

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS BRET BISHOP,

APPELLANT

Appellate Case No. 2012-212240

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in State v. Edwards violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

STATEMENT OF THE CASE

On June 9, 2011, a Union County grand jury indicted Appellant 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 (2011-GS-44-0552 & 2011-GS-44-553). R. 485 (Indictments). The prosecution called the case for trial on May 14, 2012 before the Honorable John C Hayes, III and a jury. John Anthony represented the state, and Kenneth Sowell represented Appellant. R. 1. The jury found Appellant guilty of two counts of sexual exploitation of a minor in the third degree. R. 474, lines 3 – 6. Judge Hayes sentenced Appellant to ten years on each charge, to run concurrently. R. 479, lines 12 – 14; R. 485 (Sentence sheets). On May 18, 2012, Appellant moved the court for reconsideration. R. 481 (Motion for Reconsideration). By order dated May 22, 2012. Judge Hayes denied Appellant's motion. R. 483 (Order).

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in *State v. Edwards* violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

Relevant facts

Investigator Roxie Belue testified that on May 6, 2010, she seized two computer towers, a flash drive, a camera, external hard drives, and personal data devices from Appellant's residence pursuant to a search warrant. 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. She returned several items, including two personal data devices, a VHS tape, and an external reader with a disc because the items lacked evidentiary value. R. 33, line 22 – R. 34, line 18. After the seizure of the items, measures were taken by the South Carolina Law Enforcement Division (SLED) for analysis of the items. Bart Cave, an employee of SLED, testified that he created mirror images of the hard drives submitted by the local sheriff's office. R. 90, lines 6 – 7; R. 94, lines 6 – 9. R. 95, line 23 – R. 96, line 3.

Collin Duncan, another employee of SLED, testified that he analyzed the imaged hard drives. R. 114, lines 9 – 12. On one of the imaged hard drives, Duncan located approximately thirty images 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.” Additionally, he testified that he found approximately the same

number of the videos that were of the same nature on the imaged hard drive. R. 117, lines 3 – 15; R. 184, line 24 – R. 185, line 6.

Duncan testified that the computer did not require a password for access. He also testified he 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. According to Duncan's analysis, 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.

Destiny Cipriano, who was eighteen-years old at the time of trial, testified that she and her sister, Denise Cipriano, frequently visited Appellant's stepdaughters at Appellant's home. According to Destiny, she, Denise, Appellant's stepdaughters, and Appellant used the computer, which was identified by Duncan as having downloaded images of child pornography. 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. Nevertheless, Destiny testified she never saw child pornography on the computer. R. 54, lines 20-24.91. Denise, who was fourteen-years old at the time of trial, testified that she, Destiny, Appellant's stepdaughters, and Appellant used the computer. She also 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.

Appellant presented testimony from Chance Williams, who was seventeen-years old at the time of trial. Chance testified that he frequently visited Appellant and used the computer. He further testified that a large number of teenagers used the computer. He identified the computer as belonging to Appellant's stepdaughters and testified Appellant

did not use it. 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 desktop computer at issue in the case. 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.

Finally, Appellant testified that the two desktop computers were for his stepdaughters. He testified that everyone in his family and his stepdaughters' friends had access to the computer. He further testified that the Cipriano sisters stayed at his home for weeks at a time and had unlimited access to the computer. Additionally, he listed numerous individuals who had access to the computer and used 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. 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. 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, Appellant admitted the images were of child pornography. He argued the question for the jury was who downloaded the images. He argued the state presented no evidence Appellant downloaded the images or was aware of the presence of the images. Repeatedly, Appellant emphasized the lack of evidence that Appellant actually downloaded the images or was even aware the images were on the computer's hard drive. Appellant's closing argued the reasonable inference 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.

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 (Motion for Reconsideration). As to this argument, the trial court found the proper circumstantial evidence instruction was given. R. 483 (Order).

Discussion

Our Supreme Court approved the circumstantial evidence charge requested by Appellant in 1955 in State v. Littlejohn, 228 S.C. 324, 324, 89 S.E.2d 924, 926 (1955). In 1989, the Court explained the instruction found in Littlejohn was the appropriate instruction for juries when the state relied upon circumstantial evidence to prove its case. State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). Specifically, the Edwards charge provides that a jury must not convict unless:

every circumstance relied on by the state is proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (quoting Littlejohn, 228 S.C. at 324, 89 S.E.2d at 926).

