STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of General Sessions

The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2016-001406

THE STATE,

Respondent,

v.

BRANDEN JOSHUA KIRBY,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

141 N. Main St.
Sumter, SC 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

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I.

The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during Appellant's trial, when viewed in a light most favorable to the State as required, could induce a reasonable juror to find Appellant guilty of possession of burglary tools.

STATEMENT OF THE CASE

Appellant was indicted during the July 2013 term of the Grand Jury for Williamsburg County for grand larceny and possession of burglary tools (2013-GS-45-0218). Appellant was tried *in absentia* on October 20, 2014 in Kingstree, South Carolina. At the conclusion of trial, the jury found Appellant guilty of possession of burglary tools and not guilty of grand larceny[1]. Because Appellant absconded and did not appear for trial, the Honorable Clifton B. Newman sealed Appellant's sentence. On June 29, 2016, Judge Newman unsealed Appellant's sentence and sentenced him to imprisonment for a term of five years. Following a motion to reconsider the sentence made by Defense Counsel, Judge Newman's amended Appellant's sentence to imprisonment for a term of four years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

[1] Interestingly, the trial judge asked the jurors whether they would have convicted Appellant of petit larceny if they had been given that option and all jurors raised their hands in the affirmative. Tr. p. 166.

STATEMENT OF FACTS

In April of 2013, Michael Lane was informed by a family member that some items stored on a piece of property Lane inherited from his grandfather had been stolen. Tr. pp. 74-75. Lane's brother-in-law advised him he believed someone may come back to steal some scrap metal that was stacked towards the back side of the property. Tr. p. 75. Lane later contacted Chief Michael Graham of the Greeleyville Police Department and asked him to watch the property for him on a particular night because Lane himself was unable to watch it. Tr. p. 77. Chief Graham recalled:

> He called me and said that he had had some trouble on his property. Some people had moved some stuff around. He thought they were going to come back and try to pick up some metal type items. He had people watching the property, and he wanted to know if I would watch it because he was getting different people to watch it at different times, and I told him I would be glad to do it.

Tr. p. 50. Chief Graham subsequently stationed himself in the yard of a home across the street from Lane's property. Tr. pp. 51-52.

Around an hour after arriving, Chief Graham noticed flashlights moving around the back edge of the property. Tr. p. 52. Chief Graham called 911 and informed the operator he was checking suspicious activity on a property he was watching. Tr. p. 52. Chief Graham walked through the tree line of the property in order to ascertain what the intruders were doing and heard a clanging noise which he testified sounded like metal banging together. Tr. p. 53. Chief Graham then observed a truck drive down a dirt road and stop behind the house. Tr. p. 53. Individuals then got out of the truck and Chief Graham heard, "more metal clanging together like they were loading something on the back." Tr. p. 53.

Chief Graham then contacted the Sheriff's Office and was told that officers were still ten to fifteen minutes away. Tr. p. 53. Chief Graham implored the other officers to hurry, as it looked like the intruders were about to leave. Tr. pp. 53-54. The intruders subsequently got into the truck and turned on the engine and headlights. Tr. p. 54. Chief Graham then stepped out into

the road and pointed his flashlight at the intruders and told them, "police, cut your vehicle off." Tr. p. 54. The vehicle then revved up "real high" and started driving towards Chief Graham. Tr. p. 54. Officer Graham then told the vehicle to stop and identified himself as a member of the Sheriff's Department. Tr. p. 55. The vehicle continued traveling towards Chief Graham, prompting him to fire his gun into the left headlight of the vehicle. Tr. pp. 54-55. Chief Graham walked up to the driver's side of the vehicle and observed the passenger diving through the passenger's side window. Tr. p. 55. Chief Graham was subsequently able to handcuff the vehicle's driver and passenger. Tr. p. 55.

