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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
Marvin H. Dukes, III, Circuit Court Judge

Ticket No. 2023-01-901-72065
Intermediate Appellate Case No. 2023-CP-07-01829

Appellate Case No. 2024-000929

BENJAMIN J. HAYS,.....APPELLANT,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

INITIAL BRIEF OF RESPONDENT

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2. Whether the circuit court was under any obligation to list or include every "fact" in the "Statement of Facts" section of its "Order Affirming Conviction" regardless of whether the parties stiputlated to certain facts where, in its capacity as an appellate court and using the appropriate standard of review, the circuit court properly referenced only the particular facts that supported its conclusion that the trial court did not abuse its discretion in denying Appellant's motion for a directed verdict and sending the case to the jury?

3. Whether the circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict and rejected Appellant's claim that he had legal cause or good excuse to trespass by relying in part on evidence that Appellant's wife could and did in fact respond to the location, where: (1) it showed Appellant had reasonable alternatives for getting his golf cart registered, and (2) it constituted substantial evidence reasonably tending to prove Appellant's guilt such that the matter was properly submitted to the jury?

4. Whether the circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict and rejected Appellant's claim that he had "legal cause or good excuse" to trespass simply where, in response to an email announcing his intent to violate the no trespass order to register his golf cart, a staff member of the premises "failed to inform" Appellant he could *not*, when there was ample direct and circumstantial evidence in the record reasonably tending to prove Appellant's guilt such that the matter was properly submitted to the jury?

STATEMENT OF THE CASE

Benjamin J. Hays (Appellant) was arrested on June 27, 2023, and charged with violating Section 16-11-620 of the South Carolina Code ["Entering premises after warning or refusing to leave on request"]. (Uniform Traffic Ticket No. 20230190172065; Magistrate's Return dated September 26, 2023, and filed September 27, 2023). On September 26, 2023, Appellant proceeded to a trial by jury before the Honorable Nancy Sadler, Magistrate Judge. Appellant was present and represented by William S. McGuire, Esquire, of Charleston County, and Respondent (the State) was represented by Brian C. Kiel, Esquire, of the Beaufort County Sheriff's Office. At the conclusion of trial, the six-person jury found Appellant guilty as charged and Judge Sadler sentenced him to a fine of four hundred and sixty-five dollars ($465). (Uniform Traffic Ticket; Verdict Sheet; Magistrate's Return).

Appellant paid his fine and immediately appealed his conviction to the Court of Common Pleas. (Notice of Criminal/Traffic Appeal dated September 26, 2023; Civil Action Cover Sheet for 2023-CP-07-01829). The following day, on September 27, 2023, Judge Sadler filed a "Magistrate's Return" with the Circuit Court which: (1) described the trial proceedings including a summary of witness testimony, (2) noted motions and rulings, and (3) included a "thumb drive which contains a recording of the trial and Plaintiff's exhibits 1 through 3 and Defendant's exhibits 3 and 4 for the appellate court's consideration."[1] By way of an Order of Referral from

[1] Although the magistrate submitted a thumb drive that was supposed to contain an audio recording of the trial, Appellant's counsel alleged during the appellate hearing before the circuit court that a transcript from trial could not be produced because the audio recording was "corrupted." (Tr.p.4-p.5). The State did not object to or challenge this representation and in subsequent conversations with Mr. Kiel during the pendency of the current appeal, was advised it was Judge Dukes who declared the audio recording of the trial to be corrupted. Despite this declaration, the State has now obtained a certified true copy of the audio recording from the Clerk of the Magistrate Court. That recording was the subject of the State's October 9, 2024, motion to hold this appeal in abeyance and the Court's October 22, 2024, order granting that motion for the parties to explore obtaining a transcript. After receiving a recommendation from the States, Counsel for Mr. Hays ultimately communicated with a retired court reporter regarding the possible transcription of the September 26, 2023 trial. She listened to the entire recording and has now advised that the quality is so bad in areas that she does not think she would be able to prepare a sufficient transcript

the Beaufort County Clerk of Court, the appeal was referred to Master in Equity Marvin H. Dukes, III, to serve as a Special Circuit Court Judge in the Court of Common Pleas. (Order of Referral dated January 30, 2024, and filed February 22, 2024).

On March 20, 2024, Appellant submitted a "Final Appellate Brief" in the Court of Common Pleas making the following arguments:

I. Because the Only Evidence in the Record establishes Defendant had a legal cause and good excuse to be at the Offices where he was, it was error for the trial Court to submit the matter to the jury.

II. Because the Only Evidence in the Record establishes Defendant had a legal cause and good excuse to be at the Offices when he was, a reasonable jury could not have found Defendant guilty beyond a reasonable doubt.

(Final Appellate Brief dated March 20, 2024, and filed March 21, 2024). Appellant's arguments were subsequently heard before Judge Dukes on March 26, 2024. Appellant was represented by William S. Hammett, Esquire, and the State was represented by Mr. Kiel and Assistant Solicitor Mary Jordan Lempesis of the Fourteenth Circuit Solicitor's Office. (Tr.p.1-p.3). At the conclusion of the hearing, Judge Dukes took the matter under advisement. (Tr.p.23).

