Saturday mornings. R. 132, line 4 – R. 133, line 3; R. 133,

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[2] Portia's son, Samuel Brown, Jr., also testified that Portia did not want Appellant driving her car and no longer wanted to be in a relationship with Appellant. R. 1691, lines 13-24.

[3] Portia's aunt, Vernelle Bellamy, also testified that Portia previously had a drug problem. R. 234, line 25 – R. 235, line 4.

lines 8-21. Andrews last saw Portia and Angelica on Saturday, June 10, 2006 for such an appointment. Andrews did Angelica's hair while Portia ran errands. Andrews recalled the two were in Portia's car. R. 133, line 22 – R. 135, line 12.

Lela Green, Portia's longtime friend, spoke to Portia by phone on June 10, 2006. R. 166, line 19 - R. 167, line 22. Portia indicated that she was going to the grocery store to pick up food to cook on Saturday for Sunday's dinner. R. 167, line 24 - R. 168, line 11. Additionally, Portia intended to help Green get her car fixed the following Wednesday. R. 165, line 11 – R. 166, line 14. Green testified that she and Portia planned to talk on Sunday, June 11, 2006, but never did. R. 172, lines 5-11. According to Green, Portia was happy and positive during their last conversation. R. 177, lines 11-25.

Carla Perry lived in the same apartment complex as Appellant, Portia, and Angelica in June 2006. R. 178, line 22 – R. 180, line 17. Perry last saw Portia, Angelica, and Appellant during the afternoon hours on June 10, 2006 when Portia was getting some things from her car. R. 180, line 21 – R. 181, line 21; R. 182, lines 17-25. At approximately 10:30 p.m., Perry noticed that Portia's car was not in the apartment complex parking lot and that Portia's apartment was dark. R. 184, line 11 – R. 185, line 11.

Portia's aunt, Vernelle Bellamy, saw Portia twice on Saturday, June 10, 2006. The first time Portia gave money to Bellamy to use while in Sumter shopping. Bellamy purchased an $80 pantsuit for Portia, which she gave to Portia later on Saturday. R. 235, line 22 - R. 237, line 1; R. 237, lines 2-8. On Tuesday, June 13, 2006, Bellamy received a call from Portia's workplace, Bob Bennett Ford, indicating that Portia was not at work. R. 238, lines 7-24. Concerned, Bellamy went to the police department and to Appellant's

Portia's apartment. R. 241, lines 7-14; R. 242, lines 19-21. Although the apartment manager would not allow Bellamy into the apartment, the manager entered the apartment and found nothing out of the ordinary. R. 243, lines 1-18.[4]

Debra Hobgood worked with Portia and Appellant at Bob Bennett Ford. R. 262, lines 2-12; R. 265, line 23-24. Hobgood claimed that Portia did not allow Appellant to drive her car. R. 265, lines 15-19. Hobgood further claimed that Portia wanted to get away from Appellant. To assist Portia, in March 2006, Hobgood gave Portia money for an apartment on the condition that Appellant not move into the new apartment. R. 268, line 14 – R. 269, lines 9.[5] Hobgood also testified that Angelica was supposed to attend summer camp in July 2006. R. 268, line 10 – R. 270, line 12.[6] Hobgood became worried on Tuesday, June 13, 2006, when she learned that neither Portia nor Appellant were at work. Hobgood's boss contacted the police based on representations made by Hobgood, including her understanding that Portia had lied to her about no longer living with Appellant. R. 275, line 13 – R. 276, line 4; R. 277, lines 19-25. According to Hobgood, Portia was happy when she last saw her on Friday, June 9, 2006. R. 278, lines 9-11.

While working at Bob Bennett Ford, Annette Capilos and Portia became friends. R. 762, lines 4 - 24. Capilos believed Portia began dating Appellant in 2005. R. 763, lines 9-24. After Capilos resigned her position at Bob Bennett Ford, she and Portia

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[4] Ola Mathis was the property manager for the apartments where Portia and Appellant lived in 2006. R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24. On June 13, 2006, relatives of Portia arrived at the complex. R. 320, lines 2-11. Mathis entered the apartment and found everything to be in order. R. 320, line 23 – R. 323, line 5.

[5] Hobgood also gave Portia $800 as a down payment on her new car. R. 274, lines 6-9.

[6] Harry Wertz, another employee at Bob Bennett Ford, also claimed Portia planned to send Angelica to church camp during the summer of 2006. R. 783, lines 7-10.

remained in contact. R. 764, lines 22-25. Based on a conversation with Portia, Capilos advised Portia to have a discussion with her bosses and to stay away from Appellant. R. 768, lines 5-20. Capilos claimed that a few days prior to June 13, 2006, she had called Portia about her upcoming birthday, but received no answer. R. 772, line 15 – R. 773, line 1.

Harry Wertz also worked with Portia and Appellant at Bob Bennett Ford. R. 781, lines 7-21; R. 788, lines 19-20. Wertz described Portia, who was a custodian, as a good employee, whose job was not in jeopardy. R. 784, line 18 – R. 785, line 10. He admitted that Portia was "wild" before, but she was no longer. R. 786, lines 6-13. Wertz was concerned on Monday, June 12, 2006 when Portia did not arrive at work. R. 787, lines 6-24. When Portia did not arrive for work on Tuesday, June 13, 2006, a co-worker drove by her apartment. R. 788, lines 5-18. He last saw Portia on Friday when she left work and she said she would see him on Monday. R. 788, line 23 – R. 789, line 7. Wertz admitted that Appellant was driving Portia's car on Friday, June 9, 2006. R. 789, lines 13-16. Portia was "very happy" on Friday when she left work with Appellant. R. 792, lines 18-22.