After securing the suspects, Chief Graham noticed there was a trailer connected to the truck that was filled with "some real heavy pieces of metal." Tr. p. 59. Chief Graham also found a set of bolt cutters, an ax, a chainsaw, and a welding machine inside the vehicle. Tr. pp. 58-60. On cross-examination, Defense Counsel asked Chief Graham whether any locks on Lane's property had been cut. Tr. p. 73. Chief Graham responded, "No ma'am, but there was a cable across the road direction they was coming toward when I stepped out to stop." Tr. p. 73. Chief Graham identified the passenger in the truck on the night of the incident and testified the individual told him his name was Dennis Leroy Kinon.[2] Tr. pp. 66-67.

At around 1:00 AM that evening, Chief Graham called Michael Lane and told him he had two suspects in custody and asked him to come to the property. Tr. p. 78. Lane testified that he did not know Tim Cannon or Branden Kirby and that he had not given anyone permission to be on his property that night. Tr. p. 79. Lane observed "a lot of heavy angle iron that belonged to my uncle and a part of a saw mill track that my grandfather owned and some rims and other miscellaneous items" on the trailer. Tr. p. 80. Lane described the material as "good iron." Tr. p. 90. Lane testified that the scrap metal was worth around $2,800. Tr. p. 83.

[2] This individual as later determined to be Appellant.

When asked to describe how the scrap metal was stored, Lane stated:

> The angle iron was behind a ditch and there were trees around it with vines growing over the heavy angle iron that had been stacked out a while. It was in good shape. The saw mill track was up close to the old house where my grandmother and grandfather lived, and it had grass and kind of stuff but it was sticking up so they could see the front part of it so, you know, it was kind of grown over somewhat, but I assume.

Tr. p. 85. After the incident, Lane observed "vines and limbs **cut** and, you know, had been cleaned up around it where they could load it." Tr. p. 86.

Tim Cannon testified at trial. Tr. pp. 99-112. Cannon previously pled guilty to drug possession and grand larceny charged stemming from the incident at Lane's property. Tr. pp. 99-100. Cannon admitted he and Appellant went to an abandoned farm and started loading scrap metal onto their trailer. Tr. p. 100. Cannon stated he was the driver of the vehicle and Appellant was the passenger. Tr. p. 101. Cannon recalled that while they were loading the scrap metal, a man came running up with a flashlight and pistol and, "we jumped in the truck to leave and he shot at my truck, shot at my headlights and I stopped. And he come running to the truck was a Williamsburg County Sheriff's Officer and I cut the truck off and he got me out, put me on the ground, and arrested us." Tr. p. 101. Cannon testified Appellant told law enforcement that his name was Dennis Kinon. Tr. p. 101. Cannon clarified that the name given to law enforcement was fake, as his accomplice was Appellant, not a mysterious third party named Dennis Kinon. Tr. p. 102. Cannon noted that he and Appellant intended to sell the scrap metal. Tr. p. 103. Cannon asserted he and Appellant did not use the tools found in the back of the truck on the evening of their attempted theft. Tr. p. 103. Cannon testified:

> Actually, those tools, well, along with the stealing we were doing, you know, I actually had a legitimate kind of business going, you know. I would post on Craig's List yard cleanup, or, you know, any kind of removal debris or anything like that. And actually, those tools, **some** of those tools were purchased, you know, legally for legitimate, you know, work.

Tr. p. 103.

At the conclusion of the State's case, Defense Counsel moved for a directed verdict. Tr. pp. 112-13. The trial judge denied the motion, finding:

> Well, if the evidence conflicts then it's a jury question. If the – Mr. Lane testified that there is evidence that the land was cleared and that somehow or another assist in committing the crime, then it makes it a jury issue on that point. And Mr. Brown is correct, the hands of one is the, hand of one is the hand of all and if either one of them used the tool to assist in committing the crime, then the jury could determine that their (sic) burglary tools. And certain my first inclination was to agree with you that burglar tools is just, you know, just people just, I guess any and everything can probably be called burglary tools if they are in possession of someone committing a crime, if there are no evidence, if there's no evidence that those tools are being used to commit the crime. But if there is evidence that they, direct or circumstantial evidence, that they were used to assistant in any way in committing a crime, then it can be burglary tools so I think it's a jury issue, however slight perhaps, and I deny the motion for directed verdict.