In a written Order filed May 3, 2024, Judge Dukes affirmed Appellant's conviction, ruiling:

> Accordingly, and for the reasons set forth above, IT IS THEREFORE ORDERED that the Magistrate's decisions, specifically the denial of Appellant's directed verdict motion are AFFIRMED.
>
> IT IS FURTHER ORDERED that the jury's verdict will not be disturbed, the conviction is AFFIRMED, and that this appeal is hereby dismissed.

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for review. She noted that in some places it is "perfectly clear" and in others "there is some kind of white noise rendering the speakers inaudible." Based on her opinion and the parties understanding that the contacted transcriber cannot successfully transcribe the entire recording, to her standards, the State has elected to proceed with a response to Appellant's arguments based on the record that does exist in this matter, including the certified audio recording itself, which was attached to and included with the magistrate's return.

(Order Affirming Conviction filed May 3, 2024). On May 13, 2024, Appellant timely served and filed a motion to reconsider claiming:

(1) The Order fails to address the Appellant's oral motion for a new trial based upon the lack of a full record.

(2) The Order fails to include facts that were stipulated to.

(3) The Order concludes that the conviction is affirmed because Appellant could have directed a third party to the Premises in lieu of going by himself.

(Motion to Reconsider Order Affirming Conviction and Dismissing Appeal filed May 13, 2024). By Order filed June 3, 2024, Judge Dukes denied the motion to reconsider. (Order filed June 3, 2024). Appellant timely served and filed a Notice of Appeal in this Court. Apppellant subsequently submitted a Brief of Appellant and a Designation of Matter to be Included in the Record on Appeal. This Brief of Respondent on behalf of the State now follows.

STATEMENT OF FACTS

The facts as set forth in the Magistrate's Return are as follows:

> Mr. Kiel called several witnesses all of whom testified generally that Mr. Hayes [sic] went on the property at 225 Tarpon Boulevard, Fripp Island, South Carolina, on June 27, 2023, after having been served a formal notice by the Beaufort County Sheriff's Department that Fripp Island Security would prosecute him if he returned to the property located at 225 Tarpon Boulevard.
>
> The first witness was Mr. McCarter who testified that he is employed by Fripp Island to enforce the covenants on the island. He testified that he knows Mr. Hayes [sic]because there have been several disturbances involving him at the office that he shares with Fripp Island Security. He testified (without objection) that the attorney for the Property Owner's Association had written two letters to the Defendant asking him not to return to 225 Tarpon Boulevard. He testified that on June 26, 2023, the Defendant came to the offices at 225 Tarpon Boulevard because the Defendant needed an inspection sticker for one of his golf carts. Mr. McCarter explained to the Defendant that he could not inspect the vehicle for a sticker because he had unpaid fees owed to Fripp Island. The Defendant became angry and Mr. McCarter asked him to leave. The Sheriff's Department was contacted and asked to issue the trespass notice to the Defendant, which they did.

The second witness was Chief Christian Gonzales, the chief of security at Fripp Island. Mr. Gonzales generally corroborated the testimony of Mr. McCarter regarding the events of June 26. He testified further that when the Sheriff's Department deputies arrived on June 26, he asked that they arrest the Defendant because the Defendant had received notice from Fripp Island's lawyer that he was not to go to 225 Tarpon Boulevard, but he had ignored that request. The Sheriff's deputy did not arrest the Defendant, but did serve him with a "Trespass after Notice" document which the Defendant signed. Chief Gonzales indicated that the Defendant was supposed to make an appointment for inspections and that no appointment had been made. Chief Gonzoles testified that the following day on June 27, the Defendant sent him an email stating that the person who had rented the uninspected golf cart had received a ticket and that "I have attached forms, complete on my part, to register golf carts today." Chief Gonzales testified that later that morning, the Defendant was in the parking lot of 225 Tarpon Boulevard towing a golf cart saying that he wanted it inspected. Chief Gonzales called the Sheriff's Department complaining that the Defendant was trespassing. Deputy Nicholas Horne of the Beaufort County Sheriff's Department arrived and arrested the Defendant.

The third witness was Deputy Nicholas Horne. Deputy Horne arrived at 225 Tarpon Boulevard on June 27, 2023, to find the Defendant seated in a golf cart that was located on a trailer in the parking lot. The deputy spoke with the Defendant who admitted that he had received the trespass notice, but said he thought it would be okay to be in the parking lot. During the ride to the jail, the Defendant indicated to the deputy that he was a lawyer and had argued before the United States Supreme Court.

On cross examination of these witnesses, the Defendant's attorney brought out that the Defendant was at 225 Tarpon Boulevard to comply with the regulations requiring that the Defendant have his golf carts (which he rented to visitors to Fripp Island) inspected. He had Chief Gonzales testify that the Defendant wrote him an email saying that his renter had received a ticket for driving an uninspected golf cart on the evening before he was arrested. He said that it was the same golf cart that he had refused to inspect because the Property Owner's Association had a balance owed on his account. The email is submitted herewith as Defendant's exhibit 3.

The Defendant moved for a directed verdict on the grounds that the statute has a caveat, "without legal cause or good excuse," in its prohibition against entering premises after notice and that the evidence was that the Defendant entered for the purpose of having his golf cart inspected and not with the intention of trespassing. The motion was denied and the case was submitted to the jury for a decision. The jury found the Defendant guilty of Trespassing.

