THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-000495

Charles Tillman, ... Appellant,

v.

State of South Carolina, ... Respondent.

Final Reply Brief of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional

Rules

IN REPLY

Question I

Did the trial judge err by denying Charles Tillman's motion for the court to identify the standard of review it applied when considering Mr. Tillman's motion for a directed verdict when existing South Carolina precedent supports at least two standards of review, due process requires the prosecution to present more than a "scintilla" or "modicum" of evidence, and Mr. Tillman expressly requested the trial judge apply the standard of "substantial circumstantial evidence" employed by our state's appellate courts in *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), *State v. Mitchell*, 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) *affirmed by State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), and *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)?

The State argues, "The trial judge identified and applied the proper analysis in dismissing [Charles Tillman's] directed verdict motion." Brief of Respondent at 8. In support of this argument, the State points to the trial judge stating, "I take substantial circumstantial evidence to, when you're dealing with just a a purely circumstantial evidence case, to mean exactly what the Courts have articulated in the past. So that will be my ruling." *Id.* at 10. This sarcasm is obvious because the trial judge also acknowledged "the Courts have been less than specific on what exactly substantial circumstantial evidence means." R. 584.

The State, in fact, acknowledges, "[T]here has historically been a level of confusion in applying the 'substantial circumstantial' [evidence] analysis first set forth in *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)." Brief of Respondent at 10. The State then argues, "For this reason, our Supreme Court in 2016, issued the *State v. Bennett* opinion for the express purpose of 'clarify[ing] the framework of a court's inquiry in determining whether substantial circumstantial evidence exists to require the denial of a directed verdict.' 415 S.C. 232, 235, 781 S.E.2d 352, 354 (2016)." *Id.* at 10-11. *Bennett*, however, did not provide a definition of "substantial circumstantial

evidence," which is the very thing Mr. Tillman asked the court below to do. *Bennett*, moreover, reminded the bench and bar, "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." 415 S.C. at 236, 781 S.E.2d at 353-54 (citing *State v. Hepburn,* 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013)). *Bennett* further recognized, "[I]n this area of ever-evolving jurisprudence [the] inquiry is necessarily fact-intensive." 415 S.C. at 237, 781 S.E.2d at 354.

Ultimately, the State concedes, "*Bennett* did not overrule prior jurisprudence in regards to the 'substantial circumstantial evidence' analysis," Brief of Respondent at 11, such as *Schrock, State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009), *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), *and State v. Mitchell,* 341 S.C. 406, 535 S.E.2d 126 (2000). Thus, this Court must reject the State's argument that "*Schrock* is not the principal authority since" *Bennett.* Brief of Respondent at 12.

Significantly, the State did not address Mr. Tillman's contention that "due process requires the prosecution to present more than a 'scintilla' or 'modicum' of evidence." Brief of Appellant at 11. Mr. Tillman specifically argued the definition of "substantial circumstantial evidence" must comply with mandates of *Jackson v. Virginia,* 443 U.S. 307 (1979) and *In re Winship*, 397 U.S. 358 (1970). Brief of Appellant at 15-16. The State did not address these cases *at all* in its brief. This Court should hold the trial judge erred by not identifying the standard of review applied by the court. This Court should further hold that the "substantial circumstantial evidence" standard applied in *Schrock, Mitchell, Arnold,* and *Hernandez* is the appropriate standard.

Question II

Did the trial judge err by denying Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

As s threshold matter, the State acknowledges the appellate court "is bound by the trail court's factual findings unless they are clearly erroneous." Brief of Respondent at 10 (citing *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009) and *State v. Quattlebaum*, 388 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). In this case, the trial judge found the following facts to be beyond dispute:

1. Ms. Stutler's time of death was between 11:00 p.m. on November 7, 2016 and 11:00 a.m. on November 8, 2016.

2. From sometime beginning between 8:30 a.m. and 9:00 a.m. on November 8th, Mr. Tillman had an alibi. Mr. Tillman was at work with J.C. Boggs and Walt Tillman.

3. A South Carolina Law Enforcement Division ("SLED") forensic scientist found exactly one particle of gunshot residue on the shirt that Mr. Tillman wore on November 8th. The scientific testimony cannot establish how this single particle of gunshot residue got onto Mr. Tillman's clothing. This particle of gunshot residue could have gotten on his shirt by Mr. Tillman firing a gun, by Mr. Tillman transferring it to his shirt after touching something in the room where he found Ms. Stutler's body, or by law enforcement transferring it to the shirt by not wearing gloves when collecting the shirt for evidence.

4. A SLED forensic scientist discovered the DNA of *at least* three people on the rifle used to shoot Ms. Stutler. One sample is unquestionably Ms. Stutler's DNA. Mr. Tillman cannot be excluded as contributing one of the samples, although his paternal male relatives cannot be excluded as contributing this sample. The person or people contributing the other DNA sample(s) remain unidentified. The scientific evidence cannot establish when these DNA samples were placed on the rifle or whether the DNA was placed on the rifle by the individual(s) or transferred to the rifle in some other manner.