Subsequently, the Court held a jury instruction omitting the “reasonable hypothesis” phrase, as a whole, adequately conveyed the level of proof required to find a defendant guilty. State v. Grippon. 327 S.C. 79, 82-83, 489 S.E.2d 462, 463 (1997). The Court’s holding was based upon the trial court repeatedly charging the jury that the state had the burden to prove the defendant guilty beyond a reasonable doubt and properly defining

reasonable doubt. Id. at 83, 489 S.E.2d at 463-464. Although the Court decided the dispositive issue in the case, the Grippon Court went on to recommend another jury instruction. Specifically, the Court recommended:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83-84, 489 S.E.2d at 464.

Chief Justice Finney and then-Justice Toal concurred in the result, but wrote separately to explain trial judge should not abandon South Carolina’s traditional jury charge found in Edwards. The concurrence explained the majority posited no “reasoned rejection of the longstanding rule.” Looking to other jurisdictions, the concurrence explained that the Edwards language emphasized the need for careful reasoning, provided ““sharpened clarity”” to the meaning of reasonable doubt, and explained necessary information for jurors to accurately analyze circumstantial evidence. The concurrence concluded:

This Court should retain the Edwards charge because juries need more detailed information about the relation of circumstantial evidence to determination of guilt than the majority’s suggested instruction provides. The question is not whether circumstantial evidence carries the same probative weight as direct evidence; of course it does. Rather, the question is the proper means for evaluating circumstantial and how trial courts may best help juries understand their responsibilities.

Grippon, 327 S.C. at 84-88, 489 S.E.2d at 464-467 (J. Toal concurring).

In 2004, the Court revisited the circumstantial evidence charge. The Court held the language recommended in “Grippon is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence.” State v. Cherry, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004). In their dissent, Chief Justice Toal and Acting Justice Lloyd, explained that although circumstantial and direct evidence are equally valid and convincing, circumstantial evidence, by definition, establishes collateral facts from which main facts may be inferred. Thus, a juror’s evaluation of circumstantial evidence requires the juror to connect collateral facts in order to reach a conclusion, which is not a process required when evaluating direct evidence. Id. at 603, 606 S.E.2d at 483 (C.J. Toal, dissenting). Rather than creating confusion or changing the standard for examining circumstantial evidence, the traditional charge “clarifies the jury’s responsibility to evaluate circumstantial evidence carefully and gives jurors more detailed information about the relation of circumstantial evidence to the determination of guilt.” Id. In fact, the lack of instruction for jurors concerning how to evaluate circumstantial evidence may result in jurors “reach[ing] illogical conclusions based on emotion or intuition instead of a rational, deliberative process.” Id. at 604, 606 S.E.2d at 483.

The Court, in evaluating a directed verdict motion, recognized the utility of the traditional charge when examining and analyzing circumstantial evidence. State v. Hernandez, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 2 (2009). After quoting the traditional circumstantial evidence charge and noting the abandonment of the charge, the Court explained “it nonetheless illustrates the lack of evidence against [Hernandez, Guerrero, and Avila-Arjona].” Id.

Two years later in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the South Carolina Supreme Court provided a more detailed explanation of how the traditional charge guides the evaluation and analysis of circumstantial evidence in relation to the role of a juror in finding the facts and determining guilt or innocence. The Court acknowledged its abandonment of the traditional circumstantial evidence charge, but noted “the definition illustrates the lack of evidence against [Odems].” Id. at 590, 720 S.E.2d at 52. The Court provided further insight on this issue in footnote four:

However, the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion, and this process is not required when evaluating direct evidence. Thus, the traditional circumstantial evidence definition provides more detailed information about the relation of circumstantial evidence to the determination of guilt. The definition does not, however, change the standard evaluating evidence: every circumstance must be proved beyond a reasonable doubt.

Id. at 591 n.4, 720 S.E.2d at 53 n.4 (internal citations omitted).

