STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211981

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

MARCUS DANIEL ALLISON,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **The trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and his friend acted together to burglarize the victim's home and steal from him.**

II. **The trial court properly denied Appellant's motion to suppress evidence regarding the freshly-glued false drawer and the crowbar pry marks where Appellant failed to show the lost photographs possessed exculpatory value apparent before they were lost and failed to show he could not have obtained evidence of comparable value by other means.**

STATEMENT OF THE CASE

Appellant was indicted in Oconee County in August 2010 for first-degree burglary and grand larceny in an amount between $1,000 to $5,000. On April 23-25, 2012, Appellant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Appellant guilty as indicted, and Judge Culbertson sentenced Appellant to twenty-five years for first-degree burglary and five years, concurrent, for grand larceny. A timely notice of appeal was served and filed.

ARGUMENT

I. The trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and his friend acted together to burglarize the victim's home and steal from him.

Appellant claims that the trial judge committed reversible legal error by giving the jury an instruction regarding "the hand of one is the hand of all" theory of accomplice liability because, he asserts, there was no evidence warranting the charge. Under "the hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Here, there was evidence in the record from which the jury could infer that Appellant and his friend, Donald Gentile, acted together to burglarize the victim's home and steal from him. Therefore, the trial judge did not err in providing the jury with an instruction on "the hand of one is the hand of all." See State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (if *any evidence* supports a requested jury charge, the trial court should grant the request) (emphasis added).

Appellant and Gentile were friends and were together all night long on the date in question. (R. p. 84; p. 142-43). They were up all night drinking and "partying." (R. p. 85, lines 9-11; p. 119; p. 129; p. 142-44; p. 168, lines 18-20). The following morning, after coming home from work and discovering that his camper had been burglarized, the victim observed Gentile and Appellant both carrying bags out to Gentile's truck, and saw that the bag Gentile was carrying contained one of the victim's missing DVDs. (See R. p. 89). The victim testified he briefly spoke with Appellant and Gentile who both claimed that they heard nothing during the night to indicate there had been a burglary. (R. p. 85, lines 14-17). The victim stated that both Appellant and Gentile were "acting

really squirrelly." (R. p. 85, lines 9-13). Appellant and Gentile subsequently left the house together in Gentile's truck which contained the bags. (R. p. 90-91). Later, after Gentile was gone, Appellant was observed acting suspiciously in the wooded area surrounding the RV park, and the victim and police suspected he might be attempting to hide some of the stolen items in the woods. (R. p. 93; p. 116-119; p. 163-64).

After searching Appellant's home, the police found some of the stolen items in a freshly-glued false drawer in one of Appellant's closets, along with black gloves and a crowbar. (R. p. 119-26). The crowbar, which was unusual because it was flared at one end, was a "perfect match" with the pry marks on the victim's door. (See R. p. 127-28; p. 167-68). When police confronted Appellant with the items found in his false drawer,[1] Appellant initially claimed the items belonged to him. (R. p. 131-32). However, he subsequently claimed that Gentile must have stolen the items and planted them in his camper while he was asleep in the chair. (R. p. 129, lines 18-24; p. 169). Notably, he had already told police "numerous times" that he did not go to sleep the night before because he was up all night partying. (R. p. 129, lines 20-22; p. 168-69).

The above facts supported that both Appellant and Gentile had been in possession of goods recently stolen from the victim. Based upon their possession of recently stolen goods, the jury was entitled to infer that both men stole the goods. See, e.g., State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (when one is found in possession of recently stolen property, the jury may infer circumstantially that he is the thief); see also State v. Irvin, 270 S.C. 539, 542-43, 243 S.E.2d 195, 196-97 (1978) (the trial judge properly denied a directed verdict as to both defendants where the State established the occurrence of a housebreaking and larceny and relied upon the defendants' possession of

[1] Some of the stolen items were not found inasmuch as Appellant and Gentile had removed many of the items from Appellant's property earlier that morning. (See R. p. 89-91).

