STATE OF SOUTH CAROLINA
In the Supreme Court



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APPEAL FROM CHESTERFIELD COUNTY

Court of General Sessions
Roger E. Henderson, Circuit Court Judge

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Unpublished Opinion No. 2018-UP-335 (S.C. Ct. App. filed July 25, 2018)
Appellate Case No. 2018-001884

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THE STATE,

Respondent,

v.

SAMUEL E. ALEXANDER, JR.,

Petitioner.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

A Chesterfield County grand jury indicted Petitioner for Grand Larceny (greater than $10,000). On February 18, 2016, Petitioner proceeded to a trial before the Honorable Roger Henderson and a jury. Petitioner was convicted and sentenced to ten years' incarceration. The Court of Appeals affirmed his conviction in an unpublished opinion without oral argument. Unpublished Opinion No. 2018-UP-335 (S.C. Ct. App. filed July 25, 2018). Petitioner filed a petition for rehearing, which was denied on September 20, 2018. Petition filed a petition for a writ of certiorari with this Court on October 22, 2018.

## STATEMENT OF FACTS

On October 29, 2014, Amanda Stephens discovered that her brother's trailer, which had been loaded the night before with all of her belongings, had been stolen. (R. 17, line 16–R. 18, line 21; R. 26, lines 8–11; R. 58, line 8–25). On November 18, 2014, officers with the Chesterfield County Sheriff's Office were investigating numerous reports of stolen vehicles. Their investigation led them to Petitioner's residence. Officers discovered some of Stephens' property on Petitioner's porch. (R. 26, lines 12–25; R. 27, lines 1–13; R. 37, line 11–R. 38, line 8). Officers obtained a search warrant for Petitioner's residence. (R. 26, lines 24–25; R. 27, lines 14–23; R. 35, lines 3–11). Officers recovered numerous items belonging to Stephens from the residence. (R. 28, line 2–4). Stephens testified the value of the stolen property was approximately $35,000 and made clear she did not know Petitioner or give him or anyone else permission to take the trailer. (R. 23, line 13–R. 24, line 2).

Amos Nivens testified he lived on the same road as a man named Julius Butler in October and November of 2014 and came into possession of a sixty-foot trailer from Butler. (R. 42, lines 3–25). He did not pay for the trailer at the time because Butler told him he did not have the title yet but that Nivens could keep it and use it until he got the title in a couple of weeks. (R. 43, lines 1–20). Nivens testified Butler told him the trailer belonged to his friend Sammy. (R. 44, line 21–R. 45, line 9–12). Jason Garris testified that in "early November" 2014, he bought a golf cart, a bedroom suite, and a washer and dryer from Sammy Alexander (Petitioner) and Julius Butler. (R. 46, lines 12–24). He paid between $1,400 and $1,500 for the items and did not know where Petitioner had gotten the property. (R. 47, lines 2–7).

Julius Butler testified that Garris and Nivens are his neighbors and that he worked with Petitioner. (R. 48, lines 9–20). He admitted he came into possession of a trailer and some

personal belongings that were later determined to belong to Amanda Stephens. (R. 48, line 24–R. 49, lines 2). He explained that Petitioner knocked on his door one morning and told him he bought a trailer that had stuff in it and asked he if could leave it there until he could get a flat tire fixed, to which Butler agreed. (R. 49, lines 3–10). Petitioner asked Butler if he knew anyone who might be interested in buying some of the items, and Butler thought of Garris. (R. 49, lines 14–20). Petitioner then told Butler he wanted to sell the trailer too but that he did not have the proper paperwork. (R. 49, line 23–R. 50, line 3). Butler admitted that although the trailer sat there for approximately two months, Petitioner never got the paperwork. (R. 50, lines 13–21). Butler testified Petitioner claimed to have bought the trailer at an auction. (R. 55, lines 18-19).

Richard Carnes of the Chesterfield County Sheriff's Office testified that not only did officers find Stephens' items at the residence, but they also located additional stolen property in Petitioner's truck, a full-size pickup. (R. 63, line 22–R. 66, line 5). In fact, his testimony was that while Stephens was at the Sheriff's Office, she recognized her own stolen items in the back of the truck that belonged to Petitioner, which was parked in the Sheriff's Office bay. (R. 65, line 2–R. 66, line 5). Carnes interviewed Petitioner, who did not confess to stealing the trailer but did admit to possessing the items from the trailer. (R. 66, lines 12–18). Carnes testified that Butler had a very small vehicle that would not be capable of pulling a large trailer loaded with personal belongings. (R. 66, lines 19–25).

After the State rested, defense counsel moved for a directed verdict, arguing the State failed to offer any competent evidence of the charge of grand larceny. She claimed that although the State offered evidence of possession of stolen goods, it did not offer evidence that established Petitioner's presence at the scene of the crime. (R. 67, lines 18–24). The State argued that Butler testified that Petitioner drove the trailer to his home and that the question of where he got

the trailer was one for the jury. (R. 68, lines 1–9). The trial court denied the motion, noting substantial circumstantial evidence existed to support submitting the case to the jury. (R. 68, lines 10–15).