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs jurors regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts. The trial judge’s refusal to charge the jury pursuant to the traditional circumstantial evidence charge announced in Edwards, supra, violated Appellant’s right to require the prosecution to prove his guilt beyond a reasonable doubt.

The state’s weak case against Appellant exemplified why Appellant was entitled to the Edwards 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 Edwards.

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.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentences based upon the trial judge's erroneous ruling concerning the instructions to the jury.

Respectfully submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of December, 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.

December 3, 2013

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CERTIFICATE OF SERVICE

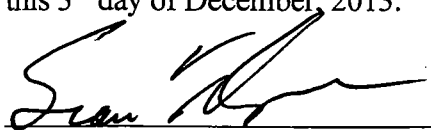
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of December, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of December, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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Appeal from Union County
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THE STATE,

Respondent,

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DOUGLAS BRET BISHOP,

Appellant.

FINAL BRIEF OF RESPONDENT

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Initially, any issue with the trial judge's failure to instruct the jury on the "reasonable hypothesis" language from the traditional circumstantial evidence jury charge was not properly preserved for appellate review because Appellant never requested a jury charge containing that language during trial and, instead, requested a jury charge that did not constitute a correct statement of law. However, regardless of any issue preservation concerns, the trial judge committed no error in instructing the jury on the law of circumstantial evidence because he instructed the jury in a manner expressly adopted as an appropriate charge on circumstantial evidence by the South Carolina Supreme Court. Furthermore, even if the trial judge somehow erred in instructing the jury on circumstantial evidence, any error was entirely harmless because the trial judge's jury instructions as a whole fully and correctly instructed the jury on the applicable South Carolina law, including on the State's burden of proving Appellant's guilt beyond a reasonable doubt.

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STATEMENT OF ISSUE ON APPEAL

Initially, any issue with the trial judge's failure to instruct the jury on the "reasonable hypothesis" language from the traditional circumstantial evidence jury charge was not properly preserved for appellate review because Appellant never requested a jury charge containing that language during trial and, instead, requested a jury charge that did not constitute a correct statement of law. However, regardless of any issue preservation concerns, the trial judge committed no error in instructing the jury on the law of circumstantial evidence because he instructed the jury in a manner expressly adopted as an appropriate charge on circumstantial evidence by the South Carolina Supreme Court. Furthermore, even if the trial judge somehow erred in instructing the jury on circumstantial evidence, any error was entirely harmless because the trial judge's jury instructions as a whole fully and correctly instructed the jury on the applicable South Carolina law, including on the State's burden of proving Appellant's guilt beyond a reasonable doubt.

STATEMENT OF THE CASE

Appellant Douglas Bret Bishop was arrested following an investigation into allegations that Appellant was in possession of child pornography on a computer in his home. In June of 2011, the Union County grand jury indicted Appellant for two counts of second-degree sexual exploitation of a minor and two counts of third-degree sexual exploitation of a minor. On May 14, 2012, a jury trial was commenced in the Union County court of general sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of two counts of third-degree sexual exploitation of a minor. Following the verdict, the trial judge sentenced Appellant to a concurrent term of imprisonment of ten years for each of the offenses. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On May 6, 2010, Investigator Roxie Belue of the Union County Sheriff's Office spoke with the wife of Appellant Douglas Bret Bishop and obtained information about Appellant that led her to obtain a search warrant for Appellant's residence. (R. pp. 15-16; pp. 18-19). Investigator Belue then searched Appellant's residence and located a number of electronic devices capable of storing images and videos of child pornography, including a desktop computer in Appellant's living room. (R. pp. 19-23). Following the search, the desktop computer and other items taken from the home were transported to the S.L.E.D. computer crime center for analysis. (R. p. 23; p. 41; p. 43; p. 83). Upon receiving those items, Bart Cave, a computer forensic analyst, successfully made duplicate copies of the hard drives taken from Appellant's computer, and Colin Duncan, an expert in forensic computer analysis, analyzed the hard drives. (R. p. 83; p. 93; p. 110; p. 114). Based on his analysis, Duncan determined that one of the hard drives removed from Appellant's computer contained approximately thirty images and thirty videos of a graphic and sexually-explicit nature involving young teenage children and prepubescent males and females engaged in sexual acts with other children and with adults. (R. pp. 115-117). As a result of Duncan's discovery of the child pornography, Appellant was arrested and indicted for two counts of second-degree sexual exploitation of a minor and two counts of third-degree sexual exploitation of a minor, and he proceeded to trial. (R. pp. 2-3; pp. 485-486).