Jack Clary, Portia's supervisor at Bob Bennett Ford, described Portia as was very happy with her job and a "model" employee. R. 795, lines 13-14; R. 796, lines 16-22; R. 805, lines 14-22. Clary described Appellant as very quiet. R. 798, lines 15-23. Clary was aware of the relationship between Appellant and Portia. R. 799, lines 3-8. On Tuesday, June 13, 2006, Clary, concerned that Portia was not at work, got Portia's address and drove to her apartment. He found her car was not there and he received no answer when he knocked on the door. R. 802, lines 1-11.

Nancy Hyler, the former office manager at Bob Bennett Ford, testified that Appellant and Portia were employees of Bob Bennett Ford in 2006. R. 744, lines 14-18; R. 745, lines 18-21; R. 746, lines 3-4. Payroll at Bob Bennett Ford ran from Thursday to Wednesday with paychecks issued on Friday. R. 746, lines 16-18. The last check issued for Portia was dated June 16, 2006, but was never picked up. R. 752, lines 1-4.[7] According to Portia's time card, her last day of work was Wednesday, June 7, 2006. R. 746, lines 12-15; R. 749, lines 3 – 7; R. 749, lines 15-16. Although another timecard did not exist, Hyler testified that a check was cut for the week of June 8 through June 14 for Portia showing she worked eighteen hours, or approximately two days. R. 749, line 19 – R. 750, line 4. Based upon Hyler knowing that Portia did not show up for work on June 12, 2006 or thereafter, Hyler determined that the last two days of Portia's employment were Thursday and Friday of the previous week. R. 752, line 20 – R. 755, line 7. Portia did not provide notice of resigning or taking leave. R. 753, lines 5-10.

Carly Coviello, an employee with T-Mobile, testified regarding records of Portia's cell phone, which was in the name of Rosalyn Sumter. R. 688, lines 9-10; R. 690, lines 6-10.[8] According to Coviello, the last call made by Portia's phone was at 9:26

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[7] Appellant's last paycheck was not picked up from Bob Bennett Ford. R. 757, lines 1-2. Appellant's last day working was Friday, June 9, 2006. R. 757, line 24 – R. 758, line 4. Appellant had not provided notice of resignation or leave. R. 757, lines 9-19.

[8] Rosalyn Sumter, Portia's aunt, testified that Portia had a cell phone on Sumter's plan. Portia paid Sumter monthly. R. 806, lines 16-20; R. 808, lines 6-23. Additionally, Sumter helped Portia get her driver's license. R. 811, lines 2-21. Sumter claimed that when she visited Portia, Appellant would remain in a back room, rather than visit with Portia's visitors. As a result, Sumter never met Appellant. R. 814, line 5 – R. 815, line 14.

p.m. on June 10, 2006. The call was made using a cell tower on Leaphart Road in West Columbia. R. 690, line 15 – R. 692, line 2.

Based upon the credit records maintained by TransUnion Credit Union, Steven Newnom testified there had been no credit inquiries for Portia's records and only three addresses, all of which were in the Midlands. R. 699, lines 18 – 19; R. 701, lines 13-18; R. 702, lines 13 -20; R. 704, lines 4-17.

Portia had checking and savings accounts with Bank of America. R. 709, lines 5-20. On June 10, 2006 at 9:50 a.m., $75 was withdrawn from the savings account at a bank in Cayce, leaving the account with a balance of $0.72. There were no further transactions on the savings account. R. 710, lines 1- R. 713, line 4. Concerning the checking account, a check card purchase for $20.09 to Eagle Express in West Columbia posted on June 6, 2010. On June 12, 2006, an automatic draft of $266.77 was made to Ford. R. 713, line 5 – R. 714, line 14. On June 8, 2006, a purchase for $8.45 at Hess was made. R. 714, lines 16-25. The account had a balance of $214.39. R. 715, lines 4-7.

Stuart Darby was Portia's treating physician for several years. Portia's last visit was on May 23, 2006 when he treated her for an upper respiratory infection. R. 876, line 4 – R. 877, line 1. Portia had been under Dr. Darby's care for a sleep disorder and anxiety. He believed the sleep disorder was the result of stress from work and home. R. 877, line 1 – R. 878, line 22. Portia was scheduled for a follow-up visit in two months, but did not return. R. 879, line 22 – R. 880, line 22; R. 880, lines 17-21.

Portia purchased a 2005 Ford Focus on June 22, 2005, pursuant to a financing agreement with Ford Motor Credit. R. 898, line 1-899, line 18. Portia had been late on a payment only once. R. 899, line 24 – R. 900, line 1. The last payment received by Ford

Motor Credit was processed on June 12, 2006. R. 900, lines 2-3. The car was repossessed and sold at auction based upon failure to make additional payments. R. 900, lines 8-13.

Nicky Rodgers, an employee with Lexington County 911, who had access to a national database for drivers' licenses, found one driver's license for Portia and it was in South Carolina. R. 914, line 7 – R. 915, line 5. She also searched for known aliases for Portia, such as Portia Bracey and Portia Sumter, and found no other drivers' licenses. R. 917, lines 5-14.

Angelica last attended school on June 1, 2006, which was the end of her second grade year. R. 918, line 9 – R. 919, line 8. The school expected Angelica to return the next year. R. 919, line 22 – R. 920, line 4. The school district received no requests from other schools for Angelica's school transcripts. R. 921, lines 20-23.

Joe Grice was the pastor of a church in West Columbia where Portia and Angelica attended regularly in 2006. R. 930, line 18 – R. 931, line 11. The church was sponsoring a youth camp set for the week of July 4, 2006, which Portia had paid for Angelica to attend. R. 930, line 1 - R. 931, line 13.[9] Angelica did not attend the camp, and neither Portia nor Angelica showed up at church again. R. 932, line 14 –R. 933, line 16.