See New Trial Motion, R. 15-16, and Order Denying New Trial Motion, R 3. These facts, accordingly guide this Court's determination of the legal issues raised in this appeal.

Next, the State's recitation of the standard of review regarding the appeal of a directed verdict motion does not address the meaning of "substantial circumstantial evidence" as applied in *Schrock, Mitchell, Arnold,* and *Hernandez.* Brief of Respondent at 12-13. Rather, the State continues to rely on *Bennett*, superficially equating the evidence presented in *Bennett* to the evidence presented in this case. The State relies heavily on the undisputed evidence that Mr. Tillman was present at the crime scene during a period of time when the crime *could have* occurred. This fact cannot be the sole basis for denying the directed verdict motion. In *Hepburn* and *Hernandez*, it was undisputed that the accused were present at the crime scene, yet our Supreme Court directed a verdict of acquittal.

The State, additionally, tries to misdirect this Court by arguing, "Interestingly, no evidence was presented at trial that would have supported a break-in or robbery." Brief of Respondent at 16. A break-in or robbery was not the alternate theory Mr. Tillman presented at trial. Rather,

> Mr. Tillman presented an alternate theory about the murder that law enforcement did not investigate. Christie Stutler was alive when Charles Tillman went to work with J.C. Boggs and Walt Tillman. While Mr. Tillman was at work, someone else came to the trailer to use illegal drugs with Ms. Stutler, a fact confirmed by the presence of the syringe. "[T]hat person flipped out or got violent. . . ., shot and killed Christie [Stutler], and panicked and hid the gun in the car as they were fleeing the scene." R. 646-79.

Brief of Appellant at 10-11.

Finally, the State relies on the direct testimony of Mr. Tillman's elderly mother, Vonnie Cummings, "alleg[ing] that she witnesses the victim alive after Appellant had departed for work." Brief of Respondent at 16-17. The State called Ms. Cummings, and she testified:

Q. That day, did you go to the washroom?

A. Well, we all was folding and went to the washing room. But she said she had some – you know, somebody like – somebody was going to come pick her up. And I told her, I said well, I'm going to be leaving in the morning at what time. And when I came out to put the clothes in the car and I hollered for her and I think she said, I'm good.

Q. You think, you say?

A I ain't for sure. I'm saying she said something, but I ain't for sure what it was, so...

Q. Did you see her?

A. I seen the shadow. I don't know who shadow, but I seen the shadow. I was coming out there to get in the car to go to the washeroom [sic] and I – I always told her because she always went everywhere I went mostly.

Q. What time –

A. Except –

Q. What time of morning would that be?

A. It was around about 8:30 or something to nine. Maybe 25 to 9:00 or somewhere along in there. I ain't for sure about the time, now.

Q. But you –

A. But I know it was around that time.

Q. But you said you saw a shadow. You couldn't even tell if that was Christie?

A. I couldn't tell who's shadow it was. But it could have been her.

Q. It could have been her?

A. It could have been.

Q. So you don't know if it was her or not?

A. Not for sure.

Q Did you leave to go to the washroom?

A. I left and went to the washerette

Q. Ms. Cummings, did you ever tell law enforcement about – about possibly talking with Christie that morning and seeing that shadow? Did you ever tell that to law enforcement?

A. They didn't ask me.[1]

Q. You didn't feel like that was important information, potentially?

A. It may have been, but they didn't ask me about her.

R. 158-59 (footnoted added).[2] Viewed in a light most favorable to the State, this testimony established that Ms. Stutler spoke to Ms. Cummings and Ms. Cummings saw the shadow of a person inside the trailer that could have been Ms. Stutler or the person that Ms. Stutler had invited over that day. Circumstantially, Mr. Tillman is excluded as the murderer. The State, however, asks this Court to consider this testimony to be untruthful even though the prosecution never presented any evidence to contradict it. This is not the standard of review applied in cases like *Hernandez* and *Hepburn.*

Although the State's circumstantial evidence arguably meets an "any circumstantial evidence" standard, it cannot meet the "substantial circumstantial evidence" standard applied in *Schrock, Mitchell, Arnold,* and *Hernandez.* This Court, therefore, should reverse the trial court and direct a verdict of acquittal.

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[1] *And see* R. 174 (Ms. Cummings testifying that law enforcement never asked her to come to the Law Enforcement Center for an interview).

