STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT TIMOTHY ARTIS,

APPELLANT.

Appellate Case No. 2012-211727

FINAL BRIEF OF APPELLANT

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II. Did the trial court err in refusing to grant a directed verdict of acquittal where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence of Appellant's guilt of petit larceny?

STATEMENT OF THE CASE

On August 18, 2011, the York County Grand Jury indicted Appellant Robert Artis for receiving stolen goods valued at $2,000 or less, third or more property offense.[1] R. 163. The York County Grand Jury also indicted Appellant for petit larceny, third or more property offense, on March 22, 2012. R. 165.

On April 16–17, 2012, Appellant proceeded to trial before the Honorable Michael Baxley and a jury. R. 1. Dan Hall represented Appellant, and Assistant Solicitor Marina Hamilton represented the State. At the close of the State's case, the trial court granted Appellant's motion for a directed verdict of acquittal on the receiving stolen goods charge, but denied Appellant's motion for a directed verdict on the petit larceny charge. R. 109, l. 9 – 121, l. 12. The jury ultimately found Appellant guilty of petit larceny. R. 152, ll. 5-21. The trial court sentenced Appellant to seven years imprisonment on the petit larceny conviction. R. 158, ll. 10-18.

[1] *See* S.C. Code Ann. § 16-1-57 (2011) ("A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony."); *see also* S.C. Code Ann. § 16-1-20(A)(5) (2011) ("A person convicted of classified offenses, must be imprisoned as follows: . . . for a Class E felony, not more than ten years[.]").

STATEMENT OF FACTS

Motion to Require the State to Elect

Pre-trial, defense counsel moved to require the State to elect whether to proceed on the petit larceny charge or the receiving stolen goods charge. R. 5, l. 10 – 6, l. 17. Defense counsel cited *State v. Tindall*, 213 S.C. 484, 50 S.E.2d 188 (1948) (holding that receiving stolen goods is a separate substantive offense from larceny), and argued that "someone else must have stolen the item or committed a larceny before a defendant can be charged or convicted of receiving stolen goods." R. 5, ll. 12-21. Defense counsel noted, "[I]f the Court allows it in then at the directed verdict stage the Court is going, as a matter of law, the Court is going to have to direct a verdict on one of the charges." R. 5, l. 23 – 6, l. 1. Defense counsel further argued,

> [I]f we got to that point, the unfair prejudice that would occur from my client being subjected to two charges that he can't possibly be guilty of both them . . . I believe the State's position is to go forward with two charges that he can't possibly be guilty of, certainly would be prejudicial to him in front of the jury. It is confusing to the jury under [Rule] 403[, SCRE,] and that it [is] also . . . misleading [to] the jury and *we would ask that the* Court *require the State to elect on [one] of the charges to go forward on [one] but not both.*

R. 6, ll. 1-10 (emphasis added).

In response, the State cited *State v. Lee*, 147 S.C. 480, 145 S.E. 285 (1928), and argued, "[W]hen several offenses are charged, [which] grow out of the same transaction, then the prosecuting officer is not required to elect and the Court instructs the jury to pass upon several counts separately and write their verdict accordingly." R. 6, l. 19 – 7, l. 1. The State maintained, "It is essentially saying that we can proceed on both charges and at the close of the case [Appellant] can move for a directed verdict if we have not presented

evidence for one of the charges." R. 7, ll. 2-5.

The trial court inquired, "[W]hat is the evidence that the State intends to introduce with regards to the petit larceny as well as the receiving stolen goods [charges?]" The State replied, "Your Honor, we are moving forward like this for judicial economy . . . [Appellant] hasn't said any statement as to where he got these items from." R. 7, ll. 12-8. The State further noted:

> [Appellant is] pleading not guilty to the larceny . . . Therefore it is presumed that he received these goods from someone else and if he gets on the stand and says . . . that he did not steal these goods then we could cover the receiving stolen goods in the same trial and that is how we would proceed.