recently stolen items and the permissible inference that the defendants were the thieves). (See R. p. 247, lines 8-13). Further, the testimony suggested that both men, who were friends and had been together all night long, were acting in concert when they were removing bags of stolen property from Appellant's home. Importantly, contrary to Appellant's assertions, there was no evidence - other than Appellant's own self-serving statement blaming Gentile - that Gentile *alone* committed the crimes; instead, the evidence suggested that either Appellant committed the crimes by himself or the two men acted together to commit the crimes.[2] Indeed, the trial judge obviously felt it would be unfair to allow Appellant to argue third-party guilt by pointing the finger at Gentile without also giving the jury the opportunity to consider the evidence suggesting Gentile and Appellant had worked *together* to commit the crimes. (See R. p. 194-95; p. 201-202). The fact that Gentile testified as a State's witness and denied any involvement in the crimes did not nullify the evidence indicating the two men acted together, since the jury could have decided that aspects of Gentile's testimony were not credible. Accordingly, the jury was entitled to an instruction on "the hand of one is the hand of all" because if they found that the men acted together pursuant to a common plan to burglarize and rob the victim, Appellant was guilty regardless of whether the State could definitively show which of the two men actually entered the victim's home and stole his property. Therefore, the trial judge did not err by giving the jury the "the hand of one is the hand of all" instruction. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (if *any evidence* exists to support a charge, it should be given, and the trial court

[2] Appellant repeatedly references the solicitor's arguments emphasizing his belief that Appellant committed this crime alone and that Gentile did not participate. (See Brief of Appellant, p. 13-15). However, the fact that the State's theory of the case was that Appellant alone committed the crime did not negate the fact that there was evidence in the record supporting the "hand of one is the hand of all" instruction.

commits reversible error if it fails to give a requested charge on an issue raised by the evidence).

II. The trial court properly denied Appellant's motion to suppress evidence regarding the freshly-glued false drawer and the crowbar pry marks where Appellant failed to show the lost photographs possessed exculpatory value apparent before they were lost and failed to show he could not have obtained evidence of comparable value by other means.

"The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (citations omitted). To establish a violation of due process, a defendant must demonstrate that the State destroyed the evidence in bad faith, or that the evidence had exculpatory value that was apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. Id. at 538-39, 552 S.E.2d at 307 (citations omitted). "Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt." State v. Hutton, 358 S.C. 622, 632, 595 S.E.2d 876, 882 (Ct. App. 2004) (citation omitted).

If the defendant does not assert that the evidence was lost or destroyed in bad faith, the defendant must demonstrate (1) the lost evidence possessed an exculpatory value apparent before it was lost *and* (2) he could not obtain other evidence of comparable value by other means. State v. Bland, 399 S.C. 220, 224-25, 730 S.E.2d 909, 911 (Ct. App. 2012). Unless he satisfies both requirements, he cannot establish a due process violation. Id.

In this case, Appellant does not contend that the State lost the photographs in bad faith. (See Brief of Appellant, p. 17). However, Appellant does contend that the lost photographs were "exculpatory" because, he asserts, "they would have shown that the drawer facing was not freshly glued and that the crowbar marks on [the victim's] camper

did not match the crowbar found in [Appellant's] camper." (Brief of Appellant, p. 17). In the State's view, Appellant has failed to meet his burden under State v. Cheeseboro.

Initially, Appellant failed to show that the lost photographs "possessed an exculpatory value" that was "apparent" before they were lost. Cheeseboro at 538-39, 552 S.E.2d at 307. Indeed, photographs corroborating that Appellant had a freshly-glued false drawer in his closet, and that the crowbar found hidden inside matched the pry marks on the victim's camper, cannot be said to have apparent exculpatory value. See Cheeseboro at 538, 552 S.E.2d at 307 (in case where gun was destroyed before the defense team could examine it, the Supreme Court affirmed the trial judge's ruling that "the gun was incriminating rather than exculpatory"); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991) (in case where the trial judge granted the defendant's motion to suppress evidence of cocaine because the cocaine was destroyed before the defendant could have it independently analyzed, the Supreme Court held the trial court erred in suppressing the cocaine and held that "the cocaine had no apparent exculpatory value" and pointed out that the defendant could attack the evidence that was introduced pertaining to the cocaine); State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247, 252 (Ct. App. 2008) (marijuana that was destroyed after it was tested was "inculpatory rather than exculpatory").

