STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOVAN A. MITCHELL,

Appellant.

INITIAL BRIEF OF RESPONDENT

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The trial court did not err in its instructions to the jury, the trial court properly advised the jury on the defense of mistake of fact, and there was no evidence that the property was abandoned.

STATEMENT OF THE CASE

Appellant Mitchell was indicted for grand larceny for thefts of metal between March 20 and March 24, 2010. Mitchell was tried by jury on October 1 and 2, 2013, before the Honorable Donald B. Hocker. Mitchell was acquitted of larceny over $5,000 and was instead convicted of larceny between $1,000 and $5,000. Mitchell was sentenced to five years imprisonment suspended to eighteen months imprisonment and two years probation. Judge Hocker ordered restitution of $1,000.

STATEMENT OF FACTS

Stan Gaines runs a foundry, Synehi Castings. The foundry pours iron, which is cut and sold to customers. Gaines owns an off-site storage facility on two acres of land that is surrounded by a chain link fence topped with barbed wire. The gate is locked by chain. A no trespassing sign is posted next to the front gate in clear view without any foliage blocking it. On March 24, 2010, Gaines arrived at the storage facility and found the chain locking the other gate was cut. He also found Appellant Mitchell loading metal stored at the facility on to a car trailer. Tr. pp. 44-48. The particular kind of metal that Mitchell was stealing is Niresist – which is iron mixed with nickel and chrome additives. Mitchell also stole cast iron parts belonging to customers. Tr. pp. 50-52. Gaines valued the Niresist at roughly $20,000. Gaines testified that a total of 7,000 pounds of metal was stolen, including 5,069 pounds of Niresist worth close to $20,000. Gaines testified the value of the other metals was about 85 cents a pound. Gaines placed the total market value of the metals stolen at roughly $22,000. Tr. pp. 51-53; R. at ___ (State's Exhibit 5).

Officer Matt Blackwell of the Greenwood Police Department responded to a call to

the storage facility to find Gaines and Mitchell present. Officer Blackwell spoke with Mitchell, who admitted he needed money and was scrapping metal. Mitchell claimed he contacted Exit Realty and they gave him permission to take the metal. Mitchell admitted he had been taking metal from the yard for weeks. Officer Blackwell proceeded to call Lieutenant Crisp. Tr. pp. 96-99.

Lieutenant Jeff Crisp testified that he arrived at the scene and Officer Blackwell informed him that Gaines saw Mitchell loading property on Mitchell's trailer and that Mitchell claimed he received permission from Exit Realty. Lieutenant Crisp noticed an Exit Realty sign on the back side of the property. Lieutenant Crisp called the realty company and discovered they had not given Mitchell permission. Further, the realty company did not have a listing for the property. Tr. pp. 126-128. When confronted, Mitchell changed his story and claimed he called the realty company but did not get an answer, so he went on the property and took metal anyway. Tr. pp. 128-129. Mitchell complied with the lieutenant's command to unload the stolen property, and Mitchell then drove his vehicle to the police station. Tr. pp. 129-130. Subsequently, Mitchell gave a statement to law enforcement. Mitchell claimed he decided the property was abandoned and went to the property several times over a four-day period to take metal. Tr. pp. 132-133.

Lieutenant Crisp explained why Mitchell would know he did not have permission to haul away the metal:

> When he asked for permission he gave me the state of mind that he knew he did not have the right to be on the property. If you know you got to call and ask for permission to be on the property, you know you don't have a right to be there. So when he said he called and asked for permission then I found

> he didn't, that gives more that he was able to lie to us about being on the property, follow up investigation and he knew from himself by not getting permission and knowing to ask for permission for entering the property that he shouldn't have been there in the first place.

Tr. p. 138, lines 1-11.

Virginia Calvert, who is employed at Harvley's Scrap Metal, authenticated several tickets for scrap metal that Mitchell sold to the scrap company. Tr. pp. 110-113; State's Exhibits 8-12. Based on these tickets, Mitchell was paid a total of $973.80 by Harvley's for stolen metals.

ARGUMENT

I.

The trial court did not err in denying directed verdict where Appellant stole metal from real property owned by victim and the metal belonged to the company owned by victim; therefore evidence was sufficient for the jury to determine that Appellant stole the metal from another.

Mitchell claims the trial court should have granted directed verdict because the owner of the stolen metals was Synehi Castings, Inc., and not Gaines. The indictment alleged the owner was Gaines. Gaines runs Synehi Castings, Inc. and owns the real property from which the stolen property was taken. Tr. p. 44, line 24 – p. 45, line 7; p. 50, lines 1-14. Mitchell stole the property and who he stole it from is not an element of the offense.

