

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 03 2014

SC Court of Appeals

Appeal from Georgetown County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID WAYNE THOMPkins, JR.

APPELLANT

APPELLATE CASE NO. 2013-002486

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to direct a verdict of not guilty on the charge that Appellant knowingly possessed and transported copper wiring stolen from a paper mill where the State only adduced evidence that Appellant had the wiring in his truck soon after an employee of the mill discovered that the same type of wiring was dragged off of the site and into a nearby river; where the employee testified that the same type of wiring was also stolen from the site three months prior; and where testimony showed others regularly recovered copper wiring from the river and Appellant regularly recovered copper for recycling?

STATEMENT OF THE CASE

On March 13, 2013, the Georgetown County Grand Jury indicted Appellant David Wayne Thompkins, Jr. on counts of transporting stolen nonferrous metals and possession of less than one ounce of marijuana. R. 163-166. On October 29, 2013, Petitioner appeared at trial before The Honorable George C. James, Jr. and a jury. William F. Edgeworth, III represented Appellant and Richard D. Todd represented the State. R. 1. On October 30, 20103, the jury found Appellant guilty on both counts. R. 1; R. 153, lines 11-23. Judge James sentenced Appellant to six years for the transportation charge and one year concurrent for the possession charge. R. 160, line 19—R. 161, line 2.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT OF NOT GUILTY BECAUSE NO SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE SHOWED APPELLANT WAS PRACTICALLY CERTAIN THAT THE WIRING HE PULLED FROM THE RIVER WAS STOLEN FROM THE NEARBY PAPER MILL.

STATEMENT OF FACTS

At trial the State called Kenneth Ray, a manager at an International Paper mill in Georgetown. He testified alongside photographic evidence about a site at the mill by the Sampit River. On January 9, 2013, he discovered a large coil of copper wiring was missing. Nearby were drag marks on the ground, cut tree branches, and a cut portion of perimeter fencing alongside the river bank. R. 33, line 12-R. 42, line 8. The State then called Dennis Freeman, another employee from International Paper who was responsible for electrical power at the plant. Freeman described the missing wiring as a new style that the company began using relatively soon before the wiring went missing. The cable was rectangular rather than circular, and Freeman was not aware of any other uses of the type of cable in the area. He also testified that a portion of the wire had previously gone missing in October of 2012. R. 45, line 5—R. 51, line 25. On cross-examination, he admitted the wire had no serial number or other identifying information. R. 52, line 1—R. 54, line 10.

Next, the State called Heath Holt, an employee at a recycling center near the mill. He testified that a representative from International Paper and a local law enforcement officer came to the center in January of 2013 and informed him about the missing copper. He claimed that shortly after the two left, Appellant came to the center seeking to sell rectangular copper wiring, and Holt notified law enforcement. R. 55, line 17—R. 60, line

20. On cross-examination, Holt testified that Appellant had made transactions at the center before. R. 61, line 21—R. 62, line 5.

The State then called Investigator Bryan McKay with the Georgetown County Sheriff's Office. He testified that he responded to the recycling center, found Appellant, whom he knew was driving under a suspended license, and arrested him. During a pat-down Officer McKay found marijuana on Appellant's person and in his truck. He stated Appellant repeatedly told him that he had pulled the copper wiring from the river behind the mill. Officer McKay also agreed that several people had told him about pulling copper wiring out of the river. R. 65, line 11—R. 105, line 20.

At the close of the State's evidence, Appellant moved for a directed verdict of not guilty on the transportation of stolen metals charge on grounds that the evidence was insufficient as a matter of law to support a finding that Appellant knew the copper wiring was stolen. The trial judge denied the motion. R. 113, line 6—R. 117, line 22.

DISCUSSION

The trial court erred in failing to direct a verdict of not guilty because no substantial circumstantial evidence showed Appellant was practically certain that the wiring he pulled from the river was stolen from the nearby paper mill. South Carolina Code subsection 16-11-523(G)(5) makes it a felony to “transport[] nonferrous metals that the person knows are stolen in a vehicle or ha[ve] in the person's possession in a vehicle on the highways of this State nonferrous metals that the person knows are stolen.” Knowledge of a fact exists when a person is practically certain of it. *See State v Lee-Grigg*, 374 S.C. 388, 404, 649 S.E.2d 41, 49 (Ct. App. 2007) *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010) (“[A] person “is said to act knowingly if he is aware the result is

practically certain to follow from his conduct, whatever his desire may be as to that result.” (internal quotations omitted)).

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

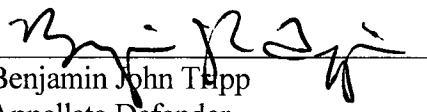
Our Supreme Court “has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict.” *State v Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011). Concomitantly, the trial court “should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.” *Id* at 586, 720 S.E.2d at 50 (citation omitted). “Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *See State v Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only “if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” *State v Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

In this case, the State presented evidence that on or shortly before January 9, 2013, the missing copper wiring was dragged from the paper mill property through brush and fencing into the Sampit River. The State also presented evidence that Appellant retrieved the same type of wiring from the area some time between October of 2013 and January of 2013. This circumstantial evidence was not sufficient to permit the inference that Appellant was practically certain the wiring he removed from the area was stolen from the mill. While the fresh drag marks and broken limbs and fencing around January 9, 2013 would indicate to a person in the area that the wiring was recently removed directly from the mill's property, no evidence showed Appellant removed his wiring at that time. Indeed, the inference that Appellant removed the wire at any time prior to January of 2013 was more sound considering the testimony that Appellant had made transactions at the recycling center well before International Paper discovered its missing wiring and the testimony that many others removed wiring from the river in the past. Thus, assuming Appellant did not remove the wiring when the tracks and broken branches were noticeable, no evidence indicated Appellant had reason to think the wiring was stolen from the mill, much less to believe so with practical certainty. In this manner the State's evidence was insufficient as a matter of law to support a conviction for knowingly possessing and transporting stolen wiring.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the trial judge and issue an order of acquittal on the charge of transporting stolen nonferrous metals.

Respectfully submitted,


Benjamin John Tepp
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID WAYNE THOMPCKINS, JR.

APPELLANT

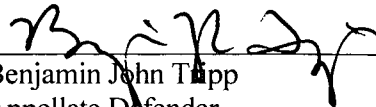
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Wayne Thompkins Jr. states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge George C. James, Jr., which was held on October 30, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for David Wayne Thompkins Jr..

Respectfully submitted,


Benjamin John Tipp
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of October, 2014.

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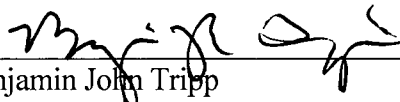
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript of October 29, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal.

October ^{2nd} ~~2~~, 2014



Benjamin John Tripp
Appellate Defender

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Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 3, 2014



Benjamin John Tripp
Appellate Defender

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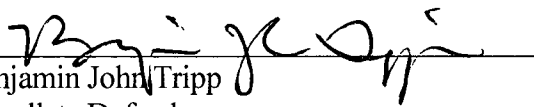
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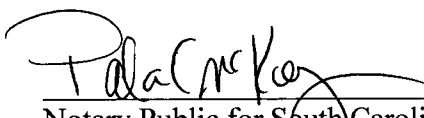
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on David Wayne Thompkins, Jr., #319107 at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472 this 3rd day of October, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 22, 2022