Appellant's "belief" that the photographs would depict something contrary to what the officers testified they depicted is insufficient to demonstrate that the photographs had exculpatory value that should have been apparent to the State before the photographs were lost. (See Brief of Appellant, p. 16). See State v. Newton, 274 S.C. 287, 291, 262 S.E.2d 906, 909 (1980) ("Mere absence of evidence of speculative value to a defendant without deliberate misconduct by the prosecution does not deprive a

defendant of a fair trial.") (citation omitted); State v. Adams, 304 S.C. 302, 304-305, 403 S.E.2d 678, 680 (Ct. App. 1991) (defendant failed to make some showing that the missing document in fact possessed an "exculpatory value that was apparent" before the State lost it; therefore, the Court could only speculate); State v. Moses, 390 S.C. 502, 518, 702 S.E.2d 395, 404 (Ct. App. 2010) (defendant's assertion that a lost videotape "would most likely" have allowed him to identify witnesses who "may reasonably" have presented favorable evidence or evidence which could have lead the defense to impeachment evidence was insufficient to establish any exculpatory value of the evidence). Since Appellant failed to show the photographs had apparent exculpatory value, this Court need not reach the second prong of the Cheeseboro test. See Bland at 224-25, 730 S.E.2d at 911.

However, even assuming the lost photographs possessed apparent exculpatory value, Appellant still failed to demonstrate that he could not obtain other evidence of comparable value by other means. First, as to the photographs of the freshly-glued false drawer, Appellant fails to explain how the photographs themselves would have shown whether or not the glue was fresh. Further, defense counsel failed to establish that he could not have investigated the false drawer in person, taken his own photographs, and/or had his own expert analyze the glue. (See R. p. 54, lines 15-22). Second, as to the crowbar,[3] defense counsel failed to establish that he could not have taken the crowbar to the victim's camper himself and made a comparison, taken his own photographs, and/or

[3] Notably, Appellant's counsel did not move pre-trial to suppress the evidence of the crowbar on the ground that the State lost the photographs of it. (See R. p. 58-59). In fact, his only pre-trial argument regarding the crowbar was that he did not want "a discussion of crowbars" since it "doesn't seem relevant to the case" because "there is no expert witness on the witness list" and "no pictures of any pry marks." (R. p. 58, lines 8-14; see also p. 127, lines 7-11). See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal). Additionally, during trial, the crowbar was entered into evidence without objection from Appellant. (R. p. 185, lines 9-15). See State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (a contemporaneous objection is required to preserve an issue for appellate review).

had his own expert examine the crowbar and the victim's camper. (See R. p. 58-59). Indeed, the crowbar was still available at trial and was in fact introduced into evidence without objection. (See R. p. 185). Therefore, Appellant failed to establish the second prong of the Cheeseboro test. See State v. Moses, 390 S.C. at 518, 702 S.E.2d at 404 (a defendant seeking dismissal of charges based upon the State's loss of evidence has the burden to demonstrate the Cheeseboro test has been met).

Moreover, Appellant had the opportunity to fully cross-examine the officers regarding loss of the photographs and regarding the integrity of their testimony on the issues of the false drawer and the crowbar. (See R. p. 130-37; p. 169-75). See State v. Hutton, 358 S.C. 622, 631-33, 595 S.E.2d 876, 881-82 (Ct. App. 2004) (defendant failed to show he could not obtain other evidence of comparable value by other means where the trial court allowed defense counsel to thoroughly cross-examine the witness about the contents of the missing written statement); see also Adams at 305-306, 403 S.E.2d at 680. Appellant was also able to argue to the jurors that they should draw an adverse inference from the State's failure to present the photographs. (See R. p. 77, lines 17-22; p. 223, lines 3-15; p. 224, lines 1-3; p. 229, lines 16-17). Further, Appellant received the benefit of a "spoliation of evidence" charge informing the jurors that when evidence is lost or destroyed by a party, they could infer that such evidence would have been adverse to that party and that they could consider this issue in deciding whether or not the State met its burden of proof. (R. p. 239, line 20 – p. 240, line 7). Therefore, Appellant failed to establish that he suffered any prejudice whatsoever from the loss of the photographs.[4]

