STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2018-UP-335 (S.C. Ct. App. Filed July 25, 2018)

2014-GS-13-00837

THE STATE,

RESPONDENT,

V.

SAMUEL EDWARD ALEXANDER, JR.,

PETITIONER

APPELLATE CASE NO 2016-000421

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was filed on August 9, 2018 and denied by the Court of Appeals on September 20, 2018. App. 9.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming Petitioner's conviction and sentence, when no substantial circumstantial evidence was offered by the State to prove all of the necessary elements of grand larceny and instead the Court relied on an inference or presumption of fact that because Petitioner was in possession of recently stolen property, there existed enough evidence to submit the case to the jury?

II. Did the Court of Appeals err in affirming Petitioner's conviction and sentence, where the trial court charged the jury that possession of stolen property was enough to show a taking and carrying away of the property in a grand larceny case, where the charge was confusing and not based upon proper statutory language?

STATEMENT OF THE CASE

On April 21, 2015, Petitioner was indicted for grand larceny of goods valued between two thousand and ten thousand dollars. R. 101- 102. He proceeded to trial before the Honorable Roger Henderson in Chesterfield County on February 18, 2016. R. 1. Tonya Copeland-Little represented Petitioner, and Mary Johnson-Lee appeared on behalf of the State.

The jury found Petitioner guilty as indicted, and Judge Henderson sentenced him to the maximum sentence of ten years. R. 100 ll. 10 – 13.

On July 25, 2018, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Alexander, Op. No. 335 (S.C. Ct. App. filed July 25, 2018). App. 1 – 3. Petitioner filed a petition for rehearing on August 9, 2018. App. 4 – 7. The Court of Appeals issued an Order denying the petition for rehearing on September 20, 2018.

This petition for writ of certiorari to the South Carolina Court of Appeals follows.

ARGUMENT

I. The Court of Appeals erred in affirming Petitioner's conviction and sentence, when no substantial circumstantial evidence was offered by the State to prove all of the necessary elements of grand larceny and instead the Court relied on an inference or presumption of fact that because Petitioner was in possession of recently stolen property, there existed enough evidence to submit the case to the jury.

Petitioner purchased a trailer of belongings from Godley Moody Auction and brought it to the home of Julius Butler. R. 48 l. 24 – R. 49, l. 19; R. 55 ll. 11 – 19. Previously, Amanda Stephens had loaded her belongings into a trailer in preparation for travel. R. 17, l. 16 – R. 23, l. 18. After noticing that her belongings and the trailer were missing, she contacted law enforcement. Id.

The trailer which Petitioner had purchased appeared to have contained some of Stephens' belongings, as some of those items were recovered from Petitioner's home which may have been without electricity. R. 26, l. 8 – R. 35, l. 14. Petitioner admitted to being in possession of items which Stephens claimed had been in the trailer, and he cooperated with law enforcement. R. 66, ll. 12 – 18.

At the conclusion of the State's case-in-chief, defense counsel moved for a directed verdict, averring that the State failed to meet every element of the charged offense. R. 67, ll. 8 – 24. The State's response omitted any reference to the asportation requirement of grand larceny and instead focused only on possession. R. 68, ll. 1 – 9.

Defense counsel agreed and noted that the State "certainly offered evidence of possession of stolen goods," but "[t]here's been no evidence that established [Petitioner's] presence at the scene of the crime at the time alleged." R. 67, ll. 18 – 24.

Discussion

Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent. State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985); State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979). To make out the offense of larceny, there must be a felonious purpose. State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960). The taking must be done *animo furandi*-with a view of depriving the true owner of his property and converting it to the use of the offender. Id.

'The 'corpus delicti' in larceny consists of two elements—the loss of the property by the owner and the loss by a felonious taking.' State v. Roof, 196 S.C. 204, 12 S.E.2d 705 (1941); and generally speaking, the term 'corpus delicti' means, when applied to any particular offense, that the specific crime has actually been committed, State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906).

During Petitioner's trial, a total of ten witnesses testified for the prosecution. None of those witnesses offered evidence that Petitioner took or carried away the goods in question. Stephens did not know Petitioner and had not seen him before trial. R. 23, ll. 19 – 22. He would not have had any reason to go by her house. R. 23, ll. 23 – 24. Therefore, at least one element of grand larceny was not present, and the Court should have directed a verdict in Petitioner's favor.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct.App.1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find

the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997).

When a case is built wholly on circumstantial evidence, if the State fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a directed verdict. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "The trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 779 (2011). The State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act". State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). "The [trial] court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

None of the ten witnesses who testified on behalf of the prosecution offered any evidence which placed Petitioner at or near Stephens' home. Petitioner readily admitted to being in possession of Complainant's belongings, but the record does not include any evidence, from law enforcement or otherwise, which indicates that Petitioner was the individual who stole Complainant's belongings and was thereby even potentially guilty of grand larceny.