Larceny is the taking and carrying away the goods of another. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979). "It is essential that the stolen goods be owned by someone other than the thief, but it is not ordinarily essential that the thief should know who the owner is." State v. Sweat, 221 S.C. 270, 273, 70 S.E.2d 234, 235-36 (1952).

"Larceny involves the felonious taking and carrying away of the goods or things personal of 'another.' It is essential, therefore, that the goods taken be owned by someone other than the thief or in the possession of someone not the accused, having, as against the accused at least, the right to those goods." 50 Am.Jur.2d Larceny § 23. "[T]he key is the right of possession superior to that of the taker. The property taken need not be owned by a certain person; it is only necessary that the property did not belong to the defendant." Id. Georgia is sagely intolerant of arguments akin to the one Mitchell makes: "[T]hose who steal will not be permitted to raise nice and delicate questions as to the title of that which is stolen.

. . . So far as the thief is concerned, he cannot question the title of the apparent owner." Bell v. State, 576 S.E.2d 876 (Ga. 2003). "Larceny is not limited to taking property away from the person who holds title to that property, but also includes taking property from a person who has rightful possession and control of the property." People v. Sheldon, 527 NW.2d 76, 77 (Mich. Ct. App. 1995). Our Supreme Court observed that "ownership of property stolen from the possession of a bailee may be laid either in the bailor or the bailee, or it may be laid in both bailor and bailee, in separate counts." Sweat, at 274, 70 S.E.2d at 236.

"If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). For purposes of reviewing the denial of directed verdict, the appellate court "views the evidence and all reasonable inferences in the light most favorable to the State." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).

In the instant case, Gaines owns the company and owns the land where the metals were stored. Whether as owner of the company owning the stolen metals, or as bailee of the metals on the company's behalf, Gaines' ownership interest was superior to Mitchell the thief. The trial court did not err in denying directed verdict in favor of the thief.

II.

Appellant failed to move for directed verdict on the basis of value and did not preserve the issue that there was insufficient evidence that the stolen items were valued between $1,000 and $5,000; further, evidence supports the jury's verdict.

Mitchell contends that the trial court should have granted directed verdict on the charge of larceny between $1,000 and $5,000 because the only evidence was that the value was either in excess of $5,000 or less than $1,000.[1] This issue was not timely raised. At trial, there was no motion for directed verdict as to value and no exception to the instructions the trial court gave to the jury. Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Jordan (finding because the issue was not raised as a ground for directed verdict below, the argument that the trial court erred in not granting a directed verdict because the proof showed the commission of obtaining property by false pretenses rather than breach of trust with fraudulent intent was not considered).

Mitchell did not make this argument until after the verdict when he requested a judgment for acquittal. Mitchell claimed he raised the subject in chambers. The trial court noted no objection was made regardless of the in-chambers discussion. Tr. p. 217. Accordingly, Mitchell's failure to make an on-record objection waives the issue for appeal.

[1] At the time, larceny greater than $5,000 was punishable by up to ten years imprisonment, and larceny

York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997) (objection made during an off-record conference which is not made part of the record does not preserve the question for review).

A judgment NOV is not a proper motion in a criminal case. In a criminal case, the only way to contest the sufficiency of the evidence post-trial is to move for a new trial. State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002) (motion for new trial is only available post-trial remedy for insufficient evidence; JNOV is a civil trial motion); State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal.").

Regardless of the question of preservation, the evidence supports the verdict. While evidence supported a value in excess of $5,000, evidence was also presented that some of the metal was sold as scrap for a total of $973.80 from previous days' thefts and in addition, more metal was already loaded on Mitchell's trailer. A juror might reject Gaines' valuation of the metal, but decide that the amount on the trailer in addition to the scrap metal easily exceeded a thousand dollars. Further, the metals were purchased in 2008 and were left outside at the time of theft. R. at ___ (State's Exhibit 2). The jury might have decided to factor in possible depreciation.

The Constitutional Court of Appeals rendered the following opinion roughly two hundred years ago:

> The only question in this case, in addition to the one taken in the first case, is, whether the jury can find a person guilty of petit larceny, where the property stolen is proved to be of greater value than twelve pence. However absurd it may

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greater than $1,000 by up to five years imprisonment. S.C. Code Ann. § 16-13-30 (Supp. 2009).

> appear, that a jury who are sworn to determine a case according to evidence, should be authorized to find goods stolen of less value than twelve pence, when all the witnesses swear they are of much greater value; it is what Judge *Blackstone* calls a pious perjury, which they have been indulged in until it has become the law of the land. The principle has been too long established to be now called in question, and, therefore, a new trial must be refused.

