ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Clarendon County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL WILSON PEARSON,

APPELLANT

APPELLATE CASE NO. 2012-212430

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for burglary first degree, armed robbery, grand larceny, kidnapping and possession of a weapon during the commission of a violent crime when the only evidence linking Appellant to the crime scene was a fingerprint found on the victim's vehicle that was stolen at the time of the incident and the fact that Appellant denied knowing the victim and where he lived despite testimony that Appellant had helped with landscaping work for the victim and his son?

STATEMENT OF THE CASE

In January of 2011, the Clarendon County Grand Jury indicted Appellant Michael Pearson and his co-defendant, Victor Weldon, in a six count indictment for burglary first degree, attempted murder, armed robbery, grand larceny, kidnapping and possession of a weapon during the commission of a violent crime, indictment #2011-GS-14-0068. On May 14, 2012, Pearson and Weldon proceeded to jury trial before the Honorable Ralph F. Cothran. Harry Devoe represented Pearson. John and Laura Knobeloch represented co-defendant Weldon. Solicitor Ernest A. Finney, III and Jason Corbett prosecuted the case. The attempted murder charge was not submitted to the jury. On May 18, 2012, the jury found both Pearson and Weldon guilty of the other charges. Judge Cothran sentenced Pearson to 30 years for burglary first degree, 30 consecutive for armed robbery, 5 years concurrent for grand larceny, 20 yeas concurrent for kidnapping and 5 years concurrent for the weapon charge. A timely notice of intent to appeal was served on May 25, 2012. This appeal follows.

STATEMENT OF FACTS

On May 15, 2010, at approximately 6:20 in the morning three masked black males assaulted and robbed Edward "Slick" Gibbons in his garage as he was leaving for work. Gibbons owned a local auto parts store. Gibbons testified that during the attack the men put tape across his face. (Tr. Vol 3, p. 42, line 22 – p. 43, lines 1-8). The three men fled the scene in Gibbons' 1987 El Camino vehicle. Gibbons testified that two of the men got inside the El Camino and the third man got in the back in the flatbed. (Tr. Vol 3, p. 50, lines 7-21).

A local farmer, Cecil Eaddy, found the El Camino about twenty minutes later abandoned in the road with the keys in the ignition. (Tr. Vol 3, pp. 113-117). Eaddy knew Gibbons and recognized the car. (Tr. Vol 3, p. 113, lines 18-25). Eaddy called Gibbons' auto parts store, learned of the incident and agreed to bring the keys to the store and bring an employee back to drive Gibbons' car to the store. (Tr. Vol 3, pp. 116 – 117). Officer Ricky Richards with the Clarendon County Sheriff's Department processed the vehicle for fingerprints. (Tr. Vol 3, pp. 122-133). Richards testified that he lifted prints from the door jamb on the driver's side and the rear quarter on the driver's side. (Tr. p. Vol 3, p. 126, line 19 – p. 127, lines 1-6). Richards found no fingerprints inside the car. (Tr. Vol 3, p. 134, line 23 – p. 135, lines 1-10). Marie Hodge, a fingerprint examiner with the Sumter Police Department, testified that one of the latent fingerprints found on the outside of the car submitted matched Appellant Pearson. (Tr. Vol 3, p. 170, lines 10-15).

According to Investigator Thomas Ham with the Clarendon County Sheriff's Department, Appellant denied knowing Gibbons, or where he lived and denied ever being at Gibbons' house or place of business. (Tr. Vol 3, p. 150, lines 5-17). Richard Gamble, however, testified that Appellant Pearson helped him with landscaping work at both

Gibbons' house and Gibbons' son's house next door. (Tr. Vol 4, p. 81, line 1 – p. 82, lines 1-25). Gamble, however, was unsure what year Appellant helped with landscaping at Gibbons' house. (Tr. Vol 4, p. 86, lines 18-25; p. 91, lines 1-19; p. 82, line 24 – p. 83, line 1).

