

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-CT-00705-SCT

***JOE H. COTTON a/k/a JOE COTTON a/k/a JOE
HENRY COTTON***

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	04/11/2012
TRIAL JUDGE:	HON. CHARLES E. WEBSTER
TRIAL COURT ATTORNEYS:	BRENDA MITCHELL ROSHARWIN MITCHELL WILBERT L. JOHNSON
COURT FROM WHICH APPEALED:	TUNICA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES WILBERT L. JOHNSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	BRENDA FAY MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 06/19/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

¶1. Joe Cotton was convicted of murder in the death of Fannie Lee Burks. He appeals from his conviction, challenging the sufficiency and the weight of the evidence. Finding no error, we affirm Cotton's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2. The following facts are taken from the Court of Appeals' opinion:

On April 9, 1995, [Fannie Lee] Burks's body was found in her apartment in Tunica, Mississippi. She had been shot three times, and some of her jewelry was missing. It was determined her death occurred after 12:01 a.m. There was no indication of forced entry, no eyewitnesses to the crime, and no weapon recovered.

At the time of the original investigation, fingernail scrapings were taken as evidence. In 2008, the cold case was reviewed by the Tunica County Sheriff's Office, and the fingernail scrapings, which had been stored in the property room of the Tunica County Sheriff's Office, were sent for DNA analysis. A DNA analyst found the right-hand fingernail scrapings contained DNA, which can remain present "for years." The DNA profile was found to be "a mixture of more than one person including an unknown male[,] and Fannie Burks could not be excluded as a contributor" to the sample. The results were compared to DNA profiles in a national database, and Cotton was found to be a potential match. The sheriff's office obtained an oral swab from Cotton through a search warrant and compared it to the DNA analysis results. Since the initial DNA analysis used all of the scrapings sample, there was no DNA sample left to re-analyzed. The DNA profile contained in the fingernail scrapings was found to be consistent with that of Cotton.

Prior to her death, Burks had worked as a cook at Nickson's Café (a/k/a Nickson's Disco Club) in downtown Tunica. Burks's good friend, Ms. Willie Nickson, testified at trial that on the afternoon of April 8, 1995, she stopped by to see Burks at the café. They made plans to eat lunch the next day. As they spoke, Nickson noticed Burks was putting rings on her fingers. Nickson also helped Burks put on a herringbone necklace. The next day, after Nickson called Burks's apartment and got no answer, Nickson and a friend went to Burks's apartment. Burks's automobile was in the parking lot, but Burks did not answer their knocks on the door and window. The apartment manager unlocked the door, and Burks's body was discovered. According to Nickson, Burks was wearing the same dress as the day before, but she did not have on the necklace, and all but one ring was missing from her fingers.

Deputy Sheriff Marco Sykes testified that when he was called to the scene of the murder, he found Burks's body lying face down on the floor of her apartment. The television was on, but the telephone was off the hook. An empty jewelry box was found in Burks's bedroom at the foot of her bed. Sykes stated "[i]t appeared that someone had been in the attic." The attic door in the hallway was pushed up,

and there was a chair and several pillows underneath the attic stair opening. Insulation that matched the insulation in the attic was on the kitchen floor, and pieces of hair were found in the kitchen sink. There was no indication of forced entry.

Dr. Steven Hayne performed Burks's autopsy. He took fingernail scrapings from Burks's right and left hands and submitted this evidence to investigators. He noted that Burks was wearing only one earring, and no other jewelry was on her body. Dr. Hayne testified at trial that the three gunshot wounds—one to her front abdomen, one to her left flank, and one to the back of her head—were all close contact wounds and were all lethal.

Sheriff Calvin Hamp testified that . . . [i]n [hi]s initial statement to police, [Cotton] repeatedly denied having seen Burks the night of her murder; however, he later admitted that he had been to the club where Burks worked on April 8, 1995, and Burks had waited on him. He bought a sandwich, which Burks passed to him in a brown paper bag Cotton also told investigators that he had been to Burks's apartment on two separate undisclosed prior dates—to return some stolen property of hers and to help move furniture into her apartment. In addition, Cotton's mother lived in the same apartment complex as Burks.