In State v. Arnold, this Court held fingerprint evidence placing Arnold with the victim on the day of the murder was not substantial and merely raised a suspicion of Arnold's guilt. 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004). In Arnold, the victim's body was discovered off a dirt road in Colleton County. Id. at 388, 605 S.E.2d at 530. The victim was last seen alive three days earlier, when he borrowed a friend's BMW to go to a dentist appointment. Id. One of the State's witnesses testified he had introduced the victim to Arnold. Id. The witness indicated he had

received a message from Arnold to call him at a phone number belonging to Arnold's father, who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. Id. The BMW had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. Id. In concluding that the circumstantial evidence presented by the State was not sufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

Similar holdings can be found in Bostick and Odems, supra. In Petitioner's case, multiple witnesses testified that Petitioner was only in possession of stolen property; no evidence was offered which placed Petitioner at the scene of the crime. Therefore, no evidence existed pertaining to the taking or carrying away of Complainant's property. Petitioner even admitted to being in possession of Complainant's property the month following the theft, which could induce a suspicion of guilt had Petitioner been charged with possession of stolen property. However, he was charged with grand larceny, and there was no evidence which placed Petitioner at the scene of the crime. Due to the non-existence of evidence indicating that Petitioner took or carried away Complainant's property, the jury should not have received the case because it could not have reasonably inferred guilt as to all elements of the grand larceny charge.

When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). Even in the light most favorable to the State, there is no evidence which indicates that Petitioner took or carried out property from Stephens' home. A jury therefore could not have found Petitioner guilty of grand larceny beyond a reasonable doubt.

Recent jurisprudence from this State can be distinguished from Petitioner's case. Unlike State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016), Petitioner's whereabouts were not placed at the scene and no fingerprints or blood were located at Stephens' property. Contrary to the facts in State v. Condrey, 329 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002), Petitioner did not work for Stephens and was not shown to be near her property.

To hold that being in possession of recently stolen goods can be tantamount to grand larceny removes one of the necessary elements of the latter crime and absolves the State of any shortcomings in its evidence. Otherwise the charge of possessing stolen property is indistinguishable from grand larceny as long as the goods were recently stolen. No evidence was offered to prove that Petitioner stole the trailer from Stephens' property: no witnesses testified accordingly, and no surveillance footage was offered. Petitioner was in possession of a trailer of goods he had purchased from an auction house.

Petitioner's house was cold in November 2014 when the search warrant was executed. R. 39, ll. 2 – 13. If the electricity was not working in his home, he may have purchased the trailer with the hopes of flipping the items in order to pay his utility bill. He was overcharged by the State, and the circuit court and Court of Appeals both failed to recognize the inadequate amount of evidence in this matter.

II. The Court of Appeals erred in affirming Petitioner's conviction and sentence, where the trial court charged the jury that possession of stolen property was enough to show a taking and carrying away of the property in a grand larceny case, where the charge was confusing and not based upon proper statutory language?

The trial judge instructed the jury with the law surrounding grand larceny:

> The State must prove beyond a reasonable doubt that the defendant took and carried away the property of another against the will or without the consent of the other person. The slightest removal of the property or the **complete possession of the property even for an instant by the defendant is enough to show a taking and carrying away of the property**.

R. 88, l. 3 – 10. (emphasis added).

Defense counsel objected to this instruction. R. 90, ll. 7 – 12. Defense counsel explained, "it sounds confusing. It makes it sound as if merely being in possession of the property is proof that ... he stole the property." R. 90, ll. 7 – 12. The trial judge disagreed and found the language proper based on the statute. R. 90, ll. 13 – 17. The statute, as cited by the trial judge at the beginning of the trial reads as follows:

> (A) Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of two thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days.
>
> (B) Larceny of goods, chattels, instruments, or other personalty valued in excess of two thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony and must be fined in the discretion of the court or imprisoned not more than:
>
> (1) five years if the value of the personalty is more than two thousand dollars but less than ten thousand dollars;
> (2) ten years if the value of the personalty is ten thousand dollars or more.

S.C. Code Ann. § 16-13-30.

