STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2013-001035

THE STATE,

Respondent,

v.

SHAWN J. BURRIS,

Appellant

FINAL BRIEF OF RESPONDENT

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I. The circuit court properly denied Appellant's directed verdict motion because the evidence that the pipe at issue was copper pipe was undisputed.

II. The circuit court properly overruled Appellant's objection to testimony regarding the dollar amount of damages caused by cutting the copper pipes of the Bi-Lo refrigeration unit because Appellant opened the door to the testimony during his cross-examination of the witness by suggesting the store had inflated the amount of damages, and any error in allowing the testimony was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

In July, 2012, the Charleston County Grand Jury indicted Appellant Shawn J. Burris, on one count of unlawful obtaining of nonferrous metals with $10,000 or more in damages, and one count of possession of tools of a crime arising from the theft of copper pipes from the rooftop refrigeration unit of a Bi-Lo grocery store on April 26, 2012. The case was called for a jury trial on April 25, 2013, before the Honorable Kristi Lea Harrington, Circuit Court Judge. Appellant appeared *pro se*, with stand-by counsel sitting with him throughout the trial.

Prior to trial, the circuit court indicated Appellant was not waiving arraignment on the indictments, so the entire indictments would be read during the arraignment, and asked the State if was alleging damages in the amount of $10,000 or more. The State informed the court it did not intend to "get into the actual specific damage, the cost of it, until the sentencing phase." (Trial Transcript [TT], p. 11; Record on Appeal [R.], p. 11).

In response to a subsequent motion to exclude testimony regarding the amount of damages, the State reiterated it did not intend to get into the specific amount of damages until sentencing, but asserted the fact there was damage to the store was part of the nonferrous metals offense. The circuit court noted the State was required to show damage occurred, which necessary required showing some monetary costs involved, and ruled the State would be allowed to present evidence to establish it. (TT, pp. 40-43; R., pp. 22-25).

A Bi-Lo employee testified he was working the nightshift on April 26, 2012, heard an unusual noise on the roof, which sounded like something banging against a metal pipe. He called the store security company, which contacted law enforcement.

When police officers arrived, he gave them access to the roof through a hatch inside the store. (TT, pp. 64-70; R., pp. 46-52).

Officer Tony Bunch of the Charleston Police Department testified he responded to a dispatch call at the Bi-Lo at approximately 5:00 a.m. on April 26, 2012. When he arrived, he walked around the building and saw a man on the roof, who appeared to be moving from one side to the other like he was stacking something. Officer Bunch radioed for assistance and helped establish a perimeter. He stated officers went inside and up to the roof, where they found Appellant, some tools and a duffle bag, and some copper piping that had been cut. (TT, pp. 78-84; R., pp. 60-66).

Officer Anthony Doxey of the North Charleston Police Department testified he also responded to the call at Bi-Lo regarding someone on the roof. After other officers arrived and secured the scene, he and another officer went inside and accessed the roof through a maintenance hatch at the back of the store. When they came out onto the roof, they saw a stack of copper pipe that had been cut from the store's refrigeration unit, and found Appellant laying underneath an air conditioning unit. Rather than voluntarily coming out when ordered to do so, Appellant began crawling away from the officers, and they had to drag him out. Appellant was wearing gloves, and a backpack, containing a hacksaw, a can of spray paint and some vise grips, was laying on the roof a few feet from where he was hiding. No one else was on the roof. (TT, pp. 104-116, State's Exhibits 4, 5, 6 [Photos]; R., pp. 86-98).[1]

Officer Robert Coker of the North Charleston Police Department testified he was the crime scene investigator called to the Bi-Lo after Appellant was apprehended. He

[1]These exhibits have been transported to the Court for consideration.

photographed the scene, including photographs showing the pieces of cut copper pipes. He also stated a camera and motion sensor on the roof were sprayed over with red paint, and a can of red spray paint was found in a bag on the roof. Tools found in blue backpack were consistent with the cuts on the copper pipes, and a blue duffle bag found on the roof was large enough to hold cut copper pipes. (TT, pp. 135-150; R., pp. 117-132).

The Bi-Lo store manager testified there was "massive amounts of damage" caused by Appellant cutting the copper pipes from the refrigeration unit. He stated the overall effect to the store was "catastrophic." (TT, pp. 195-202; R., pp. 177-184).