The only direct evidence tying Cotton to Burks's murder was the presence of his DNA under her right-hand fingernail scrapings. William Jones, a forensic scientist qualified as an expert in the field of forensic DNA analysis, testified that Cotton could not be excluded as a contributor of DNA found in fingernail scrapings taken from Burks during her autopsy. Jones tested thirteen genetic markers from the right-fingernail scrapings of Burks. The genetic profile excluded "greater than 99.99 percent of the Caucasian, African American and Hispanic populations." The scrapings were a mixture of at least two individuals, one of whom was a male, and that mixture had a DNA profile consistent with Cotton, i.e., he could not be excluded as a contributor. Nor could Burks be excluded as a contributor to the mixture. Jones testified that, in his opinion, the DNA was a mixture of Cotton's and Burks's, to "a very high degree of [scientific] certainty." Jones admitted that DNA could be transferred between individuals by casual contact. Cotton did not testify at trial; nor did he put on any witnesses in his defense. After the three-day trial, the jury returned a guilty verdict [and] [t]he trial court sentenced Cotton to life [imprisonment]. [Cotton]

filed a motion for a judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial, which was denied.¹

Cotton timely appealed his conviction, challenging the sufficiency and the weight of the evidence.² The Court of Appeals affirmed, and this Court granted Cotton's petition for certiorari. Finding no error, we affirm Cotton's conviction and sentence.

LAW AND ANALYSIS

I. Sufficiency of the Evidence

¶3. Since the only connection between Cotton and Burks's murder is the presence of Cotton's DNA under Burks's fingernails at the time of her death, this is an entirely circumstantial-evidence case.

When the State's case is based entirely upon circumstantial evidence the State is required to prove the defendant guilty not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis consistent with innocence. Circumstantial evidence need not exclude every "possible doubt" but only every other "reasonable" hypothesis of [innocence]. A mere fanciful or farfetched or unreasonable hypothesis of innocence is not sufficient to require an acquittal When reviewing a jury verdict of guilty we are required to accept as true all the evidence favorable to the State, together with reasonable inferences arising therefrom, to disregard the evidence favorable to the defendant, and if such will support a verdict of guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, then the jury verdict shall not be disturbed.³

¹*Cotton v. State*, 2013 WL 3894864, **1-3 (Miss. Ct. App. July 30, 2013).

²*Id.* at *3.

³*Montgomery v. State*, 515 So. 2d 845, 848 (Miss. 1987) (internal citations omitted); see also *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (stating an appellate court is not required "to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt [but] [i]nstead, the relevant inquiry is whether, after viewing the

¶4. Cotton claims he should be acquitted because the “[e]vidence that a very small[,] unknown quantity of Joe Cotton’s DNA was found under the fingernails of Ms. Burks’[s] right hand cannot, without more proof, support a reasonable circumstantial conclusion that Mr. Cotton murdered Ms. Burks.”

¶5. While no Mississippi case bears directly on the sufficiency of DNA evidence alone, other jurisdictions have affirmed convictions based solely on DNA evidence. *See State v. Toomes*, 191 S.W.3d 122, 129-31 (Tenn. Crim. App. 2005); *Roberson v. State*, 16 S.W.3d 156, 169-71 (Tex. Ct. App. 2000); *Rush v. Artuz*, 2009 WL 982418, *11 (E.D.N.Y. April 10, 2009); *State v. Hunter*, 861 N.E. 2d 898, 901 (Ohio Ct. App. 2006); *State v. Abdelmalik*, 273 S.W. 3d 61, 66 (Mo. Ct. App. 2008); *see also Maryland v. King*, 133 S. Ct. 1958, 1964, 186 L. Ed. 2d 1 (2013) (emphasizing that DNA provides “unparalleled accuracy” and is “far superior” to fingerprinting with regard to identifying criminals). In accordance with those decisions, we conclude that, when DNA material is found in a location inconsistent with casual contact and absent a “reasonable hypothesis consistent with innocence,” DNA evidence alone can be sufficient to support a conviction. We caution that we are not announcing a principle that DNA evidence alone will always be sufficient to support a conviction. Every conviction relying on DNA evidence must stand on its own merits.