During trial, evidence and testimony was presented establishing that numerous images and videos constituting child pornography had been downloaded and stored on Appellant's computer at various times on several different dates between February and April of 2010. (R. pp. 133-134; pp. 491-494). After the State and Appellant concluded

their presentations of evidence in the case, the trial judge instructed the jury on the applicable law. (R. pp. 458-470). During his jury instructions, the trial judge explained to the jury that the State had to prove Appellant's guilt for the charged offenses beyond a reasonable doubt, that Appellant was presumed to be innocent, that Appellant was innocent until proven guilty beyond a reasonable doubt by the State, and that the burden of proof for conviction required proof beyond a reasonable doubt. (R. pp. 459-461). The trial judge then defined reasonable doubt for the jury as follows:

Now the State is not required to prove his [guilt] beyond all or beyond every doubt. We know that it is not possible in our world to resolve all doubt or every doubt but the State must prove his guilt beyond a reasonable doubt. Our courts have defined a reasonable doubt as the kind of doubt that would cause a reasonable person to hesitate to act. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of one's guilt. If based on your consideration of the evidence you are firmly convinced that Mr. Bishop is guilty of one of the charges, you would find him guilty. On the other hand if you think there is a real possibility that he is not guilty as to the charges you would give him the benefit of that reasonable doubt and find him not guilty. He is entitled to the benefit of every reasonable doubt you have as to any issue in this case.

(R. p. 461). As his jury instructions continued, the trial judge explained to the jury that there were two types of evidence – direct and circumstantial – and identified the differences between the types of evidence, instructing:

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 evidence which immediately – I'm sorry. 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 Mr. Bishop's guilt beyond a reasonable doubt after weighing all the evidence you would find him not guilty.

(R. pp. 463-464). The trial judge then defined the elements of second-degree sexual exploitation of a minor and third-degree sexual exploitation of a minor and reaffirmed that the State was required to prove the elements of the offenses beyond a reasonable doubt. (R. pp. 466-467). Finally, the trial judge explained the verdict forms to the jurors and again emphasized that they had to find Appellant not guilty if they determined the State failed to prove Appellant's guilt for the indicted offenses beyond a reasonable doubt. (R. p. 470).

Following the jury charge, the trial judge asked the parties if anything needed to be brought to his attention regarding his instructions. (R. p. 470). Defense counsel then asserted: "I'd like you to charge 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. p. 471). However, the trial judge declined to give the requested charge while indicating that he used a charge that had been approved by the Supreme Court. (R. pp. 471-472). The jury then began its deliberations and subsequently convicted Appellant of two counts of third-degree sexual exploitation of a minor. (R. pp. 473-474). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of ten years. (R. p. 479).

Thereafter, defense counsel filed a motion for reconsideration seeking dismissal of the charges, a new trial, or a substantial reduction in Appellant's sentence. (R. p. 481). In seeking that relief, defense counsel asserted: "The court failed to charge the proper charge on Circumstantial evidence. The use of circumstantial evidence was not properly

explained to the jury and deprived the defendant of a fair trial.” (R. p. 482). However, the trial judge disagreed and denied the motion in totality. (R. pp. 483-484).

ARGUMENT

Initially, any issue with the trial judge's failure to instruct the jury on the "reasonable hypothesis" language from the traditional circumstantial evidence jury charge was not properly preserved for appellate review because Appellant never requested a jury charge containing that language during trial and, instead, requested a jury charge that did not constitute a correct statement of law. However, regardless of any issue preservation concerns, the trial judge committed no error in instructing the jury on the law of circumstantial evidence because he instructed the jury in a manner expressly adopted as an appropriate charge on circumstantial evidence by the South Carolina Supreme Court. Furthermore, even if the trial judge somehow erred in instructing the jury on circumstantial evidence, any error was entirely harmless because the trial judge's jury instructions as a whole fully and correctly instructed the jury on the applicable South Carolina law, including on the State's burden of proving Appellant's guilt beyond a reasonable doubt.