Discussion

The trial court's jury charge contained a burden-shifting instruction which the jury relied on as an accurate and perhaps conclusive presumption. The larceny statute does not include language indicating "complete possession of the property even for an instant is enough to show a taking and carrying away" as the trial court stated. Counsel has searched for relevant and binding authorities which include that language and has found only one. Collins v. Cartledge, No. 2:14CV1200-BHH-WWD, 2014 WL 8396824, (D.S.C. Nov. 14, 2014), report and recommendation adopted, No. CIV.A. 2:14-1200-BHH, 2015 WL 1518144 (D.S.C. Mar. 30, 2015). In that instance, the issue of jury instruction was not raised during PCR and was therefore procedurally barred. Outside of that case, counsel found no South Carolina state or federal sources containing language indicating that the slightest removal of the property or the complete possession of stolen property even for an instant was sufficient to prove a taking.

This Court has consistently disapproved instructions in larceny prosecutions which place the burden on the defendant to explain how he came into possession of recently stolen goods. State v. Gaines, 271 S.C. 65, 244 S.E.2d 539 (1978). Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," Morissette v. United States, 342 U.S. 246, 275, 72 S.Ct. 240, 255, 96 L.Ed. 288 (1952), and they "invad[e the] factfinding function," United States Gypsum Co., 438 U.S. 442, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978), which in a criminal case the law assigns to the jury. Sandstrom v. Montana, 442 U.S. 510, 510, 99 S. Ct. 2450, 2452, 61 L. Ed. 2d 39 (1979).

Based on the trial court's charge, complete possession of stolen goods the month after the theft is tantamount to taking and carrying away. The logic behind this jury instruction fails to

account for the intervention or involvement of a third party. Possession is simply not synonymous with a taking. The given instruction is not an accurate portrayal of the law and as such, the Court of Appeals should have reversed the trial court.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct.App.1998); see also State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct.App.2000) (holding jury charge is proper if, as a whole, it is free from error).

To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct.App.2000); see also Priest v. Scott, 266 S.C. 321, 223 S.E.2d 36 (1976) (in general, an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial).

As noted above, the charged language does not appear to come from a primary, binding source within the state. Perhaps it originated in a General Sessions bench book, but the law as provided to the jury was inaccurate, and Petitioner's convictions cannot be upheld.

Petitioner was prejudiced by the trial court's inaccurate and misleading charge. The State was not forced to prove every fact necessary to constitute the crime charged beyond a reasonable doubt. The jury may have found proof of possession, but there were insufficient facts to establish the taking and carrying away. Petitioner is not guilty of grand larceny under the law based on the evidence provided at trial.

The trial judge referred to substantial circumstantial evidence, but the possession of recently stolen goods was "merely circumstantial" and not mentioned by the State during directed verdict arguments. R. 68, ll. 10 – 15.

The Court of Appeals relied on State v. Dewitt, 254 S.C. 527, 530, 176 S.E.2d 143, 145 (1970), overruled on other grounds by State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) for the notion that there is an inference or presumption of fact that arises when an individual is found in possession of recently stolen property that he is the thief. App. 3.

"The foregoing inference is one of fact and not of law. It is evidentiary in nature and not conclusive. Upon the proof of possession of recently stolen goods, the law permits the inference of guilt unless the jury finds a reasonable explanation of such possession from all of the evidence presented at trial." Dewitt at 530, 176 S.E.2d at 145. "[T]his presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." Id.

This presumption was not explained in detail during the trial court's jury instructions. There was no distinction between the merely circumstantial nature of the presumption and the substantial circumstantial requirement to warrant a directed verdict. "The force and weight to be accorded the inference should be left to the jury to determine under all of the facts and circumstances in evidence, the burden resting upon the State throughout the trial to prove guilt beyond a reasonable doubt." Id. at 531, 176 S.E.2d at 145.

In overruling Dewitt "insofar as it permit[ted] the use of" terms such as "rebuttable" or requiring a "reasonable explanation," this Court held that "[t]he fact that defendants are found in possession of recently stolen property should be characterized **merely as an evidentiary fact**"

and "the fact of possession is **merely circumstantial evidence of guilt and should be charged as such.**" Cooper, supra, 279 S.C. 301, 301, 306 S.E.2d 598, 599. (emphasis added).

The word "merely" was only uttered twice during Petitioner's trial: once during defense counsel's objection and once during introductory remarks by the court. R. 6; l. 25; R. 90, l. 10. The trial court failed to instruct the jury with the proper version of the law and instead of checking the statute or its citing references, proceeded with a confusing charge that led to Petitioner's conviction.

CONCLUSION

Based upon the foregoing, Petitioner Samuel Alexander respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County
Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2018-UP-335 (S.C. Ct. App. filed 7/25/2018)
14-GS-13-00837

THE STATE,

RESPONDENT,

V.

SAMUEL EDWARD ALEXANDER, JR.,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Samuel E. Alexander, Jr., at 320 S. Gilliard St. Florence, SC 29506, this 22nd day of October, 2018.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 22nd day of October, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: 09/27/2028