

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2021-000466

Charles Tillman,.....Petitioner,

v.

State of South Carolina,Respondent.

**REPLY TO STATE'S RETURN TO
PETITION FOR WRIT OF *CERTIORARI***

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IN REPLY

The State addresses the first and second questions in a single argument. Mr. Tillman will keep these issues separate and distinct because, until the bench and bar has the same understanding of the definition of “substantial circumstantial evidence,” it is impossible to apply the directed verdict standard consistently.

- I. Did the Court of Appeals err by affirming the trial court’s failure to identify the standard of review and defining the meaning of “substantial circumstantial evidence,” 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 relies on *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016), and argues Mr. “Tillman would have the trial court and the appellate courts weigh the evidence,” which “is a bridge too far.” State’s Return to Petition for Writ of *Certiorari* (hereinafter “State’s Return” and “Cert. Petition”), at 15. In *Bennett*, this Court recognized circumstantial evidence is an “area of ever-evolving jurisprudence [and the] inquiry is necessarily fact-intensive.” *Bennett*, 415 S.C. at 237, fn. 1, 781 S.E.2d at 354, fn. 1. This Court also reminded:

[A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

Id., 415 S.C. at 237, 781 S.E.2d at 354 (emphasis original).

Thus, *Bennett* recognizes that jurors (and a court for that matter) weighing evidence is different from a fact-intensive inquiry to determine whether the prosecution's substantial evidence "is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.* Further guidance from this Court is needed for the bench and bar to understand the distinction. Ordinarily, a court considering a direct verdict motion accepts the prosecution's evidence as true, something jurors are not required to do. Yet, a court is not required to accept as true evidence that contrary to "indisputable forensic evidence." *State v. Rogers*, 405 S.C. 554, 564, 748 S.E.2d 265, 271 (Ct. App. 2013) ("The statement 'I put the gun to the back of [Engel]'s head and pulled the trigger' is not direct evidence that Rogers murdered Engel because we know from indisputable forensic evidence that it is not a true statement."). At a minimum, the fact-intensive inquiry at the directed verdict stage requires a court to determine what other facts can be reasonably inferred from the circumstantial evidence. *Id.*, 405 S.C. at 564, 748 S.E.2d at 270 ("Circumstantial evidence . . . requires the factfinder not only to determine that it believes the evidence, but also to make at least one additional inference from the evidence before concluding the fact has been proven."). This type of fact-intensive inquiry is precisely the analysis contained 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 bench and bar would benefit from this Court defining the meaning "substantial circumstantial evidence." Stated another way, the bench and bar would benefit from this Court distinguishing weighing the evidence form from a fact-intensive inquiry to determine

whether the prosecution's circumstantial evidence "is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."

II. Did the Court of Appeals err by affirming the trial court's denial of Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

The State alleges Mr. "Tillman does not address the trial judge's conclusion that the case contained direct evidence as well as circumstantial evidence." State's Return, at 12. Yet, the State acknowledges "[t]he trial judge did not specify the direct evidence." *Id.*, at 12, fn. 1. Nor does the State identify any direct evidence for this Court to rely on in affirming the Court of Appeals. Mr. Tillman has consistently maintained the prosecution relied exclusively on circumstantial evidence to provide the identity of the murderer. The Court of Appeals accepted the prosecution relied exclusively on circumstantial evidence to provide the identity of the murderer. This Court should reject the State's red herring.

The State accuses Mr. Tillman of relying "upon certain pieces of circumstantial evidence and his own evidence of (incomplete) alibi to argue that the evidence was not sufficient to go to the jury." *Id.* Mr. Tillman, however, engages in a fact-intensive inquiry to determine what other facts can be reasonably inferred from the circumstantial evidence. Thus, when discussing the limitations of the State's forensic evidence, for the purpose of the directed motion, Mr. Tillman accepts that evidence as true but discusses the limits of the inferences that reasonably can be drawn from that evidence. For example, discussing the limitations of the State's DNA evidence and gunshot residue evidence is entirely consistent with viewing the evidence in a light most favorable to the State. When this Court applies the "substantial circumstantial evidence" standard applied in *Schrock, Mitchell*,

Arnold, and *Hernandez*, the need to reverse the Court of Appeals and direct a verdict becomes apparent.