On cross-examination, Appellant questioned the manager about some invoices regarding the damages Bi-Lo loss prevention officers purportedly provided to law enforcement the day Appellant was arrested, and indicated some of the documents were not even related to the Bi-Lo store in question. (TT, pp. 203-210; R., pp. 185-192). On re-direct, the State asked about the dollar amount of damages to his store, and over Appellant's objection, the manager testified the total damages were approximately $189,000. On re-cross, Appellant asked the manager if Bi-Lo was "just trying to make up for losses from other stores." (TT, pp. 210-213; R., pp. 192-195).

After the State rested its case, Appellant moved for a directed verdict on the ground the State failed to put up expert testimony indicating the cut pipes were nonferrous metals, or that they did not contain iron. In denying the motion, the circuit court noted the police officers' testimony there were copper pipes cut from the refrigeration unit stacked up on the roof when they apprehended Appellant. (TT, pp. 214-218; R., pp. 196-200).

The jury convicted Appellant of both charges, and the circuit court sentenced him to concurrent terms of ten years incarceration on the nonferrous metals conviction, and five years incarceration on the tools conviction. (TT, p. 253; R. p. 228). This appeal followed.[2]

[2]Appellant does not challenge on appeal the possession of tools of a crime conviction.

ARGUMENT

I. The circuit court properly denied Appellant's directed verdict motion because the evidence that the pipe at issue was copper pipe was undisputed.

Appellant asserts the circuit court erred in denying his directed verdict motion because the State failed to prove through expert testimony that the metal piping at issue was copper, and did not contain a significant amount of iron. The evidence was undisputed, however, that the pipes were copper refrigeration pipes.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008). In reviewing the denial of a directed verdict motion, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State, and the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliland, 402 S.C. 389, 741, S.E.2d 521, 525 (Ct. App. 2012). If there is any direct evidence, or substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Brown, 740 S.E.2d at 495; State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005); Gilliland 741 S.E.2d at 525.

In denying Appellant's directed verdict motion, the circuit court cited police officers' testimony that when they apprehended Appellant, they saw copper pipes stacked on the roof that had been cut from the store refrigeration system, and Appellant had tools in his possession that could be used to cut copper. The court also cited the store manager's testimony regarding the damage caused by the cut copper pipes, which put

approximately 60% of the store's inventory in jeopardy. (TT, pp. 214-218; R., pp. 196-200).

Appellant misconstrues the language of the applicable statute regarding nonferrous metals. He contends the statute requires proof the copper pipes did not include a significant quantity of iron or steel. Read in context, however, the statute expressly defines copper pipes as nonferrous metals.

"Nonferrous metals" are defined as "metals not containing significant quantities of iron or steel, **including**, but not limited to, copper wire, copper clad steel wire, **copper pipe**,. . . ." S.C. Code Ann. §16-11-523(A) (Supp. 2013) (emphasis added). Thus, by statutory definition, copper pipe is a "nonferrous metal" that does not contain significant quantities of iron or steel.

Viewed in the light most favorable to the State, the undisputed evidence in this case established the pipes cut from Bi-Lo's refrigeration unit were copper pipes. The circuit court's denial of Appellant's directed verdict motion is amply supported by the record, and should be affirmed.

II. The circuit court properly overruled Appellant's objection to testimony regarding the dollar amount of damages caused by cutting the copper pipes of the Bi-Lo refrigeration unit because Appellant opened the door to the testimony during his cross-examination of the witness by suggesting the store had inflated the amount of damages, and any error in allowing the testimony was harmless beyond a reasonable doubt.

Appellant contends the circuit court erred in allowing the Bi-Lo manager to testify to the actual amount of damages to the store. Appellant opened the door to the testimony at issue during his cross-examination of the store manager. Further, any error in admitting the testimony was harmless.

The admission or exclusion of evidence is committed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 656 S.E.2d 359, 368 (2008); State v. McEachern, 399 S.C. 125, 731 S.E.2d 604, 609 (Ct. App.2012). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. McEachern, 731 S.E.2d at 609.

A. Opening the Door

When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); McEachern, 731 S.E.2d at 610. "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 663 S.E.2d 357, 360 (Ct.App. 2008).

