STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 07 2019
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2016-001109

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,.....APPELLANT.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On December 12, 2018, this Court issued an opinion affirming Appellant's conviction for resisting arrest. Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to the petition. For the following reasons, Appellant's petition for rehearing should be denied.

> **The trial judge's instruction on circumstantial evidence is a correct charge under South Carolina law. Moreover, any error in failing to provide the jury with the Logan charge is harmless because the jury instructions, as a whole, adequately conveyed the applicable law and the State's burden of proof.**

Appellant argues the trial judge erred in refusing to provide the jury with the Logan circumstantial evidence charge. The State disagrees with this allegation of error: the trial judge provided the jury with the Grippon[1] charge, which the Supreme Court of South Carolina has found to be a current and accurate explanation on the evidentiary value of circumstantial

[1] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

evidence. Moreover, even if the trial judge erred in refusing to provide the Logan charge, any such error was harmless because the trial judge's instructions, as a whole, accurately conveyed the applicable law to the case and the State's burden of proof.

In State v. Logan, our Supreme Court considered whether the circumstantial evidence jury instruction from Grippon remained an appropriate statement of the law. 405 S.C. at 90, 747 S.E.2d at 448. Logan asserted that the charge from Grippon was invalidated by the Court's more recent decisions in cases involving challenges to the denials of directed verdict motions. Logan, 405 S.C. at 91, 747 S.E.2d at 448. However, the Court disagreed and found that the trial judge committed no error in instructing the jury on the law of circumstantial evidence in a manner consistent with the charge articulated in Grippon. Logan, 405 S.C. at 94, 747 S.E.2d at 449. The Court then went on to propose a new circumstantial evidence jury charge containing the following language:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452. Regarding the newly-articulated charge, the Court instructed that the charge should be provided "when so requested by a defendant[.]" Id. Thus, the Court modified its earlier holdings in Grippon and Cherry to allow trial judges to instruct juries on

circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

The facts of this case are indistinguishable from Logan. In both cases, the trial judges instructed the jury in a manner consistent with the approved jury charge from Grippon. See Logan, 405 S.C. at 90, 747 S.E.2d at 447 (identifying the circumstantial jury instruction given in Logan's case, which contained virtually identical language to the circumstantial evidence jury instruction given in Appellant's case). As a result, the trial judge properly instructed the jury on the law of circumstantial evidence. See id. at 94, 747 S.E.2d at 449 ("[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon."). Notably, the Supreme Court in Logan did not find that the circumstantial evidence charge from Grippon reduced the State's burden of proof or constituted an incorrect statement of the law. See Logan, 405 S.C. at 100, 747 S.E.2d at 452-453 ("This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in Grippon and Cherry."). Instead, the Supreme Court simply proposed a new circumstantial evidence charge that could appropriately be given upon request. See Logan, 405 S.C. at 99, 747 S.E.2d at 452 (providing a new circumstantial evidence jury instruction that should be given when requested that did not include any "reasonable hypothesis" language). Because the charge given was a complete and accurate statement of the law, it could not have been error.

Finally, even assuming the trial judge somehow erred in failing to give the Logan instruction on circumstantial evidence, any error was entirely harmless because the trial judge fully and correctly instructed the jury on the State's burden of proof. In Logan, the Supreme Court of South Carolina found the trial court's proper instruction on the reasonable doubt burden of proof rendered "any conceivable error . . . harmless beyond a reasonable doubt" because the

Grippon charge, combined with the clear instruction on reasonable doubt, properly conveyed the applicable law to the jury. Logan, 405 S.C. at 94, n.8, 747 S.E.2d at 449 n.8. Notably, the reasonable doubt instruction in Logan included the following language:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty. If, on the other hand, you think there is a real possibility the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty . . . . You should weigh all the evidence in this case, and, after weighing the testimony, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty . . . . The burden of proof remains on the [S]tate to prove guilt beyond a reasonable doubt.

Id. Since Logan, this Court has repeatedly found harmless error in the failure to provide the Logan charge where the jury was given the Grippon charge and a correct instruction on reasonable doubt. See State v. Drayton, 411 S.C. 533, 545–46, 769 S.E.2d 254, 260–61 (Ct. App. 2015) (vacated in part on other grounds, aff'd in result); State v. Jenkins, 408 S.C. 560, 573–74, 759 S.E.2d 759, 766 (Ct. App. 2014). In the instant case, the trial judge gave the Grippon charge and used an instruction on reasonable doubt identical to that of the trial court's in Logan. Thus, the jury charges, as a whole, properly instructed Appellant's jury on the applicable law. See Wharton, 381 S.C. at 213, 672 S.E.2d at 788.

Accordingly, the trial judge's refusal to give the Logan circumstantial evidence charge did not constitute a prejudicial abuse of discretion.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny rehearing in this case.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

BY: _____
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

January 7, 2019

RECEIVED
JAN 07 2019
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2016-001109

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,.....APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Return to the Petition for Rehearing in the above-referenced case by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, 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 7th day of January, 2019.

Shana Montgomery

Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ALAN WILSON
ATTORNEY GENERAL

January 7, 2019

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

RE: State v. Robin Renee Herndon – Appellate Case No. 2016-001109

Dear Ms. Kitchings:

Enclosed please find the original and six copies of my Return to the Petition for Rehearing in the above-referenced case, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

WFS/
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division