III. Did the Court of Appeals err by affirming the trial court’s denial of 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 argues:

Despite the stipulation of a murder, the burden still rested on the State to prove that Tillman unlawfully killed the victim with malice aforethought. In recognition of this established heavy burden, this Court has reasoned that “the State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant’s stipulation.” *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000) (citing Am.Jur.2d Stipulations 17, at 557 (1974)).

State’s Return, at 17. This Court must reject this argument. In *Johnson*, “[t]he defense offered to stipulate,” but “the prosecutor rejected the offer,” and [t]he trial judge admitted the photograph into evidence.” *Id.* Here, the State entered into the stipulation with Mr. Tillman. As the trial judge recognized, the stipulation “seems to remove a great number of issues and the question of whether it’s a suicide [is] out of the picture.” R. 77-79.

As argued in Mr. Tillman’s Cert. Petition, at 17-20, these photographs were not relevant and, if relevant, the prejudicial effect of admitting the photographs substantially outweighed any probative value.

This Court has expressed its “growing concern” about prosecutors introducing photographs that “are at the outer limits of what our law permits a jury to consider” and “encourage[d] all solicitors to refrain from pushing the envelope on admissibility.” *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010); *see also State v. Collins*, 409 S.C.

524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring). This Court’s guidance is needed in order to set limits on the admissibility of crime scene and autopsy photographs.

IV. Did the Court of Appeals err by affirming the trial court’s denial of 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 argues Mr. Tillman “asserted the opinion [below] reflects the panel ‘implicitly’ determined ‘the prosecution solicited inadmissible testimony,’” and the record shows no improper ‘criminal profile’ evidence was ‘solicited’ and presented to the jury.” State’s Return, at 20 (citing Mr. Tillman’s Petition for Rehearing, A. p. 17). Mr. Tillman’s Petition for Rehearing actually states the Court of Appeal’s “opinion implicitly holds the prosecution solicited inadmissible testimony when ‘the State asked State Law Enforcement Division Agent Bo Barton questions about his experience as a criminal profiler.’” A. 17. The question presented to the Court of Appeals—and now to this Court—is not whether it was improper for the State to solicit this testimony, but rather whether Mr. Tillman was prejudiced by the State soliciting this testimony. By agreeing it was impossible to “unring the bell” and providing a curative instruction, the trial court ruled the testimony inadmissible and questioned whether the prejudice could be cured.

The State argues there is no prejudice to Mr. Tillman because Agent Barton’s “testimony to the jury was extremely limited,” he ‘did not express an opinion,’ and he “was neither offered nor qualified as an expert.” State’s return, at 20-21. Although never asking the trial judge to qualify Agent Barton as an expert witness, the prosecution most definitely engaged in the questioning necessary to qualify him as an expert witness. Although Agent Barton did not express an opinion, Mr. Tillman was prejudiced because the jurors were left

with the impression that there was something uniquely probative about Agent Barton's interview techniques and testimony, suggesting a decision in an improper basis.

In other contexts, this Court prevents the State from unnecessarily offering a witness' expert qualifications, to avoid prejudice to the accused, when the real purpose of calling the witness is to introduce a statement. *E.g. State v. Douglas*, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009) ("Given the nature of Herod's testimony, which was based upon her own personal observations and discussions with child victims, we find it was unnecessary to qualify her as an expert in this case."). As this Court recognizes:

[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts. The label of expert should be jealously guarded by the court and never loosely bandied about.

State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013).

This Court's guidance is needed to limit prosecutors from "backdoor" impermissible opinion evidence.

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

The State argues this Court should not consider the cumulative error doctrine because the Court of Appeals found not error, and, "There is nothing to accumulate." Return, at 22. As seen, Mr. Tillman identifies multiple errors by the trial court, all of which he contends entitled him to a new trial. If this Court declines to enter a directed verdict of acquittal, and if this Court concludes the errors identified in Questions III and IV, standing alone, are insufficiently prejudicial to require a new trial, then consideration of the cumulative error doctrine is warranted.

CONCLUSION

For the Reasons set forth in the petition for a writ of certiorari and this reply, this Court should grant the writ and consider the issues.

Respectfully Submitted,

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