STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenwood County

Donald B. Hocker, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOVAN ALEXANDER MITCHELL,

APPELLANT.

APPELLATE CASE NO. 2013-002162

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Appellant is entitled to a directed verdict on the indicted charge of grand larceny where the State did not prove the allegations set forth in the indictment; the State alleged that Appellant took and carried away the "personal goods of Stan Gaines" but the evidence at trial established that the goods were not personally owned by Gaines but by a corporation named Synehi Castings, Inc.

II. Appellant is entitled to a directed verdict on the jury's verdict of guilty on the charge on grand larceny in an amount between $1,000 00 and $5,000.00 where after the jury rejected the property's valuation of over $22,000.00 by finding Appellant not guilty of grand larceny in an amount greater than $5,000 00, the only evidence remaining showed that the value of the property was worth under $1,000.00.

III. The Trial Court erred in failing to give Appellant's requested full charge on the law of mistake of fact and good faith and erred in particular by failing to explain to the jury that any belief by Appellant that the property was abandoned did not have to be objectively reasonable to preclude a conviction for grand larceny.

STATEMENT OF THE CASE

On September 27, 2013, Appellant Jovan A. Mitchell was indicted by the Greenwood County Grand Jury for one count of grand larceny in violation of S C. CODE ANN. § 16-13-30. The indictment alleged that "between March 20, 2010 and March 24, 2010, [Appellant] feloniously [took and carried away] the personal goods of Stan Gaines of the value of more than ten thousand and NO/100 ($10,000.00) dollars described as follows: a quantity of metal, with ıntent to deprive the owner permanently of such goods . . . ." R.*.

On October 1-2, 2013, Appellant was tried before the Honorable Donald B. Hocker and a jury r 1 Appellant was represented by Carson M. Henderson, and the State was represented by Assistant Solicitors Shannon S Odom and Chrıstopher A. Morrow. Id

As to the charge of grand larceny ın an amount greater than $5,000.00, the jury found Appellant not guılty. R. 183, ll. 9-14, Verdict Form. As to the lesser included charge of grand larceny in an amount between $1,000.00 to $5,000.00, the jury found Appellant guilty R. 183, ll. 14-16; Verdict Form

Judge Hocker sentenced Appellant to a perıod of five years imprisonment suspended upon the service of eıghteen months with two years of probation R. 208, ll 2-6; Sentencıng Sheet. Judge Hocker also ordered Appellant to make restitution in the amount of $1,000.00. R. 208, ll 6-10, Sentencing Sheet

Appellant tımely filed and served his Notice of Appeal on October 7, 2013.

STATEMENT OF FACTS

Stan Gaines testified at trial that he ran a machine shop for a living. R. 20, ll. 16-25. The machine shop was named Synehi Castings. R 21, ll. 1-2. Gaines testified that Synehi Casting owned two storage facilities for the storage of its iron – one located at 310 Ginn Street and one located at 109 Smythe Avenue, both in Greenwood County. R. 21, ll. 4-16

Gaines described the property located at Smythe Avenue as being around two acres and surrounded with a chain link fence with barbed wire. He said the gates were locked with chain locks. He said there was a no trespassing sign on one part of the property. R. 22, l. 21 – 24, l 6.

Gaines testified that he encountered Appellant at the Smythe Avenue location on March 24, 2010 around 10:00 in the morning. R 21, l 19 – 22, l. 12. Gaines said he noticed a car and trailer in the middle of the property and noticed someone loading iron onto the trailer. Gaines said Appellant was the individual loading iron onto the trailer. R. 22, ll 15 – 20. Gaines claimed the chain lock had been cut. R 22, ll. 15-16, 23, l. 25.