R. 7, ll. 15-21.

The trial court then asked the State, "[W]hat do you say to the Rule 403 argument that it is prejudicial to the defendant[?]" Interestingly, the State responded, "We are not presenting evidence that is going to be prejudicial to [Appellant]. He would go up on the stand. He would give his defense if that's what he needs to do and that would be it." R. 7, l. 25 – 8, l. 3. The State also argued, "The inference that [Appellant] received these goods from someone else would be produced when he says he did not steal them himself." R. 8, ll. 3-5. The trial court then informed the State, "The State goes first . . . [y]ou can't call the defendant." The State retorted, "But [Appellant] can move for a directed verdict again, if we did not produce evidence for receiving stolen goods." R. 8, ll. 11-15.

At this point, the trial court confirmed the State's theory was that Appellant stole a piece of aluminum and was later "caught on video and he produced an ID" when Appellant sold the aluminum as scrap metal. R. 8, l. 23 – 9, l. 8. This prompted the trial court to once again inquire, "[W]hat evidence will you have with regard to, other than circumstantial

evidence, that the defendant either was given th[e] stolen goods or stole it himself. What would be the evidence?" R. 9, ll. 9-12. The State eventually specified:

> Well, we also have that [Appellant] lived next door with another woman at that residence. *He lived right next door to the body shop where this item was stolen. He could have possibly received it from her or he could have stolen it himself.* They both had the opportunity to do so and that would be something that he could present circumstantially.

R. 10, ll. 5-11 (emphasis added). Notably, the State never called the "woman" who lived with Appellant as a witness.

Defense counsel argued, "[O]bviously the State could benefit tremendously if they could get two charges in front of the jury[.]" R. 10, ll. 20-24. Defense counsel also argued, "[B]ecause [Appellant] can't be guilty of both of [charges], [presenting both charges to the jury] would be unfairly prejudicial to my client." R. 11, ll. 1-3. The trial court acknowledged defense counsel's argument and stated, "Very good. . . . I will take that matter under advisement." R. 11, ll. 4-5.

The trial court ultimately held:

> I had a chance to review the case law . . . and I am persuaded by the precedents handed up by counsel [*State v. Lee*] . . . The case has some age on it, . . . ***but the principle has stood the test through the years which is simply that when a person is charged with receiving stolen goods as well as larceny, the State is not required to elect . . . as to how they wish to proceed. They may proceed on both charges***, and the question will be put to the jury if both cases get to the jury as to whether or not there has been proof of guilt on the counts separately. So the Court does not require election. I am going to respectfully deny your motion.

R. 13, ll. 3-17 (emphasis added). Defense counsel argued that our Supreme Court held in *Lee* that if the offenses charged "do not grow out of the same transaction . . . the proper practice is to require the prosecuting officer to elect upon which counts he will proceed." R.

13, l. 20 – 21, l. 1. Defense counsel noted, "The opinion does not include a recitation of the facts, so we do not have any basis, factual basis, to see how [the Supreme Court] reached that." R. 14, ll. 4-6. Defense counsel further argued, "[T]hese two offenses factually in this case, do not grow out of the same transaction and would be basis of requirement election [sic]." R. 14, ll. 17-19.

In response, the trial court stated, "Well counsel, there are many junctures at which this problem pointed out by the defense maybe fixed." R. 14, ll. 23-25. The trial court also told defense counsel, "It is unlikely, but if a failure of proof on one or the other or both may resolve it at the directed verdict stage." R. 15, ll. 3-5. Interestingly, the trial court indicated that he did not have the discretion to require the State to elect upon which charge to proceed against Appellant at trial: "*But I can't require - - what you are really asking me to do is to force the state into a particular tactic or strategy, which is not for the court to do.*" R. 15, ll. 14-16 (emphasis added).

Relevant Evidence Presented by the State

James Fanning ("complaining witness") "run[s] a body and machine shop" in Rock Hill, South Carolina. R. 43, ll. 12-24. The complaining witness maintained that he noticed a piece of aluminum missing from his business after returning to work on a Monday morning. R. 47, ll. 9-19. The complaining witness then stated that he went to Palmetto Salvage yard and that he recognized Appellant with the piece of aluminum in a surveillance video. R. 51, l. 18 – 52, l. 18. The complaining witness claimed that he was able to identify the piece of aluminum because it was painted turquoise on one side. R. 53, ll. 3-5. The complaining witness further recalled that he was able to recognize Appellant because Appellant lived fifty feet from his body shop in one of his rental properties. R. 53, ll. 14-21.