Evidence of Appellant's Conduct

Takiesha Shelton, an employee of Motel 6, testified that the motel's records showed Appellant arrived at a motel in Vicksburg, Mississippi on June 12, 2009 and departed on June 13, 2009. Appellant paid cash for the room. R. 720, lines 15-16; R.

[9] A check in the amount of $75 had been written from Portia's account to Youth Camper on April 30, 2006. R. 716, lines 8-17; R. 717, line 25 – R. 718, line 6.

722, line 18 – R. 723, line 11; R. 724, lines 1-21; R. 725, lines 1-3. Records showed Appellant arriving on June 14, 2006 and departing on June 15, 2006 at a motel in Eloy, Arizona. Again, Appellant paid cash. R. 726, line 18 – R. 727, line 18. One receipt listed Appellant's address in Florida, but a second receipt showed his address in Cayce. R. 733, lines 16-23; R. 736, lines 14-19.[10]

In 2006, Appellant had two accounts with Wachovia/Wells Fargo bank – checking and savings. The records established that there were transactions occurring in both accounts originating from the Midlands of South Carolina from June 9, 2006 until June 11, 2006. R. 1191, lines 14-21; R. 1197, line 2 – R. 1201, line 6. Then, on June 13, 2006, there were three withdrawals totaling $420 originating in Waskom, Texas. R. 1202, line 17 –R. 1203, line 24. On June 14, 2006, Appellant's savings account had a balance of $2.23 and his checking account had a balance of $0.08. R. 1201, lines 8-10; R. 1204, lines 3-7.

Shane Ramirez, an officer with the Texas Highway Patrol, stopped Appellant for speeding on June 14, 2006 at 12:12 p.m. at milepost 72 on I-10 in Fort Hancock, Texas. R. 661, lines 19-21; R. 662, lines 11-15; R. 663, lines 8-12; R. 667, lines 9-12; State's Exhibit #29. Appellant was driving a 2005 Ford Focus that was registered to Portia. R. 664, lines 21-25; R. 665, lines 6-16. There were no passengers in the car, but there was a child's car seat in the back. R. 666, lines 19-21; R. 670, lines 19-25. Appellant informed Ramirez that he was going to Arizona to pick up his wife.[11] R. 671, line 21 – R. 672, line

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[10] Gail Heath, a forensic document examiner with SLED, testified that the signatures on the receipts were written by Appellant. R. 1146, lines 12-20; R. 1154, lines 16-20.

[11] According to the apartment lease, Appellant and Portia were married. R. 337, line 22 – R. 338, line 6.

1.

Nathan Bresee worked for Customs and Border Protection in Blaine, Washington in 2006. R. 356, lines 23-25. He encountered Appellant on June 17, 2006, at 10:45 p.m. at the border. R. 356, lines 9-17. Because Appellant had been refused entry into Canada, Bresee performed a criminal history check on Appellant. He received a positive NCIC alert indicating that Appellant was a missing person. R. 356, lines 18-22; R. 361, lines 12-23; R. 386, lines 7-22. Bresee contacted the West Columbia Police Department (WCPD) as the reporting agency. R. 363, lines 13-19. Although no warrant had been issued for Appellant's arrest, the WCPD told Bresee that Appellant was a suspect in a double homicide. R. 364, lines 3-5.

Upon learning this information, Bresee and other Border Protection agents conducted two searches of Appellant's person and a search of his two bags. R. 364, lines 5-7; R. 364, lines 23-25; R. 387, line 2 – R. 388, line 8; R. 394, line 11 – R. 395, line 1. Bresee found several items in Appellant's possession that he sent to WCPD, including a Greyhound bus ticket from Seattle to Vancouver dated June 17, 2006, a Motel 6 receipt dated June 14, 2006, and a second Motel 6 receipt dated June12, 2006. R. 390, line 1 – R 391, line 7; R. 395, lines 5-8; R. 409, line 7 – R. 411, line 8; R. 507, line 22 – R. 508, line 4. According to Bresee, at 3:10 a.m. on June 18, 2006, WCPD confirmed to him that an arrest warrant had been issued for Appellant on the charge of grand larceny. R. 395, lines 18-25.

Courtney Polinder, an officer with the Whatcom County Sheriff's Office in Washington, received a call from Border Protection at 3:30 a.m. indicating that a warrant had been issued and required service. R. 437, line 20 – R. 438, line 1. Polinder served a

fugitive warrant and an arrest warrant concerning grand larceny on Appellant who was being detained at the border. R. 438, line 2 – R. 439, line 14. He estimated that he served the warrant between 4:00 a.m. and 4:30 a.m. R. 439, lines 6-10. Polinder retrieved Appellant's property from Border Protection and transported it, along with Appellant, to the county jail. R. 439, lines 15-18; R. 441, line 24 – R. 442, line 21.

Although Polinder claimed he did not interrogate Appellant, he testified that Appellant denied any involvement with the vehicle, which was listed in the warrant. R. 527, lines 18-19; R. 529, lines 7-22. Further, Appellant denied driving the vehicle to the West Coast; rather, Appellant stated he travelled with a friend and then by bus. R. 529, line 23 – R. 530, line 6. Appellant confided in Polinder that he lived with Portia and Angelica, had quit his job, left to visit Canada, and planned to return to South Carolina. R. 531, line 16 – R. 532, line 23; R. 534, line 20 – R. 535, line 3.

