STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

APPELLANT.

APPELLATE CASE NO. 2018-001938

INITIAL REPLY BRIEF OF APPELLANT

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1.

The state's explanation of the standard of review for the denial of a directed verdict in South Carolina is misleading. Moreover, Appellant was entitled to a directed verdict of acquittal for both kidnapping and conspiracy to kidnap.

Under its standard of review heading, the state contended, "For the issue of directed verdict, the operative question is whether evidence exists sufficient for any reasonable juror to reach a guilty verdict." Brief of Respondent at 23 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). It later expanded, "Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt." Brief of Respondent at 24 (citing State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992)).

The state's cherry picking of language and case law concerning the standard of review is misleading. The correct standard of review in South Carolina is: "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004) (citing State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002) and State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272-273 (1990)). "When the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight." Id. at 594, 606 S.E.2d at 478 (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

"The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." Id. (citing Mitchell, 341 S.C. at 409, 535 S.E.2d at 127). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. (citing State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001)). "However, *a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis*." Id. (citing State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996)) (emphasis in original).

This emphasized language was reiterated by our Supreme Court in State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016) and State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016). In both cases, the Supreme Court reversed the Court of Appeals after the Court of Appeals held the trial judge erred by denying the respective motions for a directed verdict. The Court in Bennett resolved any "confusion over the appropriate standard of review governing whether the State has presented sufficient evidence to overcome a motion for a directed verdict." Pearson, 415 S.C. at 472-473, 783 S.E.2d at 807 (citing Bennett, 415 S.C. 232, 781 S.E.2d 352).

"The Court explained that within the jury's inquiry, it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so 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." Pearson, 415 S.C. at 473, 783 S.E.2d at 807 (quoting Bennett, 415 S.C. at 237, 781 S.E.2d at 354) (internal alteration and quotation marks omitted). "In contrast, the trial court, when ruling on a directed verdict motion, views the evidence in the light most favorable to the State and must submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of

the accused, or from which his guilt may be fairly and logically deduced." Id. (quoting Bennett, 415 S.C. at 237, 781 S.E.2d at 354) (internal quotation marks omitted).

Appellant is not asking this Court to reweigh the evidence. The state's case against Appellant as to the offense of kidnapping was based solely on the fact that Heather Elvis and Sidney Moorer had an affair months earlier that Appellant discovered, that Elvis was missing and her last known location (based on historical cell site location information) was the Peachtree Boat Landing, that her last known communication was allegedly with Sidney, and Grant Fredericks' testimony that the Moorers' truck was the vehicle seen on surveillance footage traveling towards and away from the boat landing around the time Elvis went missing.[1] This circumstantial evidence simply is not the substantial circumstance evidence necessary to survive a directed verdict as no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *At most*, it raises a suspicion Appellant was involved in Elvis's disappearance.

A comparison with the evidence found sufficient by our Supreme Court in Bennett demonstrates the point. Bennett was convicted of second degree burglary, petit larceny, and malicious injury to property. Bennett, 415 S.C. at 234, 781 S.E.2d at 352. Officers responded to an alarm activated at the C.C. Woodson Community Center in Spartanburg shortly after three o'clock in the morning, and found a window shattered into "thousands of pieces" with the door next to it open. Id. at 234, 781 S.E.2d at 353. The officers noticed that a mounted television on the wall in the community room appeared to have been tampered with, as if someone had been

[1] To be clear, Fredericks specifically testified that he had "no opinion" about where the vehicle he identified as the Moorers' truck may have gone after it left the view of the camera. He asserted, "Once it got out of camera view, I have no opinion as to where it may have gone." He merely testified that the vehicle continued southbound toward the direction of the boat landing when it was first seen on the surveillance footage and, when seen again minutes later, it continued driving northbound away from the landing. Tr. 1004, l.14 – 1005, l. 8.

attempting to remove it. Id. A fingerprint was lifted from the manipulated television that matched Bennett's fingerprints. Id. Officers also discovered a computer and a television were missing from the computer room. Id. Two drops of blood were located beneath the stand where the stolen television had been. The DNA profile from the blood droplets matched Bennett. Id.