(Magistrate's Return, p.1-p.3).

The audio recording of the trial closely tracks the magistrate's summary of facts; however, it also includes additional information not specifically summarized, such as the opening statements and closing arguments from the parties, additional witness testimony, the body camera recordings from Mr. McCarter and Deputy Horne that were introduced as State's Exhibits #1 and #3, a description of the written no trespass notice given to Appellant, and the emails between Appellant and Chief Gonzales which were introduced as Defense exhibits #3 and #4. (September 26, 2023 Trial Recording).

Although the trial recording in its entirety is included in the interest of completeness, several parts of that recording are of particular relevance. First, Mr. McCarter, who is employed by the Fripp Island Property Owner's Association (POA), testified on redirect examination he was aware that before the trespass incident, Appellant was told not to come to the office where he trespassed because of prior issues at this location with the POA staff. He explained that he and others in either the Fripp Island Security Office (FISO) or his office had made it clear that if Appellant wanted his golf carts inspected, they would make arrangements with him so as not to cause a scene at the office. McCarter testified Appellant had been instructed to get his golf cart inspected at a different location. (September 26, 2023 Trial Recording, 35:20 to 35:52).

Second, FISO Chief Gonzales described his interactions with Appellant at the trespass location on both June 26th and June 27th of 2023. (September 26, 2023, Trial Recording, 41:32 to 49:27). He testified that when Appellant showed up on June 26, 2023, to have his golf cart inspected, Gonzales reminded Appellant he was not supposed to be there unless he had made an appointment with Gonzales or the general manager of the POA (FISO and the POA shared office space in a single building at 225 Tarpon

Boulevard on Fripp Island); however, since Appellant was there, he tried to accommodate him with an inspection. Gonzales exaplained the POA rules would not permit an inspection if there was any balance owed to the POA so that when the front desk checked the computer and advised Appellant had a $17 balance, he confirmed the rule with the POA general manager and then advised Appellant he could not conduct the inspection requested. (September 26, 2023 Trial Recording, 44:21 to 45:29). Gonzales explained that due to prior incidents at the trespass location, Appellant had been advised, in writing, that he was not to come to the office to have his golf carts inspected without making an appointment with either himself or the general manager of the POA. (September 26, 2023 Trial Recording, 45:52 to 46:32). Gonzales testified that when he told Appellant the golf cart could not be inspected Appellant got mad and began cursing. He said he intended to have Appellant arrested that day for violating the prior written instructions from the POA attorney; however, because the letters were not official "no trespass" notices, he instead completed such a notice, provided a copy to Appellant, explained what it meant, and had Appellant sign it, all in an effort to make it clear to Appellant that his behavior had to stop and could not happen again. (September 26, 2023 Trial Recording, 46:33 to 48:46; State's Exhibit #2). The very next day, Appellant returned to the office with the golf cart, so Gonzales called the Sheriff's Department and detained Appellant until they arrived to arrest him for trespassing. (September 26, 2023 Trial Recording, 48:47 to 49:27).

Third, Deputy Horne's body camera video from the incident was played for the jury. (September 26, 2023 Trial Recording, 1:11:09 to 1:15:22). After authenticating the video, Horne testified that Appellant's wife arrived to pick up the golf cart shortly after

Appellant was arrested. Horne explained this meant Appellant had someone else who could have brought the golf cart in for the inspection instead of bringing it himself. (September 26, 2023 Trial Recording, 1:15:20 to 1:15:47; State's Exhibit #3).

STANDARD OF REVIEW

In an appeal from a magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews the case for preserved errors raised to it by appropriate exception. *State v. Williams*, 417 S.C. 209, 218, 789 S.E.2d 582, 587 (Ct. App. 2016); *State v. Hoyle*, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012) ; *State v. Johnson,* 396 S.C. 182,186, 720 S.E.2d 516, 518 (Ct. App. 2011). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. *Id.* The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70. The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); *Hoyle*, 397 S.C. at 625, 725 S.E.2d at 722; *Johnson*, 396 S.C. at 186, 720 S.E.2d at 518.

ARGUMENT

I.

Any argument stemming from Appellant's complaint that the trial court record was incomplete due to the lack of a transcript was waived because he elected to proceed with his appeal in the circuit court rather than immediately requesting a remand to reconstruct the record. To the extent Appellant's argument was not waived, the circuit court properly denied his request for a new trial because Appellant failed to establish that it was prevented from conducting a meaningful appellate review of the issues raised. Furthermore, Appellant's argument is not preserved for appellate review because it was not sufficiently raised to and ruled upon by the trial court and it should be deemed abandoned as conclusory on appeal.

Appellant argues it was error for the circuit court, sitting in an appellate capacity, to deny his request for a new trial where "the record was incomplete" due to the lack of a trial transcript and where the State "stipulated to limit the record to the magistrate's return and stipulated facts." He complains that despite this stipulation, "the State argued extensively about facts outside the magistrate's return and stipulations" at the appellate hearing. Appellant argues that under these circumstances—after he failed to succeed on the merits of his appeal—the circuit court should have granted his motion for reconsideration and given him a "new trial to reconstruct the record." He now asks this Court to order reconstruction of the record or in the alternative, order a new trial. (Brief of Appellant, p.4-p.5). The State submits Appellant's argument should be denied and dismissed for a variety of reasons.