Before closing arguments, the trial judge invited counsel into his chambers to look over the proposed jury charge. (R. 70, lines 7–10). Following that conference, both counsel agreed they were ready for closing arguments and did not make any objections to the charge on the record. (R. 70, lines 11–14). After the trial judge instructed the jury on the law, defense counsel took exception to the second part of the grand larceny charge, arguing it was "confusing. It makes it sound as if merely being in possession of the property is proof that the property, that he stole the property." (R. 90, lines 7–12). The trial judge noted her objection but disagreed. (R. 90, lines 13–17). The jury found Petitioner guilty, and the trial judge sentenced him to ten years' imprisonment. (R. 100).

## ARGUMENT

### I.

**The trial court properly denied Petitioner's directed verdict motion because the State presented sufficient evidence to submit the case to the jury.**

Petitioner argues the trial judge erred in failing to direct a verdict on the charge of grand larceny, claiming the State presented no direct or substantial circumstantial evidence that Petitioner took or carried away any of the property in question. However, the State presented testimony that Petitioner had possession of the stolen property in "early November" 2014, and some of the stolen property was recovered at his home on November 18, 2014. The property was stolen on October 29, 2014. Possession of recently stolen property constitutes substantial circumstantial evidence from which the jury could find him guilty of grand larceny. The trial court correctly denied his motion for a directed verdict.

#### Standard of Review

When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury. *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015).

#### Discussion

In ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v.*

*Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978).

Larceny is the "felonious taking and carrying away of the goods of another" against the will or without consent of the other. *State v. Keith*, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985). Where one is found in possession of recently stolen property, a jury may infer that he is the thief. *State v. Dewitt*, 254 S.C. 527, 530, 176 S.E.2d 143, 145 (1970) (citing 50 Am.Jur.(2d), Larceny, Section 162). "What is meant by 'recent' is incapable of exact or precise definition, and the term is said to vary 'within a certain range with the conditions of each particular case.'" *State v. Lyles*, 211 S.C. 334, 339–40, 45 S.E.2d 181, 183 (1947) (*citing* Wharton's Crim.Ev., Sec. 759). The time frame in this case falls squarely within what this Court has determined to be sufficiently recent to submit the case to the jury. In *State v. Dewitt*, the defendant was found in possession of a grain drill that had been stolen about two months earlier and charged with larceny. The Court held the trial judge properly submitted the case to the jury. *Dewitt*, 254 S.C. at 533, 176 S.E.2d at 147. The *Dewitt* court cited *State v. Bennett*, 5 S.C.L. 514, 692 (S.C. Const. App. 1815), a case also involving a two month time frame, and *State v. Lyles*, 211 S.C. 334, 339, 45 S.E.2d 181, 183 (1947), which involved a time frame of approximately four weeks. These cases establish that the question of "recency" is a factual issue to be determined by the jury, at least in cases such as those cited where the time frame is within approximately two months. *See also State v. Irvin*, 270 S.C. 539, 542, 243 S.E.2d 195, 196 (1978) (affirming trial court's denial of directed verdict motion in housebreaking and larceny case where theft occurred on February 27, 1976 and "sometime in March 1976" the stolen goods were found in possession of a man who claimed to have bought them from defendant).

Both Garris's and Nivens' testimony indicated that it was in "early November" of 2014 that they obtained the trailer and property from Petitioner and Butler. Amanda Stephens' stolen property was recovered from Petitioner's home on November 18, 2014. The theft occurred on October 29, 2014. The facts of this case are nearly identical to those of *Irvin*, *supra*, where this Court found the denial of directed verdict proper. The time frame is well under those involved in *Dewitt* and *Bennett*, *supra*. Accordingly, the trial court did not err. Certiorari should be denied.

## II.

**The trial court correctly charged the jury on grand larceny based on the current and correct law of South Carolina.**

Petitioner argues the trial court's charge to the jury on grand larceny "violated Petitioner's right requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury and was not based on statutory language." Here, the charge was correct because it accurately stated the current and correct law.

### Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

### Discussion

The only requirement for a jury charge is that it be based on the current and correct law of South Carolina. *See Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) ("In general, the trial court is required to charge only the current and correct law of South Carolina."). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010).

Petitioner claims the charge "makes it sound as if merely being in possession of the property is proof that . . . he stole the property." (App.Br.9 citing R. 90, lines 9–12). This is not a reasonable interpretation of the charge. Earlier in the charge, the judge instructed the jury, "If the defendant is found possessing recently stolen goods this may be used as evidence that the defendant stole the goods. This would simply be an evidentiary fact to be taken into consideration by you along with the other evidence in the case and you may give it the weight

you decide it should have." (R. 86, line 25–R. 87, line 6). Defense counsel had no objection to this portion of the jury charge, likely because it was a current and correct statement of the law.