Appellant contends the trial judge erred in denying his requested charge on circumstantial evidence. In support of that contention, Appellant maintains that the trial judge's failure to instruct the jury in accordance with the traditional circumstantial evidence jury charge from State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), violated his constitutional right to have the State prove his guilt beyond a reasonable doubt. Initially, although Appellant contends on appeal that the trial judge should have instructed the jury on the "reasonable hypothesis" language from the Edwards charge, Appellant never asked the trial judge to instruct the jury using that language. Instead, Appellant asked the trial judge to instruct the jury 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 a finding of innocence[.]" which was an incorrect statement of law. (R. p. 471). As a result, the trial judge committed no error in declining to instruct the jury in the manner that Appellant actually requested at trial, and Appellant's appellate argument is not preserved for appellate review since it was not raised to the trial judge. However, even assuming the issue was somehow properly preserved for appellate review, the trial judge would have committed no error had he declined to instruct the jury on the

“reasonable hypothesis” language from the Edwards charge because he instructed the jury on the law of circumstantial evidence in the manner expressly adopted as an appropriate charge on circumstantial evidence by our Supreme Court in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). Furthermore, even if the trial judge somehow erred in instructing the jury on circumstantial evidence despite the fact that he did so in a judicially-approved manner, any error was entirely harmless because the trial judge’s jury instructions as a whole properly explained the State’s burden of proof to the jury and correctly and thoroughly defined reasonable doubt. Accordingly, the trial judge committed no error in instructing the jury in Appellant’s case. Appellant’s convictions should be affirmed.

STANDARD OF REVIEW

In reviewing a trial judge’s jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). When reviewing the trial judge’s jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). “A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.” State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”).

ANALYSIS

Over fifty years ago, in State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955), the South Carolina Supreme Court addressed the distinction between a trial judge's consideration of circumstantial evidence at the directed verdict stage of a trial and a jury's consideration of circumstantial evidence during deliberations. Regarding the jury's consideration of circumstantial evidence, the Court instructed:

[I]t is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused **to the exclusion of every other reasonable hypothesis**. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (emphasis added). Regarding the trial judge's consideration of circumstantial evidence at the directed verdict stage, the Court explained:

But on a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.

Id. at 329, 89 S.E.2d at 926. Thereafter, in State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989), the Supreme Court adopted the "reasonable hypothesis" language from Littlejohn as the appropriate standard to be charged to juries in cases involving circumstantial evidence.

Subsequent to the decision in Edwards, the Supreme Court considered the question of whether a trial judge committed reversible error in omitting the "reasonable hypothesis" language from a circumstantial evidence jury instruction in State v. Grippon,

327 S.C. 79, 81, 489 S.E.2d 462, 462-463 (1997). During Grippon's trial, the trial judge refused Grippon's request to instruct to the jury on the "reasonable hypothesis" language because he interpreted that language as shifting the burden of proof from the prosecution to Grippon. Id. at 81, 489 S.E.2d at 463. On appeal, the Court concluded that the trial judge erroneously determined he was required to omit the "reasonable hypothesis" language from his jury charge and noted that it had recently approved the use of such language in instructing a jury. Id. However, the Court ruled that the trial judge did not err in instructing the jury in Grippon's case because the jury instructions as a whole adequately apprised the jury of the proper legal standard to be applied in deciding the case. Id. at 83, 489 S.E.2d at 463. The Court further determined the omission of the "reasonable hypothesis" language did not affect the burden of proof. Id. at 83, 489 S.E.2d at 463-464. Significantly, the Court then addressed the propriety of the "reasonable hypothesis" language itself and concluded the charge was unnecessary in cases where the jury had been properly instructed on the reasonable doubt standard. Id. at 83, 489 S.E.2d at 464. Thereafter, the Court recommended the following jury charge for use in cases where circumstantial evidence was presented and the jury was properly instructed on reasonable doubt:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83-84, 489 S.E.2d at 464.

