ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN J. BURRIS,

APPELLANT

APPELLATE CASE NO. 2013-001035

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant Burris' motion for a directed verdict when the state did not prove beyond a reasonable doubt, by calling an expert to testify, that the alleged nonferrous metal piping was copper and did not contain a significant amount of iron as required by S.C. Code Section 16-11-523?

2. Did the trial court err in allowing the state's witness to testify as to the approximate dollar amount of the damages to the Bi-Lo refrigeration unit which was not an element required by S.C. Code Section 16-11-523 because the statute only required an amount of five thousand dollars or more?

STATEMENT OF THE CASE

On July 9, 2012, the Charleston County Grand Jury indicted Shawn Justin Burris on the charges of the unlawful obtaining of non-ferrous metals and possession of tools of a crime. On April 25, 2013, Burris proceeded to trial before the Honorable Kristi Lea Harrington and a jury. Burris represented himself *pro se,* with Luke Malloy, Lorelle Proctor and Ted Smith serving as stand-by counsel. The state was represented by Richard Waring and Culver Kidd. He jury returned a verdict of guilty on both charges as indicted. Judge Harrington sentenced Burris to ten years on the unlawful obtaining of non-ferrous metals and five years on the possession of tools of a crime with both to run concurrent. Burris filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On April 26, 2012, Jesse Gay, who worked the night shift at Bi-Lo in Charleston, heard noises on the roof around 5:00 a.m. He called the alarm company who called 911 as was the policy. R. 41, ll. 9 – 22; R. 46, ll. 3 – R. 49, ll. 24. When the police arrived, they saw a person on the roof who appeared to be stacking something. R. 42, ll. 1 - 5; R. 59, ll. 21 -R. 62, ll. 5. Officer Anthony Doxey and Sergeant Bullard entered the Bi-Lo, and made contact with the employees. The officers then went onto the roof through a hatch door inside the building. R. 87, ll. 1 – R. 88, ll. 24.

The officers found Burris under the air conditioner wearing gloves with a backpack nearby with tools in it. There was a stack of what the officer thought to be copper pipe apparently cut from the air conditioner. R. 89, ll. 20 – R. 94, ll. 18. Burris was arrested and charged with the unlawful obtaining of nonferrous metals and possession of tools of a crime. R. 95, ll. 1 – 24; Indictment 2013-GS-10-4289; Indictment 2012-GS-10-4290.

At trial, Burris represented himself with Luke Malloy, Esquire, assisting him. R. 7, ll. 8 – R. 15, ll. 8. Pretrial, the judge asked the state if they were alleging that the damage was $10,000 since the indictment said $10,000 or more. The solicitor replied:

> Mr. WARING: Your Honor, the state wasn't really going to get into the actual specific damage, the cost of it, until the sentencing phase. And if he is convicted, we're just going to go into the general amount of damage.
>
> The COURT: All right.
>
> Mr. WARING: Because the cost damage is not one of the elements of the crime of unlawful obtaining nonferrous metals or possess of burglary tools.

R. 11, ll. 8 – 21.

The judge went on to explain to Burris that the indictment indicated the amount of property loss which went to punishment. She stated that the amount was not an element of the offense but just went to punishment. She explained that less than $5000 was a misdemeanor and over $5000 was a felony. Burris did not object to the indictment being read to the jury. It alleged an amount of $10,000 or more. R. 12, ll. 8 – R. 13, ll. 12.

When the judge inquired about pretrial motions, Burris moved to suppress any and all reference to the damages related to this case until sentencing. The state stated again that he was not planning "on actually getting into specific details about monetary loss until, if and when he was convicted, at the sentencing phase." R. 21, ll. 1 - 24, ll. 25.

The judge told Burris that the state had to show some damage and to do that, they had to show some costs associated with the damage. R. 25, ll. 1 – 10. The judge then stated:

> And so, Mr.Burris, there will be, assuming we get to the stage that the jury finds you guilty, we will have an opportunity ---the Bi-Lo representative to come in and present testimony as to whether it was over $5000 or under $5000. Do you understand?

R. 25, ll. 11 – 17.

During the state's case, David Owca, who was the store director or manager of the Bi-Lo involved in the incident, testified that the defendant caused massive amounts of damage. R. 177, ll. 10 – R. 181, ll. 25. On redirect, the solicitor asked Mr. Owca to tell the jury the extent of the damage moneywise. Burris objected because of the prior motion not to do that until sentencing. The judge overruled the objection and allowed it. Mr. Owca then stated the cost of the damage was approximately $189,000. The solicitor asked him to break that down. Mr. Owca testified that the evaporator units on the roof had to be replaced at $30000 each. The freon cost $48000. The lost products, the extra labor, extra time, bringing

in freezer trucks form Greenville. It all added up to about $189000. R. 192, ll. 17 – R. 193, ll. 25.

On cross examination, Burris asked the witness how many days it took to repair. Mr. Owca said immediate repairs took three days but long term took longer. He did not know that Bo-Lo representatives presented invoices to the police on the day of Burris' arrest for the damage done to the store. The date was October 24, 2011. Mr. Owca said those invoices were for a different store. Burris said they were used at his bond hearing. R. 184, ll. 20 – R. 190, ll. 25.

Mr. Owca said that two units had to be replaced. He then admitted that the units were not replaced for three to four months. They still worked but had been compromised when they were cut open and would have to be replaced eventually. R. 192, ll. 1 – 18.