Tr. pp. 115-16. After further argument by Defense Counsel concerning the sufficiency of the evidence[3], the trial judge stated, "I understand your argument. Maybe you'll win that count with the jury, but I'm gonna submit it to the jury for their decision." Tr. p. 117.

After the jury found Appellant guilty on the possession of burglary tools charge, Defense Counsel moved for a judgment notwithstanding the verdict. Tr. pp. 163-64. The trial judge denied Appellant's motion, finding:

> Well, the jury was given the case based on the testimony of the victim that it appeared the area had been cleaned off, and the jury was given the charge on direct and circumstantial evidence which could easily lead them to conclude that the tools were used or were intended to use in assisting in the commission of the crime. Pictures aren't necessary and testimony is sufficient if believed by the jury, and I respectfully deny the motion.

Tr. p. 165.

[3] Interestingly, it appears Defense Counsel referenced State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014), in his argument and noted the present case is "much like" that case. Importantly, Appellant's case was tried prior to the Supreme Court's reversal of the decision of the Court of Appeals in that case. See State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016) (holding the circumstantial evidence presented by the State could induce a reasonable juror to find Pearson guilty).

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during Appellant's trial, when viewed in a light most favorable to the State as required, could induce a reasonable juror to find Appellant guilty of possession of burglary tools.

Appellant asserts the trial judge erred in denying his motion for directed verdict because the State failed to present substantial circumstantial evidence establishing either (1) Appellant possessed the burglary tools or (2) that Appellant had any intent to use the tools in the commission of a crime. In support of this contention, Appellant raises several criticisms of Michael Lane's testimony, calling it "uncorroborated," and urges this Court to consider alternative hypotheses and weigh Lane's testimony against the testimony of Tim Cannon, who testified the tools were not used on the evening of the theft. To the contrary, the State presented substantial circumstantial evidence that could induce a reasonable juror to find Appellant guilty of the charged offense.

The South Carolina Code provides:

> It is unlawful for a person to make or mend, cause to be made or mended, or have in his possession any engine, machine, tool, false key, picklock, bit, nippers, nitroglycerine, dynamite cap, coil or fuse, steel wedge, drill, tap-pin, or other implement or thing adapted, designed, or commonly used for the commission of burglary, larceny, safecracking, or other crime, under circumstances evincing an intent to use, employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same are intended to be so used.

S.C. Code Ann. § 16-11-20. When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a

reasonable doubt." State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The United States Supreme Court has noted:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (second emphasis added) *quoted with approval in* State v. Pearson, 415 S.C. 463, 471 n.2, 783 S.E.2d 802, 806 n.2 (2016).

If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

In Bennett, the South Carolina Supreme Court considered a case where the State contended this Court erred in reversing the trial judge's denial of directed verdict by weighing the evidence and considering alternative hypotheses. 415 S.C. 232, 781 S.E.2d 352. In examining the decision of this Court, the Supreme Court concluded this Court erroneously weighed the

evidence and reversed Bennett's conviction based on its belief that there was a plausible alternative theory inconsistent with Bennett's guilt. Id. at 236. The Supreme Court clarified that analysis was, "contrary to our jurisprudence and misapprehends the court's role in making this determination." Id. In reversing this Court, the Supreme Court concluded that, in examining the evidence in the light most favorable to the State, the evidence, "could induce a reasonable juror to find Bennett guilty." Id. at 237.

In the current case, Appellant urges this Court to weigh the evidence and consider alternative hypotheses in order to find the State's evidence insufficient. For example, Appellant argues that, "common sense would dictate that the mere moving of the items would make it appear that the vines and branches were **broken** or **torn**." Br. of Appellant p. 9 (emphasis added). However, as discussed in Bennett, there is no requirement that the State present evidence sufficient to exclude every other hypotheses of Appellant's guilt. The evidence presented at Appellant's trial was sufficient to induce a reasonable juror to find Appellant guilty. Moreover, the evidence presented was not that the branches were "broken" or "torn." Lane specifically testified the limbs and vines were "cut." There is an important distinction between a limb that has been cut and one that is broken or torn.