Subsequently, following the decision in Grippon, the Supreme Court again considered the issue of the propriety of a trial judge's jury charge on circumstantial evidence in State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). In that case, the trial judge instructed the jury on circumstantial evidence in a manner consistent with the recommended charge from Grippon and denied Cherry's request to instruct the jury on the "reasonable hypothesis" language from Littlejohn and Edwards. Cherry, 361 S.C. at 591-592, 606 S.E.2d at 476-477. On appeal, the Court noted that the decision in Grippon clearly determined the "reasonable hypothesis" language was not a **required** jury instruction on circumstantial evidence. Cherry, 361 S.C. at 597, 606 S.E.2d at 480. The Court then determined that the charge from "Grippon is the sole remaining charge to be utilized by the courts of [South Carolina] in instructing juries in cases relying, in whole or in part, on circumstantial evidence." Id. In reaching that conclusion, a majority of the Court concluded that "the reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not." Id. at 601, 606 S.E.2d at 482; see also Holland v. United States, 348 U.S. 121, 139-140 (1954) ("The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect[.]" (citations omitted)); see, e.g., State v. Adcock, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (N.C. 1984) ("We are of the opinion that the reasonable doubt instruction and the 'moral certainty' circumstantial evidence instruction encompass the

same measure of proof. Therefore, recognizing that the purpose of a charge to the jury is to clarify the issues and apply the law to the evidence, we conclude that the giving of the 'moral certainty' or the 'reasonable hypothesis' instruction in addition to the reasonable doubt instruction would tend to confuse the jury by requiring them to engage in an unnecessary and repetitious application of the same measures of proof to the evidence in the case. We hold that an instruction on circumstantial evidence to the effect that a conviction may not be based upon it unless the circumstances point to guilt and exclude to moral certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given.”).

Most recently, in State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013), a case decided after Appellant's trial, the Supreme Court again considered whether the circumstantial evidence jury instruction from Grippon remained an appropriate statement of the law. In that case, Logan asserted that the charge from Grippon was invalidated by the Court's more recent decisions in cases involving challenges to the denials of directed verdict motions. Logan, 405 S.C. at 91, 747 S.E.2d at 448. However, the Court disagreed and found that the trial judge committed no error in instructing the jury on the law of circumstantial evidence in a manner consistent with the charge articulated in Grippon. Logan, 405 S.C. at 94, 747 S.E.2d at 449. The Court then went on to propose a new circumstantial evidence jury charge containing the following language:

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. at 99, 747 S.E.2d at 452. Regarding the newly-articulated charge, the Court instructed that the charge should be provided "when so requested by a defendant[.]" Id. Thus, the Court modified its earlier holdings in Grippon and Cherry to allow trial judges to instruct juries on circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

In the case sub judice, the trial judge committed no error in instructing the jury because he properly charged the jury on the relevant and applicable law. Specifically, the trial judge instructed the jury that Appellant was presumed innocent and that the State had the burden of proving Appellant's guilt for the indicted offenses beyond a reasonable doubt and thoroughly and completely defined reasonable doubt for the jury. Furthermore, when instructing the jury on circumstantial evidence, the trial judge explained the relevant law to the jury in the manner specifically recommended by our Supreme Court in Grippon and expressly adopted as a correct charge on circumstantial evidence by our Supreme Court in Cherry. See Cherry, 361 S.C. at 601, 606 S.E.2d at 482 ("[W]e hold that the recommended language in Grippon is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction."); see also Logan, 405 S.C. at 94, 747 S.E.2d at 449 ("[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon."). Thus, by instructing the jury on all of the applicable law and in a manner

expressly recognized by our Supreme Court as an appropriate statement of the law on circumstantial evidence, the trial judge committed no error in instructing the jury during Appellant's trial. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472 (“[T]he trial court is required to charge only the current and correct law of South Carolina.”).

