STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

APPELLANT

APPELLATE CASE NO. 2017-001876

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict where the state failed to present any direct or substantial circumstantial evidence that Appellant obstructed justice?

STATEMENT OF THE CASE

On March 20, 2014, an Horry County grand jury indicted Appellant for obstruction of justice (2014-GS-26-1121). R. 1100-1101. The state, represented by Nancy Livesay and Joshua Holford, called the case for trial before the Honorable R. Markley Dennis, Jr., and a jury on August 28-30, 2017. R. 1. James Galmore and Kirk Truslow represented Appellant. R. 1. During the jury's deliberations, the jury requested a written explanation for the obstruction of justice charge. R. 459, ll. 5-7; R. 1097-1098. The judge provided the jurors with the written instruction regarding obstruction of justice. R. 459, ll. 7-8; R. 1097-1098. The judge did not provide the entirety of the instructions in written form.[1] Ultimately, the jury found Appellant guilty as charged. R. 460, l. 24 – R. 461, l. 5. Judge Dennis sentenced Appellant to ten years in prison. R. 475, l. 1; R. 1102.

On September 1, 2017, Appellant served his notice of appeal. This brief follows.

[1] Defense counsel failed to object to the judge providing the jury with only the instruction regarding obstruction of justice in written form. Nevertheless, the South Carolina Supreme Court has made clear that "[i]t is never appropriate ... to give only part of the charge to the jury." State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009). While "[a] trial court may, in its discretion, submit its instructions on the law to the jury in writing," "submission of written instructions to the jury is not appropriate for every case." State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). Provision of written instructions to the jury must "be carefully exercised by the Bench." Id. at 129, 644 S.E.2d at 697-698.

STANDARD OF REVIEW

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "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." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal," the reviewing court "must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

STATEMENT OF FACTS

Brianna Warrelmann and Heather Elvis worked at the Tilted Kilt restaurant and bar in 2013. R. 207, l. 20 – R. 208, l. 6. The two were roommates as well. R. 208, ll. 4-6. Appellant "did maintenance work around the restaurant." R. 208, ll. 7-10; see also, R. 236, ll. 6-9. From June of 2013 until late October or early November, Appellant and Elvis "were in a normal boyfriend/girlfriend relationship." R. 208, ll. 11-14; R. 208, ll. 21-24; R. 237, ll. 14-18; R. 238, ll. 1-2; R. 238, ll. 13-15. When Appellant and Elvis broke up, Elvis initially had difficulty, but "towards the end she was doing fine." R. 210, ll. 9-11; see also R. 238, ll. 6-10. In fact, in December, Elvis was "[h]appy" and "was starting to get out there again, talking to new men." R. 210, ll. 12-14.

On December 17, 2013, Elvis went on a date with Steven Schiraldi and had plans to go out with him the following day as well. R. 216, ll. 1-6; R. 216, ll. 10-17; R. 218, ll. 8-14; R. 220, ll. 1-6; R. 221, ll. 4-7. After the date, Elvis and Schiraldi communicated through text messages until 2:43 a.m. on December 18, 2013. R. 85, ll. 16-23; R. 90, ll. 20-24; R. 223, ll. 9-19.[2]

On December 19, 2013, a police officer with the Horry County Police Department noticed "a suspicious vehicle at a landing." R. 18, ll. 2-21. Thereafter, the officer's supervisor began "looking for Heather Elvis." R. 19, ll. 5-11. The supervisor went to the Tilted Kilt. R. 19, ll. 12-16. From there, the supervisor was led to Appellant. R. 19, ll. 19-23.

Appellant's first contact with police

Very early in the morning on December 20, 2013, the supervisor left a voicemail message for Appellant. R. 20, ll. 20-24; R. 31, ll. 10-13; R. 429, ll. 9-11. When Appellant returned his

[2] Schiraldi was first contacted by police on December 20, 2013. R. 225, ll. 6-9. Schiraldi never went to the police to discuss Elvis's disappearance, despite knowing he was the last person to see Elvis. R. 226, ll. 7-10; R. 227, ll. 1-9. Schiraldi explained that he "was pretty in the dark about the situation" until law enforcement approached him. R. 227, ll. 10-14.

call, the supervisor asked if Appellant "had any information on the whereabouts of Heather Elvis." R. 21, ll. 4-7; R. 31, ll. 10-13. Despite the formal police report indicating that Appellant told the supervisor that he had not *seen* Elvis in six weeks, the supervisor insisted at trial that Appellant explained that he had not "spoken to her in approximately six weeks." R. 21, ll. 8-10; R. 30, l. 24 – R. 31, l. 5; R. 31, ll. 19-20; R. 1077-1088. Nevertheless, the supervisor was forced to admit that during that *same* conversation with the supervisor, Appellant said "he had spoken to her the night before." R. 21, ll. 20-23; R. R. 1077-1088. "[H]e only spoke to her to tell her to stop contacting him." R. 21, ll. 15-19; R. R. 1077-1088.

Based upon this conversation, the supervisor sent an officer – Casey Cantebury – to speak with Appellant in person. R. 21, l. 24 – R. 22, l. 3; R. 36, ll. 5-7. According to the supervisor, due to the change in Appellant's story about his communications with Elvis, the supervisor "felt as if" "there was going to be more questions and more follow-up to be done with him." R. 22, ll. 4-8.

The supervisor claimed that if he had known about "a pay phone call or that he had talked to her twice after midnight," he would have "probably" "gone out there" himself and "with additional information, it would have led [him] to contact Investigations." R. 23, ll. 3-10. Knowledge of the pay phone call and Appellant talking to Elvis twice after midnight would have turned the investigation into a "suspicious missing person." R. 23, ll. 11-13. The only difference, for the supervisor, between a missing person's case and a suspicious missing person's case was contacting the investigations department. R. 23, ll. 14-22.

In short, the supervisor indicated that if he had known about a pay phone call from Appellant to Elvis or that Appellant had talked to Elvis twice after midnight, the supervisor

probably (1) would have interviewed Appellant personally, and (2) would have contacted Investigations. These were the only changes the supervisor indicated would have occurred.

Appellant's second contact with police

Cantebury contacted his fellow officer, Brian Scales, to accompany him to Appellant's house on December 20, 2013, in the wee hours of the morning. R. 40, ll. 11-22; R. 54, ll. 3-5. Elvis had been missing "[r]oughly, two days." R. 50, ll. 14-16. At the time of this conversation, the police "were investigating a missing person" and "believed" Appellant was "the last person to have spoken to her." R. 41, ll. 8-14. While Cantebury and Scales spoke to Appellant, Scales's in-car camera recorded the interaction. R. 41, l. 15 – R. 42, l. 10; State's Exhibit #1. According to the video, the police spoke to Appellant from 2:11 a.m. until 2:30 a.m. on December 20, 2013, just a short time after Appellant spoke to Cantebury's supervisor by phone. R. 46, ll. 11-15; R. 47, ll. 6-9; R. 53, ll. 22-25; State's Exhibit #1.

Appellant told the officers that the last time he spoke to Elvis was either last night or the night before. State's Exhibit #1. Appellant readily admitted that he and Elvis had been involved in a relationship. State's Exhibit #1. After the break-up, the two did not have contact with each other until recently, when Elvis contacted him repeatedly. State's Exhibit #1. At the mention of this, Cantebury said he had records showing that for the last month there were 360 text messages and over twenty calls between the two. R. 58, ll. 18-22; State's Exhibit #1.

Although Appellant never told the officers that he had called Elvis that night, he did say that she had called him and left a voicemail. R. 49, ll. 10-16; State's Exhibit #1. At the time of the conversation with police, Appellant had deleted the voicemail. R. 49, ll. 17-18; State's Exhibit #1. Appellant never mentioned a pay phone call. R. 49, ll. 19-20. Appellant told police that the last time he saw Elvis was several weeks prior to the police speaking to him. R. 49, ll.

21-23. Appellant did not mention seeing Elvis around his house the week prior to the conversation. R. 50, l. 24 – R. 51, l. 1.

During this conversation, Appellant provided the officers with his phone and permitted the officers to look at his phone, including seeing text messages from Elvis. R. 182, ll. 3-23; State's Exhibit #1.

At trial, Scales claimed that if Appellant had told them that he called Elvis from a pay phone earlier that night, then the police "would have tried to locate the pay phone and any surveillance video around" it. R. 51, ll. 10-15. Testimony from another officer would reveal the police were well aware of the pay phone calling Elvis's phone and immediately obtained surveillance video from the area around the pay phone.

The detectives' investigation

Jeff Cauble was assigned to investigate the disappearance of Elvis at 8:30 or 9:00 a.m. on December 20, 2013, - a mere six hours after the police met with Appellant at his home and only seven-and-a-half hours after the supervisor called Appellant. R. 121, ll. 2-23. Quite clearly, this was "very early on in the investigative stage." R. 121, l. 24 – R. 122, l. 1.

Jonathan Martin, another detective working the case, obtained Elvis's phone records "[f]irst thing in the morning" on December 20, 2018. R. 51, l. 24 – R. 52, l. 1; R. 63, ll. 1-11. Using "exigent circumstances," the police obtained Elvis's phone records "very quickly" – having the records around 8:30 or 9:00 a.m. R. 64, ll. 9-17; R. 64, l. 20. In fact, the police may have had Elvis's phone records prior to questioning Appellant on December 20, 2013, at 2 a.m., which would explain Cantebury's reference to text messages and phone calls. R. 60, ll. 13-21; R. 124, ll. 8-12; State's Exhibit #1.

As the police explained, it would be "routine" to obtain the cell phone records of a missing person. R. 58, ll. 15-17. According to Martin, "[i]n a normal missing person case" the police will "look to see if [the missing person had] any communication with people." R. 64, ll. 9-13.

Elvis's phone records on December 18, 2013, from 1:35 a.m. until 3:41 a.m. revealed that she received a phone call from a pay phone at 1:35 a.m. that lasted for just under five minutes. R. 68, l. 23 – R. 72, l. 10.[3] In light of the call being made from a pay phone, the police did not know the identity of the caller.

"In the beginning stages" of the investigation, Brian Wilson was tasked with getting video of the pay phone at a gas station. R. 293, ll. 9-15. The police had this video *prior* to Appellant's interrogation during the afternoon on December 20, 2013. R. 293, l. 25 – R. 294, l. 2. The police obtained the video because they were aware that Elvis's phone received a call from that pay phone, but they were not aware of the caller's identity. R. 295, ll. 10-19; R. 297, ll. 23-25. Due to its quality, the video did not reveal the identity of the caller either. R. 297, ll. 20-22.

Prior to Appellant meeting with police during the afternoon of December 20, 2013, at least one officer had watched video footage from a location near the pay phone. R. 98, ll. 15-20. The footage revealed a "male figure" fitting Appellant's description. R. 98, ll. 19-20. The police were aware that Appellant was "the one communicating with her so much around" the time of the pay phone call; therefore, "it made sense" to the police that "he would have been the one to make that phone call" from the pay phone. R. 101, ll. 7-12.

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[3] The payphone records established that at 1:33 a.m. on December 18, 2013, there was a call to Elvis's phone from that payphone that lasted for four minutes and fifty seconds. R. 115, ll. 10-21.

Wilson explained that the police would have obtained the video from the pay phone *even if* Appellant *never* spoke to the police. R. 299, ll. 11-19. Wilson was clear that the police would not have known the caller's identity had Appellant not told the police that he was the person using the pay phone to call Elvis. R. 300, ll. 3- 23. In fact, according to Wilson, Appellant aided the investigation by supplying this information. R. 301, ll. 3-6.

After the call from the pay phone to Elvis, she repeatedly called the pay phone that had called her earlier beginning at 2:29 a.m. R. 73, l. 1 – R. 75, l. 17. Elvis also attempted to send text messages to the pay phone. R. 84, l. 22 – R. 85, l. 12.

Then, at 3:16 a.m., Elvis called Appellant's phone number. R. 75, l. 18 – R. 76, l. 2. The police were aware this was Appellant's phone number because he provided it to them and actually spoke to them using that phone number. R. 76, ll. 3-6. Elvis called Appellant's number again at 3:17 a.m. and the call lasted for just over four minutes. R. 76, ll. 12-18. Elvis continued to call Appellant's number thereafter. R. 76, l. 20 – R. 77, l. 5; R. 80, ll. 1-14. Due to the phone records, the police were also aware that at 3:41 a.m. on December 18, 2013, Elvis spoke to Appellant. R. 90, ll. 24-25.

On December 20, 2013, the police obtained Appellant's phone records as well. R. 76, ll. 7-9; R. 86, ll. 16-22; R. 87, ll. 13-15. In fact, the police had Appellant's phone records when Appellant met with the police on later in the day on December 20, 2013. R. 87, ll. 13-20; R. 95, ll. 3-5.

Based upon phone records, the police knew that Elvis had talked to Appellant "that day." R. 124, ll. 6-10. For the police, it was "very important … to talk to everyone who could have known something about her whereabouts." R. 124, ll. 10-12.

Appellant's third contact with police

Martin and Cauble, detectives with the Horry County Police Department, interrogated Appellant on December 20, 2013, at approximately 3 or 3:30 p.m. R. 89, ll. 4-9; R. 124, ll. 3-5; State's Exhibit #8. Appellant spoke to the police for "about 45 minutes." R. 91, ll. 20-22; State's Exhibit #8.

Martin explained that the police were "[v]ery early in the investigation" at the time of the interrogation of Appellant. R. 90, ll. 3-6. The police had been working the case only "about five hours." R. 90, ll. 3-6. Martin noted that gathering accurate information is important in an investigation because "[a]ny leads that lead you to a different direction can be very time consuming." R. 89, l. 25 – R. 90, l. 2.

What Appellant told police initially did not "match up with the phone records" the police received. R. 91, ll. 23-25. Martin explained that initially, Appellant "did not disclose the pay phone call," but when the police "presented him with the belief that he was the one that made the call," including having video from the area of the pay phone, Appellant admitted he made the pay phone call. R. 92, ll. 1-5; R. 144, l. 21 – R. 145, l. 1; State's Exhibit #8.[4] Although Appellant initially denied calling Elvis from a pay phone, within ten or fifteen seconds, he admitted to the call. R. 101, l. 22 – R. 102, l. 2; State's Exhibit #8. Appellant explained he called Elvis at 3:17 a.m. to tell her to stop putting notes on his car. R. 135, ll. 4-12; R. 135, ll. 13-14; State's Exhibit #8. Additionally, during the interrogation, Appellant denied seeing Elvis the week before. R. 92, ll. 6-8.[5]

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[4] According to Cauble, it was only when the police told Appellant they had video from the pay phone that Appellant "felt like he needed to come clean" and tell the police that he "actually made a phone call." R. 180, ll. 1-4.

[5] Martin testified that Appellant denied "seeing her prior to November." R. 92, ll. 6-8. This statement could not be true as the recording of the interrogation revealed and as the police knew because Elvis and Appellant were dating from July until October or November.

Martin was forced to admit that he would not have known that Appellant made the phone call to Elvis without Appellant's admission. R. 110, l. 5 – R. 222, ll. 23. In essence, the information Appellant provided actually assisted law enforcement in their investigation. R. 111, ll. 21-23.

The solicitor wanted to know what Martin did as a result of Appellant's statements on December 20, 2013. Martin explained:

> Being that he was the last person that had any known communication with her, the last phone record showed he talked to her, and he actually admitted he had talked to her, you know, his statements were very important to us. So we had to corroborate the things he was saying. When he identified that he is providing us information that was less than true, we had to now follow up on everything that had to do with his statements.

R. 92, ll. 9-21. When asked what follow-up Martin did as a result of Appellant not disclosing the pay phone call immediately, Martin explained the police "would be thorough in the complete investigation." R. 94, ll. 2-5. The implication being the police would be less than thorough had Appellant immediately disclosed the pay phone call. Martin went a little further, noting that because Appellant "provided a statement that [was] less than true," the police "had to confirm everything that he provided" to the police that Appellant claimed was true. R. 94, ll. 6-10. In the words of Martin, the police "would have to confirm everything." R. 94, ll. 10-11.

Martin further stated that if Appellant had told the first officers with whom he spoke about his calling Elvis from a pay phone, the police "probably would have gone out to that pay phone the night of the incident, maybe talked to witnesses when we know he was out there, talk to maybe the person that worked the pay phone." R. 95, l. 16 – R. 96, l. 1. Additionally, Martin said that because Appellant was "providing a statement that he [was] out there," the police would not "have to do the phone records from the pay phone." R. 96, ll. 1-3. Martin also claimed that

if Appellant had told the patrolman that he used a pay phone to call Elvis, that "probably would have furthered" law enforcement "a couple of hours." R. 98, ll. 4-9.

When pressed for how Appellant's denial of making the call from the pay phone impeded or obstructed the investigation, Martin seemed bewildered: "If he was honest about making the pay phone call then there would have been ...." R. 103, ll. 9-11. Upon further prodding, he stated, "There would have been more belief that the statements he [was] providing us were truthful, everything was truthful, as opposed to - - a single lie can make the entire statement be questioned." R. 103, ll. 12-16.

The police were interested in where Appellant was during the late evening hours of December 17, 2013, into the early morning hours of December 18, 2013. R. 131, ll. 10-17; State's Exhibit #8. Cauble claimed that Appellant misled the police about his whereabouts during those hours. R. 133, ll. 11-13. According to Cauble, the police found out Appellant "was actually near her residenc[e] at one point, and that he was also at Long Beard's which is where [Elvis] was actually as well, later on that evening." R. 133, ll. 14-18.[6] For some unstated reason, this was "material" to the police investigation, and the police did not discover it until *after* speaking to Appellant. R. 134, ll. 3-7.

Cauble "guess[ed]" it took until mid-February for the police to "figure out what part of [Appellant]'s statement was true and which part was not." R. 140, l. 24 – R. 141, l. 2.

Other than Appellant denying using the pay phone to call Elvis, which Appellant corrected within ten seconds, Cauble could point to no other time that Appellant *lied* to law enforcement. R. 167, ll. 2-6. According to Cauble, Appellant *misled* the police regarding the length of his relationship with Elvis when he said the two were involved from the beginning of

[6] Long Beard's was a bar and restaurant near Elvis's restaurant. R. 160, l. 18 – R. 161, l. 10.

September until late October or early November. R. 171, ll. 7-12. According to Cauble, Appellant "misled" the police by leaving "parts of the story out." R. 163, ll. 2-6.[7] Cauble claimed that Appellant was misleading about "how long he had been having contact with" Elvis. R. 143, ll. 1-3.

Appellant told the police that Elvis rode by his house four or five times. R. 144, ll. 2-4; R. 149, ll. 5-9; State's Exhibit #8. Cauble claimed that the tower information obtained from Elvis's phone records indicated Appellant was misleading the police regarding Elvis riding by his house. R. 144, ll. 5-9. According to Cauble, there was no way for Appellant to "fix" this inconsistency and it was up to the police to figure that out. R. 149, ll. 5-9. Later, Cauble would admit that he did not know *when* Appellant said Elvis was on his road five times. R. 155, ll. 13-16. Cauble confessed he did not even recall if Appellant had told him that. R. 155, ll. 17-18. In fact, when Cauble was confronted with a transcript of the interview, it was revealed that Appellant never indicated *when* he saw Elvis on his road. R. 156, ll. 22-25; R. 171, l. 21 – R. 172, l. 1.

Regarding Appellant not telling police that he was near Elvis's residence, Cauble was forced to admit that Appellant told the police he did not know where Elvis lived, but believed she lived somewhere in North Myrtle Beach. R. 158, ll. 21-23. However, Elvis lived nowhere near North Myrtle Beach, which the police knew. R. 159, ll. 3-13. Appellant's presence near Long Beard's was important to police because they knew Elvis had been at Long Beard's. R. 164, ll. 8-10. The police never asked Appellant if he were near Long Beard's. R. 160, l. 18 – R. 161, l. 10. Cauble could not even say that Appellant knew where Long Beard's was located. R. 162, ll.

[7] To Cauble, an omission was the same has misleading; he found no distinction between the two. R. 167, ll. 13-21.

21-23. Appellant never denied to the police that he was near Long Beard's. R. 162 l. 24 – R. 163, l. 1.

Cauble claimed that if he had "all of this information" that he "eventually had," he would have done things differently when he "got up from that interview room on December 20th." R. 149, ll. 15-19. Specifically, Cauble claimed the police "would have been able to start on this investigation earlier than what [they] did." R. 149, ll. 20-23. To this point, Cauble further claimed that if Appellant had told the supervisor who called him what Appellant told Cauble and Martin, then the officer would have called out the investigations unit. R. 149, 24 – R. 150, l. 2. Cauble asserted the police "definitely would have been able to get to the evidence quicker" and "would have been able to get to an interview with him quicker." R. 150, ll. 5-6. However, Cauble could not point to one thing that the police would have found at that point. R. 150, ll. 6-7. Nevertheless, he asserted it was "always best to get the investigation started as fast as possible." R. 150, ll. 7-9. The police want to get to evidence quickly because "it helps the evidence from being tainted or destroyed in any way." R. 150, ll. 10-13. In Cauble's opinion, Appellant's conversation with police "hindered the investigation." R. 150, ll. 14-20.

Appellant told the police that he and his wife were "in a good place" and as a result, he wanted to call Elvis to tell her to stop contacting him. R. 172, ll. 19-21. However, the police discovered that while Appellant was calling Elvis from a payphone, Elvis's wife was "talking or texting her boyfriend." R. 173, ll. 1-4. According to Cauble, "it didn't make a whole lot of sense," that the two could be "in such a good place" if Appellant's wife "sexting on the phone." R. 173, ll. 4-8. Cauble could not establish that Appellant was aware of his wife's conduct; therefore, Appellant's statement about his relationship with his wife could not be misleading.

Cauble admitted that even if Cauble believed what Appellant said regarding his discussion with Elvis on the pay phone, *the investigation would not stop*. R. 176, l. 22 – R. 177, l. 5. When asked whether there was anything in the investigation that was done because Appellant said he told Elvis to stop leaving notes, Cauble responded, "Everything thereafter was because of his lie." R. 177, ll. 6-9. Yet, when asked if the police "take away the lie," if there would be "no investigation," Cauble admitted the police were still investigating Appellant and others. R. 177, ll. 10-14.

Regarding what the police did differently based upon Appellant's interview, Cauble contended that the police "had to get extensive phone records" – for Appellant, Appellant's wife, and Appellant's kids. R. 177, ll. 15-24. The police "had to Cellebrite" Appellant's phone because the police "needed to know more information there." R. 177, l. 25 – R. 178, l. 1. Additionally, Cauble claimed the police got video from "a couple of places," which resulted in "MAIT" being called out. R. 178, ll. 1-4.[8] There were "several things that took place after the fact." R. 178, ll. 4-5. Yet, Cauble was forced to admit that if Appellant had never met with the police – if Appellant had never said one word to the police – then the police still would have gotten Appellant's phone records, Appellant's wife's phone records, and Elvis's phone records. R. 178, l. 6 – R. 179, l. 1.

Cauble insisted that if Appellant "would have come out with this information" during his first phone call with the police, then "things could have been different in [the police] investigation." R. 179, ll. 15-19. Cauble amended this statement to be clear that he could only contend that the investigation "could have been different," and could not say it "would" have

[8] According to Cauble, numerous individuals, including Horry County Police Department investigators, SLED, the Myrtle Beach Police Department, and the Sherriff's Department, worked on finding evidence regarding what part of what Appellant told the police was true and what part was not. R. 148, ll. 5-11.

been different. R. 180, ll. 7-12. It was "hard" for Cauble to say "exactly" what the police "would have found" if the police "got to it early enough." R. 180, ll. 20-21; R. 187, ll. 3-8.

Two months after the interrogation of Appellant, the police charged him with obstruction of justice. R. 148, ll. 2-4.

An in-depth analysis of phone records

According to the phone records, between July 17, 2013, and July 31, 2013, there were 411 contacts between Elvis's phone and Appellant's phone. R. 197, ll. 10-15. In August, there were 564 contacts between them. R. 198, ll. 1-10. In September, there were 553 contacts. R. 198, ll. 15-19. The two contacted each other 517 times in October. R. 199, ll. 1-5. In November, the two contacted each other 64 times. R. 199, ll. 11-14. The last contact between the two numbers was on December 18, 2013. R. 205, ll. 6-9.

A cell phone tower served Appellant's home, but the phone records indicated that particular tower was never used by Elvis from July through December. R. 202, ll. 7-14; R. 335, ll. 1-3. However, the records for Elvis's phone only showed a tower location when a voice call was made using that tower to connect to the network. R. 206, ll. 8-12; R. 350, ll. 15-19.

During the early morning hours of December 18, 2013, from 1:35 a.m. until 2:30 a.m., there were five calls from Elvis's phone using the tower closest to Elvis's home. R. 333, l. 20 – R. 334, l. 3. Then, between 2:32 and 3:05 a.m., the phone used a tower that was "directly south in the vicinity of Long Beard's restaurant." R. 334, ll. 3-12. The phone then started using the tower nearest Elvis's home for two calls at 3:16 a.m. and 3:17 a.m. R. 334, ll. 15-16. The final four calls connected to a tower in the area of Peachtree Landing. R. 334, ll. 16-20.

On December 17, 2013, Appellant's phone used a tower near his home for almost the entire day. R. 337, l. 23 – R. 338, l. 10. At 9:29 p.m., Appellant's phone used a different tower.

R. 338, ll. 11-17. For calls made at 9:38, 9:40 and 9:53, the phone used a tower "in the vicinity of the Tilted Kilt restaurant or the phone booth, in that general area." R. 338, ll. 20-25. Then, at 10:12, the phone used a tower on the west side of the airport, near the Sticky Fingers restaurant near the mall. R. 339, ll. 1-5. From 10:25 until 10:51, the phone stayed in that area. R. 339, ll. 6-11. At 10:52 p.m., the phone began to change antenna on the tower showing movement to the River Oaks area, where Elvis lived. R. 339, ll. 12-23.

Between 11:03 and 11:06, Appellant's phone was in the vicinity of Long Beard's restaurant. R. 340, ll. 4-11. For about an hour, between 11:30 p.m. on December 17, and 12:30 a.m. on December 18, the phone used a tower near the university. R. 340, l. 24 – R. 341, l. 5. Then, between 12:56 and 1:10, the phone used a tower indicating it was "in the immediate vicinity of Sticky Fingers restaurant near the mall." R. 341, ll. 20-23. At 1:12 a.m., the phone moved away from Sticky Fingers. R. 341, l. 25 – R. 342, l. 3. At 1:14 a.m., the phone was near a Wal-Mart. R. 342, ll. 4-9. Around 1:30 a.m., the phone was in the vicinity of the phone booth. R. 342, ll. 15-21.

Approximately, an hour and forty minutes later, the phone used the tower closest to Appellant's residence. R. 342, l. 24 – R. 343, l. 5.

The state's final witness – Donald DeMarino

The state called Donald DeMarino as a witness against Appellant. DeMarino was related to Appellant's wife. R. 373, ll. 1-7. After Elvis went missing, DeMarino and other family members were at Appellant's house. R. 373, l. 21 – R. 374, l. 3. DeMarino claimed that he and Appellant walked outside where the two men had a private conversation. R. 374, ll. 4-14. During the conversation, Appellant allegedly showed DeMarino a phone – "a flip phone, gray flip phone." R. 374, ll. 20-23. When the prosecutor asked DeMarino if Appellant showed him

"something on that phone that showed [DeMarino] that he knew more about Heather Elvis after she went missing," DeMarino answered, "I want to say yes." R. 375, ll. 6-9.

Despite his alleged awareness of this information, DeMarino did "[n]othing," at least, initially. R. 376, ll. 10-11. DeMarino had been arrested and placed in the local detention center "[t]en, maybe 15 times." R. 376, ll. 17-20. In fact, DeMarino still had a charge pending against him until June of 2017, just two months before Appellant's trial. R. 377, ll. 1-16. It was at some point while DeMarino was sitting in jail that he told the police about his alleged encounter with Appellant. R. 378, ll. 17-23. DeMarino admitted he had been questioned by the police previously and did not reveal the alleged conversation with Appellant until he was awaiting disposition of his outstanding criminal charges. R. 379, ll. 6-12.

DeMarino had *no idea* when this alleged conversation took place. R. 375, ll. 18-25.

Solicitor's closing argument

The solicitor argued that obstruction of justice is "hindering the police" and "misleading" the police. R. 379, ll. 7-9. According to the solicitor, obstruction of justice included "doing anything to obstruct justice being served." R. 379, ll. 9-10.

In describing Appellant's interaction with the first officer who called him to inquire about Elvis, the solicitor argued that Appellant denied seeing Elvis, but admitted Elvis called him a couple of days prior to the inquiry. R. 380, ll. 9-19. "He never mentioned one time anything about calling her first. He never mentioned one thing about her driving by his house. He never mentioned one thing about notes." R. 380, ll. 19-22. The solicitor described Appellant's answers as "deceptive" and misleading to the police. R. 380, ll. 23-25. The solicitor alleged Appellant told a "story to the police to hinder the investigation, obstruct, not tell vital information; not only not tell it, but mislead." R. 400, ll. 12-15.

It was important that Appellant was misleading the police, according to the solicitor, because Appellant "was the only person that talked to her, that lasts about 10 minutes." R. 400, ll. 1-5. In the solicitor's words, no one had "more information about this woman" than Appellant. R. 400, ll. 6-8. Appellant "was important" because of his conversation with Elvis. R. 400, ll. 9-12.

Next, the solicitor emphasized Appellant's conversation with the officers at his home. R. 400, ll. 16-17. According to the solicitor, Appellant told the police there had "been this huge gap, this huge gap, and then all of a sudden she started blowing up [his] phone." R. 400, l. 24 – R. 401, l. 1. When asked why Elvis had started calling him again, Appellant said he did not know why, but stated that she wanted the two of them to meet. R. 401, ll. 2-3.

While speaking to the officers at his home, Appellant took out his phone. This moment was a "turning" point for the solicitor. R. 401, ll. 3-5. That was "[s]uch a deliberate act to hinder and mislead them." R. 401, ll. 6-7. According to the solicitor, Appellant allowing the police to examine his cell phone was "an intentional, deliberate act to hinder this investigation and mislead the police." R. 401, ll. 9-10. The solicitor argued that Appellant "knew that the phone didn't show evidence from that pay phone. He knew that phone didn't have those deleted text messages on it." R. 401, ll. 12-13. Showing the officers his phone was "leading them in the wrong direction" in the solicitor's mind. R. 401, ll. 13-20. Allowing the officers to inspect his phone was "deliberately showing them information he knew was part of the story." R. 401, ll. 20-23.