First and foremost, Appellant waived any complaint he may have had about the sufficiency of the record when he elected to proceed with his appeal to a ruling on the merits rather than moving for an immediate remand to "reconstruct the record" either at the outset of the hearing or as soon as he believed "facts outside the magistrates' return and stipulations" were being argued. Second, even if the complaint was not waived, the circuit court properly denied Appellant's request for a new trial because Appellant failed to establish that the court was

prevented from conducting a meaningful appellate review. Finally, this entire issue is not preserved for appeal because the claim that the record was insufficient for appellate review was not raised to and ruled upon by the circuit court during the hearing before the circuit court, and it should be deemed abandoned as conclusory.

Analysis

Magistrate and municipal courts are not courts of record. *State v. Long*, 406 S.C. 511, 515 n.3, 753 S.E.2d 425, 427 n.3 (2014). Though the magistrate's court is not a court of record, the magistrate nevertheless has the duty of reducing the witnesses' testimony to writing. *State v. Duncan*, 269 S.C. 510, 514, 238 S.E.2d 205, 207 (1977). Indeed, our supreme court has held it was error for a circuit court to hear a criminal appeal in the absence of a record filed by the magistrate, even if the circuit court was furnished a taped recording of the trial. *State v. Barbee*, 280 S.C. 328, 329, 313 S.E.2d 297, 298 (1984). Conversely, nothing prohibits the magistrate from including an audio recording of the trial with the written record and making it part of the return.

A magistrate's return is the official record of the trial proceedings, and an appellate court may not consider facts not included within the return. *State v. Brown*, 358 S.C. 382, 387-88, 596 S.E.2d 39, 41 (2004). The burden is on the appellant to provide a sufficient record from which an appellate court can make an intelligent review. *State v. Mitchell*, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998); *State v. Freeman*, 319 S.C. 110, 122, 459 S.E.2d 867, 874 (Ct. App. 1995). Here, the magistrate's return consisted of: (1) a summary of the trial testimony, (2) a description of Appellant's motion for a directed verdit and the court's ruling on that motion, (3) a description of the jury's verdict finding Appellant guilty of trespassing, (4) an audio recording of the trial (later deemed by the circuit court to be corrupted but now included in the Record on

Appeal before this Court), and (5) Plaintiff's Exhibits #1 through #3 and Defendant's Exhibits #3 and #4. (Magistrate's Return). The return did not include a prepared transcript of the trial proceedings. Nevertheless, it "included" the audio recording of the trial and necessarily any "facts" that are part of that recording; therefore, those facts were properly considered by the circuit court. *Brown*, 358 S.C. at 387-88, 596 S.E.2d at 41.

Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge. *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). Where portions of stenographic notes are lost prior to transctiption, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. *Id.* at 333-34, 162 S.E.2d at 278. However, the reconstructed record must allow for meaningful appellate review. *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273-74 (Ct. App. 2007). A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducing a meaningful appellate review. *Adams v. H.R. Allen, Inc., CNA*, 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) (quoting *Ladson*, 373 S.C. at 325, 644 S.E.2d at 274).

Initially, the State submits Appellant waived any complaint he may have had about the sufficiency of the record in this case. The proper time to requrest reconstruction of the record would have been *prior* to review of that record on appeal, not *after* an unfavorable appeallate decision had been rendered by the circuit court. Indeed, failing to timely both: (1) object to the sufficiency of the record and (2) obtain an immediate ruling on that objection constituted a waiver of any issue Appellant had with either the record itself or the arguments made by the State during the appeal. *See State v. Hall*, 253 S.C. 294, 295, 170 S.E.2d 379, 380 (1969) ("The failure of defendant to object or to request additional instructions, when opportunity was

afforded, constituted a waiver of any right to complain on appeal of errors in the charge."); *State v. Dicapua*, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (finding the defendant's statement that he had "no objection" when the State moved to enter a videotape into evidence amounted to a waiver of any issue Dicapua had with the videotape).

Although Appellant did complain about the lack of a transcript at the outset of the circuit court appeal, he only asked for relief from the alleged deficiency "in the alternative," and only if the circuit court did not reverse his conviction based on the substantive grounds and the record that was presented. (Tr.p.4-p.5). He then proceeded to argue those substantive grounds but rather than securing reversal, his conviction was affirmed. In his May 13, 2024 motion to reconsider, Appellant compained in part that "the Order fails to address the Appellant's oral motion for a new trial based upon the lack of a full record" (Motion to Reconsider Order Affirming Conviction and Dismissing Appeal filed May 13, 2024), but this challenge came too late to effectively retract his previous waiver. Appellant's argument was waived, therefore it should be denied and dismissed.