¶6. Here, an expert in forensic DNA analysis testified that “[t]he genetic profile for the DNA donor of the right fingernail scrapings [from Burks] excludes greater than 99.99 percent of the _____ evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

Caucasian, African-American and Hispanic populations,” but that “Joe Cotton cannot be excluded as being a contributor to the mixture of the scrapings.” Cotton does not dispute that his DNA was found under Burks’s fingernails. Rather, he proffers the following “hypothesis” as to how it got there:

Cotton told investigators that Ms. Burks had waited on him in Nickson’s café. She could have come into contact with him then. Just as likely, she cleaned up after him. If so, she came into contact with his eating utensils and napkin, both of which would have had Mr. Cotton’s DNA on them. Ms. Burks could have picked up money handled by Cotton either as payment for the food or a tip and collected his DNA then.

In short, Cotton argues that Burks *could* have gotten his DNA under her nails through casual contact when she waited on him at the café, and, therefore, his conviction must be reversed and rendered because this is a reasonable hypothesis consistent with innocence.

¶7. A hypothesis must be based on evidence and the reasonable inferences that can be drawn from the evidence. A hypothesis is “[a] supposition *based on evidence* but not proven; a proposed explanation, *supported by evidence*, that serves as a starting point for investigation.”⁴

Cotton’s argument hinges on Burks touching him, his dishes, or his money at the café. However, there is no evidence that Burks touched Cotton or his belongings. The only evidence that Cotton and Burks interacted at the café came from Sheriff Hamp, who testified that:

A. [Cotton] stated he received the food from Ms. Fannie Burks [the night she was murdered]. He ordered a sandwich and she passed him a brown bag. And I asked him was there a possibility she could have scratched him and stated, um, yes, it was a possibility. Then we asked, “Well, if you were scratched, wouldn’t you have known you were scratched when

⁴*Black’s Law Dictionary* 760 (8th ed. 2004) (emphasis added).

somebody's passing you a bag?" He stated, yes, he would have known if he was scratched.

Q. Okay. And so after [Cotton] said he would have known if he was scratched, so did you then ask him if she had ever scratched him?

A. Yes, I did.

Q. What was his answer to that?

A. No.

This testimony does not support an inference of even casual contact. In fact, it negates such an inference, as Cotton said Burks did not scratch him. It also does not provide a basis for Cotton's argument that Burks cleaned up after Cotton or handled his money. Instead, it merely posits that Burks passed Cotton a brown paper bag several hours before she was murdered.

¶8. Cotton also relies on the following testimony from the State's DNA expert, William Jones:

Q. . . . And as far as leaving, a person leaving DNA, if I touched you on your – just say on your forehead with my hand, would it be likely that I would have your DNA on my hand or under my fingernails?

A. It be likely that – I would say it would be possible. It depends on the circumstances. If it was just a glancing touch, I would say not likely. If I'm bleeding, I would say extremely likely.

Q. Okay.

A. If I'm sweating, I would say yes, reasonably likely that from the sweat you got a little bit, a little bit of my DNA on your fingers or something.

Q. On the fingers?

A. Yeah, wherever you touched.

Q. *Okay. Would you expect it to be under the nails, in the nail scrapings?*

A. *Well, if you didn't actually get your nails on me, I would not expect it. But in my DNA world I wouldn't say anything is possible but I would want to do a little experiment a few times to see before I would give up on whether it could or could not happen.*

...

- Q. [I]f you come in contact with a person or if you come if [sic] contact with a person by a handshake or rubbing of the head or patting on the back. Is it possible that DNA will stay in the fingernails?
- A. If the fingernails actually are what is touching, yes. There can be DNA adhering to it if you're touching somebody with your fingernails, scratching their back or whatever.

However, Cotton's reliance on this testimony is misplaced. There is no evidence that Burks touched Cotton's forehead, shook his hand, rubbed his head, or patted his back at the café. And for his reasonable hypothesis to stand, it must be founded in the record evidence and the reasonable inferences that can be drawn from that evidence—not merely supposition about what “could have been.” Because Cotton's DNA was found under Burks's fingernails, a circumstance inconsistent with casual contact, and because there is not a “reasonable hypothesis consistent with innocence” to explain its presence, we find the evidence sufficient to support the jury's guilty verdict. It is not our job as an appellate court to ask whether we believe “that the evidence at trial established guilt beyond a reasonable doubt [but] [i]nstead, the relevant inquiry is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁵ We find that he or she could. For these reasons, the trial court's denial of Cotton's motion for judgment notwithstanding the verdict is affirmed.