Our Supreme Court held the evidence introduced by the state was sufficient to withstand Bennett's motion for directed verdict since forensic evidence placed Bennett within the Center and, more specifically, at the two places where the crimes had occurred. Id. at 237, 781 S.E.2d at 354. "His fingerprint was found on a manipulated television set in the community room where the window had been broken and his blood was recovered just beneath the spot the stolen television had been mounted. Testimony suggested Bennett would have no reason to be in the community room because he was not involved in any of the groups that met there." Id. Our Supreme Court asserted, "Examining this evidence in the light most favorable to the State, we find the evidence could induce a reasonable juror to find Bennett guilty." Id.

In this case, there was no forensic evidence placing Appellant or Sidney at the Peachtree Boat Landing where the state alleged Elvis was kidnapped, unlike the evidence placing Bennett at the scene of the burglary and, more specifically, at the exact location where the television was stolen. Moreover, there was absolutely no evidence of a struggle at the boat landing or inside the Moorers' truck. The evidence established that both Appellant and Sidney were home around the timeframe Elvis disappeared. Appellant texted her sister, Ashley Caison, that she was home at 3:10 on the morning of December 18, 2013. Ashley testified she saw Appellant immediately thereafter when she (Ashley) observed the Moorer children, whom she was babysitting, walking home when Appellant and Sidney returned that morning. The cell phone location evidence

established that both Appellant's phone and Sidney's phone were home for the rest of the morning.

Moreover, the state presented *zero* evidence, direct or circumstantial, of any agreement, confederation, or conspiracy between Appellant and Sidney to kidnap Elvis. Consequently, in the light most favorable to the state, the evidence presented was insufficient to allow a reasonable juror to find Appellant guilty beyond a reasonable doubt of conspiracy to kidnap. See Bennett, 415 S.C. 237, 781 S.E.2d at 354.

Respectfully, this Court should direct a verdict of acquittal on both offenses.

2.

Appellant's objection to Grant Fredericks' testimony that Appellant's truck was the vehicle seen on surveillance footage driving towards and away from the Peachtree Boat Landing where Heather Elvis was allegedly kidnapped—to the exclusion of all other vehicles—since his conclusions were not shown to be reliable was preserved for appellate review.

The state argues Appellant's objection to Grant Frederick's expert testimony that Appellant's truck was the vehicle seen on surveillance footage driving towards and away from the Peachtree Boat Landing where Elvis was allegedly kidnapped to the exclusion of all other vehicles was not preserved for appellate review since the "trial court never made a final ruling on the testimony because Appellant never objected before the jury." Brief of Respondent at 38. However, Appellant *did* object to the testimony before the jury and received a final ruling. Moreover, the grounds of Appellant's objection were well known since April 2016 and clearly argued and articulated before the trial judge when he qualified Fredericks' as an expert. See Tr. 943, ll. 1-22.

A written motion to exclude or limit Fredericks' testimony was filed by Kirk Truslow, counsel for Appellant's codefendant, Sidney Moorer. R. * (Motion to Suppress). A pretrial hearing on the motion was held on April 18, 2016 before Judge Dennis. Appellant's request to join in the motion was granted by Judge Dennis during the pretrial hearing.[2] Tr. 5, l. 5 – 8, l. 9 (April 18, 2016).

[2] For whatever reason, the state makes much of the fact that the motion to suppress was originally filed and argued by counsel for Sidney Moorer, Appellant's codefendant. See Brief of Respondent at 39. However, this fact is inconsequential. Appellant's request to join in Sidney's motion was granted by Judge Dennis during the April 2016 hearing, without any objection from the state. Moreover, Appellant renewed the objection to Fredericks' testimony during her trial before Judge Culbertson, both when Fredericks' was first qualified as an expert and later during his testimony.