Gaines alleged that Appellant took a type of metal called ni-resist, a valuable type of metal used in the food industry. Gaines testified that Appellant also took some regular cast iron parts. R. 26, ll. 15-25

Gaines contended that the approximate value of the metal taken between March 20 and 24, 2010 was valued at over $22,000 00. R. 27, ll. 11-13, 27, l. 24 – 28, l. 1. Gaines maintained that a scrap yard would not have paid $22,000 00 or more for the type of metal taken because scrap yards only buy the metal as scrap and do not have a spectrometer which can identify the type of metal being sold. R. 28, l. 2 – 18

Gaines testified that around 7,000 pounds of metal were taken from the storage area. R 28, ll. 22-24. He said he believed around 5,069 pounds of that was ni-resist metal valued at around $20,000.00. R. 28, l 25 – 29, l. 3 According to Gaines, the value of the other metal taken was around 85 cents a pound. R. 29, ll. 8-10 Gaines testified that he did not know how many pounds of metal Appellant was actually loading on his trailer on March 24, 2010 when he observed Appellant because Appellant put that metal back on the property after the officers arrived. R. 29, ll. 18-23.

On cross-examination, Gaines admitted that the incident report did not include any mention of any locks being cut. R. 31, ll. 2-24. He again confirmed that no one inventoried the metal that Appellant loaded onto and then unloaded off his trailer after the law enforcement arrived on March 24, 2010. R. 66, ll. 14 – 22.

Gaines testified that he and his wife purchased the Smythe Avenue property in April 2002 and that this property used to be the old Grendel Mill site. R. 53, ll. 14-18. The property, as seen in pictures introduced by the State, looked just like an abandoned, rundown mill site, even though Gaines claimed it was a warehouse site. R 65, l. 18 – 66, l. 2; State's Exs. 2-6. Tubs of metal were just lying outside on the Smythe Avenue property. R. 66, ll. 3-5.

The company, Synehi Casting, also owned a building on Ginn Street. R 54, ll. 6-8. Apparently, Synehi Casting would purchase metal and have it shipped to the Ginn Street location. Synehi Casting would pay a delivery fee for metal to be shipped to the Ginn Street location, but then Synehi Casting would turn around and move this allegedly very valuable metal to the Smythe Avenue location R. 54, l. 6 – 60, l. 20; Defendant's Ex 2

Officer Matt Blackwell of the Greenwood City Police Department received a call about an alleged larceny in progress at Smythe Avenue on March 24, 2010. R. 71, l. 16 – 72, l. 22. When he arrived, Stan Gaines and Appellant were at the scene. R. 72, l. 23 – 73, l. 3 Officer Blackwell testified that when he arrived, Gaines was standing outside of the gated property and said that he owned the real property there on Smythe Avenue. Officer Blackwell described the property as "an old mill place" with "gates around it." Officer Blackwell said Gaines was standing in front of an open gate when Officer Blackwell went to speak with Gaines R. 73, l. 23 – 74, l. 2.

Gaines told Officer Blackwell that for several weeks he had had people coming onto his property taking metal. Gaines informed Officer Blackwell that there was currently a person on his property in a vehicle and a trailer taking metal off his property. R. 74, ll. 5-9 Officer Blackwell turned to Appellant and asked him what he was doing. Appellant replied that he was just there scrapping metal. R. 74, ll 9-13.

Officer Blackwell then called Lieutenant Jeff Crisp and advised him of the situation. Lieutenant Crisp said he would be on his way to the scene. Officer Blackwell stood by until Lieutenant Crisp could arrive. R. 75, ll. 4-9

Officer Blackwell testified that even though he had a video camera in his police car, he did not record any of the incident or his interactions with Gaines and Appellant. R. 75, l 10 – 76, l. 4. On cross-examination, Officer Blackwell testified that he also did not take any pictures at the scene that day R. 77, l. 25 – 78, l. 18. Therefore, there were no pictures taken showing how much metal was on Appellant's trailer before he unloaded it. R. 78, l. 23 – 79, l 6.

Officer Blackwell stated that he prepared part of the incident report and he acknowledged that he did not include any mention of cut locks He said that when he arrived to the scene, the gates were open. R 81, l. 23 – 82, l. 7

Officer Blackwell testified during cross-examination that he was not aware at the time that Gaines did not own all of the old mill property. R. 83, ll. 22-24. He acknowledged that he had no idea how Appellant accessed the property that day or which entrance he might have driven through to get on the property. R 84, ll 11 – 16. He admitted that he did not inventory what was on Appellant's trailer that day and did not take any pictures of it. R. 84, ll. 19-24.