In any event, the circuit court properly denied Appellant's request for a new trial because Appellant failed to establish that the circuit court was prevented from conducting a meaningful appellate review. Indeed, in direct contradiction to his claim, the circuit court conducted such a review. It was able to review the magistrate's written return, which stated it included a summary of the trial testimony and directed verdict argument and "a recording of the trial and Plaintiff's Exhibits #1 through #3 and Defendant's Exhibits #3 and #4" (Magistrate's Return, p.2), as well as listening to the arguments presented by the attorneys at the appellate hearing to inform its decision. Based on the return and arguments made, the circuit court then conducted a meaningful appellate review, considered Appellant's issues in light of the evidence and

arguments presented, articulated a sound appellate decision, and affirmed Appellant's convictions—all in sufficient detail for this Court to now review the subatantive ruling based on the same evidence. This court now also has the added benefit of being able to review the audio recording of the trial, which was "included" with the Magistrate's Return and submitted to the circuit court. There was simply no justification shown for the circuit court to order reconstruction of the record and no basis for this Court to order such reconstruction now. *Ladson*, 373 S.C. at 325, 644 S.E.2d at 273-74.

Finally, this entire issue is not preserved for appeal because, despite noting the lack of a trial transcript, Appellant never actually argued the record before the circuit court was insufficient for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Instead, armed with the knowledge that a transcript of the trial had not been prepared and the audio recording had been deemed corrupted, Appellant attempted to "game" his appeal by trying to limit the circuit court to consideration of only a select set of "stipulated" facts, regardless of whether a broader set of facts was actually considered by the jury in reaching its verdict. Simply because every fact may not have been specifically described in the Magistrate's Return does not mean it was somehow improper for the attorneys to describe to the circuit court what actually transpired at trial. Indeed, this is essentially what would have been allowed had the trial court been ordered to reconstruct the record. *China v. Parrott*, 251 S.C. at 333-34, 162 S.E.2d at 278 ("In order to settle the record on appeal, it became necessary for the trial judge to determine what transpired with reference to the withdrawal of the demand for punitive damages and the submission of the issue of recklessness to the jury. In doing so he

properly considered the affidavits of counsel and the court reporter as to what happened."). If any facts were before the jury, they were properly before the circuit court. Here, those facts at a minimum included all testimony presented to the jury and the full body camera footage introduced by the State as State's Exhibits #1 & #3. Appellant should not profit from trying to have it both ways simply because the transcript/audio of the trial was, at that time, unavailable. Indeed, the burden was on Appellant to provide a sufficient record from which an appellate court can make an intelligent review. *Mitchell*, 330 S.C. at 199, 498 S.E.2d at 647; *Freeman*, 319 S.C. at 122, 459 S.E.2d at 874. He failed to meet that burden.

Furthermore, Appellant's "incomplete record" argument should be deemed abandoned on appeal because it is conclusory. *See State v. Howard*, 384 S.C. 212, 217-218, 682 S.E.2d 42, 45 (2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (finding an issue is deemed abandoned on appeal where appellate counsel made a "two sentence conclusory argument with citation to only *Brady* and no analysis whatsoever as to why or how *Brady* applies"). Here, Appellant references several cases about reconstruction of the record when a trial transcript has been lost or destroyed; however, the authority referenced does not support the relief requested and fails to include analysis as to how the authority would apply under the circumstance of this case. As a result, the entire argument is conclusory and should be deemed abandoned. For all of the reasons above, this argument should be denied and dismissed, and the circuit court's order affirming Appellant's conviction should be affirmed.

II.

The circuit court was under no obligation to list or include every "fact" in the "Statement of Facts" section of its "Order Affirming Conviction" regardless of whether the parties stiputlated to certain facts because, in its capacity as an appellate court and using the appropriate standard of review, the circuit court properly referenced only the particular facts that supported its conclusion that the trial court did not abuse its discretion in denying Appellant's motion for a directed verdict and sending the case to the jury.

Appellant argues the cirucuit court erred in failing to include certain facts stipulated to by the parties when it described the "undisputed facts" which supported its ruling affirming Appellant's conviction. He contends: (1) that he "secured stipulated facts from the State that were omitted from the Court's Order," (2) that those stipulations were essential to his trial and appeal, (3) that the stipulations explained why his compliance with the no-trespass notice "would create a greater harm than non-compliance," and (4) that they also "explained how transporting the golf cart to the premises was necessary." Appellant argues that by omitting stipulated facts that were material to his "defense of necessity," the circuit court somehow committed reversible error, and that this Court should now order that "the stipulated facts be included in the list of undisputed facts and based on that record, his conviction be overturned." (Brief of Appellant, p.5-p.6). The State disagrees.

Analysis

As noted above, in an appeal from a magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews the case for preserved errors raised to it by appropriate exception. *Williams*, 417 S.C. at 218, 789 S.E.2d at 587; *Hoyle*, 397 S.C. at 625, 725 S.E.2d at 721-22 ; *Johnson,* 396 S.C. at 186, 720 S.E.2d at 518. An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are

without evidentiary support. *Id.* The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70.