On cross-examination, the complaining witness admitted that there is a "trailer park" located behind his business and that the piece of aluminum was accessible to the public (i.e., there was no fence preventing entry onto the property). R. 59, l. 7 – 61, l. 15. The complaining witness also admitted that he did not discover the piece of aluminum was missing until Monday morning when he arrived to work (i.e., the piece of aluminum could have been stolen at any time from Friday afternoon until Monday morning). R. 61, l. 17 – 64, l. 4.

Terry Taylor, the general manager for Palmetto Recycling, revealed that he was not present when Appellant allegedly sold the piece of aluminum. R. 73, ll. 21-23. Taylor recalled that he reviewed the surveillance video with the complaining witness and law enforcement. R. 74, l. 7 – 75, l. 23. Taylor admitted that he did not recognize Appellant. R. 82, ll. 8-13. Taylor then stated that the date on the purchase order with Appellant's name and driver's license corresponded with the date of the surveillance video. R. 86, l. 16 – 87, l. 21.

Motion for a Directed Verdict on Both Charges

At the close of the State's case, defense counsel moved for a directed verdict of acquittal on both charges. R. 109, l. 9 – 110, l. 5. In support of his argument, defense counsel cited *State v. McNeil*, 314 S.C. 473, 445 S.E.2d 461 (Ct. App. 1994) (holding grand larceny and possession of stolen vehicle are separate and distinct offenses) and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (finding "[t]he circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury."). R. 110, l. 9 – 112, l. 18.

Defense counsel also pointed out why the circumstantial evidence presented by the state was not substantial: (1) Based on the complaining witness' testimony, "there is a three-day time period where the metal could have been taken by someone[;]" (2) "[The] place where this metal was located was in an open area, accessible to the public[;]" and (3) "[T]here is no link in my client possessing [the piece of aluminum] and [the complaining witness] being able to say . . . what has been introduced into evidence today shows [Appellant] with this particular piece of metal[.]" R. 109, l. 12 – 114, l. 2.

In response, the State noted that the complaining witness identified Appellant in the surveillance video from Palmetto Salvage yard. R. 114, ll. 20-22. The State also claimed, "The defense is saying someone else took this item. Not the defendant. But he is in possession of this item as we saw evidenced by the video." R. 115, ll. 2-6. The trial court interjected, "*Let me stop you there. We don't have any evidence from the defendant. We haven't gotten [to] the defendant's case. The focus is on what is the proof the State has put up. So the question to you is, what is the proof you have of receiving stolen goods*?" The State replied, "It's just a question of fact how he received those goods and that's a question of fact for the jury. . . . We showed that [Appellant] [was] in possession of these stolen items." R. 115, ll. 2-25 (emphasis added).

Again, the trial court asked the State, "[W]hat is the proof you have . . . that the defendant received stolen goods?" and the State responded, "The victim did testify that this item was taken. And he has testified that it was stolen from his location and the defendant is found in possession of it at Palmetto Recycling on video with his ID." R. 116, ll. 1-9. Defense counsel argued, "I would also add that there has been no evidence that my client had any knowledge of what he had in his possession on March the 29th was in fact stolen.

Absolutely no, no evidence of knowledge." R. 117, ll. 20-24. The trial court also noted that the State's witness on the receiving stolen goods charge did not testify. R. 117, l. 25 – 118, l. 2.

The State reiterated, "[Appellant] had possession of these goods. *Now, it can be perceived that he did not steal them*, which is what they are putting forward." R. 118, ll. 13-15 (emphasis added). The State based its case-in-chief on the following theory:

> *When you know, based on all the circumstantial evidence, [Appellant] lives next door. He had opportunity to take it, but someone else could have taken it also*, is what they're planting the seed of. So what we are doing is we are saying okay, so if he did not actually steal these items then he *received possession of stolen goods.* Is in possession of stolen goods. .