[4] In that vein, if Appellant's defense was that Gentile committed the crimes and planted the stolen items in Appellant's camper, the loss of the photographs could not have hurt Appellant's case because, even if the drawer was freshly-glued and the crowbar matched, Gentile was the one to blame under Appellant's theory. (See R. p. 51-53; p. 75-78; p. 129, lines 17-20; p. 169, lines 6-8; p. 224-33).

Appellant cites to State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990) in support of his argument that he could not obtain evidence of comparable value by other means. (See Brief of Appellant, p. 17). In Jackson, the defendant was arrested for DUI and taken to the police department where he was videotaped performing field sobriety tests and was also given a breathalyzer test. Jackson at 314, 396 S.E.2d at 101. At a pretrial conference, the solicitor dismissed the charge after the parties watched the videotape. Id. However, a few months later, the State notified the defendant that it had changed its mind and that the charge would in fact be prosecuted. Id. Nevertheless, the videotape was erased a couple of months later and the State lost the original breathalyzer test report. Id. The Supreme Court held that, under "the peculiar facts of this case," the defendant's due process rights had been violated because the videotape was clearly "material" and the exculpatory value was apparent before its destruction inasmuch as one assistant solicitor was willing to drop the charges because of it. Id. at 316, 396 S.E.2d at 102. In addition, the Court found that the defendant "had no other evidence and could not obtain evidence of comparable value." Id.

Jackson is distinguishable. First, the "peculiar facts" of Jackson indicate that "a conscious decision was made by the Solicitor's office to dismiss the charges" and "[i]t was because of this decision that the tape was ordered to be erased." Id. Thus, the Supreme Court placed great emphasis on the fact that the State had previously dismissed the charges. Second, the exculpatory value was apparent before the videotape was destroyed because the State was willing to drop the charges after watching it. Id. In Appellant's case, the facts are not "peculiar" since there is no issue regarding a previous dismissal of the charges based upon the missing photographs. The photographs were lost, through simple negligence, after the officer left his position at the police department

to take another job.[5] (See R. p. 54, line 25 – p. 55, line 15; p. 128, line 9 – p. 129, line 9; p. 171, lines 8-21). Further, as discussed above, Appellant failed to prove that he could not obtained evidence of comparable value by other means. See *supra*, p. 8-9. Therefore, the Jackson case is not controlling, and Appellant failed to meet his burden to show a due process violation based upon the State's loss of the photographs.

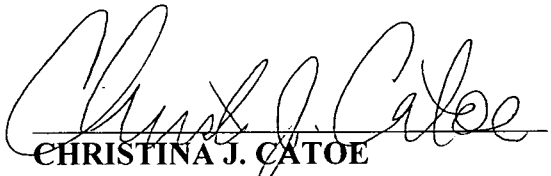
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



CHRISTINA J. CATOE
SC Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

July 22, 2013

[5] Appellant argues that it was "unfair" for officers to testify about the freshly-glued false drawer and the crowbar match when the photographs of these things were missing. (Brief of Appellant, p. 17). Respondent would note that the police were not required to take photographs to corroborate their investigation and could have testified about their personal observations of the false drawer and the crowbar match even if no photographs had ever been taken.

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THE STATE OF SOUTH CAROLINA,

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MARCUS DANIEL ALLISON,

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent submits that the following should be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Trial Transcript p. 47-59; p. 72-248; p. 260; p. 268-69.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.

CHRISTINA J. CATOE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

July 22, 2013

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Carmen V. Ganjehsani**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **22nd** day of **July, 2013.**

CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 22nd day of July, 2013.

Notary Public for South Carolina.
My Commission Expires: 10/28/2014

ALAN WILSON
ATTORNEY GENERAL

July 22, 2013

VIA HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Marcus Daniel Allison
Appellate Case No. 2012-211981

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Affidavit of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

cc: Carmen V. Ganjehsani, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589