

ORIGINAL

RECEIVED

DEC 03 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS BRET BISHOP,

APPELLANT

APPELLATE CASE NO. 2012-212240

FINAL REPLY BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
ARGUMENT IN REPLY	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

<u>State v. Cherry</u> , 361 S.C. 588, 606 S.E.2d 475 (2005).....	4
<u>State v. Grippon</u> , 327 S.C. 79, 489 S.E.2d 462 (1997).....	4
<u>State v. Logan</u> , Op. No. 27296 (S.C. Sup. Ct. filed Aug. 14, 2013).....	3, 4

Statutes

S.C. Code Ann. § 16-15-410(A).....	4
------------------------------------	---

ARGUMENT IN REPLY

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in *State v. Edwards* violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

In his initial brief, Appellant argued the trial judge erred in refusing to charge the jury pursuant to the traditional circumstantial evidence definition as requested. On August 14, 2013, the South Carolina Supreme Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina. In *State v. Logan*, Op. No. 27296 (S.C. Sup. Ct. filed Aug. 14, 2013), the Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. *Id.* Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." *Id.*

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." *Id.* Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." *Id.* In light of the differing analysis required when examining direct versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant's case, the instruction directs jurors that "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.” The instruction also provided that “[i]f these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.” Id.

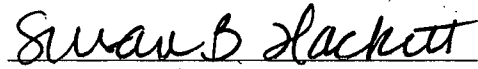
Although the Court held that a trial judge may instruct the jury as to circumstantial evidence as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005) the Court held that a trial judge may not rely exclusively on that charge over a defendant’s objection. Id. Clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it was necessary in Appellant’s case. As detailed in Appellant’s brief, the state presented a very weak case, consisting entirely of circumstantial evidence. The statute required the state prove Appellant possessed material that contained a visual representation of a minor engaging in sexual activity and knew the content of the material. See S.C. Code Ann. § 16-15-410(A). Appellant admitted the material found on the hard drive satisfied the statute’s definition of child pornography, but denied possessing the material or having knowledge of the content of the material. On this point, the prosecution presented absolutely no direct evidence that Appellant downloaded the material or was aware the material had been downloaded. Even the prosecution’s witnesses denied observing child pornography on the computers and testified that multiple people had unfettered access to the computer. The issue of who downloaded the materials was the only issue before the jury. It was imperative that the jury not make its decision based on “emotion or intuition instead of a rational, deliberative process,” and the way to accomplish this goal was through a clear and concise jury charge, such as the one announced in Logan.

Due to the absolute paucity of direct evidence against Appellant concerning his having downloaded the material or having knowledge of the material and the undisputed evidence indicated that at least four other people had access to the computer and the knowledge required to download materials at the time the prohibited materials were downloaded, justice required the trial judge to instruct the jury that the circumstantial evidence must "point conclusively to the guilt of the accused." Here, the evidence against Appellant was the same as the evidence against his stepdaughters and their friends. None of the circumstantial evidence conclusively pointed to Appellant's guilt.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

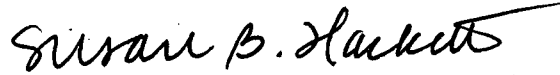
ATTORNEY FOR APPELLANT

This 3rd day of December, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

December 3, 2013

A handwritten signature in black ink, reading "Susan B. Hackett", written over a horizontal line.

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

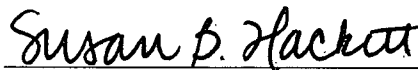
V.

DOUGLAS BRET BISHOP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of December, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of December, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.