In arguing the trial judge's jury instructions were erroneous, Appellant contends on appeal that the trial judge's alleged refusal to instruct the jury pursuant to the circumstantial evidence charge adopted in Edwards violated his constitutional rights by denying him the right to have the State prove his guilt beyond a reasonable doubt. However, the trial judge did not refuse a request for such a charge because one was never made during Appellant's trial. Instead, as opposed to asking the trial judge to instruct the jury on the “reasonable hypothesis” language from the charge adopted in Edwards, defense counsel asked the trial judge to instruct the jury 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 a finding of innocence.” (R. p. 471). Critically, that requested language was far different from the “reasonable hypothesis” language from Edwards and constituted an incorrect statement of the State's burden of proof, which was simply to prove Appellant's guilt beyond a reasonable doubt. See Burr v. Florida, 474 U.S. 879, 880-881 (1985) (“[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the ‘reasonable doubt’ standard[.] . . . [T]he ‘reasonable doubt’ standard merely attempts ‘to exclude as nearly as possible the likelihood of an erroneous judgment.’ Hence, ‘beyond a reasonable doubt’ cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors’ own minds.” (citations omitted)); see also State v. Hackett, 215 S.C. 434, 449, 55 S.E.2d 696, 703 (1949) (instructing that proof beyond a reasonable doubt is a degree of proof

distinguishable from an absolute certainty); see, e.g., Nangreave v. State, 318 Ga. App. 437, 439, 734 S.E.2d 203, 205 (Ga. Ct. App. 2012) (“The State is not required to remove every possibility of innocence of the crime charged, and it is not required to disprove bare possibilities that the crime could have been committed by someone else.”); State v. Frieze, 3 Neb. App. 263, 272, 525 N.W.2d 646, 652 (Neb. Ct. App. 1994) (“[T]he State is required to establish the defendant’s guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant’s innocence.”); State v. Williams, 330 N.C. 579, 587, 411 S.E.2d 814, 819 (N.C. 1992) (“The State need not disprove every possibility that could exonerate the defendant. The State need only present substantial evidence of the defendant’s guilt.” (citation omitted)). Thus, because Appellant did not request a charge on the “reasonable hypothesis” language from Edwards during trial, Appellant cannot now complain about the failure to give that charge for the first time on appeal. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (“[A] defendant may not argue one ground below and another on appeal.”); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Moreover, because the charge that Appellant did request during trial was an incorrect statement of law, the trial judge committed no error in declining to instruct the jury in the manner actually requested. See State v. Marin, 404 S.C. 615, 620, 745 S.E.2d 148, 151 (Ct. App. 2013) (“[T]here is no error of law in refusing to give a specific request to charge where (1) the charge

requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly.” (emphasis added)).

However, even assuming the issue was properly preserved and Appellant’s requested charge could somehow be construed as a request for the “reasonable hypothesis” language from the Edwards charge, the trial judge still committed no error in instructing the jury on circumstantial evidence during Appellant’s trial. Importantly, just like the trial judge in Logan’s case, the trial judge in Appellant’s case instructed the jury in a manner consistent with the approved jury charge from Grippon. See Logan, 405 S.C. at 90, 747 S.E.2d at 447 (identifying the circumstantial jury instruction given in Logan’s case, which contained virtually identical language to the circumstantial evidence jury instruction given in Appellant’s case). As a result, the trial judge properly instructed the jury on the law of circumstantial evidence. See id. at 94, 747 S.E.2d at 449 (“[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon.”). Notably, the Supreme Court in Logan did **not** find that the circumstantial evidence charge from Grippon reduced the State’s burden of proof or constituted an incorrect statement of the law. See Logan, 405 S.C. at 100, 747 S.E.2d at 452-453 (“This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in Grippon and Cherry.”). Instead, the Supreme Court simply proposed a new circumstantial evidence charge that could appropriately be given upon request that, significantly, did **not** include the “reasonable hypothesis” language from the Edwards charge that Appellant now, for the first time on appeal, contends should have been given. See Logan, 405 S.C. at 99, 747 S.E.2d at 452 (providing a new circumstantial evidence jury instruction that should be given when requested that did **not** include any “reasonable

hypothesis" language). Thus, as Appellant did not request any language similar to the language from the circumstantial evidence charge proposed by the Supreme Court in Logan, the trial judge committed no error in instructing the jury on the law of circumstantial evidence in the manner adopted by the Supreme Court in Grippon.