Viewing the evidence in the light most favorable to the State, the following substantial circumstantial evidence establishing Appellant's guilt for the offense of possession of burglary tools was presented: (1) Appellant and Cannon were caught "red-handed" by Chief Graham stealing scrap metal from Lane's property and Cannon admitted he and Appellant intended to steal the scrap metal and later sell it; (2) Chief Graham found a set of bolt cutters, an ax, a chainsaw, and a welding machine inside a truck in which Appellant was a passenger; (3) There was a cable barrier across the road in the direction Appellant and Cannon were traveling at the

time Chief Graham stopped them; (4) Michael Lane, who owned the property and thus was intimately familiar with the land and materials on it, testified the scrap metal on the property was overgrown with vines and limbs which had been **cut** by Appellant and Cannon in their attempt at removing the goods. The State thus presented evidence showing that Appellant and Cannon were in possession of the burglary tools at the time Chief Graham thwarted their escape, Appellant and Cannon used the tools to cut vines and debris from the scrap metal, and Appellant and Cannon were traveling in a direction which would have necessitated the use of the bolt cutters in order to get through a cable fence.

In arguing the State's evidence was insufficient, Appellant places great reliance on the testimony of Ben Cannon where he testified he and Appellant did not use the tools on the night of the theft and that "**some** of those tools were purchased, you know, legally for legitimate, you know, work." In emphasizing Cannon's testimony, Appellant is simply imploring this Court to weigh the evidence and believe one witness over another. Cannon's testimony that **some** of the tools were purchased for legitimate work and that they did not use them on the evening of the robbery merely created a question of fact for the jury where the jury must determine which witness they find credible.[4]

The present case is very similar to State v. Nicholson, 221 S.C. 472, 71 S.E.2d 306 (1952). In Nicholson, the defendant consented to a search of his car where officers discovered tools that were "commonly used for the commission of burglary and larceny and usually found about the scene of safe-cracking." Id. at 474. The defendant made a statement "to the effect that he and his companion owned the tools and had been timely apprehended because they were,

[4] Importantly, Cannon did not testify that he and Appellant had no intent to use the tools on the evening of the theft. Cannon simply testified the tools were not used. This leaves open the possibility that Appellant and Cannon intended to use the tools to clear the debris but did not ultimately need them, which would still satisfy the intent requirement imposed by S.C Code Ann. § 16-11-20 .

quoting from the testimony of one of the officers, 'fixing to pull some big jobs. . . . fixing to go into the business.'" At trial, the defendant testified that he was in possession of the tools in question because he was employed as an electrician. Id. at 476. The South Carolina Supreme Court affirmed the trial judge's denial of the directed verdict motion, finding that the evidence presented created a question of intent that was for a determination by the jury. Id. As in Nicholson, Cannon claimed to have **some** of the tools for a legitimate purpose, with his stated reason being that he owned a lawn maintenance business. Thus, a reasonable inference is that the remaining tools were **not** for a legitimate purpose. There is also a similar admission of criminal intent, as Cannon admitted he and Appellant were planning on stealing the scrap metal and selling it for a profit. Unlike in Nicholson, however, Appellant and Cannon were actually in possession of the burglary tools when they were committing the crime, which presents a far more severe situation than in Nicholson, where the defendant merely stated his intent to commit "big jobs." As in Nicholson, the evidence presented posed a question of fact for the jury as to whether Appellant possessed the burglary tools and whether Appellant possessed the requisite intent. See also State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("The question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon."). The trial judge, thus, properly denied Appellant's directed verdict motion. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: 
V. Henry Gunter, Jr.
Bar # 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 25, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Williamsburg County
The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No: 2016-001406

THE STATE,

Respondent,

v.

BRANDEN JOSHUA KIRBY,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the 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 his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 25th day of May, 2017.

Anne Mueller

Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

May 25, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Branden Joshua Kirby
Appellate Case No: 2016-001406

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: Laura R. Baer (with two copies)
Ms. Trisha Allen