II. Weight of the Evidence

⁵*Bush*, 895 So. 2d at 843 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

¶9. Finally, and in the alternative, Cotton claims that he is entitled to a new trial because his conviction is against the overwhelming weight of the evidence. A motion for a new trial should be granted only in “exceptional cases in which the evidence preponderates heavily against the verdict.”⁶ When reviewing the denial of a motion for a new trial, the evidence must be viewed in the light most favorable to the verdict.⁷ A verdict should be upheld unless it “is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.”⁸ This occurs only if reasonable men could not have found the defendant guilty based on the evidence when it is viewed in the light most favorable to the verdict.⁹ For the reasons stated in the sufficiency-of-the-evidence analysis, allowing the jury’s guilty verdict to stand does not sanction an unconscionable injustice against Cotton. Finding no error, we affirm both the judgment of the Court of Appeals and Cotton’s conviction and sentence in the trial court.

¶10. **CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. THIS SENTENCE SHALL RUN CONSECUTIVELY WITH ANY PREVIOUSLY IMPOSED SENTENCES.**

⁶*Weatherspoon v. State*, 56 So. 3d 559, 564 (Miss. 2011).

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Id. at 564.

⁸*Jenkins v. State*, 947 So. 2d 270, 278 (Miss. 2006) (quoting *Baker v. State*, 802 So. 2d 77, 81 (Miss. 2001)).

⁹*Bush*, 895 So. 2d at 844 (Miss. 2005) (quoting *Amiker v. Drugs For Less, Inc.*, 796 So. 2d 942, 947 (Miss. 2000)).

**WALLER, C.J., RANDOLPH, P.J., PIERCE AND COLEMAN, JJ., CONCUR.
KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
DICKINSON, P.J., CHANDLER AND KING, JJ.**

KITCHENS, JUSTICE, DISSENTING:

¶11. In Mississippi criminal prosecutions based entirely on circumstantial evidence, the State carries the significant burden to prove the defendant's guilt beyond a reasonable doubt *and to the exclusion of all reasonable hypotheses consistent with innocence*. *Lynch v. State*, 877 So. 2d 1254, 1268 (¶ 34) (Miss. 2004); *Montgomery v. State*, 515 So. 2d 845, 848 (Miss. 1987). In such cases, "[t]o justify conviction, there must remain no reasonable hypothesis save that of guilt." *Baker v. State*, 317 So. 2d 901, 902 (Miss. 1975). Therefore, when the State's evidence is entirely circumstantial, it is the burden of the State to eliminate every reasonable hypothesis consistent with innocence; it is not the burden of the defendant to argue whether a certain reasonable hypothesis occurred or not. The majority improperly shifts the burden of proof to the defendant in a circumstantial evidence case, and for that reason, I must respectfully dissent.

¶12. The sole physical evidence against Cotton was the presence of DNA on a very small amount of scrapings taken from the fingernails of Burks's right hand. As noted by the majority, other jurisdictions have affirmed convictions based solely on DNA evidence. However, every one of the cited cases is markedly different from the one before us. In *State v. Toomes*, 191 S.W.3d 122 (Tenn. Crim. App. 2005), the defendant's DNA material was found in the vaginal and anal swabs of a rape victim, in a place that indisputably is inconsistent with casual contact and exclusionary of a reasonable hypothesis consistent with innocence. Again, in *Roberson v. State*, 16 S.W.3d 156 (Tex. Ct. App. 2000), the defendant's DNA was obtained from a rape-kit

examination of the victim's vagina. The defendant in *Rush v. Artuz*, 2009 WL 982418 (E.D.N.Y. April 10, 2009), was convicted of rape after his genetic material was found in a rape kit. A DNA profile obtained from a vaginal smear containing semen was used to convict the defendant in *State v. Hunter*, 861 N.E.2d 898 (Ohio Ct. App. 2006). Clearly, if Cotton's DNA had been obtained from a rape kit, or found in or near Burks's vagina in the form of semen or blood, the evidence combined with its location would be sufficient to convict. But his DNA was found in a few sparse scrapings obtained from underneath the fingernails of one of Burks's hands, and it was shown that the two had been in close physical proximity only hours before Burks's murder.