Virginia Calvert worked at Harvley's Scrap Metal as the office manager. R. 86, ll. 7 – 23 She testified that in March 2010, Harvley's recorded purchases of scrap metal on hand tickets. A vehicle bringing scrap metal to Harvley's would pull on a scale which would register the total weight of the vehicle. The driver would then unload the metal and bring the vehicle back to the scales to be weighed. Harvley's would subtract the empty weight from the full weight to determine had much metal the driver had sold. All scrap metal purchased by Harvley's was done by weight. R. 87, ll. 4 – 22.

Calvert testified that Harvley's did have a spectrometer on site to determine the types of metal, but it was only used for odd specialty metals or certain grades of aluminum of stainless steel The spectrometer was not used on general scrap steel. R. 87, l. 23 – 88, l. 3.

When Harvley's purchased the scrap metal, it would make a copy of the driver's photo ID to include on the ticket. The ticket would also show the weight of metal sold and the price paid to the driver by Harvley's R. 88, ll. 7 – 18.

Calvert testified as to the following scrap metal sold by Appellant to Harvley's:

1. 1,000 pounds of metal sold on March 22, 2010 for $90.00;
2. 700 pounds of metal sold on March 22, 2010 for $63.00;
3. 4,000 pounds of metal sold on March 23, 2010 for $360.00;
4. 240 pounds of metal sold on March 23, 2010 for $21.60;
5. 3,000 pounds of metal sold on March 23, 2010 for $277.20; and
6. 1,800 pounds of metal sold on March 24, 2010 for $162.00.

R 88, l. 25 – 92, l. 20; State's Exs. 8-13.

The total Harvley's paid Appellant for scrap metal he sold from March 22-24, 2010 was $973.80.

Calvert also testified that Harvley's identified metal as scrap steel when a magnet would stick to the metal. Magnets would not stick to metals like aluminum, copper or brass. R. 92, l. 23 – 93, l 4

On cross-examination, Calvert said that Danny Harvley was the owner of Harvley's Scrap Yard, and she described Danny Harvley as being very knowledgeable about scrap metal. R. 94, ll 1 – 12. Calvert said that she herself knew the difference between aluminum and steel, aluminum and iron, steel and iron, and copper and aluminum. R. 94, ll. 15 – 25. She stated that ninety percent of metal could be identified visually. R. 95, ll. 1-3. She testified that there was no doubt that Danny Harvley would know the difference between different types of metals. R. 95, ll 4-9.

Calvert testified that Harvley's owned a barometer that could scan metal and identify the chemical makeup of the metal. R. 95, ll. 10 – 23. Calvert said the hand tickets indicated that Appellant only sold Harvley's scrap steel and not aluminum, copper, tin, or

iron. If any other type of metal had been indicated, there would have been a separate ticket and the metal would have been weighed on a separate set of scales. R 96, l. 2 – 98, l. 25. Calvert felt comfortable that what Appellant sold was just scrap metal because Danny Harvley knew the difference between scrap steel and other types of metal. R. 99, ll 1 – 11.

Calvert also said that if anything suspicious came through the yard, Danny Harvley would call the police. There were no records indicating that Danny Harvley called the police about Appellant. R. 97, l. 4 – 98, l. 10

Lieutenant Jeff Crisp testified that he was contacted by Officer Blackwell on March 24, 2010 about an incident at the old mill site When Lieutenant Crisp arrived at the site, he was advised by Officer Blackwell that Appellant had been seen loading property onto his trailer. R. 102, l. 20 – 103, l 25. Lieutenant Crisp asked Appellant why he was there taking metal and Appellant apparently advised Lieutenant Crisp that he had gotten permission from Exit Realty to retrieve the metal. Exit Realty had a sign up on the back side of the property. R. 104, ll. 1 – 13. Lieutenant Crisp said he called Exit Realty but it did not have the property under contract and did not know why an Exit Realty sign was up on the property. R. 104, ll. 10-20. When Lieutenant Crisp advised Appellant that Exit Realty had not given Appellant permission to be on the property, Appellant clarified that he tried to call Exit Realty but could not get an answer. R. 104, l. 21 – 105, l. 3.