On June 19, 2006, Brenda Wilson, an agent with the Federal Bureau of Investigation, and Glen Hutchings, a local police officer, interviewed Appellant. R. 542, lines 1-16. During the interview, Appellant stated he quit his job on Friday, June 9, 2010, but planned to return to South Carolina to attend a truck driving school. R. 591, line 12 – R. 592, line 8. He admitted he and Portia had a romantic relationship, but claimed the relationship had become more like roommates within the last year. R. 593, lines 4-9. Appellant stated he last saw Portia's car on Friday when the two went home. R. 595, lines 7-24. Appellant denied driving the car outside of South Carolina. R. 596, line 1-5. He had had no contact with Portia or Angelica since Friday because the two had decided to go their separate ways. R. 596, lines 6-19.

When Wilson confronted Appellant with evidence of his having driven the car outside of South Carolina, Appellant admitted doing so. R. 599, line 15 – R. 600, line 5. However, Appellant stated Portia was agreeable to him driving the car because she was in "over her head" with the payments. R. 600, lines 6-18. Wilson then called WCPD with the information. R. 607, lines 5-9.

Bradley Richardson, an officer with the Seattle Police Department, received a request on June 18, 2006 to look for Portia's car. He looked near the Greyhound bus station and found the car. R. 646, line 23 – R. 647, line 18; R. 651, lines 18-24. He contacted WCPD with the information. R. 649, lines 12-18. Thereafter, he conducted a cursory search of the car and had it towed to a secure facility. R. 650, lines 1-16.

Police Investigation

Shane Phillips, an officer at West Columbia Police Department (WCPD), responded to a call for a possible missing person on June 14, 2006. At that time, he met with Sallie Jones, who indicated Portia was missing. R. 1158, lines 18-22; R. 1159, lines 12-24. Phillips was unsuccessful in his attempts to reach Portia by phone. R. 1160, lines 5-20. Phillips also learned that Appellant was not at work. R. 1161, lines 11-17. Phillips entered the apartment of Appellant and Portia on June 14, 2006 to conduct a welfare check. Phillips found "nothing was disheveled, nothing messed up, no sign of any kind of struggle or anything like that." R. 1163, line 8 – R. 1165, line 16. As a result of his investigation, Phillips entered the information for Portia into the NCIC as a missing person. R. 1163, lines 2-7.

Later on June 14, 2006, Phillips returned to the apartment with another WCPD officer, April Bayne for what Bayne characterized as a second "welfare check." R. 1220,

line 24 – R. 1221, line 1. Bayne looked in all of the rooms, opened drawers, and even removed items from the drawers. R. 1238, lines 12-15; R. 1241, lines 9-15; R. 1242, lines 17-20. Bayne took photographs of items throughout the apartment. She claimed she took photos of items that indicated the family was not traveling, photos of unusual items, and photos for liability purposes. R. 1243, line 18 – R. 1246, line 20; R. 1250, line 4 - R. 1251, line 11; R. 1253, line 4 - R. 1254, line 7. She admitted she saw no blood in the apartment on June 14, 2006. R. 1286, lines 4-8.

Ola Mathis, the apartment manager, recalled that the police arrived on Wednesday and entered the apartment. R. 330, lines 5-14. Approximately four months later, the police released the apartment and Mathis was allowed to enter the apartment to clean it for a new rental. While cleaning, she found guns under the couch and called the police. R. 332, lines 6-24. However, prior to cleaning the apartment, Mathis had also allowed family members to retrieve items from the apartment. R. 333, lines 8-12.

On June 22, 2006, Rod Green, an agent with SLED, arrived in Seattle, Washington, where he processed Portia's car. R. 842, lines 3-23. Green found no evidence of blood, but found two sets of fingerprints on the exterior of the car near the trunk. R. 847, line 14 – R. 848, line 10; R. 851, line 21 – R. 852, line 5. Green also took a swab from the steering wheel. R. 852, lines 17-21. Green examined the recovered prints, and rendered no opinion on one set due to the quality of Appellant's fingerprint card; however, he identified three fingerprints from the second set as belonging to Appellant. R. 860, line 19 – R. 862, line 17.[12] He explained the three fingerprints were

[12] Melissa Wallace with SLED compared the latent print that Green offered no opinion on with Appellant's major case prints, which showed Appellant's entire hand rather than just the fingertips. Wallace testified that the latent print from the car and Appellant's major

considered a simultaneous print, meaning they were made at the same time. R. 865, lines 2-9. When Green examined the trunk, it had a "new car smell" and did not smell strongly of cleaners or perfumes. R. 869, lines 9-12.

Matt Edwards with WCPD travelled to Washington on August 3, 2006 and transported Appellant back to South Carolina. In addition to transporting Appellant, he also transported Appellant's two pieces of luggage. R. 936, lines 5-22.

The following items were found in Appellant's luggage: binoculars, banking documents, old receipts, a wallet, letters, a Greyhound bus ticket dated June 17, 2006, motel receipts, a raffle ticket, tax documents, torn notebook paper with phone numbers, business cards, two sets of keys, a Family Dollar receipt for toiletries dated June 13, 2006, a pay stub, an old traffic ticket, a South Carolina lottery ticket dated June 10, 2006, a car title, documentation from the Canadian border, jewelry, and clothing. R. 1005, line 12 – R. 1039, line 15; R. 1048, line 5 – R. 1049, line 23.

James Sullivan of the WCPD conducted a photographic comparison of the key given to him by Jones, which she claimed Portia gave to her, a key from Appellant's luggage, and a key created using the car's VIN. He concluded the two keys had the same cuts. R. 1093, lines 16-17; R. 1094, line 16 – R. 1102, line 17. Additionally, Sullivan compared two sets of keys found among Appellant's possessions, which appeared to be house keys and mailbox keys. Sullivan concluded the keys had the same cuts. R. 1102, line 19 – R. 1108, line 2. However, Sullivan was unsuccessful in his attempt to use the

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case prints matched. The major case prints were obtained using a court order. R. 1132, line 1-2; R. 1137, line 13 – R. 1139, line 18.

house key on the apartment door or any of the other 116 locks he tried at the apartment complex. R. 1108, lines 5-22; R. 1116, lines 9-12.