During the pretrial hearing, Truslow stated he had no objection to Fredericks' opinion as to the class or characteristics of the questioned vehicle. His objection was to Fredericks' opinion concerning the uniqueness of headlight spread patterns. Tr. 73, ll. 15-18 (April 18, 2016). He asserted, "The premise set forth, based on his [Fredericks'] experience, not [on] science, is that every, every single vehicle has a unique spread pattern of lights, just like a fingerprint to a person . . . That is a principle that is not based on science. It's never been researched, never been tested, and it's never been peer reviewed." Tr. 126, l. 15 – 127, l. 6 (April 18, 2016). Truslow requested Judge Dennis limit Fredericks' testimony to his opinion that the vehicle in the surveillance footage is *consistent* with the make and model of the Moorers' truck. Tr. 127, ll. 18-22 (April 18, 2016) (emphasis added). Truslow emphasized that Fredericks only tested one other vehicle that was the same make and model as the Moorers' truck. Tr. 128, ll. 5-10 (April 18, 2016). He concluded, "What I'm saying is that the Court, in my opinion, should find that it is not an accepted scientific principle, that no two vehicles have the same headlight spread pattern, *just like a fingerprint*. It's just not founded in science and *it's not [an] accepted or reliable scientific principle*." Tr. 128, ll. 10-15 (April 18, 2016) (emphasis added).

During the pretrial hearing, Judge Dennis ultimately concluded that he would "allow the testimony." He emphasized that Fredericks stated "in his experience." The judge asserted, "He's saying in his experience and . . . that's the distinction here. He's testifying from his personal experience in analyzing, he's never encountered that." Tr. 129, ll. 15-17 (April 18, 2016). According to the judge, if Fredericks had stated the uniqueness of headlight spread pattern was "a standard in the industry" that would be a different matter. Tr. 129, ll. 19-22 (April 18, 2016). He found it was "a recognized science" and "a recognized standard for identification." Tr. 130, l. 5 – 131, l. 12 (April 18, 2016).

During trial, Appellant renewed her objection to Fredericks' qualification as an expert. Her objection was consistent with the argument raised pretrial before Judge Dennis. While defense counsel agreed Fredericks was qualified to examine video and give an opinion as to the identify of, for example, a specific make or model of a vehicle, he objected to Fredericks being permitted to identity a certain vehicle as the unknown vehicle captured on the videos to the exclusion of all other vehicles. Tr. 943, ll. 2-22. Counsel asserted, "What we object to is him being qualified as an expert to say that he can look at a video . . . or two videos very brief in time and then come back and say *that is a specific truck and it doesn't match any other F-150 in the world. That is a specific truck. It's like [] DNA . . . [T]hat's a specific area or subarea that we . . . honestly don't believe he's qualified to submit an opinion*." Tr. 943, ll. 6-16 (emphasis added). Judge Culbertson, the trial judge, ultimately qualified Fredericks as an expert in video forensic analysis over Appellant's objection. Tr. 943, ll. 23-24; Tr. 947, ll. 2-5. The judge asked counsel to renew his objection when Fredericks "goes to render an opinion" that counsel believes "exceeds his scope of expertise." Tr. 943, l 24 – 944, l. 1.

Immediately before Fredericks rendered his opinion that the Moorers' Ford F-150 truck was the "questioned vehicle" seen on surveillance footage during the early morning hours of December 18, 2013 traveling southbound in the direction of the boat landing and, several minutes later, traveling northbound away from the landing, defense counsel objected "to drawing a conclusion." Tr. 1003, l. 23 – 1004, l. 2. Based on the earlier argued grounds for Appellant's objection to Fredericks' testimony, it was obvious counsel's objection was to Fredericks' ultimate conclusion that the identity of the unknown vehicle was the Moorers' truck to the exclusion of all other vehicles. The assistant solicitor responded, "Your Honor, he's an expert."