Lieutenant Crisp stated that when he arrived on the scene, Appellant was inside the fence with his SUV that had a trailer attached The gate was open and the SUV was backed into the property Lieutenant Crisp said he saw some metal on Appellant's trailer. Appellant unloaded the metal at the officers' request. R. 105, ll. 11-24.

After Appellant unloaded the property from the trailer, he agreed to go to the police department where he gave a recorded statement Appellant's recorded statement was published to the jury. R 106, l 1 – 2; State's Ex 1

In this statement, Appellant said he drove by the site and happened to see it. He said the fence was open so he just went inside. Appellant tried to call the realtor sign that was out front because many times realty companies would tell him that he could take the scrap metal off the properties they were selling He thought Exit Realty would have no problem with him removing the scrap metal Appellant said he first went to the site on Saturday, March 20 and then went back on Monday, March 22. He sold some scrap metal at Harvley's on Monday On Tuesday, March 23, Appellant said he took two loads from the mill site and sold it at Harvley's. He took one load to Harvley's on Wednesday, March 24. Appellant again said that he tried to call the realty company and did not get answer Appellant asserted that the property appeared to be abandoned. He said there was a gate open at the top of the hill, so he went into that gate. Appellant said another gate elsewhere on the property was open too so he drove in through the gate. Appellant did not see any signs indicating that the property was private, and Appellant did not see any signs with the name of the owner of the property. Appellant just thought the metal came from the old mill. Appellant said he did not think much of it. State's Ex. 1.

After Appellant gave his statement, Lieutenant Crisp charged him with grand larceny R. 109, ll 9-11. Lieutenant Crisp did not charge Appellant with trespassing because he felt that Appellant had been very cooperative with law enforcement. R. 111, l. 18 – 112, l. 13.

Lieutenant Crisp confirmed that no pictures were taken of the scene on the day of the incident R 112, l 25 – 113, l. 21. The officers did not take any pictures of what Appellant had loaded onto his trailer because that property was returned. R. 113, ll. 13-15.

On cross-examination, Lieutenant Crisp testified that there was a realtor sign located on part of the old mill property on a piece of property not owned by Gaines. R. 118, l. 24 – 119, l. 11; 132, ll 18-22. Lieutenant Crisp again verified that the officers took no pictures of where Appellant's vehicle was located, what items Appellant may have had on his vehicle, or any pictures of the Exit Realty sign R 120, ll. 7 – 17.

Lieutenant Crisp confirmed that Appellant thought the property was abandoned and did not realize anyone owned the property. R. 121, ll. 9-11, 124, ll 11-17. Lieutenant Crisp also acknowledged that the incident report did not mention anything about there being cut locks or any chains missing from the fences R. 122, ll. 1 – 6. He further testified that he looked into Appellant's car but did not find any instruments that could cut locks or anything of the sort. R. 126, ll 9 – 17.

Lieutenant Crisp testified that this incident occurred in broad daylight. Appellant was with a woman and his children. Lieutenant Crisp agreed there was no evidence that Appellant was trying to hide or conceal what he was doing. Appellant was very cooperative with law enforcement. R. 123, l. 8 – 124, l 7.

ARGUMENT

I. **Appellant is entitled to a directed verdict on the indicted charge of grand larceny where the State did not prove the allegations set forth in the indictment; the State alleged that Appellant took and carried away the "personal goods of Stan Gaines," but the evidence at trial established that the goods were not personally owned by Gaines but by a corporation named Synehi Castings, Inc.**

At the close of the State's case, Appellant moved for a directed verdict on the indicted charge of grand larceny against Appellant where the indictment alleged that Appellant took and carried away the "personal goods of Stan Gaines" but the evidence established that the metals taken were actually owned by the corporation Synehi Castings, Inc. The Trial Court denied this motion for a directed verdict. R. 134, l 23 – 148, l. 25.

The evidence established that Synehi Castings, Inc. purchased the metals taken. Receipts showed that Synehi Castings, Inc. purchased the metals, and Gaines confirmed at trial that Synehi Castings, Inc. purchased the metals and had the metals shipped to its Ginn Street location before the metals were delivered to the Smythe Avenue location. R. 54, l. 6 – 60, l. 20; Defendant's Ex 2. The alleged value of the metals taken was submitted to the solicitor on letterhead of Synehi Castings, Inc. Defendant's Exs. 1 and 2. The evidence at trial therefore established that the metals taken were owned by Synehi Castings, Inc. and were not the personal property of Gaines.