The indictment alleged Appellant's actions caused $10,000 or more in damages, which made the offense a felony under S.C. Code Ann. §16-11-523(C)(2) (Supp. 2013) (violation of the statute is a felony if the amount of damages is $5000 or more). During the pre-trial hearing, Appellant asserted Bi-Lo submitted a false statement regarding the store damages, and moved to exclude testimony regarding the amount of damages. The State indicated it did not intend to go into the specific amount of damages until sentencing, but did plan to prove some amount of damages as part of the *res gestae* of the offense. The circuit court ruled the State could present evidence the copper pipe was cut, mutilated or otherwise injured, which necessarily included some cost associated with the damage. (TT, pp. 40-43; R., pp. 22-25).

During the store manager's direct examination, the State did not elicit any testimony regarding the specific amount of damages, but merely asked the manager to describe the damages, the steps the store undertook to mitigate the damages, and the overall effect on the store, which the manager described as "catastrophic."[3] On cross-examination, however, Appellant referenced "invoices" Bi-Lo's loss prevention officers submitted to law enforcement that were purportedly used at Appellant's bond and preliminary hearings. After the manager testified some of the documents Appellant showed him related to a different store, Appellant asked why the documents were presented in the case against him, and the manager testified he did not know what

[3] The State does not concede, and the circuit court did not rule, evidence of the specific amount of damages Appellant caused was irrelevant to the State's case-in-chief, or unduly prejudicial to Appellant. The indictment alleged damages of $10,000 or more, and therefore, the State had to put in some evidence indicating the damages were substantial. The State merely indicated it did not intend to go into the specific amount until sentencing, and complied with that stated intention through the store manager's direct examination.

invoices the loss prevention officers submitted. Appellant then asked questions about the dates work at the store occurred, clearly implying some of the work was not related to removal of the copper pipes. (TT, pp. 195-210; R., pp. 177-192).

On re-direct, the State asked the manager about the dollar amount of damages to the store. Over Appellant's objection, the manager testified the damages were approximately $189,000, and gave a list of things included in that amount. On re-cross, Appellant asked the manager if Bi-Lo was just trying to "make up for losses at other stores." (TT, pp. 210-213; R., pp. 192-195).

By questioning the veracity of Bi-Lo's damages submissions, Appellant clearly attacked the store manager's credibility regarding the "catastrophic" damages sustained as a result of Appellant's actions. At a minimum, this tactic opened the door to testimony regarding the actual amount of damages, and what was included in it, to show the store manager's testimony regarding the "catastrophic" damages was credible and valid.

Appellant asserts '[t]he judge and the state violated their word to [Appellant]." Contrary to this assertion, the circuit court never ruled the specific amount of damages was inadmissible, and as indicated pre-trial, the State did not present evidence of the specific amount during the store manager's direct testimony. Appellant's implication the store fabricated the amount of damages changed the situation, the State had a right to elicit testimony in response, and Appellant cannot claim he was deceived in any way.

B. Harmless Error

Assuming for purposes of argument only that admitting the testimony at issue was improper, any error was harmless beyond a reasonable doubt. Error is harmless where it could not have reasonably affected the result of the trial, and appellate courts will not set aside judgments due to insubstantial errors not affecting the result. Way v. State, ___

S.C. ___, ___ S.E.2d ___, 2014 WL 4347510, *4 (S.C. Sup. Ct. 2014) The materiality and prejudicial character of the error must be determined from its relationship to the entire case. *Id.*

"It is unlawful for a person to willfully and maliciously cut, mutilate, deface, or otherwise injury any personal or real property, including any fixtures or improvements, for the purpose of obtaining nonferrous metals in any amount." S.C. Code Ann. §16-11-523(B) (Supp. 2013). As noted above, Appellant was indicted for causing $10,000 or more in damages by cutting, defacing, or otherwise injuring the Bi-Lo store property for the purpose of obtaining nonferrous metals.

The indictment was read in front of the jury panel because Appellant requested formal arraignment before the case proceeded to trial. (TT, pp. 11-13, 17-18; R., pp. 11-13, 17-18). Therefore, the jury knew the alleged damages were $10,000 or more, and the store manager testified the effect on the store was "catastrophic."

Regardless of the damages amount, the jury had to determine if Appellant willfully and maliciously caused the damages for the purpose of obtaining nonferrous metals. Whether the damages were $1, $10,000, or $189,000, the issue before the jury did not change, and any error in admitting testimony regarding the actual amount of damages was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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October 29, 2014

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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 Informaiton in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing 2 copies in the United States mail, postage prepaid, addressed to:

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

This 29th day of October 2014.

Sally B. Ellison

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