R. 118, ll. 18-25 (emphasis added). The trial court interjected again, "*Really what you are telling me is you are basing your prosecution on what you believe the defense is going to say.* But the prosecution has to stand on its own before it can be worried about what response is coming back, if any." R. 119, ll. 3-7 (emphasis added). The trial court further stated:

> *I mean at best this is conjecture that the defendant received stolen goods.* There is no third person in this body of proof whatsoever. So it is clearly not a receiving of stolen goods. The question is well then, did he possess a stolen good. *There is no evidence that the defendant knew it was stolen or should have known it was stolen*, or how he got it which you say he purloined it. . . . *I just simply don't believe receiving stolen goods survives the direct[ed] verdict stage.*

R. 119, l. 12 – 120, l. 2 (emphasis added).

The trial court granted the motion for a directed verdict of acquittal on the receiving stolen goods charge:

> I don't think it's fair for the defendant to put him to the

> burden of facing a charge of receiving stolen goods and that's really no[t] the theory of the State and there is no evidence to support it other than circumstantial evidence and suspicion which I do not believe meets the level required . . . thus I am going to enter a judicial dismissal on the receiving stolen goods charge.

R. 120, ll. 14-22. Yet, despite the State's failure to present evidence establishing Appellant's involvement in taking the piece of aluminum from the complaining witness' business, the trial court denied the motion for a directed verdict on the petit larceny charge:

> In regard to the petit larceny charge I find there is ample and specific circumstantial evidence which would have proximity of the defendant to the item. The fact that the item went missing, or was discovered by the owner. The fact that there is a video which depicts the defendant selling that item, and then, not just a visual identification but of the defendant with the item, but a photo ID which is a South Carolina driver's license. All that clearly goes beyond. Meets the test of circumstantial evidence which excludes others, and inculpates the defendant and for all those reasons the Court denies your motion to collectively dismiss both charges and denies your motion to dismiss both charges and denies your motion to dismiss the petit larceny charge, but grants your motion on the receiving stolen goods charge.

R. 120, l. 23 – 121, l. 12.

After the jury found Appellant guilty of petit larceny, the trial court denied defense counsel's renewal of his prior motions. R. 158, ll. 7-16.

ARGUMENT

I. The trial court erred in refusing to require the State to elect to prosecute either the offense of petit larceny or the offense of receiving stolen goods, when the offenses did not arise out of a single chain of circumstances and are not proved by the same evidence, thereby violating Appellant's right to a fair trial.

"A motion to compel the state to elect upon which count it will proceed is addressed to the sound discretion of the court, as a general rule; and its action thereon will not be interfered with, unless the discretion has been used to the manifest injury of the defendant." *State v. Sheppard*, 54 S.C. 178, 32 S.E. 146, 147 (1899) (citation and internal quotation marks omitted). "The rule in this state . . . seems to be that, while distinct offenses may be charged in separate counts of the same indictment, the proper practice is, where the several offenses grow out of the same transaction, to instruct the jury to pass upon the several counts separately; but, if the several offenses charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed." *Id.* (citations omitted). This Court has noted, "[D]ifferent misdemeanors can be joined in the same indictment and tried together where they (1) 'aris[e] out of a single chain of circumstances,' (2) 'are proved by the same evidence,' (3) 'are of the same general nature,' and (4) no 'real right of the defendant has been jeopardized.'" *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (1985) (quoting *City of Greenville v. Chapman*, 210 S.C. 157, 41 S.E.2d 865, 867 (1947)).

In this case, the York County Grand Jury indicted Appellant for petit larceny and receiving stolen goods. R. 163 (Indictments); *See State v. Hamilton*, 172 S.C. 453, 174 S.E. 386, 396-97 (1934) ("The crime of larceny and that of receiving stolen goods are entirely separate and distinct offenses."). Petit larceny is codified at S.C. Code Ann. § 16-13-30(A) (2010) ("Simple larceny of any article of goods . . . has value of two thousand

dollars or less, is petit larceny, a misdemeanor[.]"). *See State v. Teal*, 225 S.C. 472, 474, 82 S.E.2d 787, 788 (1954) (noting the "corpus delicti" in larceny consists of two elements, the loss of the property by the owner and the loss by a felonious taking); *see also State v. Condrey*, 349 S.C. 184, 191, 562 S.E.2d 320, 323 (Ct. App. 2002) (noting larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent). Receiving stolen goods is codified at S.C. Code Ann. § 16-13-180(A) (2010), and provides, in pertinent part, "It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen."