In opposition to Appellant's motion for a directed verdict, the State contended there was evidence that Gaines owned Synehi Castings, Inc. While Gaines testified that he ran the machine shop, Synehi Castings, there was no evidence presented by the State that Gaines was the sole owner of the corporation R. 20, l 24 – 21, l 4. There was no evidence presented by the State of how Synehi Castings, Inc. was set up and organized as a

corporation or any evidence presented by the State as to the officers and shareholders of Synehi Castings, Inc.

Furthermore, a corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders Costas v First Fed Sav & Loan Ass'n, 283 S.C. 94, 321 S E.2d 51 (1984) "[T]his oft-stated principle is equally applicable, whether the corporation has many or only one stockholder." Id at 102, 321 S.E.2d at 56. Therefore, even if Gaines was the sole owner of Synehi Castings, Inc – which the State did not prove at trial – the metals would not belong to Gaines personally where the corporation owned the metals

Where the evidence established that the metals were owned by Synehi Castings, Inc., Appellant was entitled to a directed verdict where the indictment specifically alleged that he took and carried away the "personal goods of Stan Gaines." The indictment should allege the true owner of the property as the offense of larceny involves the taking and carrying away of property with the intent of "depriving the true owner of his property and converting it to the use of the offender" State v. Williams, 237 S.C. 252, 260, 116 S.E.2d 858, 862 (1960) (internal citation omitted)

The Trial Court, in denying the motion for directed verdict, relied upon the case of State v Sweat, 221 S.C. 270, 70 S E 2d 234 (1952). In Sweat, the defendants moved for a directed verdict on a larceny indictment on the ground that the persons named in the indictment were not the true owners of the property Id. at 273, 70 S.E. at 235. The trial court permitted the State to amend the indictment to add the name of the true owner of the property. Id. The Supreme Court held that the trial court's allowance of the amendment to the larceny indictment to change the name of the victim was not erroneous. Id.

The Sweat case is distinguishable from the facts of Appellant's case because in Sweat, the State moved to amend the indictment to reflect the name of the true owner of the property The State did not request any such amendment in Appellant's case.

Accordingly, the State did not prove the allegations set forth in the indictment – that Appellant took and carried away the "personal goods of Stan Gaines" – and Appellant is entitled to a direct verdict on the charged offense of grand larceny.

II. Appellant is entitled to a directed verdict on the jury's finding of guilty on the charge on grand larceny in an amount between $1,000.00 and $5,000.00 where after the jury rejected the property's valuation of over $22,000.00 by finding Appellant not guilty of grand larceny in an amount greater than $5,000.00, the only evidence remaining showed that the value of the property was worth under $1,000.00.

The jury found Appellant not guilty as to the charge of grand larceny in an amount greater than $5,000.00 but found Appellant guilty of grand larceny is an amount between $1,000.00 and $5,000 00. R. 183, ll. 9-16 The evidence at trial, however, only established two possible values of the property taken – the approximately $22,000.00 in value as alleged by Gaines or the $973.80 sold by Appellant to Harvley's Scrap Yard. R. 27, ll. 11-13; 27, l. 24 – 28, l. 1, 22-24; 28, l. 25 – 29, l. 3, 8-10; 88, l 25 – 92, l. 20; State's Exs. 8-13; Defendant's Exs. 1 and 2.

The jury obviously rejected Gaines' valuation of the metals by finding Appellant not guilty of grand larceny in an amount greater than $5,000.00. After the verdict, Appellant therefore moved for a judgment of acquittal on the ground that the State presented no evidence of any value of the property between $1,000.000 and $5,000 00. The value was either over $22,000.00 or under $1,000.00. R. 186, l. 22 – 187, l. 6. Appellant argued that the evidence presented to the jury did not support its verdict of guilty on grand larceny in an amount between $1,000.00 and $5,000.00. R 188, ll. 2-6, 18-19; 194, l 10 – 196, l. 3; 197, l. 20 – 198, l. 9 The Trial Court denied Appellant's motion.