¶13. The only case cited by the majority that comes close to the facts before this Court is *State v. Abdelmalik*, 273 S.W.3d 61 (Mo. Ct. App. 2008). The defendant in that case was convicted of capital murder based upon his DNA material's having been found underneath the fingernails of the victim. *Id.* at 64. However, in that case, "a 'significant' amount of Abdelmalik's DNA was found under the fingernails of the victim's left hand, which [was] also the hand missing a fingernail from the apparent struggle." *Id.*

The material discovered under the victim's left hand fingernails was *visible to the naked eye* and contained *human tissue and blood*. The DNA testing returned a genetic profile that would occur only once in one quintillion individuals. The amount of material collected from the victim's left hand fingernails was *more than one hundred times more than is necessary to develop a full genetic profile*.

Id. (emphasis added). In this case the amount of testable genetic material was so minute that it was consumed after the first DNA test. Dr. Hayne testified that he did not see "any foreign material underneath the fingernails" when he scraped them. There was no sign of an intense

physical struggle such as in *Abdelmalik*, where the attacker's blood and flesh were scratched off by the victim during the attack. In fact, none of the cases from foreign jurisdictions cited by the majority is comparable to the case before us, in that, in all of those cases, the location of the defendant's DNA was, without question, inconsistent with casual contact, and, particularly in the rape cases, inconsistent with any reasonable hypothesis consistent with innocence.

¶14. Here, as stated in the indictment, the State had the burden of proving that Joe Cotton “did unlawfully, willfully and feloniously, without authority of law, and with deliberate design to effect death, kill Fannie Lee Burks. . . .” In support of its case, the State adduced evidence showing that a very small amount of Cotton's DNA was found underneath the fingernails of Burks's right hand and that Burks's gunshot wounds were “contact” wounds, meaning her killer placed the barrel of the gun on or close to her skin before shooting her. The State elicited testimony indicating that Cotton knew Burks and even had been in her apartment on two prior occasions. It adduced evidence showing that Cotton had been in close physical proximity with Burks the day she was murdered, and that the two may have touched each other. The State's DNA expert testified that casual contact can lead to DNA under human fingernails, particularly if the person to whom the DNA belongs is sweating or bleeding when the contact between the nail and the skin occurs. No evidence was adduced to show that Cotton was at or near Burks's apartment at the time of her death; no murder weapon was found; and none of Burks's valuables was recovered or observed in Cotton's possession.

¶15. Two reasonable hypotheses explaining how Cotton's genetic material got under the fingernails of Burks's right hand can be gleaned from the evidence adduced at trial. Either

Burks scratched Cotton as he attacked her and killed her from close range, or she scratched or touched him with her fingernail as she handed him his food at the restaurant where she worked a few hours before she was killed. The majority's reliance on Cotton's statement to police that Burks did not scratch him when she handed him his food is unpersuasive. Cotton was asked whether he remembered whether someone from whom he had purchased food had scratched him during an exchange that had occurred more than thirteen years before. The majority's expectations regarding the power and accuracy of longterm human memory far exceed my own. Because both of the hypotheses were reasonable, based upon the evidence, the State did not meet its burden of proof as a matter of law.

¶16. This Court has reversed convictions predicated on circumstantial evidence where the evidence proved only that the defendant had been near the object of the crime at some point. In *Deloach v. State*, 658 So. 2d 875, 877 (Miss. 1995), this Court overturned a conviction for burglary because the only evidence linking the defendant to the crime was his palm print on the side of a vending machine located at the vocational complex where the burglary had occurred. The Court found that “[t]he State failed to address the very reasonable hypothesis that Deloach placed his palm print on the vending machine during a time when he had lawful access to the machine[,]” despite the fact that Deloach was not a student at the school and did not seem to have a reasonable explanation for ever having touched the vending machine. *Id.* Ultimately, the State did not meet its burden because it “relie[d] on the inference that if Deloach ever had access to the machines then it was necessarily at the time of the burglary” without addressing

the other reasonable inference of innocence that the palm print's presence on the vending machine created. *Id.* at 877-78.¹⁰

¶17. I see no evidentiary difference between the palm print found on the vending machine in *Deloach* and the DNA found underneath Burks's fingernails in the present case. In *Deloach*, the State failed to show a motive for the crime, or to show any evidence that Deloach had touched the vending machine during the commission of a burglary. Similarly, in this case, the State adduced no evidence of a murder weapon, no evidence of Cotton's having been near the victim's apartment around the time of the murder, and no evidence to show that his DNA had been deposited under Burks's fingernails during the murder. In *Deloach* and in the case before us, both an inculpatory and exculpatory explanation reasonably can be inferred from the circumstantial evidence. Accordingly, the State did not carry its burden of proof as a matter of law.