Pre-trial, defense counsel moved to require the State to elect whether to proceed on the petit larceny charge or the receiving stolen goods charge. R. 5, l. 10 – 6, l. 17; *See Tate*, 286 S.C. at 464, 334 S.E.2d 289 (applying the test to determine whether the State is required to elect upon which charge to proceed against the defendant at trial); *see also State v. Sweat*, 221 S.C. 270, 277, 70 S.E.2d 234, 237 (1952) (finding "[i]t is an accepted rule that one who commits larceny cannot be adjudged guilty of criminally receiving the property stolen."). In denying defense counsel's motion to require the State to elect the charge upon which to proceed, the trial court misinterpreted our Supreme Court's ruling in *Lee*, 147 S.C. 480, 145 S.E. 285. Specifically, the trial court improperly relied on *Lee*, as its factual application is distinct from this case.

In *Lee*, our Supreme Court held, "There being no question that the offenses charged in the two counts of this indictment grew out of the same transaction, the court properly refused to require the state to elect . . . ." *Lee*, 147 S.C. 480, 145 S.E. 285. After he took defense counsel's motion under advisement, the trial court erroneously held:

> The case [*State v. Lee*] has some age on it, . . . but the principle has stood the test through the years which is simply that *when a person is charged with receiving stolen goods as well as larceny, the State is* ***not*** *required to elect . . . as to how they wish to proceed. They may proceed on both charges . . . .*

R. 13, ll. 3-17 (emphasis added); *See Id.*

Notably, the State failed to present evidence establishing that these two offenses are connected (i.e., arose out of a single chain of circumstances), and as evinced by the trial court's directed verdict on Appellant's receiving stolen goods charge, the offenses are not provable by the same evidence. R. 120, l. 14 – 121, l. 12. *See Tate*, 286 S.C. at 464, 334 S.E.2d at 290; *see also Hamilton*, 172 S.C. 453, 174 S.E. at 396-97. Similar to *Tate*, joinder of these charges would be highly prejudicial to Appellant because it would improperly infer to the jury that Appellant is guilty of at least one of the charges, thereby denying his right to a fair trial by diluting the presumption of innocence and the State's burden of proof. *Tate*, 286 S.C. at 464, 334 S.E.2d at 290. Additionally, the trial court's directives to the jury are akin to an improper comment on the facts because the jury is apprised of the two charges at the beginning of trial, then when the trial court instructs the jury only one of those charges, it implies to the jury which charge the trial court believes is correct. Therefore, the trial court erred in refusing to require the State to elect to prosecute either the offense of petit larceny or the offense of receiving stolen goods.

Furthermore, the trial court did not appear to understand that whether to allow these counts to be tried together was in its discretion based on following erroneous statement: "*But I can't require - - what you are really asking me to do is to force the state into a particular tactic or strategy, which is not for the court to do.*" R. 15, ll. 14-16 (emphasis added); *See State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is

apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").

II. The trial court erred in refusing to grant a directed verdict of acquittal where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence of Appellant's guilt of petit larceny.

The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395.

Our Supreme Court "has repeatedly affirmed the principle that when the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (emphasis added). In *Odems*, the Court cited *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based

solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

In this case, the evidence merely raised the suspicion of Appellant's guilt, as the State failed to present evidence any substantial circumstantial evidence on the petit larceny charge. It is evident that the trial court recognized the State's paucity of evidence with his repeated questioning of the solicitor about the State's theory of the case: "[W]hat is the evidence that the State intends to introduce with regards to the petit larceny as well as the receiving stolen goods [charges?]" The State replied, "Your Honor, we are moving forward like this for judicial economy . . . [Appellant] hasn't said any statement as to where he got these items from." R. 7, ll. 12-15. The State further noted:

> [Appellant is] pleading not guilty to the larceny . . . Therefore it is presumed that he received these goods from someone else and if he gets on the stand and says . . . that he did not steal these goods then we could cover the receiving stolen goods in the same trial and that is how we would proceed.

R. 7, ll. 15-21.

The trial court later confirmed the State's theory was that Appellant stole a piece of aluminum and was later "caught on video and he produced an ID" when Appellant sold it as scrap metal. R. 8, l. 23 – 9, l. 8. This prompted the trial court to once again inquire, "[W]hat evidence will you have with regard to, other than circumstantial evidence, that the defendant either was given this stolen goods or stole it himself. What would be the evidence?" R. 9, ll. 9-12. The State speculated:

> Well, we also have that [Appellant] lived next door with another woman at that residence. *He lived right next door to the body shop where this item was stolen. He could have possibly received it from her or he could have stolen it himself.* They both had the opportunity to do so and that would be something that he could present circumstantially.