Robin Taylor, a DNA analyst from SLED, testified regarding multiple items of evidence she tested. R. 1496, lines 7-21. First, she developed a partial profile from the swab from the steering wheel, which matched Appellant. R. 1518, lines 8-19. Moving to the items of evidence recovered from the apartment, Taylor developed profiles from a mixture of DNA on a swab from the hall bathroom of the apartment, and could not exclude Appellant as a contributor. R. 1518, line 20 – R. 1519, line 17. A section of the carpet seized from the apartment tested positive for blood and was a mixture of at least two individuals' DNA. The major contributor was consistent with a daughter of Theresa Brown. The minor contributor was a male, but no further conclusions could be reached. R. 1520, line 6 – R. 1521, line 1. An area on the bottom of a green chair found in the apartment, a swab from the master bedroom sink, and a swab from a blue container found in the apartment tested positive for blood. All three also contained a mixture of DNA with the major contributor being consistent with a daughter of Theresa Brown, and unidentified minor contributors. Similarly, swabs from a different area of the green chair, carpet, and master bedroom door tested positive for blood and the DNA profiles were consistent with a daughter of Theresa Brown. R. 1521, line 13 – R. 1525, line 21. The same was true for two other areas of the carpet and five sections of a sheet found near the green chair. R. 1526, line 5 – R. 1528, line 3.

Steven Derrick, an expert in the field of blood stain analysis, analyzed the blood stains found in the apartment, some of which were visible with the naked eye and others were visibly only with the use of an enhancing agent. Derrick opined that the right arm

of the green chair showed a "broken" droplet of blood with a transfer stain going down the arm. He concluded the three distinctive lines of blood going down the arm were made by three fingers making contact with the chair. R. 1535, line 21 – R. 1538, line 6. The undercarriage of the green chair showed multiple patterns, including drops, transfers, and smears. On the wood portion of the undercarriage of the green chair, which was broken, Derrick found what he called a "hair transfer pattern" of blood. R. 1539, line 8 – R. 1540, line 5; R. 1546, lines 4-17. He opined that the spatter had to be caused by a medium range of force based upon the size of the droplets, which was caused by a fist or other blunt object. R. 1541, lines 1-7. Derrick further opined that the chair was not upright when the blood spatter was distributed on the chair. R. 1544, lines 3-19. In the hair transfer pattern, Derrick found a "conglomerate of blood" that he claimed indicated a wound in the hairline where bloodletting had occurred. R. 1546, line 14 – R. 1547, line 11. Based upon his analysis of the blood, Derrick opined that something other than a natural incident occurred, specifically an assault. R. 1549, lines 114; R. 1560, lines 2-15.

The blood spatter on the blue container showed the source of the bloodletting was between three and ten inches from the floor. R. 1550, line 21 – R. 1551, line 12. Additionally, Derrick opined that the blood on the floor had been wiped based on the patterns he detected. R. 1552, line 21 – R. 1554, line 1. The blood found on the master bedroom door was from an object with blood on it making contact with the door and then moving across the door. Derrick was "inclined to believe" a left hand left the blood. R. 1555, line 10 – R. 1556, line 18.

Bayne testified regarding WCPD's failure to follow-up on numerous leads and tips indicating sightings of Portia and/or Angelica. For example, a patron at a local ice

cream shop claimed she saw the two on July 1, 2006 and contacted the police. Although WCPD inquired if the shop had video, no one spoke to the patron until six years later. R. 1607, lines 10-24; R. 1612, line 10. WCPD took a statement from Angelica's P.E. teacher who told police in 2006 that Angelica informed him that she was going to Texas; WCPD conducted no follow-up regarding this lead. R. 1614, line 4 – R. 1615, line 25; R. 1620, line 14 – R. 1621, line 4; R. 1626, line 3 – R. 1627, line 20. A truck driver claimed he saw a woman fitting Portia's description at a truck stop near El Paso, Texas. The trucker said the woman approached him asking for help because she had been left at the truck stop by her boyfriend. The trucker gave the woman food coupons to be used at the truck stop. Although the trucker was not sure of the exact date and city, he narrowed it down to the week of June 17, 2006 and to a truck stop near El Paso. R. 1627, lines 21-25; R. 1631, line 6 – R. 1639, line 10; R. 1648, line 3 – R. 1649, line 19. Bayne was unaware that the prosecutor had secured receipts from Mullins in 2012, shortly before the trial, and that Mullins had narrowed down the truck stops to two, despite the fact that it was six years later. R. 1649, line 20 – R. 1650, line 18. Bayne admitted WCPD did not follow up on approximately six leads received from the National Center for Missing and Exploited Children even though five of the leads indicated sightings in California and one was for a sighting on Amtrak between Seattle and Portland. R. 1653, lines 7-23; R. 1655, line 9 – R. 1660, line 4.

Motion for Directed Verdict

At the conclusion of the state's case, Appellant moved for a directed verdict. Appellant explained that the primary circumstantial evidence against him "might be termed as flight." Although blood was found in the apartment shared by Appellant,

Portia, and Angelica, no evidence tied Appellant the alleged assault resulting in the blood evidence. R. 1699, lines 16-17; R. 1700, line 1 – R. 1707, line 21; R. 1711, line 11 – R. 1712, line 8.

Judge Griffith denied the motion for directed verdict. He "note[d] for the record that [he was] not certain every fact presented was circumstantial, but a large majority was circumstantial." The judge was persuaded by "the circumstantial facts regarding the relationship among [Portia and Angelica], the extended testimony regarding their personal habits, routines, work area, their hair appointments, all that sort of thing" coupled with their "mysterious disappearance" with no communication. He found the evidence sufficient to survive a directed verdict motion. R. 1714, lines 3-20.