The State failed to present evidence that the goods taken were worth between $1,000.00 and $5,000.00. The jury, having rejected Gaines' valuation of $22,000.00, was left with evidence showing only a value of $973 80. While there was some testimony that Appellant was loading some metal onto his trailer on March 24, 2010 which he then unloaded, this metal was not inventoried or photographed R. 29, ll. 18-23; 66, ll. 14-22, 77,

l 25 – 102, l. 18; 78, l. 23-79, l 6, 84, ll. 19-24; 112, l. 25 – 113, l. 21, 113, ll. 13-15; 121, ll. 7-17. No evidence was presented as to the value of this metal, and the value of the metal returned was left to the conjecture and speculation of the jury. See State v Smith, 274 S.C. 622, 266 S.E.2d 422 (1980) (holding conviction of grand larceny must be reversed where the State presents no evidence of value of stolen item). This metal which Appellant unloaded and returned cannot be considered by the jury since the State presented no evidence of how much this metal weighed or its value

The only competent evidence remaining after the jury rejected Gaines' $22,000.00 valuation was a value of $973.80. Appellant is therefore entitled to a judgment of acquittal for grand larceny in an amount between $1,000.00 and $5,000.00.

III. The Trial Court erred in failing to give Appellant's requested full charge on the law of mistake of fact and good faith and erred in particular by failing to explain to the jury that any belief by Appellant that the property was abandoned did not have to be objectively reasonable to preclude a conviction for grand larceny.

Prior to closing arguments and the Trial Court's charge to the jury, Appellant asked the Trial Court to give a jury instruction on mistake of fact and good faith. Specifically, Appellant requested the following jury charge:

> To make out the offense of larceny, the defendant must have a specific intent to steal specific property from the true owner of the property, and a specific intent to convert the property to the defendant's own use.
>
> Where intent of the defendant is an ingredient of the crime charged (as it is with the offense of larceny), the existence or non-existence of the defendant's intent is a question of fact which must be determined by you, the jury.
>
> Whether the defendant had the specific intent to steal must be determined, not only from the act of taking, but from all of the surrounding circumstances.
>
> In this case, a mistake of fact by the defendant as to whether or not the property in question was abandoned will preclude conviction, but only if you, the jury, find that the defendant acted in good faith based on his actual belief that the property was abandoned when he took possession of the property.
>
> The defendant's good faith does not have to be objectively reasonable. The defendant should be judged on his own good faith belief, and should not be judged on the good faith belief of a reasonable man or reasonable woman in the community.
>
> If you, the jury, find that the defendant acted in good faith based on his actual belief that the property was abandoned, then you are required to find the defendant not guilty of larceny.
>
> The burden is on the defendant to introduce some evidence, direct or circumstantial, of his good faith belief for why he believed the property was abandoned and thereafter took possession of the property.
>
> If the defendant produces some evidence that he acted with a good faith belief, then, at this point, the State, in order to convict the defendant of

> larceny, is required to prove beyond a reasonable doubt that the defendant did not act in good faith and under a mistake of fact when he took the property.
>
> If the State cannot prove beyond a reasonable doubt that the defendant acted in bad faith at the time he took possession of the property, then the defendant is entitled to a verdict of not guilty.
>
> If the defendant, in good faith or ignorance of the effect of his act, takes possession of property which belongs to another, but without the specific intent to deprive the true owner of the property, the defendant is not guilty of larceny.

R. 150, l. 3 – 151, l 5, Court's Ex. 1.

The Trial Court declined to give the full requested charge on mistake of fact and good faith and instead only gave the following limited charge on mistake of fact:

> [T]he defendant has raised the defense of mistake of fact. The State must prove beyond a reasonable doubt that the defendant intended to commit grand larceny. However, where a person, in ignorance or honest mistake as to a fact, commits an act which but for the mistake would be a crime there is no criminal intent and the person cannot be found guilty of the crime.

R. 177, l. 25 – 178, l. 6.

At the conclusion of the Trial Court's charge to the jury, Appellant renewed his objection regarding the Court's refusal to give the requested full charge on mistake of fact. R 180, ll. 11-14.