[2] The State's Brief, at p. 17, fn. 17, argues Mr. Tillman "undoubtedly is referring to his mother [sic] testimony" when arguing "'in a light most favorable to the State, the evidence presented at trial established that Ms. Stutler was alive at 8:30-9:00 a.m. on November 8th when Charles Tillman left for work with J.C. Boggs and Walt Tillman.'" The State's contention overlooks the testimony of Willie Tillman, who also spoke to Ms. Stutler that morning. The State persistently tries to limit its analysis to the evidence it presented in its case-in-chief, but on appeal the defense evidence must also be considered. *Hepburn, supra.*

Question III

Did the trial judge err by denying Charles Tillman's motion to exclude photographs depicting Christie Stutler's deceased body—State's Exhibit Numbers 2, 3, 14, 18, 36-39, 47-51, 54-56, 58, 60, 61, 63, 94-123, 136-139 and 141—when those photographs were not relevant to any issue in the case because Mr. Tillman stipulated the manner of death was a homicide and did not contest the nature of any of Ms. Stutler's injuries and the prejudicial effect of admitting the photographs substantially outweighed any probative value?

The State's brief, at 18-21, never addressed the fact that Dr. Brett Woodard could have testified about the nature of the wounds to Christie Stutler without needing to use the photographs, for example, by using a diagraph. Admission of these photographs was contrary to Rules 401, 402, and 403, SCRE. This Court should order a new trial.

Question IV

Did the trial judge err by denying Charles Tillman's motion for a mistrial when the State sought to introduced evidence from a purported "criminal profiler," when "criminal profiling" is not a legitimate science?

The State concedes error but argues the court below properly denied Charles Tillman's motion for a mistrial because Mr. Tillman "was not prejudiced by the testimony given by [SLED] Agent Bo Barton." Brief of Respondent at 21-27. The State brief, however, illustrates the prejudice. Following the prosecution's improper attempt to qualify Agent Barton as an expert in criminal profiling, he testified:

> Q: In the interview with Mr. Tillman, what did you all talk about initially when you all – when he first – when he first got there?
>
> A: My point to talk to Mr. Tillman was to try to understand a better understanding of what he believed happened that day, what actually happened that day, events leading, state of mind of the victim, that kind of thing. So we began talking and I was going to give – I gave him three separate options as to the possible likelihood after my review of the case file –

R. 466. At this point, Mr. Tillman moved for a mistrial, arguing, in part, that what Agent Barton is "getting ready to say is, based on my review of the file as an expert at criminal profiling I wanted to give Charles Tillman three scenarios and see how he responded to them, and he's going to going to give opinion testimony." R. 466-68. The State correctly observes, "These three separate options referenced by Agent Barton was [sic] made apparent to the jury when the interview record was played." Brief of Respondent at 26. The jurors undoubtedly viewed this testimony in context of Agent Barton's training as a "criminal profiler," called in by Chief Deputy Natalie Talbert, for a specific reason to interview Mr. Tillman. As the trial judge acknowledged, the curative instruction did not "unring the bell."[3]

Agent Barton's testimony about criminal profiling was inadmissible and suggested the jurors render a verdict on an improper basis. *Id.* It is impossible for this Court to say that this testimony did not affect the verdict. *See, e.g. State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999). This Court should order a new trial.

Question V

Did the trial judge err by denying Charles Tillman's request to charge based on *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989)?

The State merely argues that the jury instruction on circumstantial evidence based on *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) is no longer the current law in South Carolina. Mr. Tillman, in fact, acknowledged this fact in footnote 20 of his Brief of Appellant, at p. 30. Mr. Tillman, nevertheless, contends the instruction required by *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) is inadequate to convey to the jurors

[3] *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted).

that the prosecution has the burden of disproving, beyond a reasonable doubt, any alternate theories that an accused argues are supported by the circumstantial evidence in the case. Perhaps, this Court can address this concern within the confines of current precedent. On the other hand, addressing this issue might require arguing an argument against precedent in our Supreme Court. *See State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) (The Court of Appeals "lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.") *affirmed as modified by State v. Cheeks,* 408 S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9.

Question VI

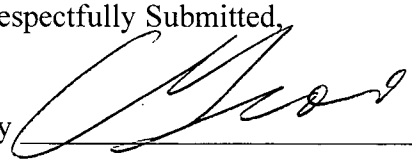
Should this Court grant Charles Tillman a new trial based on the cumulative error doctrine?

As discussed in Mr. Tillman's opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. Respondent's brief, at pp. 29-30, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). Beekman asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, Mr. Tillman raised at trial every issue he asserted in his opening brief. This Court should order a new trial.

CONCLUSION

For the reasons set forth in Charles Tillman's Brief of Appellant and this Reply Brief, this Court should reverse the trial court and direct a verdict of acquittal. In the alternative, this Court should reverse the trial court, vacate Mr. Tillman's convictions and sentence, and remand this case for a new trial.

Respectfully Submitted,

By 

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Rule 211, SCACR Certification

This Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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By _____

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