Appellant's case-in-chief

Appellant then presented his case. Rebecca Kilbride, who was a teacher at Angelica's school, knew Appellant because he, alone, picked Angelica up from school two or three times per week. R. 1716, line 4 – R. 1717, line 2. Additionally, George Mook, who worked at Bob Bennett Ford with Appellant and Portia, saw Appellant driving Portia's car "once in a while." R. 1718, line 20 – R. 1719, line 1.

Page Moore with WCPD also testified on Appellant's behalf. On February 29, 2012, Moore followed up with Barbara Williams, who had called police in 2006 claiming to have seen Portia and Angelica at an ice cream shop in Lexington County. R. 1721, line 25 – R. 1722, line 6. Although Williams had called in 2006, the first contact WCPD had with her was six years later in 2012. R. 1723, lines 21-25.[13]

[13] On cross-examination, Edwards admitted that WCPD responded to a tip on July 10, 2006 from Ms. Williams who claimed to have seen Portia at an ice cream shop in Pine Ridge on July 1, 2006 at 10 a.m. Although WCPD went to the ice cream shop, no one

Matt Martin, an investigator for the Eleventh Circuit Solicitor's Office, testified that the credit report using Angelica's social security number showed a collection report for an unpaid credit balance. R. 1727, lines 14-18; R. 1730, lines 4-9; R. 1731, line 20 – R. 1732, line 4. It appeared the collection was for an unpaid medical bill in California in October of 2008. R. 1732, lines 21-25.

Dr. Kimberly Collins, an expert in pathology and forensic pathology, reviewed the photographs from Appellant's and Portia's apartment. She found no indication of dragging down the hallway of the apartment. R. 1452, line 23- R. 1453, line 2. The photographs further indicated there was no significant volume of blood to soak through the carpet because neither the bottom of the carpet nor the padding had blood on them. R. 1453, line 24 – R. 1454, line 8. She was unable to form an opinion as to the quantity of blood on the green chair as such was medically and scientifically impossible. R. 1454, lines 14-19. Further, she was unable to form an opinion about the type of injury that may have been present, how the injury came to be, or the severity of the injury. R. 1456, line 18 – R. 1457, line 1.

Renewal of Motion for Directed Verdict

At the conclusion of Appellant's case, Appellant renewed his motion for directed verdict. R. 1751, lines 9-14. The judge again denied Appellant's motion. R. 1751, line 22 – R. 1752, line 5.

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attempted to interview Ms. Williams or conduct any follow-up at that time. R. 954, line 14 – R. 956, line 16.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963). The prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013)(citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. The Odems Court used the traditional circumstantial evidence jury charge in making its directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The Supreme Court granted a directed verdict of acquittal to the defendant in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). Dr. Jennings Cox, who lived and worked in Savannah, was last seen alive on June 18, 1997 at his office. He borrowed a colleague's car to go to a dentist appointment. Later, he called his secretary to cancel his remaining appointments for the day. Bank records indicated he withdrew money from an ATM in Hardeeville, South Carolina during the afternoon of June 18, 1997. During their investigation, the police interviewed Bobby Ray Ware.

Ware, a truck driver who lived in Savannah, had had a sexual relationship with Dr. Cox for more than a year. On the weekend of June 14-15, Ware introduced Dr. Cox

to Arnold, who was staying with Ware. According to Ware, Dr. Cox and Arnold had sex that weekend. Ware also saw Arnold with a gun while he was staying with him. Id. at 388-389, 605 S.E.2d at 530. Ware left at 6:00 a.m. on June 17, 1997 to drive to Chicago while Arnold remained at Ware's house. On June 19, 1997, Ware received a message to contact Arnold at a specific phone number. Later, Ware contacted Arnold at the phone number, which belonged to Arnold's father who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530

The borrowed car was found on June 20, 1997 in a parking lot in Johnson City, Tennessee. Although there was no blood in the car, there were some unspecified scratches on it. Additionally, police recovered a fingerprint from a coffee cup lid found in the center compartment of the car. The fingerprint was identified as Arnold's right thumbprint. Id. The body of Dr. Cox was found on June 21, 1997 in Colleton County. He had been shot. No additional evidence was found at the scene. Id. at 388, 605 S.E.2d at 530. On June 27, 1997, Arnold was arrested at his father's house in Tennessee. Id. at 389, 605 S.E.2d at 531.

According to the Court, the fingerprint evidence established only that Arnold was in the car on the same day Dr. Cox was last seen alive, the presence of the borrowed car in the same state where Arnold was after his stay in Savannah raised only a suspicion of guilt. The prosecution presented no evidence that Appellant was even at the scene of the crime in Colleton County. Therefore, the Court granted a directed verdict of acquittal to Arnold. Id. at 390, 605 S.E.2d at 531.

On October 9, 2013, this Court granted a directed verdict to Karl Lane on the charge of burglary in the first degree. On April 21, 2011, Mark McSwain discovered

several firearms were stolen from his safe. McSwain's neighbor saw a car carrying two people pull into McSwain's driveway at 3:20 p.m. that day. One of the individuals approached the front door of the home, return to the car, and then approach the back door. The neighbor described the car as red or burgundy with a paper tag and the front passenger panel was covered in gray primer. After police left the scene, McSwain noticed a folded piece of paper in the grass beside the driveway. The paper was from the unemployment office, where Lane had visited the day of the burglary and was located about three miles from McSwain's house. Lane, 406 S.C. at 119 – 120, 749 S.E.2d at 166 – 167.