The full mistake of fact and good faith charge requested by Appellant was supported by both the law and the evidence in the case, and the Trial Court therefore erred as a matter of law in refusing to give the requested full charge to the jury.

"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. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) "A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues." State

v Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. Id. at 406, 649 S.E 2d at 50 When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. State v. Cole, 338 S.C 97, 101, 525 S.E.2d 511, 512–13 (2000).

Under South Carolina law, "[a] mistake of fact which negates the existence of the mental element of the offense, will preclude conviction." State v Kelsey, 331 S.C. 50, 77-78, 502 S E.2d 63, 77 (1998) (citing 21 AM JUR.2D *Criminal Law*, § 141 at 276 (1981)); WILLIAM SHEPARD MCANINCH, CRIMINAL LAW OF SOUTH CAROLINA, 542 (1996). If the particular offense is a general intent crime, the mistake of fact must be reasonable. See Kelsey, 331 S C. at 78, 502 S.E 2d at 77

Larceny, however, is a specific intent crime. Larceny is the taking and carrying away of the goods of another against the owner's will or without his consent and with the felonious intent to permanently deprive the owner of his property and to convert it to the use of the taker. State v. Williams, 237 S C. 252, 260, 116 S.E.2d 858, 862 (1960) ("To make out the offense of larceny, there must be a felonious purpose. 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." (internal citation omitted)). The Trial Court in this case charged the jury, without objection by the State, that the State had to "prove beyond a reasonable doubt that the defendant intended to permanently deprive the owner of the property" and "intended to commit grand larceny." R. 177, ll. 11-14, 178, ll. 1-2.

A belief that property is abandoned is a belief in a legal right to take that property. See Torcia, Wharton's Criminal Law § 78, at 560–561 (15th ed. 1993) ("[A] defendant is not guilty of larceny for taking the property of another if he mistakenly believed that the property was his own or was abandoned" [footnote omitted]); see also Morissette v. United States, 324 U.S. 246, 276 (1952)

One cannot consciously intend to steal property that he honestly believed he had a legal right to take. Allowing a larceny conviction even where a defendant honestly believed that the property had been abandoned would be tantamount to substituting mere negligence for specific intent

Therefore, because larceny is a specific intent crime, a jury does not have to find that a defendant's mistake in fact in believing the property was abandoned was reasonable. Cf Kelsey, 331 S.C at 78, 502 S E.2d at 77 (holding mistake of fact must be reasonable for general intent crimes) With respect to specific intent crimes such as larceny, the question for the fact finder is not whether the defendant has behaved reasonably but instead whether he actually possessed the requisite mental state

There are at least fourteen jurisdictions whose courts have concluded that an honest belief in the right to take property, even if unreasonable, is inconsistent with an intent to steal. See, e.g., People v. Navarro, 99 Cal.App.3d Supp. 1, 11, (1979) (if the jury "concluded that defendant in good faith believed that he had the right to take the beams, even though such belief was unreasonable as measured by the objective standard of a hypothetical reasonable man, defendant was entitled to an acquittal since the specific intent required to be proved as an element of the offense had not been established"); State v. Varszegi, 635 A 2d 816 (Conn. App Ct. 1993), quoting from 50 Am Jur.2d Larceny §