¶18. The State bears the burden of excluding any reasonable hypothesis consistent with innocence beyond a reasonable doubt. If the State has not been able to exclude any and all reasonable hypotheses consistent with innocence, then it has failed in its burden of proof. "To

¹⁰The Court relied on two prior cases, *Corbin v. State*, 585 So. 2d 713 (Miss. 1991), and *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945), in holding that the circumstantial evidence was insufficient to support a conviction. The Court in *Corbin* reversed a burglary conviction because the defendant's fingerprints were found on a few of the items that were stolen, and those facts, standing alone, did not prove beyond a reasonable doubt that the defendant was the one who committed the burglary. *Corbin*, 585 So. 2d at 715-16. In *McLain*, the Court reversed and rendered a conviction for larceny of an automobile when the sole evidence against the defendant consisted of his fingerprint on the rear-view mirror of the car. *McLain*, 24 So. 2d at 16.

justify conviction, there must remain no reasonable hypothesis save that of guilt.” *Baker*, 317 So. 2d at 902. “[W]here the evidence tends equally to sustain two inconsistent propositions, neither can be said to have been established by legitimate proof and certainly not through the guise of circumstantial evidence.” *In re B.J.S.*, 174 Ga. App. 515, 516, 330 S.E.2d 186, 188 (Ga. Ct. App. 1985). “If . . . the evidence of guilt or innocence remains anywhere near equipoise—that is, the facts are equally susceptible to two or more constructions—then reasonable doubt exists as a matter of law.” *Haskins v. Commonwealth*, 44 Va. App. 1, 9, 602 S.E.2d 402, 406 (Va. Ct. App. 2004) (quotation omitted).

¶19. The majority states that the testimony provided in this case “does not support an inference of even casual contact.” With respect, I completely disagree. Cotton purchased food from Burks and she passed him a bag of food. One can imagine many ways in which casual and relatively unnoticeable contact, resulting in passage of DNA from Cotton to Burks, could have occurred while he was in the café with her. For example, Cotton could have sneezed on Burks, or inadvertently sprayed saliva onto her during the course of routine conversation. Burks’s wiping her face in the aftermath of such an innocuous occurrence could have resulted in the deposit of Cotton’s DNA under her fingernail. But it is not for this Court, or for Cotton, to develop a list of lawful scenarios in which Cotton’s DNA might have made its way to Burks’s fingernails. Rather, it is sufficient that the State’s expert testified that the DNA’s presence underneath the nail could have been the result of casual contact between the two. This provides an adequate evidentiary basis for a reasonable hypothesis that is consistent with Cotton’s innocence and requires his acquittal.

¶20. The State did not eliminate the possibility of transfer by casual, innocent contact, and the majority incorrectly holds that it is Cotton’s burden to adduce evidence to show that, in his encounter with Burks more than thirteen years prior, she shook his hand or rubbed his head or patted his back, or did anything else to touch him. It is not Cotton’s burden to prove that such casual touching occurred; it is the State’s burden to prove that it did not. This was the rationale relied upon by the Court in *Deloach*, where the defendant was under no obligation to argue an innocent explanation of the presence of his palm print on the vending machine at the site of the burglary. Instead, the Court correctly held that the State had failed to eliminate all reasonable innocent explanations for the presence of the palm print.

¶21. So should we do here. At the end of the day, the circumstantial evidence was capable of two reasonable interpretations: Cotton’s DNA got under some of Burks’s fingernails when he killed her, or through some casual contact with her. Both inferences are reasonable and supported by the evidence, and it is the State’s burden to eliminate all reasonable hypotheses consistent with innocence. It has not done so. The majority finds that the DNA material was “found in a location inconsistent with casual contact and absent a ‘reasonable hypothesis consistent with innocence.’” I find that, based upon the evidence adduced at trial, the DNA material was found in a location consistent with casual contact and that there was a reasonable hypothesis consistent with innocence. Because Cotton’s conviction should be reversed, I respectfully dissent.

DICKINSON, P.J., CHANDLER AND KING, JJ., JOIN THIS OPINION.