The prosecution presented evidence that at times Lane drove a car matching the description provided by McSwain's neighbor and was driving the car the day of the burglary, that the folded piece of paper belonged to Lane, and that Lane did not want to talk to the police the day after the burglary. However, this Court found the evidence did not meet the standard of substantial circumstantial evidence. "At most, the evidence the state presented raise[d] only a mere suspicion that Lane committed the crime." Id.

The Eleventh Circuit Solicitor's Office failed to present substantial circumstantial evidence that Appellant was guilty of murder and grand larceny. The prosecutor presented evidence that Portia and Angelica were no longer in Lexington County and had no contact with family and friends for six years, which was unusual. The prosecution presented evidence that Appellant lived with Portia and Angelica until shortly before their disappearance. The prosecution presented evidence that blood consistent with that of Theresa Brown's daughter was in their shared apartment and was indicative of an

assault. Finally, the prosecution presented evidence that Appellant left South Carolina around the time of Portia's and Angelica's disappearance.

What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant killed Portia and Angelica. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant was present at the crime scene, which the prosecution claimed was in Lexington County. What the Eleventh Circuit Solicitor's Office failed to present was evidence that Appellant stole Portia's car, especially in light of the evidence that Appellant frequently drove Portia's car with her permission, the two were involved in a romantic relationship, and the two lived together.

II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations and evaluation of the evidence as fact-finder violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.

Relevant facts

At the conclusion of the case, the parties engaged in a charge conference to discuss the standards the judge would use to evaluate the evidene. Appellant moved for an instruction consistent with the circumstantial evidence charge found in State v. Grippon.[14] R. 1752, line 17 – R. 1753, line 6. The judge then asked the state if the "charge on circumstantial evidence as outlined by Grippon is consistent with the appropriate law." R. 1753, lines 7-15. The state responded it would "be comfortable with any standard" used by the judge. R. 1753, lines 16-19. Appellant clarified for the record that he was asking for "the old Edwards[15] charge." Specifically, he requested "in a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete." R. 1753, line 20 – R. 1754, line 4. The state then objected to the trial court considering language found within a dissenting opinion of the Supreme Court. R. 1754, lines 7-9.

The trial judge, and fact finder, responded that he would not "charge something that [was] not the law." R. 1755, lines 8-10. Appellant clarified that the language he relied upon was from a concurring opinion, not a dissent. Additionally, he argued that

[14] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be "the old Edwards standard, which is any exception that would tend to disprove the case is sufficient to defeat the case." R. 1755, line 19 – R. 1756, line 11. Nevertheless, the judge denied the request. R. 1756, lines 12-15.

Discussion

On August 14, 2013, the South Carolina Supreme Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina. In State v. Logan, 405 S.C. 83, 94-95, 747 S.E.2d 444, 450 (2013) the Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. at 97, 747 S.E.2d at 451. Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." Id.

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." Id. Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." Id. at 97-98, 747 S.E.2d at 451. In light of the differing analysis required when examining direct versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant's case, the instruction directs

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[15] State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).

the fact finders 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." The instruction also provided that "[i]f these circumstances merely portray the defendant's behavior as suspicious, the proof has failed." Id. at 99, 747 S.E. 2d at 452.

Although the Court held that a trial judge use the circumstantial evidence instruction as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005), the Court held that a trial judge may not rely exclusively on that charge over a defendant's objection. Id. at 100, 747 S.E.2d at 452-453.

As an initial matter, Appellant benefits from the Logan ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final); Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final")).

Second, clear, cogent, and concise instructions directing even the trial judge on how to analyze the circumstantial evidence before it were necessary in Appellant's case. The instruction concerning how to evaluate circumstantial evidence was necessary in Appellant's trial due to the nature of the evidence presented by the prosecution, which was entirely circumstantial.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs the fact finder regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts. The trial judge's refusal to utilize the charge concerning how to use circumstantial evidence violated Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt.

III. In violation of the Fourth Amendment to the United States Constitution and Article One, Section Ten of the South Carolina Constitution, the trial judge erred in failing to suppress evidence seized in connection with Appellant's arrest, including all of the items found in his luggage, Appellant's statements, Appellant's fingerprints, and Appellant's extradition, where the arrest warrant issued was not supported by probable cause due to the officer's omission of vital information, which placed the scenario in an entirely different light.

Relevant facts

Appellant incorporates by reference the factual recitation presented in Issue I, supra, concerning Polinder serving the arrest warrant on Appellant in Washington, statements made by Appellant to Polinder, the interview of Appellant by the FBI agent, and Appellant's extradition to South Carolina, which was based upon the warrant for grand larceny, testimony by family and friends concerning Appellant having driven Portia's car.[16] Kevin Odell, an employee of Lexington County Sheriff's Department, booked Appellant into the jail. As part of the booking process, he took Appellant's fingerprints. R. 837, lines 19-20; R. 838, lines 1-22.

Matt Edwards, a detective with WCPD, procured the arrest warrant for Appellant on the charge of grand larceny. R. 449, lines 14-17.[17] The warrant affidavit contained the following information: on June 14, 2006, Portia and Angelica were reported missing

[16] As evidenced by the fugitive complaint, order and warrant of arrest and detention on fugitive complaint, governor's warrant of arrest and extradition, the State of Washington detained Appellant and extradited him to South Carolina based upon the arrest warrant. R. 1815.

[17] The warrant was typed and signed by Edwards on June 18, 2006. R. 452, lines 18-20.

having not been seen since June 10, 2006; on June 14, 2006, Appellant was ticketed in El Paso, Texas while driving alone in a 2005 Ford Focus valued at $12,000 registered to Portia Washington; on June 18, 2006, Appellant was stopped while trying to cross the Canadian border on a bus; and the whereabouts of the vehicle were unknown. R. 451, line 14 – R. 452, line 12; R. 1813.

In addition to the written affidavit, Edwards orally supplemented the information. R. 452, line 25 – R. 453, line 1. Edwards orally "reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Appellant "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Appellant lied to the trooper when he said he was going to pick up his wife in Arizona because Appellant was unmarried, and that Appellant showed up in Washington alone. R. 453, lines 3 – 22.

Incredulously, Edwards failed to inform the magistrate that Appellant and Portia were involved in an intimate relationship. R. 460, line 21 –R. 461, line 7. Edwards failed to inform the magistrate that Appellant and Portia lived together and their lease listed them as husband and wife. R. 457, lines 4-7. Edwards failed to inform the magistrate that the registered owner of the car was Appellant's live-in girlfriend. R. 461, lines 10-12. Edwards failed to inform the magistrate that Appellant and Portia lived together in multiple residences over the past couple of years. R. 460, lines 17-20. Equally importantly, Edwards failed to inform the magistrate of any conversations with Portia's mother in which she stated that Appellant drove Portia's car to drop Angelica off at her house. R. 456, lines 14 – 25.

In his argument to the trial court, Appellant emphasized the testimony of Portia's mother, Sallie Jones, who had testified the previous day that Appellant frequently drove Portia's car to drop Angelica off after school. R. 468, line 18 – R. 471, line 8. Appellant admitted that the face of the arrest warrant established probable cause, but argued the omissions rendered the warrant defective. Specifically, Appellant argued that he was driving a car belonging to his live-in girlfriend of two years and that co-workers and family members informed police that Appellant would drive Portia's car. R. 473, line 19 – R. 475, line 15. However, the information presented by law enforcement to the magistrate gave the impression that a "random person" was found driving Portia's car. R. 475, lines 16-24. The omission of important details rendered the warrant invalid. R. 475, line 25 – R. 476, line 12. Appellant summarized his argument as follows:

> At the end of the day it's acting as a judge who would have been asked to sign that probable cause warrant, is the omission of the fact, even if their family didn't like it, that they had a relationship over two years where they lived together in the same home, more important than what on the face of that warrant appears like a stranger/stolen car case. And that's exactly how it was presented to the judge. Detective Edwards said he never made mention of [Portia and Appellant]'s relationship.

R. 487, lines 14-23.

The trial judge noted that "[o]n a probable cause warrant, I just don't think that's required, to tell everything they knew." R. 488, lines 20-21. Appellant clarified that it was not necessary "to tell everything," but it was improper to omit "the pink elephant in the room." Appellant explained "[i]t's not a stranger theft, and that's how that warrant's presented. It's presented as a random person and he's driving their car with no reason - - no reason in the world, Judge, why [Appellant] would have this car." R. 488, line 22 – R. 489, line 3.

Ultimately, the trial judge ruled that "based upon the information that the West Columbia Police detectives had at that time," the information they presented to the magistrate was sufficient to establish probable cause. R. 491, lines 6-10. However, the judge acknowledged that "certain facts [were] left out." R. 491, lines 11-17.

Discussion

Appellant's right to be free from an arrest not based upon probable cause is rooted in the United States Constitution and the South Carolina Constitution. The Fourth Amendment to the United States Constitution provides for

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Additionally, the South Carolina Constitution provides similarly for "[t]he right of the people to be secure in their persons ... against unreasonable ... seizures" and for "no warrants [to] issue but upon probable cause, supported by oath or affirmation, and particularly describing ... the person or thing to be seized." S.C. Const. Art. 1, § 10.

Thus, an arrest warrant must be based upon probable cause. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish probable cause, it may be

supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)(citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court held that the Fourth and Fourteenth Amendments gave defendants the right to challenge the veracity of warrant affidavits after the warrants were issued and executed in certain circumstances, including where the affidavit omits necessary information. Our Supreme Court, applying Franks, found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The Court found the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. The Court then examined the affidavit by excluding the false information and inserting the exculpatory information. Id. at 555, 524 S.E.2d at 397. The Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id.

The Court presumed that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit. However, the Court found the information omitted in Missouri's case went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The Court explained that the omitted information did more than create "some uncertainty," rather it created "an affirmative hurdle which the remaining portions of the affidavit must overcome." Id. at 555-556, 524 S.E.2d at 397-398. Although finding the case presented a "close call on the probable cause determination," the Court held the combination of the officer's false statement and omission of critical facts "pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant." Id. at 556, 524 S.E.2d at 398.

Turning to Appellant's case Edwards sought and obtained an arrest warrant for grand larceny, which is the felonious taking and carrying away of goods of another of a certain monetary value. See State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002). Additionally, the taking must be done with the intent to deprive the true owner of his property and to convert it to the use of the offender. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). Thus Edwards was required to provide the magistrate with evidence to support a probable cause determination that Appellant feloniously took and carried away Portia's car with the intent to deprive Portia of the use of the car and convert the car to his own use.

Edwards failed to inform the magistrate either in writing or orally that Appellant and Portia lived together in a romantic relationship, which included holding themselves out as husband and wife, and family members, friends, and co-workers had witnessed

Appellant driving Portia's car in the past. The omitted facts go to the "very heart of the affidavit's purpose" because the information not relayed to the magistrate exculpate Appellant from having stolen Portia's car, or at a minimum did more than create some uncertainty. A reasonable person would not believe Appellant was guilty of the crime of grand larceny of Portia's vehicle knowing Appellant and Portia lived together in a romantic relationship and Appellant had driven the car in the past.

CONCLUSION

Appellant respectfully requests that this Court direct a verdict of acquittal as to all three charges concerning Issue I. Appellant respectfully requests that this Court reverse his convictions and order a new trial concerning Issues II, and III.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 25th, 2014

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

APPELLANT

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 Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kenneth Lynch # 350750, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 25th day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of June, 2014.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

RECEIVED
JUN 25 2014
SC Court of Appeals