Petitioner attempts to argue the jury charge on grand larceny was somehow burden shifting. He claims the jury "relied on [the charge] as an accurate and perhaps conclusive presumption." (App.Br.10). However, the trial judge clearly told the jury the State had to 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 [and that he] intended to permanently deprive the owner of the property . . . ." (R. 88, lines 3–14). As noted above, the trial judge also made clear earlier in the charge that the possession of stolen goods was an evidentiary fact to be taken into consideration when weighing the evidence. At no time did the trial judge indicate any presumptions existed about the fact that Petitioner possessed the stolen goods. However, as discussed in the previous section, the permissible inference does exist to the extent it is an evidentiary fact that should be considered by the jury and given the weight the jury deems appropriate. Because juries are presumed to follow instructions, here the jury was told to consider the possession of stolen property as an evidentiary fact and we can presume the jury did just that. *See Foye v. State*, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999) ("A jury is presumed to follow instructions.").

Petitioner states in his brief that other than *Collins v. Cartledge*[1], an unpublished case that contains the same jury instruction language for larceny, he has "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." (App.Br.10). This portion of the charge was clearly referring to the asportation element of grand

[1] No. 2:14CV1200–BHH–WWD, 2014 WL 8396824, at *11 (D.S.C. Nov. 14, 2014).

larceny. Our Supreme Court has stated that the slightest removal of the stolen property with felonious intent fulfills the requirement of the asportation element of the offense. *State v. Moultrie*, 283 S.C. 352, 354, 322 S.E.2d 663, 664 (1984) (quoting *State v. Tindall*, 213 S.C. 484, 489, 50 S.E.2d 188 (1948)). The *Moultrie* Court also recognized the goods did not even need to be removed from the premises, where the Petitioner simply moved the stolen tires thirty-three feet from the rack. Petitioner's argument uses the language "prove a taking," but the trial judge in this case used the word "show," not "prove." And because the jury charge must be considered as a whole, it is important to note that in other portions of the charge, the trial judge made clear the possession of recently stolen property was an evidentiary factor to be considered, not something that "proved" a taking.

Petitioner cites cases that disapprove of instructions in larceny cases that place the burden on a defendant to explain how he came into possession of stolen goods. The State acknowledges that *State v. Gaines*, 271 S.C. 65, 244 S.E.2d 539 (1978), makes clear that a trial judge cannot tell the jury that the defendant has the burden to explain his possession of stolen property. In *Gaines*, the trial judge undeniably erred by instructing the jury that a person found in possession of recently stolen goods was required to give some satisfactory explanation of his possession or the law would presume him to be the thief and guilty of larceny. The Court took the opportunity in *Gaines* to admonish the trial bench, stating:

> "The jury should not be instructed that the burden or duty is upon a defendant to explain possession in such cases, lest the jury draw the conclusion that either (1) the defendant is required to personally give explanatory testimony or (2), in the absence of explanation by the defendant, the inference is to be considered conclusive of guilt."

*Gaines*, 271 S.C. at 67, 244 S.E.2d at 540–41 (quoting *State v. DeWitt*, 254 S.C. 527, 530–31, 176 S.E.2d 143, 145 (1970) & citing *State v. Sumner*, 269 S.C. 175, 236 S.E.2d 815 (1977)).

Here, the trial judge did not in any way tell the jury Petitioner had to give an explanation for his possession of the stolen goods. These cases are inapplicable.

The State also acknowledges the United States Supreme Court cases cited by Petitioner finding that conclusive presumptions of intent would override the presumption of innocence and be inappropriate. Indeed, the State agrees that whether intent existed is certainly a question for the jury. However, no conclusive presumption regarding intent was set forth in this case. Indeed, no presumption was charged by the trial judge in his jury instructions. He simply told the jury the slightest removal of the property or complete possession of the property is enough to show a taking and carrying away. Within the same section of charges Petitioner complains about, the preceding statement by the trial judge was, "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." (R. 88, lines 3–7). That statement made it abundantly clear to the jury that its job was to find those elements of grand larceny beyond a reasonable doubt. No "accurate and perhaps conclusive presumption" was contained in the instruction, and nothing about the instruction was at all burden-shifting. When viewed as a whole, the jury charge was entirely appropriate.

Additionally, Petitioner's argument that "[t]he logic behind this jury instruction fails to account for the intervention or involvement of a third party" is without merit. Petitioner's argument regarding third party intervention was an excellent argument for defense counsel to make to the jury during her closing, which she did. However, those arguments do not mean that "the given instruction is not an accurate portrayal of the law." Indeed, as noted above, the wording of the trial judge's jury instruction on grand larceny was the current and correct law in South Carolina. Certiorari should be denied.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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November 21, 2018

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APPEAL FROM CHESTERFIELD COUNTY

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Roger E. Henderson, Circuit Court Judge

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Appellate Case No. 2018-001884

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THE STATE, Respondent,

v.

SAMUEL E. ALEXANDER, JR., Petitioner.

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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by delivering two copies of the same to Taylor D. Gilliam, Esquire, SCCID, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 21st day of November, 2018.

Anne Mueller

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