Furthermore, even assuming the trial judge somehow erred in instructing the jury on circumstantial evidence, any error was entirely harmless because the trial judge fully and correctly instructed the jury on the State's burden of proving Appellant's guilt beyond a reasonable doubt. Specifically, the trial judge instructed the jury that Appellant was presumed to be innocent, explained that the burden of proof resided solely with the State, and thoroughly defined reasonable doubt for the jury. See Grippon, 327 S.C. at 82-83, 489 S.E.2d at 463-464 ("[T]he instruction actually given by the trial judge, as a whole, adequately conveyed the level of proof required to find appellant guilty. The trial court repeatedly charged the State had the burden of proving the defendant guilty beyond a reasonable doubt, and reasonable doubt was correctly defined. Therefore, the jury was adequately apprised of the proper legal standard, and the omission of this 'reasonable hypothesis' phrase from the circumstantial evidence charge did not affect the burden of proof."). Therefore, because the trial judge's jury instructions properly conveyed the applicable law to the jury, "any conceivable error was harmless beyond a reasonable doubt" assuming one occurred. Logan, 405 S.C. at 94, n. 8, 747 S.E.2d at 449. As a result, there is no proper basis to reverse Appellant's convictions based on the trial judge's jury instructions. See State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In conclusion, the trial judge in Appellant's case properly and completely instructed the jury on the applicable law. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). In doing so, the trial judge charged the jury on the law regarding circumstantial evidence in a manner consistent with the instructions of the Supreme Court in Grippon and Cherry while correctly defining reasonable doubt for the jury, and nothing more was constitutionally required of the trial judge to ensure that the jury was apprised of the State's burden of proving Appellant's guilt beyond a reasonable doubt.¹ See Victor v. Nebraska, 511 U.S. 1, 5 (1994) (instructing that a trial judge in a criminal case is only constitutionally required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt and that no specific language or wording is required to be used to advise the jury of that burden of proof); State v. Longworth, 313 S.C. 360, 372, 438 S.E.2d 219, 225 (1993) (holding no specific charge on reasonable doubt is mandated or required); see also State v. Rayfield, 357 S.C. 497, 505, 593 S.E.2d 486, 490 (Ct. App. 2004) ("The trial court is required to charge the correct law of South Carolina."). For the foregoing reasons, the jury instructions presented in Appellant's case do not warrant a reversal of Appellant's convictions. See Ezell, 321 S.C. at 425, 468 S.E.2d at 681 ("A jury charge which is substantially correct and covers the law does not require reversal."). Appellant's convictions should be affirmed.

¹ Notably, Appellant has not challenged the trial judge's denial of his directed verdict motion on appeal, and, thus, the trial judge's ruling on the sufficiency of the evidence is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling is the law of the case); see also State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) ("In his appellate brief, Fripp does not dispute the correctness of the trial court's ruling that he opened the door to Officer Heany's hearsay testimony. Therefore, that ruling is the law of the case.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 18, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2012-212240

THE STATE,

Respondent,

vs.

DOUGLAS BRET BISHOP,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 18th day of November, 2013.

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DOUGLAS BRET BISHOP,

APPELLANT

APPELLATE CASE NO. 2012-212240

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ARGUMENT IN REPLY

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in *State v. Edwards* violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

In his initial brief, Appellant argued the trial judge erred in refusing to charge the jury pursuant to the traditional circumstantial evidence definition as requested. On August 14, 2013, the South Carolina Supreme Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina. In *State v. Logan*, Op. No. 27296 (S.C. Sup. Ct. filed Aug. 14, 2013), 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.

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. As detailed in Appellant’s brief, the state presented a very weak case, consisting entirely of circumstantial evidence. The statute required the state prove Appellant possessed material that contained a visual representation of a minor engaging in sexual activity and knew the content of the material. See S.C. Code Ann. § 16-15-410(A). Appellant admitted the material found on the hard drive satisfied the statute’s definition of child pornography, but denied possessing the material or having knowledge of the content of the material. On this point, 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 absolute paucity of direct evidence against Appellant concerning his having downloaded the material or having knowledge of the material and the undisputed 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.” 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.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

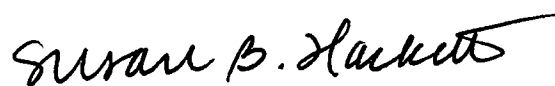
ATTORNEY FOR APPELLANT

This 3rd day of December, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

December 3, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

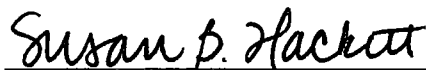
V.

DOUGLAS BRET BISHOP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of December, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of December, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022