Tr. 1004, l. 3. The trial judge maintained it was "a factual determination that the jury has to make" and overruled counsel's objection.

Consequently, this issue was certainly preserved for appellate review and, respectfully, this Court should address the merits. Ultimately, the Court should hold the trial judge abused his discretion by qualifying Fredericks as an expert in forensic video analysis and allowing him to testify about the "uniqueness" of the Moorers' truck to the exclusion of every other vehicle. Given the importance of this inadmissible opinion to the state's case, this Court should respectfully reverse Appellant's convictions and remand for a new trial.

3.

Appellant's alleged violation of Rule 5, SCRCrimP, did not prejudice the state despite the its vague claim, and the state wholly failed to address Appellant's argument that the exclusion of her witnesses violated her due process right to present a defense and her statutory right to present witnesses in her favor.

The state vaguely, in a single conclusory sentence, claimed defense counsel's "rule violation prejudiced the State" without specifying how the state was actually prejudiced. Brief of Respondent at 54. At trial, the assistant solicitor claimed the state was prejudiced because it did not have an opportunity prior to trial to interview the potential alibi witnesses, which was the purpose of the rule. Tr. 14, ll. 1-10.

Despite the state's claim otherwise, it was not prejudiced by the alleged late disclosure. The state was undisputedly aware of these witnesses before trial. Polly Caison, Appellant's mother, and Ashley Caison, Appellant's sister, had lived in the same residence since the investigation began. Consequently, the state was obviously aware of where to contact them. Moreover, the state had previously interviewed all of these witnesses during its investigation and *had them under subpoena for trial*.

There was also adequate time for the state to interview these witnesses before the defense presented its case. See Tr. 1972, ll. 8-17 (where the trial judge acknowledged "the purpose behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she [Appellant] was somewhere else."). The state had an entire week before the trial even started. Pretrial matters and the state's presentation of its case in chief lasted eight days plus a weekend. There is no doubt that during this seventeen day period, someone from the state could have re-interviewed these witnesses if needed.

Additionally, the state speculated as to the strength of Appellant's alibi defense and ultimately claimed "Appellant was not prejudiced by the alleged error." Brief of Respondent at 54. However, we do not know what these witnesses would have testified since the trial judge erroneously denied Appellant's request to proffer their testimony. See Tr. 1822, ll. 7-18. At a minimum, this Court should remand this case for a hearing to allow the evidence to be proffered so it can be reviewed on appeal.

Significantly, the state wholly ignored Appellant's argument that the exclusion of her witnesses violated her due process right to present a complete defense. While the solicitor at trial acknowledged the judge excluded Appellant's alibi witnesses "for procedural reasons," defense counsel made clear that Appellant had a fundamental right to present a defense "beyond the specific rule." Tr. 1791, l. 19 – 1792, l. 5; Tr. 22, ll. 1-13. The trial judge's exclusion of Appellant's alibi witnesses because she only provided the state with their contact information seven days before trial instead of ten eviscerated her defense and violated her constitutional and statutory right to present witnesses in her favor. See State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'"); See S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."). The exclusion of these witnesses as a sanction was disproportionate to the supposed violation and the purpose of the rule.

Respectfully, this Court should hold the trial judge abused his discretion by excluding the alibi testimony of Christian Moorer, Nikki Moorer, Polly Caison, and Ashley Caison based on the alleged violation of Rule 5(e), SCRCrimP, and Appellant's right to present a complete

defense. Appellant's convictions should therefore be reversed, and she should be granted a new trial.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal for kidnapping and conspiracy to kidnap. In the alternative, Appellant requests this Court reverse her convictions and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 26th day of August, 2020.

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Reply Brief of Appellant has been served upon Tammy Caison Moorer, #378074, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 26th day of August, 2020.

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT