THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DOUGLAS BRET BISHOP,

APPELLANT

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-217

Appellate Case No. 2012-212240

PETITION FOR REHEARING

On June 11, 2014, this Court affirmed Appellant's convictions and sentences for two counts of sexual exploitation of a minor in the second degree and two counts of sexual exploitation of a minor in the third degree in an unpublished opinion. State v. Bishop, Op. No. 2014-UP-217 (S.C. Ct. App. filed June 11, 2014). On appeal, Appellant challenged the trial court's failure to offer clarifying jury instructions on circumstantial evidence. In the one-paragraph opinion, this Court affirmed because (1) the reviewing court considers a trial court's jury instructions as a whole and in light of the evidence and issues presented at trial; (2) the trial court is required to charge only the

free from error, then any isolated portions, which may be misleading, do not constitute reversible error. Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing requesting this Court rehear the matter due to the significant points overlooked or misapprehended by this Court as explained below.

While Appellant's case was pending on appeal, the South Carolina Supreme Court issued State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) holding that although a trial court may instruct a jury concerning circumstantial evidence as defined in Grippon[1] and Cherry,[2] the trial court "should provide" an instruction guiding the jury on how to analyze circumstantial evidence, in addition to a proper reasonable doubt instruction, when requested to do so by a defendant. The approved charge provides jurors with much-needed guidance in analyzing circumstantial evidence:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Id.

This Court's citation to State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) for the proposition that a trial court is required only to charge the current and correct law of South

[1] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

Carolina suggests this Court determined Logan is not retroactive. Such a holding suggests that Logan is not retroactive. This runs counter to this Court's holding in State v. Jenkins, Op. No. 5232 (S.C. Ct. App. filed May 21, 2014) and Griffith v. Kentucky, 479 U.S. 314, 328 (1987). Appellant seeks rehearing concerning the retroactive applicability of Logan, supra.

Further, Appellant seeks rehearing of this Court's additional holding that consideration of the instructions as a whole and in light of the evidence and issues presented at trial and that isolated misleading portions do not constitute reversible error, there was no error in the trial court's failure to provide clarifying instructions concerning circumstantial evidence. The paucity of evidence against Appellant presented at trial necessitated a clear instruction for the jury concerning how to analyze circumstantial evidence.

On May 6, 2010, police seized two computer towers from Appellant's residence. R. 16, lines 7 – 14; R. 20, lines 4 – 22; R. 24, lines 18-19; R. 26, lines 5-10; R. 32, lines 20-24. SLED purportedly analyzed the imaged hard drives of both computers. R. 114, lines 9 – 12. On one of the imaged hard drives, SLED located approximately thirty images and videos of "graphic, and explicit nature with what appeared to be young teens, young children prepubescent, males, females, involved in sexual acts with other children or other adults." R. 117, lines 3 – 15; R. 184, line 24 – R. 185, line 6. According to SLED, the computer did not require a password for access and the prosecution had no evidence that Appellant actually downloaded the pornographic images or even knew the images were present on the hard drive. R. 158, lines 3-25; R. 179, line 8 – R. 180, line 20. Further, it appeared someone had tried to delete the pornographic images from the hard drive. R. 181, lines 11-17; R. 182, lines 18-21; R. 184, lines 13-15; R. 193, line 25 – R. 194, line 5.

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[2] State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

Two female teenagers, who often visited Appellant's stepdaughters at Appellant's home frequently used the computer along with Appellant's stepdaughters. R. 49, lines 22-23; R. 50, lines 8-15; R. 51, lines 4-6; R. 51, line 24 – R. 52, line 2; R. 52, lines 3-11; R. 53, line 20 – R. 54, line 6; R. 54, lines 13-19. One of the teens testified she never saw child pornography on the computer despite her frequent use of it. R. 54, lines 20-24.91. The other teen recalled seeing an unidentified man use the computer previously. R. 56, lines 1-2; R. 56, lines 12-19; R. 57, lines 9-22; R. 58, lines 5-7; R. 59, lines 15-16; R. 60, lines 1-8; R. 61, lines 2-13.

A male teenager frequently visited Appellant's home and used the computer. He recalled a large number of teenagers used the computer, which he identified as belonging to Appellant's stepdaughters. He never saw Appellant use that computer. R. 211, lines 3-4; R. 211, line 21 – R. 212, line 3; R. 212, line 20 – R. 213, line 21; R. 214, lines 1-19; R. 233, line 18 – R. 234, line 24. Dennis Tucker, Appellant's neighbor and friend, testified that he saw Appellant's stepdaughters using the computer. Appellant, on the other hand, used a laptop. Additionally, he testified to observing approximately nine different teenagers using the desktop computer. R. 241, lines 9-21; R. 244, lines 14-25; R. 245, lines 1-23; R. 250, lines 5-7; R. 251, lines 9-13. Another neighbor, Robert Warr, testified that he never saw Appellant use the desktop computer. He only observed Appellant use the laptop. Additionally, he testified there were teenagers at Appellant's home almost every day using the computer. R. 256, lines 11-15; R. 257, line 17 – R. 258, line 13; R. 259, lines 11-23; R. 260, lines 1-6; R. 260, lines 11-19; R. 262, line 6 – R. 263, line 3.

Appellant testified that the desktop computer was for his stepdaughters, and everyone in his family and his stepdaughters' friends had access to the computer. His daughters' friends stayed at his home for weeks at a time and had unlimited access to the computer. Neither Appellant nor his wife restricted access or use of the computer. He did not monitor what his stepdaughters or their

friends were doing on the computer. R. 281, line 6 – R. 289, line 20. He testified he did not use the desktop computer, except on rare occasions when his laptop was not working. He explained he had no reason to use the desktop computer. R. 296, line 20 – R. 297, line 9; R. 310, line 22 – R. 311, line 6; R. 312, lines 6-24; R. 350, line 1 – R. 353, line 11. Appellant had no idea there was any pornography on the computer. R. 294, lines 23-25; R. 295, lines 20-22.

In closing argument, Appellant admitted the images were of child pornography, but explained the question for the jury was who downloaded the images. The state presented no evidence Appellant downloaded the images or was aware of the presence of the images. The most reasonable inference was that one of the teenagers who had unlimited and unmonitored access to the desktop computer downloaded the images of child pornography. R. 424, line 6 – R. 426, line 7; R. 428, line 18 – R. 430, line 3; R. 432, line 2 – R. 433, line 2; R. 435, line 14 – R. 437, line 2.

At the conclusion of the trial, the judge charged the jury as follows concerning circumstantial evidence:

> There are two types of evidence which are generally presented in a trial such as this. Those two types are direct and circumstantial evidence. Direct evidence is testimony of someone who claims to have actual knowledge of the facts such as an eyewitness. It is evidence which establishes the main fact sought to be proven.
>
> Circumstantial evidence is proof of a chain of facts and circumstances which indicate the existence of a fact. Circumstantial evidence is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or personal observation. Our law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence, our law does not require a greater degree of certainty to circumstantial, as opposed to direct evidence what you should do in this case is weigh all of the evidence. If you are not convinced of [Appellant]'s guilt beyond a reasonable doubt after weighing all the evidence, you would find him not guilty.

R. 463, line 8 – R. 464, line 4. At the conclusion of the court's jury instructions, Appellant asked that the jury be instructed that in order to be convicted of a crime based on circumstantial evidence,

the state must disprove all the other possible facts which could lead to a finding of innocence. R. 471, lines 15 – 18.[3]

In Logan, supra, the Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." Id.

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." Id. Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." Id. In light of the differing analysis required when examining direct versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant's case, the instruction directs jurors that "to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." The instruction also provided that "[i]f these circumstances merely portray the defendant's behavior as suspicious, the proof has failed." Id.

[3] In his motion for reconsideration, Appellant argued the trial court failed to charge the jury properly concerning circumstantial evidence. He explained the error deprived him of a fair trial. R. 481. As to this argument, the trial court found the proper circumstantial evidence instruction was given. R. 483.

Although the Court held that a trial judge may instruct the jury as to circumstantial evidence as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005), the Court held that a trial judge may not rely exclusively on that charge over a defendant's objection. Id. Clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it was necessary in Appellant's case. The state's weak case against Appellant exemplified why Appellant was entitled to the Logan charge regarding circumstantial evidence. The statute required the prosecution to prove Appellant possessed material that contained a visual representation of a minor engaging in sexual activity and knew the content of the material. S.C. Code Ann. § 16-15-410(A). Although Appellant admitted the material found on the hard drive satisfied the statute's definition of child pornography, Appellant denied possessing the material or having knowledge of the content of the material. The prosecution presented absolutely no direct evidence that Appellant downloaded the material or was aware the material had been downloaded. Even the prosecution's witnesses denied observing child pornography on the computers and testified that multiple people had unfettered access to the computer. The issue of who downloaded the materials was the only issue before the jury. It was imperative that the jury not make its decision based on "emotion or intuition instead of a rational, deliberative process," and the way to accomplish this goal was through a clear and concise jury charge, such as the one announced in Logan.

Due to the state's lack of direct evidence and the fact that the circumstantial evidence indicated that at least four other people had access to the computer and the knowledge required to download materials at the time the prohibited materials were downloaded, justice required the trial judge to instruct the jury that the circumstantial evidence must "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Here, the evidence against

Appellant was the same as the evidence against his stepdaughters and their friends. None of the circumstantial evidence conclusively pointed to Appellant's guilt to the exclusion of the others.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 26th day of June, 2014.

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RECEIVED

JUN 26 2014

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Douglas Bret Bishop, #350914, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 26th day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day
of June, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.