Here, the circuit court, acting in its capacity as an appellate court and using the appropriate standard of review, properly referenced the particular facts that supported its order affirming Appellant's conviction. Judge Dukes noted the evidence was: "viewed, as it must be, in the light most favorable to the State." (Order, p.4). Thus, the court's failure to mention other, potentially less State-friendly facts from the record, stipulated or not, was not only appropriate, but also has no bearing on whether those facts continue to exist in the record. In affirming the magistrate's denial of Appellant's motion for a directed verdict, the circuit court found the State: "produced uncontradicted evidence that Appellant was found at 225 Tarpon Boulevard, Fripp Island, after receiving the trespass notice not to be on that property." (Order, p.4). It concluded: "the State offered evidence, when viewed, as it must be, in the light most favorable to the State, that Appellant knowingly and voluntarily trespassed onto 225 Tarpon Boulevard, Fripp Island." These findings by the circuit court, made in its capacity as an appellate court and using the appropriate standard of review for the denial of a directed verdict, were proper, sufficient, and supported by the "Statement of Facts" set forth in the "Order Affirming Conviction." The circuit court did not abuse its discretion or commit an error of law in failing to list or recite every fact in the record when determining that the trial court did not abuse its discretion in denying Appellant's motion for a directed verdict and sending the case to the jury. To the extent any unlisted fact allegedly undermines that decision, it can, as argued by Appellant in arguments III and IV, be considered in reviewing the propriety of the ruling. This Court should therefore deny and dismiss this argument and affirm the decision of the circuit court to affirm Appellant's conviction and sentence.

III.

The circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict and rejected Appellant's claim that he had "legal cause or good excuse" to trespass by relying in part on evidence that Appellant's wife could and did in fact respond to the location, because: (1) it showed Appellant had reasonable alternatives for getting his golf cart registered, and (2) it constituted substantial evidence reasonably tending to prove Appellant's guilt such that the matter was properly submitted to the jury.

Appellant argues the circuit court erred in affirming the trial court's denial of his motion for a directed verdict. Specifically, he complains the circuit court improperly relied upon evidence that his wife could, and did, respond to the location after his arrest when the circuit court affirmed the trial court's rejection of his defense that he had "legal cause or good excuse" to trespass at the time of the charged offense.[2] (Brief of Appellant, p.6-p.8). The State disagrees and submits the circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict based in part on this evidemce, because it showed Appellant had reasonable alternatives for getting his golf cart registered and because it constituted substantial evidence reasonably tending to prove his guilt such that the matter was properly submitted to the jury.

Standard of Review

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *State v. Phillips*, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016); *State v. Condrey*, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. *Phillips*, 416 S.C. at 192, 785 S.E.2d at 452; *State v. Cherry,* 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial court

[2] Pursuand to Article 7 of Chapter 11 of Title 16 of the South Carolina Code (Trespasses and Unlawful Use of Property of Others), "Any person who, **without legal cause or good excuse**, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so . . . ." is guilty of "entering premises after warning." S.C. Code Ann. § 16-11-620 (emphasis added).

must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Phillips*, 416 S.C. at 192-93, 785 S.E.2d at 452 (*quoting State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Thus, when reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *State v. Brown* , 402 S.C. 119, 124, 740 S.E.2d 493, 495 (2013); *State v. Holcomb* , 426 S.E.2d 557, 562, 827 S.E.2d 367, 370 (Ct. App. 2019). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *Brown* at 124, 740 S.E.2d at 495. However, if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *Id.* The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); *see also State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Appellant first argues it was error for the circuit court to even include this "fact" about his wife in its findings of fact as a basis to affirm, because it is not explicitly stated in the magistrate's return or stipulation, and instead only appears in State's Exhibit #3, which was submitted with the magistrate's return on a zip drive. (Brief of Appellant, p.6-p.7). Yet, as argued above, any items "included" in the magistrate's return, and consequently any "facts" subsumed in those items, are part and parcel of the magistrate's return and were appropriately considered by the appellate court. *Brown*, 358 S.C. at 387-

88, 596 S.E.2d at 41. This necessarily includes the body camera footage introduced as State's Exhibit #3 and the fact demonstrated in that video that Appellant's wife showed up at the scene shortly after his arrest—body camera footage that was played for the jury at trial. (September 26, 2023 Trial Recording, 1:11:09 to 1:15:22). The return also includes the audio recording of the trial, which itself includes direct testimony from Officer Horne that Appellant's wife arrived to pick up the golf cart shortly after Appellant was arrested. (September 26, 2023 Trial Recording, 1:15:20 to 1:15:47). All of this evidence was before the circuit court and was properly considered.

Next, Appellant argues the circuit court erred in relying in part on this "fact" about his wife to affirm the rejection of his claim of "legal cause" to trespass because "it was not legally possible for a jury to find that the State had proven beyond a reasonable doubt that [Appellant] had violated the trespass notice without justification." He argues "legal cause" is a matter of law for the court to decide, that it was the State's obligation to prove he did *not* have a legal cause to be there, and that somehow the premises upon which he trespassed was a government/quasigovernmental office which precluded the State from imposing a burden with civil and criminal liability that could be satisfied by him securing the assistance of a third party. (Brief of Appellant, p.7). The State disagrees and submits Appellant attempts to overcomplicate the circuit court's decision to affirm the trial court's straightforward rejection of what he himself describes as his "defense of necessity." (Brief of Appellant, p.6).