Gibbons was taken to the hospital where Investigator Ham assisted a nurse in removing the tape from Gibbons' head. (Tr. Vol 3, p. 142, lines 6-25). The tape was submitted to the South Carolina Law Enforcement Division [SLED] for DNA testing. SLED agent Catherine Leisy testified that DNA from the tape matched the co-defendant, Weldon. (Tr. Vol 4, p. 104, lines 18-24). According to Investigator Clark with the Clarendon County Sheriff's Department, Appellant Pearson and Weldon denied knowing one another. (Tr. Vol 4, p. 35, lines 8-10). Records from the South Carolina Vocational Rehabilitation Center show that from December 9 -12, 2008, seventeen months before the incident in Gibbons' garage, Appellant Pearson and Weldon were both assigned to the wood shop as part of a job readiness training program. (Tr. Vol 4, p. 93, line 11 – p. 94, lines 1-15).

ARGUMENT

The trial judge erred in refusing to direct a verdict of acquittal for burglary first degree, armed robbery, grand larceny, kidnapping and possession of a weapon during the commission of a violent crime when the only evidence linking Appellant to the crime scene was a fingerprint found on the victim's vehicle that was stolen at the time of the incident and the fact that Appellant denied knowing the victim and where he lived despite testimony that Appellant had helped with landscaping work for the victim and his son.

At the close of the State's case both Appellant and the co-defendant moved for a directed verdict of acquittal citing 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. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). (Tr. Vol 4, pp. 138 – 152). Counsel for Appellant argued, "There is no evidence of my client being at the scene of the crime, no direct evidence, -- no eyewitnesses and no forensic evidence. My client lived a block and half from the store. My client walks the neighborhood and recently put the fingerprint on the – at the store and no other place." (Tr. Vol 4, p. 141, lines 9-14). The judge denied the motion. The judge stated:

> As far as Mr. Pearson's fingerprint the evidence in this case that has come before this jury that I recall he told the police officer he did not know Mr. Gibbons. He had not been at his house or his place of business. His vehicle was taken that morning. Within 30 minutes the vehicle was found abandoned a mile and a half or two miles away. The vehicle was processed and was carried to the auto parts place and processed. That day his fingerprint was found on the vehicle. And I certainly think at least that's sufficient evidence for the jury to make a determination of guilt or innocence in this case. And I respectfully deny your motion.

(Tr. Vol 3, p. 149, lines 5-17).

The only evidence linking Appellant to the crime scene was the fingerprint found on the outside of Gibbons' car recovered, abandoned, on a road about twenty minutes after the

burglary, robbery, assault and kidnapping. The evidence is insufficient to place Appellant at the scene of the crime. The judge erred in refusing to direct a verdict of acquittal.

In Bostick, 392 S.C. at 139, 708 S.E.2d at 776-777, the South Carolina Supreme Court wrote:

> A case should be submitted to the jury when the evidence is circumstantial "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." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); *see also* State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

The State's case against Appellant was based entirely on circumstantial evidence: 1.) the fingerprint found on the outside of the car; 2.) evidence that Appellant denied knowing Gibbons and denied being at his house despite evidence that he did landscaping work for Gibbons and his son in the past and 3.) evidence that Appellant denied knowing the co-defendant despite the fact that seventeen months prior they at both been at vocational rehabilitation. Viewing the evidence in the light most favorable to the State, there is not any substantial evidence which reasonably tends to prove the guilt of Appellant or from which is guilt may be fairly and logically deduced. The fingerprint is insufficient to place

> 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.
>
> State v. Hernandez, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 2 (2009) (citing State v. Edwards, 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), abrogated by State v. Cherry, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004)).
>
> Despite the Court's abandonment of the use of this particular definition as a jury charge in State v. Cherry, the definition illustrates the lack of evidence against Petitioner. (footnote omitted).

As in Odems, the circumstantial evidence presented by the State in the present case does not reasonably tend to prove appellant's guilt and fails the Court's well settled directive that circumstantial that is not substantial is insufficient to go to a jury. At best, the State's evidence barely raises a suspicion. As discussed above, a mere suspicion is not sufficient evidence for submission to the jury. The judge should have directed a verdict of acquittal on all charges.

CONCLUSION

Based on the argument above, Appellant's convictions and sentences should be reversed and the case remanded for entry of a directed verdict of acquittal.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2013.