DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2007

ROBERT BURKELL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-1153

[October 17, 2007]

FARMER, J.

On Sunday afternoon the Frenchman was found in his room beaten to death. He had been bludgeoned with repeated blows to the head, but no weapon was ever identified or found. Death came some 18 hours before he was discovered. He was last seen around 8:30 on Saturday evening.

He had lodging in a four-bedroom house with a family of father, mother, two adult sons, and teenaged daughter. It was the father who discovered the body. Father and daughter were in the house with decedent all night on Saturday. Mother was also there but left for a brief period to visit a friend.

The man's room had two sets of sliding glass doors, none of which were locked. Other doors leading into the family room of the house were also unlocked. Nothing suggested forced entry. But at least twelve latent fingerprints from the scene could not be matched to the man or any member of the family.

The dead man's blood was found on the corner of a coffee table in his room and on the floor. Prints from the father's heel and toe were found in the blood on the floor. The evidence did not explain when the prints were made—whether at the time of death or sometime later. Police also retrieved specks of blood belonging to the Frenchman and the father from a floor mat in the bathroom and its sink. The evidence did not show when or how these specks of blood were placed in the bath.

The man and the father had dinner together in a restaurant on the

evening before his body was discovered. They usually dined together twice per week. The Frenchman was said to have a prickly personality, but there was no hint of friction or tension between them. A barmaid who saw them that night and on other occasions described the father as a gentleman. To her the Frenchman did not seem a happy man.

The father had remodeled his house to provide lodging to the man. He, on the other hand, had given the father his power of attorney. The father had cashed a $10,000 check drawn on the man's account on the day before death. The father was a beneficiary in the man's will. The Frenchman left an estate of nearly $300,000.

The father was indicted and convicted of first degree murder. The issue is whether the evidence was enough to find him guilty.

In assessing the sufficiency of the evidence as a matter of law, the court must decide whether the State produced competent, substantial evidence contradicting the presumption of innocence. *State v. Law*, 559 So.2d 187, 189 (Fla. 1989). There is a special standard of review when a conviction is based entirely on circumstantial evidence. *Law*, 559 So.2d at 188; *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982). If the only proof of guilt is circumstantial, a conviction cannot stand if the evidence fails to contradict any reasonable hypothesis of innocence. *Law*, 559 So.2d at 188; *McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Mayo v. State*, 71 So.2d 899 (Fla. 1954). Recently in a case of "purely circumstantial" evidence the court said:

> "'Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.' Similarly ... we [have] held that '*the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences.*' Suspicions alone cannot satisfy the State's burden of proving guilt

> beyond a reasonable doubt, and the expansive inferences required to justify the verdict in this case are indeed improper." [e.s., c.o.]

Ballard v. State, 923 So.2d 475, 482 (Fla. 2006).

The State's principal argument is that the evidence is not *purely* circumstantial. It contends that the footprint and blood-DNA evidence are, taxonomically, direct evidence. The State is only partially correct. Footprints and blood-DNA may operate as direct evidence for some specific issues. For example, footprints may directly establish a person was at a certain place in spite of denying ever being there. Blood-DNA analysis may settle the identity of the one contributing a specimen.

But here the State relied on these two kinds of evidence to prove something beyond mere presence or identity. The State asked the jury to infer from the footprints and blood-DNA evidence that it was the father who had committed premeditated murder. Hence the motion for judgment of acquittal properly required the judge to determine if this evidence satisfied the unique burden of circumstantial evidence.

The State's case depends on the inference that the prints were made by the murderer. It is common knowledge that blood does not dry instantly, that it remains semifluid for varying periods depending on its quantity and ambient conditions. Here there was no evidence as to the quantity of blood, the ambient conditions, or how long it had been on the floor when the print was made. Not a single expert witness ventured an opinion as to when the footprints were made. No one said they could have been made *only* when the murder was committed. Indeed at oral argument the State candidly acknowledged the lack of evidence that the footprints could have been made only then.

The footprints in the blood place the father in the room, but they alone do not tell us *when* he was there or *what he did* when he was there. The blood specks in the bathroom reveal only that grown men may leave specks of blood in their bath. Alone, neither tends to show that it was the father alone who bludgeoned the man to death.

By itself it is not especially remarkable that the father's footprint was in the room. The father and the decedent had their abode in the same house. Admittedly, the father told police he thought he was wearing sandals, not in his bare feet, when he discovered the body. Yet even though police took possession of those sandals along with several articles of his clothing, the State presented no evidence at trial about them. The

record fails to show whether blood was found on them or not.

The State analogizes the footprint to fingerprints. We accept the analogy. At the same time, the State relies on *Tirko v. State*, 138 So.2d 388 (Fla. 3d DCA 1962), which also held that the State must prove that the fingerprints were left only at the time of the murder. To be able to draw the inference that the footprints were made at the time of death, the State had to adduce further evidence as to the critical element of timing. The State did not do so.

The State's evidence also did not contend with the fact that the doors to the Frenchman's room were unlocked, thus providing entry and escape to and from the place of death. The State's evidence fails to explain who could have left at least twelve latent fingerprints at the scene not belonging to anyone who lived there. Further, the police described a bloody scene and a violent attack, but the evidence fails to explain the absence of blood-stained clothing or any traces of blood in the fingernail scrapings removed from the father. Nor does the State's evidence explain the absence of other signs of blood outside decedent's room besides the specks recovered from the bath.

We think this is a case of striking analytical similarity to *Ballard*. There the presence of the defendant's arm hair in one of the victim's hands and his fingerprints in the bedroom where the bodies were found was not sufficient to avoid a judgment of acquittal. The Court explained:

> "Given the evidence of Ballard's frequent and personal access to the premises, the State simply could not refute the possibility of his prior innocent presence in the bedroom as accounting for the hair and print. The fingerprint and hair evidence only serves to prove that Ballard was in [the victim's] apartment at some point in time, which Ballard readily admits because he was a long-time friend of the couple and socialized regularly with them."

923 So.2d at 484. Here too the father had "frequent and personal access" to the room. Here too nothing explains the timing of the footprint or the presence of the incongruous fingerprints. Here too there is no eyewitness to the crime, no one explaining its preparation, execution or aftermath; no admissions by defendant; no suspicious conduct by defendant, no evidence of hatred or ill feeling toward the victim; no murder weapon. *Id.* In short, a finding of guilt would require a significant sorites of linked inferences (what *Ballard* refers to as "stacking") from just the proven fact of blood-DNA or footprints.

The law deems circumstantial evidence legally sufficient only because it has eliminated every plausible theory of innocence. *Ballard*, 923 So.2d at 482; *Wright v. State*, 348 So.2d 26 (Fla. 1st DCA 1977). The State's evidence in this case did not eliminate every plausible theory of innocence. Suspicions may be weighty enough to stimulate further investigation but not to validate a conviction. *Cox v. State*, 555 So.2d 352 (Fla. 1989).

Reversed for entry of Judgment of Acquittal.

SHAHOOD, C.J. and TAYLOR, J., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Alfred J. Horowitz, Judge; L.T. Case No. 03-21532 CF10A.

Carey Haughwout, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.