STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Aiken County
Court of General Sessions
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-000467

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,..... PETITIONER.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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[1] State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2014)

STATEMENT OF ISSUE

The Court of Appeals properly affirmed Petitioner's conviction after finding harmless the trial judge's refusal to give the circumstantial evidence charge articulated in State v. Logan.

STATEMENT OF THE CASE

On April 2, 2015, the Newberry County Grand Jury indicted Petitioner on the charge of Homicide by Child Abuse (HCA) (2015-GS-36-0133). On April 4–8, 2016, Petitioner proceeded to a jury trial before the Honorable Frank R. Addy, Jr. Charles Verner, Esquire, represented Petitioner; Solicitor David Stumbo, Esquire, and Assistant Solicitor Taylor Daniel, Esquire, represented the State. The jury found Petitioner guilty as charged and the trial judge sentenced her to thirty years' imprisonment.

Petitioner filed a timely Notice of Appeal and the direct appeal perfected. On December 5, 2018, the South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Herndon, Op. No. 2018-UP-458 (S.C. Ct. App. filed December 12, 2018). Petitioner's timely petition for rehearing was denied on February 21, 2019. On March 21, 2019, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return, filed on behalf of the State, follows.

STATEMENT OF FACTS

At the conclusion of Appellant's case-in-chief, trial counsel requested five specific jury charges, including one regarding the interpretation and weight of both direct and circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Mirroring the language of the Logan charge, the requested charge read:

> 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 proved 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 [Appellant's] behavior as suspicious, the proof has failed.
>
> The State has the burden of proving [Appellant] guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relied on direct evidence, circumstantial evidence, or some combination of the two.

Trial counsel conceded his charge and the trial judge's charge were similar, but argued his requested charge was a "more direct and complete statement of the law since 2013)." (R.p.1224, line 24–R.p.1226, line 8; R.pp.1432–33).

The judge denied trial counsel's request for the charge, believing the charge in her bench book was "very similar" to the requested language. (R.p.1226, lines 12–15).

During her instructions to the jury, the trial judge charged direct evidence, circumstantial evidence, and reasonable doubt as follows:

> Ladies and gentlemen of the jury, I submit to you that there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in the case. After weighing all of the evidence in the case, if you are not convinced of the guilt of [Appellant] beyond a reasonable doubt, you must find [Appellant] not guilty.

. . . .

What is reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving [Appellant] guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence.

In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of [Appellant'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 [Appellant] is guilty of the crime charged, you must find [Appellant] guilty. If, on the other hand, you think there is a real possibility that [Appellant] is not guilty, you must give [Appellant] the benefit of the doubt and find her not guilty.

(R.p.1345, line 16–R.p.1346, line 15; R.p.1350, line 21–R.p.1351, line 20).

At the conclusion of the trial judge's instructions, trial counsel renewed his objections to the failure to include the Logan charge. (R.p.1365, line 4–R.p.1366, line 18).

CERTIORARI

Petitioner argues this Court should grant certiorari, but fails to articulate any "special and important" reasons for the Court to do so. Rule 242(b), SCACR states that a writ of certiorari is not a "matter of right," but should be granted only where special and important reasons merit this Court's review. In the instant case, Petitioner fails to articulate any "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals. Indeed, the Court of Appeals' decision was a straightforward exercise of reviewing and affirming the trial court's application of established precedent, logic, and practical consideration of the particular facts and circumstances of Petitioner's case. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

ARGUMENT

The Court of Appeals properly affirmed Petitioner's conviction after finding harmless the trial judge's refusal to give the circumstantial evidence charge articulated in State v. Logan.

Petitioner argues the Court of Appeals erred in affirming her conviction because she claims the trial judge's failure to provide the jury with the Logan charge could not have been harmless error because the State's case "relied almost entirely on circumstantial evidence." The State disagrees with this allegation of error; the trial judge's charge to the jury was an accurate statement of law which correctly explained how it should evaluate circumstantial evidence. Further, any alleged error in failing to charge the jury with the language included in Logan was necessarily rendered harmless by the accurate charge.

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 proposed 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.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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April 11, 2019

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PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Return to Petition for a Writ of Certiorari on Petitioner by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served this 11th day of April, 2019.

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