State v. Bennet, 5 S.C.L. 515 (1815) (italics in the original). Perhaps one way to interpret the opinion is that, at least when a lesser offense is charged without objection, the jury of laymen have within their common experience and expertise the ability to ascertain a fair value of a stolen item between two opposing views of evidence. In the instant case, they may have not been willing to accept the high valuation offered by Gaines, but recognized a value in excess of the minimum scrap value offered. See Saylor v. Commonwealth, 214 S.W. 826, 826 (Ky. Ct. App. 1919) ("In cases like this, where the jurors are familiar from personal observation and common knowledge with the value of property stolen, and there is reasonable room for difference of opinion as to the value, they need not accept as true the statements of witnesses, but may bring to their assistance in arriving at the value of the property their own knowledge, drawn from experience and observation, and reach a different conclusion from that expressed by the witnesses.").

Additionally, trial counsel through argument and cross-examination challenged Gaines' assertion of value, questioning why the metal was moved to a less secure location or why it was left outside in the elements.[2] See State v. Westfall, 710 S.W.2d 408 (Mo. Ct. App. 1986) (finding that although victim testified he bought the air conditioning unit for $250 five years prior to theft, evidence of the unit's age and that it had never run was

sufficient to require the trial court to instruct the jury on the lesser offense of stealing property under $150). Accordingly, evidence supports the verdict.

[2] Tr. pp. 192-193.

III.

The trial court did not err in its instructions to the jury, the trial court properly advised the jury on the defense of mistake of fact, and there was no evidence that the property was abandoned.

Mitchell claims the trial court erred in giving his request to charge on mistake of fact and good faith. However, the trial court substantially charged the correct law and made no error. Further, no evidence existed that the property was abandoned.

Abandoned property is property "cast away" by its owner, who no longer intends "to have any interest therein." Wharton's Criminal Law § 377 Abandoned property. "The first person to take possession acquires ownership. Therefore, abandoned property cannot be the subject of larceny." Id. However, there has to be some basis to believe the property is abandoned, and that is what is lacking in the instant case – evidence that thousands of pounds of metal were "cast away." In Sikes v. State, 28 S.W. 688 (Tx. Crim. App. 1894), two turbine water wheels were left by their owner on a railroad platform for a year and were later moved by the owner to the right of way for nine years. Sikes procured an agent of a railroad company to secure the wheels and ship them to him in Houston. The Texas court rejected Sikes' argument that the property was abandoned, reasoning as follows:

> Property may be said to be abandoned when the owner "throws it away," or when it is voluntarily left or lost, without any intent or expectation to regain it. The property in this case had not been abandoned. The property was of such a character that it could not be carried with the person of the owner. It could be left or placed by him wherever most convenient, without his losing his rights thereto.

Id. at 689.

The same month, the Texas Court of Criminal Appeals dealt with yet another claim of abandonment in Borer v. State, 28 S.W. 951 (Tx. Crim. App. 1894). Borer argued that "cattle at large, and not in their accustomed range, are not deemed in law to be in possession of their owner and while thus running at large are not the subject of theft." Id. at 951. The Texas court considered this "a startling proposition" that "would authorize thieves to steal all stock that should happen to leave their accustomed range." Id.

As in Sikes, Gaines should be allowed to place thousands of pounds of metal on his own real property without threat of it being carried away, especially when he has surrounded the property with a fence **topped with barbed wire**. In the instant case, no evidence suggests that the items were abandoned. Larceny's prohibition exists to protect the rights of property owners and Mitchell's proposition is as startling as the one in Borer. Under Mitchell's argument, any thief would be entitled to the jury instruction if merely claiming they thought whatever they stole was abandoned, even if the item was found on a hanger in a department store. Reason becomes abandoned under this view of the law.

Regardless, the trial court's instruction was sufficient. The trial court instructed the jury as follows:

> Now, Mr. Foreman, ladies and gentlemen of the jury, the defendant has raised the defense of mistake of fact. The State must prove beyond a reasonable doubt that the defendant intended to commit grand larceny. However, where a person, **in ignorance or honest mistake** as to a fact, commits an act which but for the mistake would be a crime there is no criminal intent and the person cannot be found guilty of the crime.

Tr. p. 207, lines 24 – p. 208, line 6 (emphasis added). The trial court had already instructed

the jury at this point that, "It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed." Tr. p. 206, lines 23-25. The jury instructions were sufficient and the trial court did not err. A jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990); State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). Based on the trial court's instructions, if the jury believed that Mitchell really believed the property was abandoned, they would have acquitted him of the charge. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (Jurors are presumed to follow the trial court's instructions). Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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November 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

JOVAN A. MITCHELL, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Carmen V. Ganjehsani, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 20th day of November, 2014.

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ALAN WILSON
ATTORNEY GENERAL

November 20, 2014

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State v. Jovan A. Mitchell**
Appellate Case No: 2013-002162

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

Megan E. Harrison

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: Carmen V. Ganjehsani, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)

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