41 (Supp. 1993) ("A defendant who acts under the subjective belief that he or she has a lawful claim on property lacks the required felonious intent to steal. Such a defendant need not show his mistaken claim of right was reasonable, since an unreasonable belief that he had a right to take another's property will suffice so long as he can establish his claim was made in good faith"); Charles v. State, 18 So. 369 (Fla. 1895) ("[T]he good faith and honest belief of the defendant need not be such as would be entertained by a reasonable and prudent man, provided it was really honest and in good faith, and not a sham or pretense"); Binnie v. State, 583 A.2d 1037 (Md. 1991) ("In short, under the circumstances and the factual situation presented by Binnie, it was within the province of the jury, not of the court, to determine whether Binnie should benefit from the honest belief defense, regardless of how dubious, suspect, farfetched, and incredible Binnie's account may have appeared to the trial judge"); People v. Karasek, 234 N.W.2d 761 (Mich. Ct. App. 1975) ("A felonious intent is an inseparable and essential ingredient of every larceny, and if a person takes property under a claim of right, however [ ] unfounded, he is not guilty of the offense" [citation omitted]); see also State v. Abbey, 474 P.2d 62 (Ariz. Ct. App. 1970); People v. Romo, 220 Cal App.3d 514 (1990), State v. Cavness, 911 P 2d 95 (Haw. Ct. App 1996); Stuart v. People, 73 Ill. 20, 22 (1874); State v. Sexton, 733 A.2d 1125 (N.J. 1999), People v. Zona, 928 N.E.2d 1041 (N.Y. 2010); State v. Lawrence, 136 S.E.2d 595 (N.C. 1964); Tate v. State, 706 P.2d 169, 171 (Okla. Crim. App 1985); Green v. State, 221 S W.2d 612 (Tex. Crim App. 1949); State v. Ward, 562 A.2d 1040 (Vt. 1989)

Accordingly, the error in the Trial Court's charge to the jury in this case was that the Trial Court did not fully explain to the jury that Appellant's mistake in fact did not have to

be objectively reasonable and that any mistake on his part in believing that the property was abandoned would preclude a conviction for the offense of grand larceny. There was no reason for the Trial Court to refuse to give Appellant's requested full charge on mistake of fact and good faith. The law and the evidence supported the requested charge.

In this case, Appellant asserted in his statement that he honestly believed the items of scrap metal he took had been abandoned. The site just looked like a rundown, abandoned mill site. State's Exs 2, 4, 5, 6. Tubs of scrap metal were just lying in tubs outside. R. 66, ll. 3-5 Appellant said the gates were opened, and Gaines and the officers who testified at trial both agreed that there was no mention in the incident report of any cut locks or the like. Lieutenant Crisp found no instrument's in Appellant's car that could cut locks. R. 31, ll. 2-24; 81, l. 23-82, l. 7; 122, ll. 1-6; 126, ll. 9-17; State's Ex. 1. While there was a no trespassing sign on one part of the property, heavily obscured by overgrown shrubbery, Appellant said he did not see any such signs indicating that the property was privately owned. State's Exs. 1 and 7 Lieutenant Crisp confirmed incident occurred in broad daylight and that Appellant was with a woman and his children Lieutenant Crisp agreed there was no evidence that Appellant was trying to hide or conceal what he was doing and that Appellant was very cooperative with law enforcement. R. 123, l. 8 – 124, l. 7.

Appellant's belief was sufficient to negate the specific intent necessary to prove larceny, regardless of whether his belief was objectively reasonable. Appellant's honestly held belief that the property had been abandoned was sufficient to negate the specific intent that is an essential element of the crime of larceny, and the Trial Court should have fully explained to the jury that Appellant's mistake of fact did not have to be objectively reasonable.

Appellant was prejudiced by the jury not hearing the full law on mistake of fact and good faith because the jury may have thought Appellant's belief that the property was abandoned was not reasonable and that because his belief was not reasonable, he had to be convicted of larceny. The jury may not have realized that Appellant's subjective belief that the property and metals were abandoned was alone sufficient to negate the specific intent required for larceny thus precluding the jury from being able to find Appellant guilty of larceny. The prejudice to Appellant by the Trial Court's refusal to give the requested full charge was compounded by the statements made by the solicitor in his closing argument to the jury that Appellant's belief the property was abandoned was "a fairy tale of fiction" and a "preposterous and ridiculous claim." R. 154, ll. 3-4. Appellant's conviction for grand larceny should be reversed and remanded for a new trial where the Trial Court erred in not giving the requested full charge on mistake of fact and good faith.

CONCLUSION

For the foregoing reasons, Appellant Jovan A. Mitchell respectfully requests this Court to reverse his conviction for grand larceny in an amount between $1,000.00 and $5,000.00 and either issue an Order of Acquittal or remand for a new trial.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of January, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOVAN A. MITCHELL,

APPELLANT.

APPELLATE CASE NO. 2013-002162

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of January, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of January, 2015

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021