R. 10, ll. 5-11 (emphasis added). The State never called the "woman" who lived with Appellant as a witness. R. 117, l. 25 – 118, l. 2.

At trial, the only evidence presented by the State was that Appellant sold the piece of aluminum as scrap metal. R. 43, l. 12 – 53, l. 21; R. 59, l. 7 – 64, l. 4; R. 73, l. 21 – 75, l. 23; R. 82, ll. 8-13; R. 86, l. 16 – 87, l. 21. In his directed verdict argument, defense counsel pointed out why the circumstantial evidence presented by the State was not substantial: (1) Based on the complaining witness' testimony, "there is a three-day time period where the metal could have been taken by someone[;]" (2) "[The] place where this metal was located was in an open area, accessible to the public[;]" and (3) "[T]here is no link in my client possessing [the piece of aluminum] and [the complaining witness] being able to say . . . what has been introduced into evidence today shows [Appellant] with this particular piece of metal[.]" R. 109, l. 12 – 114, l. 2.

The State admitted, "*Now, it can be perceived that he did not steal them*, which is what they are putting forward." R. 118, ll. 13-15 (emphasis added). The State based its case on the following:

> *When you know, based on all the circumstantial evidence, [Appellant] lives next door. He had opportunity to take it, but someone else could have taken it also*, is what they're planting the seed of. So what we are doing is we are saying okay, so if he did not actually steal these items then he *received possession of stolen goods.* Is in possession of stolen goods.

R. 118, ll. 18-25 (emphasis added). The trial court ultimately granted the motion for a directed verdict on the receiving stolen goods charge, but reversibly erred in denying the motion for a directed verdict on the petit larceny charge. R. 120, l. 14 – 121, l. 12.

In *Odems*, our Supreme Court held, "The circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury." *Odems*, 395 S.C. 582, 720 S.E.2d 48. Specifically, the State presented the following circumstantial evidence: (1) The police found Odems in a car with the burglars and the stolen goods; (2) Odems fled from the police; and (3) Odems "asked an uninvolved person to lie for him" to the police. Same as in this case, nothing placed Odems at the scene of the crime. *See Id.* Notably, the circumstantial evidence presented in *Odems* is much greater than the scant evidence against Appellant on the petit larceny charge.

Regardless of the trial court's decision to grant a directed verdict on the receiving stolen goods charge, the State only presented evidence as to Appellant's possession of the aluminum. The Solicitor's comments to the trial court certainly indicate exactly how insubstantial and weak the State's case was against Appellant on the petit larceny charge. The State knew its case was weak and improperly used the strategy of trying Appellant on both charges to present the charade of an either-or question of Appellant's guilt. Accordingly, the State failed to present evidence to support every element of the charged offense. *See Teal*, 225 S.C. at 474, 82 S.E.2d at 788 (noting the "corpus delicti" in larceny consists of two elements, the loss of the property by the owner and the loss by a felonious taking); *see also Condrey*, 349 S.C. at 191, 562 S.E.2d at 323 (Ct. App. 2002) (noting larceny is the felonious taking and carrying away of the goods of another against the

owner's will or without his consent).

In sum, the evidence against Appellant is unequivocally circumstantial and does nothing more than raise the mere suspicion of Appellant's guilt. *See Odems*, 395 S.C. at 586, 720 S.E.2d at 50. The evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. Accordingly, the trial court erred in refusing to grant a directed verdict where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that Appellant was guilty of petit larceny. *See In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1073.

CONCLUSION

Based on the foregoing reasons, Appellant Robert Artis respectfully requests that this Court issue an Order of acquittal (Issue II), or in the alternative, remand this case to the York County Court of General Sessions for a new trial (Issue I).

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 5th, 2013

C-G-

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT TIMOTHY ARTIS,

APPELLANT

Appellate Case No. 2012-211727

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of September, 2013.

C – C

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2013.

Kaut Lyndon (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.