Necessity Defense

In South Carolina, the defense of necessity has only been specifically recognized in the context of three crimes: prison escape, *State v. Henderson*, 298 S.C. 331, 380

S.E.2d 817 (1989); *State v. Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975); driving under suspension, *State v. Cole*, 304 S.C. 47, 403 S.E.2d 117 (1991); and unlawful possession of a pistol by a minor, *State v. Sullivan*, 345 S.C. 169, 547 S.E.2d 183 (2001). In *State v. W.M.S.*, 320 S.C. 403, 407, 465 S.E.2d 580, 583 (Ct. App. 1995), this Court assumed, without deciding, necessity may also be applicable to a fourth crime, transporting a child under age of 16 outside of state with intent to violate custody order, but it held the defendant failed to establish all the elements necessary to receive a jury charge for the defense. In all of these contexts, our courts have consistently recognized there are three required elements of a necessity defense. The evidence must show: (1) there is a present and imminent emergency arising without fault on the defendant's part; (2) the emergency gives rise to well-grounded apprehension of death or serious bodily injury if the criminal act is not done; and (3) there is no other reasonable alternative to avoid the threat of harm except to commit the criminal act. *Sullivan*, 345 S.C. at 173-74, 547 S.E.2d at 185; *Cole*, 304 S.C. at 49-50, 403 S.E.2d at 119; *W.M.S.*, 320 S.C. at 407, 465 S.E.2d at 583.

Here, there was simply no evidence and therefore no possibility of Appellant meeting element two because he never had a "well-grounded apprehension of death or serious bodily injury" if he did not get his golf cart inspected on the date he trespassed, or any date for that matter. Furthermore, as shown by the testimony at trial, the issuance of the no trespass notice in the first place arose due to "fault on [Appellant's] part"—namely the prior difficulties between himself and the Fripp Island POA which led to written directives not to come to the office without an appointment. (September 26, 2023 Trial Recording, 35:20 to 35:52; 45:52 to 46:32). Finally, and most importantly for the analysis here, the fact that Appellant's wife could, and did, arrive at the scence shortly

after Appellant's arrest shows there was at least one reasonable alternative to avoid the "threat of harm" except to commit the trespass. Perhaps even more telling, and as an alternative sustaining ground for the trial court's ruling on this third-element aspect of Appellant's necessity defense, the testimony at trial showed Appellant was given two other reasonable alternatives to avoid the harm beyond the one noted by the circuit court of simply asking his wife to bring the golf cart to the office. Appellant was advised, in writing, that he was not to come to the office to have his golf carts inspected without *making an appointment* with either Chief Gonzales or the general manager of the POA. (September 26, 2023 Trial Recording, 45:52 to 46:32). Although Appellant argued at trial that he attempted to make such an "appointment" on the day of the trespass, there was no evidence his unilateral email announcement that he was coming to the location was agreed upon by office staff. Appellant was also instructed he could have his golf carts inspected *at an alternative location.* (September 26, 2023 Trial Recording, 35:20 to 33:52). He failed to attempt to do so. Thus, there were at least three reasonable alternatives, including the one noted by the trial court, that eliminated Appellant's claim of "legal cause." The circuit court properly affirmed the denial of a directed verdict on this ground.

Furthermore, to the extent this Court consideres extending the defense of necessity to the crime of trespass in South Carolina, the circuit court's decision should still be affirmed. Pursuant to general principles, and consistent with the narrow approach taken in South Carolina in requiring proof of the three necessary elements, it is widely recognized that "economic necessity" has never been accepted as a defense to a criminal charge. 115 Am. Jur. 3d *Proof of Facts* § 4 (2024); Wharton, Criminal Law 15:2 (16th

ed. 2024); Illinois Practice Series, Criminal Practice and Procedure, 6 Section 24:95 (2d ed.); Crim. L. Def. *Duress* § 177 (2024); *State v. Moe*, 24 P.2d 638 (Wa. 1933); *People v. Whipple*, 279 P. 1008 (Cal. 2nd Dist. 1929); *Harris v. State*, 486 S.W.2d 573 (Tex. Crim. App. 1972). Appellant's trial defense presented a classic example of "economic necessity," where he argued he was threatened with financial liability to contracted guests of his rental properties if he didn't remedy the situation with his golf carts by getting them inspected and registered immediately. Even under the Massachusetts case cited by Appellant and referenced by the circuit court, *Commonwealth v. Magadini*, 52 N.E.3d 1041 (2016), which admittedly dealt with a criminal trespass charge, the finding turned on the defendant's reasonable belief of death or serious bodily harm. This was because the defendant was homeless and trespassed to avoid very cold weather in the early morning hours in February or March in Massachusetts. No comparable circumstance existed here.

In conclusion, the trial court properly concluded Appellant failed to prove the required elements to receive a directed verdict on grounds of necessity, or as necessity is described in the statute—legal cause. Similarly, the circuit court properly affirmed the trial court's decision on this basis. Instead, Appellant argues economic necessity.

Directed Verdict

Thus, to withstand Appellant's directed verdict motion in the trial of this case, the State was required to produce evidence that Appellant:

(1) Without legal cause or good excuse;

(2) Entered into the dwelling house, place of business, or on the premises of another person;

(3) After having been warned not to do so.