On re-cross, Burris asked Mr. Owca if they were trying to make up losses from other stores. Burris showed him Defendant's Exhibit 25 which had an invoice for the Kru-Kel which was Mr. Owca's other store in North Charleston. It showed he purchased 160 units of R22 (Freon) at $142.50 each. Burris then showed him Defendant's Exhibit 27 which showed a purchase for Kru-Kel for 160 units of R22 at $285 each. The witness replied that Freon went up in the six month period. R. 194, ll. 6 – R. 195, ll. 21.

At the close of the state's case, Burris moved for a directed verdict on the grounds that the state had not proved the elements of the statute because the state had not proved that the material was nonferrous. According to the statute, nonferrous meant that it did not contain a significant amount of iron. Burris argued that the state had not proved the composition of the pipes or that they were copper. The state replied that they had presented ample evidence that the pipes were copper because the store manager had worked at the

store for a while and knew they were copper. The state argued that the police officers said they were copper. The state did not believe they needed an expert to say the pipes were copper. R. 196, ll. 23 – R. 197, ll. 25.

Burris argued that the Bi-Lo manager was not qualified to state the pipes were metal or iron or anything of the sort. The judge reviewed cursorily the testimony of the witnesses, and then denied the directed verdict motion. R. 198, ll. 1 – R. 200, ll. 25.

The defense did not present any testimony. After the defense rested, Burris renewed his directed verdict motion which the judge denied. The judge said he had waived his motion for a directed verdict since the case had already gone to the jury, but she allowed him to put his directed verdict motion on the record. Burris' motion was based on his same previous grounds. R. 219, ll. 1 – 22.

ARGUMENT

The trial court erred in denying Appellant Burris' motion for a directed verdict when the state did not prove beyond a reasonable doubt, by calling an expert to testify, that the alleged nonferrous metal piping was copper and did not contain a significant amount of iron as required by S.C. Code Section 16-11-523.

South Carolina Code Section 16-11-523 concerns "obtaining nonferrous metals unlawfully; disruption of communication or electrical service." The statute provides:

> For purposes of this section, "nonferrous metals' means metals not containing significant quantities of iron or steel, including, but not limited to, copper wire, copper clad steel wire, copper pipe, copper bars, copper sheeting, aluminum other than aluminum cans, a product that is a mixture of aluminum and copper, catalytic converters, lead-acid batteries, steel propane gas tanks, and stainless steel beer kegs or containers.

In State v. Hepburn, 406 S.C. 416, _753 S.E.2d 402 (2013), the Supreme Court summarized the standard for a directed verdict: In cases where the state has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). During trial, when ruling an a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight citing. Id. at 593, 606 S.E.2d at 477-78. The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (2004). On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Id.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held that the state presented insufficient evidence to submit the murder charge to the jury. The Court held that the trial court should have granted a directed verdict because the state's evidence only raised a "suspicion of guilt." Bostick was charged with the murder of his neighbor, who was an older woman. The evidence against Bostick consisted of items (car keys, calculator) belonging to the victim which were found in the Bostick family's burn pile; the fire accelerant in the burn pile was one not used by Bostick's mother; Bostick had a pattern on his shoes that matched the accelerant which was gasoline; the blood found on Bostick's jeans did not match the victim's.

In State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975), the Supreme Court held that a basic principle of law is that the state has the burden of proof as to all of the essential elements of the crime. Citing State v. Paulk, 18 S.C. 514, (1883).

The state did not present evidence that the material contained only copper and not iron or steel or any other product. The evidence only raised a suspicion that the material was copper or nonferrous. The statute plainly states that nonferrous metal does not contain significant quantities of iron or steel. The state did not prove this required element of the statute beyond a reasonable doubt. The Bi-Lo store manager nor the police officers were qualified to say what the metal contained or the quantities of the ingredients in it. The state needed to present an expert who could have tested the pipe to determine its ingredients. The directed verdict should have been granted.

ARGUMENT

The trial court erred in allowing the state's witness to testify as to the approximate dollar amount of the damages to the Bi-Lo refrigeration unit which was not an element required by S.C. Code Section 16-11-523 because the statute only required an amount of five thousand dollars or more.

South Carolina Code 16-11-523 (C) (2) provides:

> A person who violates a provision of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the direct injury to the property, the amount of loss in value to the property, the amount of repairs necessary to return the property to its condition before the act, or the property loss, including fixtures or improvements, is five thousand dollars or more.

The state has the burden of proof as to all of the essential elements of the crime. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

The specific amount of damage was not an element of the crime. The state told the court that the specific amount was not an element but was appropriate for sentencing. The judge told Burris that the state could allege an amount over or under $5000 but the specific amount would be for sentencing. Then the judge allowed the state's witness to tell the jury the specific amounts of the damages for different repairs needed. This was prejudicial to Burris especially after he had not been convicted at that point.

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

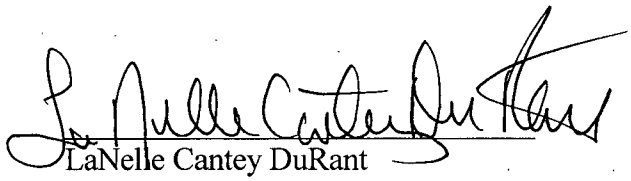
The only evidence of monetary damages that the state should have been allowed to present to the jury was the fact that the amount was over $5000 although any monetary amount should have been reserved for sentencing. However, Burris did not object to the indictment being read to the jury during arraignment where the indictment said $10000 or more. The judge should not have allowed the state to go beyond that amount before a conviction. The amount of estimated damages of $189000 was so excessive to $5000 as required by the statute, or the $10000 as provided in the indictment that it was especially prejudicial to Burris.

The judge and the state violated their word to Burris.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for an entry of a directed verdict on Issue one, and a new trial on Issue Two.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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 30th, 2014

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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 Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2014.

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