S.C. Code Ann. § 16-11-620. Here, there was abundant evidence Appellant entered the "place of business" or "premises" of the Fripp Island POA by entering the parking lot of 225 Tarpon Boulevard, towing a golf cart, on June 27, 2023. (Magistrate's Return; September 26, 2023 Trial Recording, 48:47 to 49:27; State's Exhibit #3). There was also abundant evidence Appellant made this entry by coming to the POA office after having been warned not to do so. (September 26, 2023 Trial Recording, 46:33 to 48:46; State's Exhibit #2). Thus, the only element in dispute and the argued grounds for Appellant's directed verdict motion was his claim that the State failed to prove his entry was "without legal cause or good excuse." As argued extensively above, Appellant's defense of necessity (legal cause) was properly disposed of by the trial court, as affirmed by the circuit court. To the extent Appellant's claim that "good excuse" serves as a separate possible defense independent of "legal cause," it is clearly not a matter of law but instead is a fact based defense that must be determined by the jury. Here, through cross-examinatin of State's witnesses and the introduction of defense exhibits through those witnesses, Appellant presented evidence he believed would constitute "good excuse" to trespass; however, the State produced contrary evidence which undercut the merits of Appellant's claims. The circuit court, noting there was direct or substantial circumstantial evidence reasonably tending to prove Appellant's guilt, even if susceptible of more than one reasonable inference, found the case was properly submitted to the jury. *Id.* It appropriately affirmed the denial of Appellant's motion for a directed verdict upon viewing the evidence in the light most favorable to the State. *Pearson*, 415 S.C. at 474, 783 S.E.2d at 808; *Richburg*, 250 S.C. at 459, 158 S.E.2d at 772 (1968). For all of these reasons, the State submits the trial court properly denied Appellant's motion for a directed verdict and the circuit court properly affirmed his conviction.

IV.

The circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict and rejected Appellant's claim that he had "legal cause or good excuse" to trespass simply where, in response to an email announcing his intent to violate the no trespass order to register his golf cart, a staff member of the premises "failed to inform" Appellant he could *not*, because there was ample direct and circumstantial evidence in the record reasonably tending to prove Appellant's guilt such that the matter was properly submitted to the jury.

Appellant argues the circuit court erred in affirming the trial court's refusal to grant a directed verdit upon rejecting his claim that he had "good excuse" to violate the trespass order. He contends that where there was evidence in the record he informed POA staff in advance that he was coming to the premises to register and have his golf cart inspected, and the staff responded but failed to inform him he could *not*, he established legal cause or good excuse and as a result the case should not have been submitted to the jury. (Brief of Appellant, p.8-p.9). The State disagrees.

The standard of review for reviewing the denial of a directed verdict set forth in Argument III above is hereby incorporated by reference. Under that standard of review, the circuit court properly affirmed the trial court's denial of Appellant's motion for a directed verdict and rejected his argument that his unilateral email announcement that he was coming to the location constituted "good excuse" to trespass.

As argued above, there was abundant evidence in the record that Appellant entered the "place of business" or "premises" of the Fripp Island POA by entering the parking lot of 225 Tarpon Boulevard, towing a golf cart, on June 27, 2023. (Magistrate's Return; September 26, 2023 Trial Recording, 48:47 to 49:27; State's Exhibit #3). There was also abundant evidence Appellant made this entry by coming to the POA office *after* having been warned not to do so.

(September 26, 2023 Trial Recording, 46:33 to 48:46; State's Exhibit #2). Thus, the only element in dispute and the basis of Appellant's directed verdict motion was his claim that the State failed to prove his entry was "without legal cause or good excuse." As argued extensively above, Appellant's defense of necessity (legal cause) was properly disposed of by the trial court, as affirmed by the circuit court. To the extent Appellant's claim that "good excuse" serves as a separate possible defense independent of "legal cause," it is clearly not a matter of law but instead is a fact-based defense that must be determined by the jury. Here, through cross-examinatin of State's witnesses and the introduction of defense exhibits through those witnesses, Appellant presented evidence he believed would constitute "good excuse" for his admitted trespass. This included the following email exchange with Chief Gonzales on the morning of the incident:

> **Sent: Tuesday, June 27, 2023 8:36 AM**
>
> Chief Gonzales:
>
> I have attached forms, complete on my part, to register golf carts today. A citation was issued to one of my guests last evening. They were driving the golf cart you refused to register yesterday despite there being no authority in the rules or regulations for the reason you decided to relate to me. Regardless, that issue no longer exists. I suggest you void the citation.
>
> Ben Hays
>
> **Sent: Tuesday, June 27, 2023 9:03 AM**
>
> As I mentioned to you yesterday; you have an outstanding balance on your POA account that you need to clear up before security can register your carts. Your guest may appeal the ticket to the appeals committee. Have a wonderful day sir and if I can be of any assistance to you please let me know.
>
> Sincerely,
> Christian Gonzales

(Defendant's Exhibits #3 & #4). The State, however, produced contrary evidence which undercut the merits of the reasonableness of Appellant's claims. The circuit court, noting there was direct or substantial circumstantial evidence reasonably tending to prove Appellant's guilt, even if susceptible to more than one reasonable inference, found the case was properly submitted to the jury. *Id.* It appropriately affirmed the denial of Appellant's motion for a directed verdict upon viewing the evidence in the light most favorable to the State. *Pearson*, 415 S.C. at 474, 783 S.E.2d at 808; *Richburg*, 250 S.C. at 459, 158 S.E.2d at 772 (1968). For all of these reasons, the State submits the trial court properly denied Appellant's motion for a directed verdict and the circuit court properly affirmed his conviction.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the decision of the circuit court and Appellant's underlying conviction and sentence be affirmed.

Respectfully submitted,

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