Next, the prosecutor argued that Appellant's deleting of a voicemail from Elvis, but keeping records of phone calls from and to Elvis was "[d]eliberately, intentionally misleading the police." R. 402, ll. 1-4. Of course, the prosecutor omitted that Appellant actually told the police

about the voicemail and that Appellant deleted the voicemail prior to the police asking him about Elvis.

Oddly, the solicitor argued that the "best part" of the interrogation of Appellant at 2 a.m. was "not that he show[ed] the phone," but it was that he went inside and the conversation with the police ended. R. 402, ll. 19-21. That was "how" the jury knew Appellant was "intentionally trying to hinder the investigation." R. 402, ll. 21-22. When Appellant re-initiated his conversation with the police, the solicitor claimed Appellant provided "[m]isinformation." R. 403, ll. 1-2. The solicitor described Appellant's assertion that there had not been "300 text messages" between Appellant and Elvis in the last thirty days as "misinformation." R. 403, ll. 5-15. Later, the solicitor described Appellant as denying "300 calls" between them. R. 403, ll. 5-15.

In the solicitor's opinion, Appellant knew his cell phone records would not "show the pay phone" call to Elvis, and therefore, Appellant was willing to permit law enforcement to inspect his cell phone. R. 403, ll. 20-25. In the solicitor's view, Appellant was "deliberately trying to mislead them." R. 403, l. 25 – R. 404, l. 1.

By showing the police his phone that would not show his contact with Elvis by pay phone, Appellant, according to the solicitor, was lying, deceiving, and deliberating hindering the investigation. R. 404, l. 24 – R. 405, l. 3. The solicitor argued that the only reason Appellant agreed to speak to the police was so that he could "mislead them, to send them in the wrong direction." R. 405, ll. 4-8. This was Appellant's intent "because seconds and minutes matter." R. 405, ll. 12-14.

The solicitor even argued that Appellant voluntarily going to the police department on the afternoon of December 20, 2013, was because he wanted "to hinder and obstruct the police and

mislead them." R. 406, ll. 22-24. "He came to give a false story and lead them in the wrong direction." R. 406, ll. 24-25.

When Cauble and Martin were interrogating Appellant, he denied contacting Elvis "that night." R. 407, ll. 15-21. Even when asked if he called her from a payphone, Appellant denied it. R. 407, ll. 22-24. This, according to the solicitor, resolved any doubt that Appellant was trying to mislead, obstruct, or hinder the police investigation. R. 407, l. 25 – R. 408, l. 2. Per the solicitor, "[t]hat statement alone shows his intent to mislead and obstruct that investigation." R. 408, ll. 9-10.

Of course, within ten seconds, Appellant admitted he had called Elvis from a payphone. R. 408, ll. 11-12. Then, Appellant also admitted that he had seen Elvis and she had left notes on his vehicle. R. 408, ll. 19-24. Appellant explained that he told the police that he called Elvis from a pay phone to tell her to leave him alone. R. 409, ll. 2-5.

The police had "to get the phone records" to determine the veracity of Appellant's statement – according to the solicitor. R. 409, ll. 11-13; R. 410, ll. 3-4 ("So let's get the phone records and get it cleared up."). The solicitor completely omitted that the police had Elvis's phone records prior to interrogating Appellant at the police station, that the police were in the process of obtaining Appellant's phone records while interrogating Appellant at the police station, and that at least one officer honestly testified that those records would have been obtained in any missing person's case.

In the solicitor's estimation, the cell tower information conclusively proved Elvis was not by Appellant's house during the entire month of December. R. 410, ll. 16-20. The solicitor failed to acknowledge that the tower information was limited to when the phone was being used

and would not record a person's every movement, but would record only when the phone was in use, such as making a phone call.

The solicitor relied heavily upon two text messages from Appellant to Elvis asking her to call him, which were deleted from his phone, but recovered using software, to say that Appellant was showing the police his phone that he knew would not show those messages. R. 413, ll. 12-21.

To refute Appellant's claim that he asked Elvis to quit calling him, but she would not, the solicitor relied upon phone records showing Appellant "reached out to her 40 times" and Elvis "reached out to him 24" during the same time span. R. 414, ll. 20-24.

The solicitor claimed that when Appellant spoke to the police, he left out that "he rode by her house that very night." R. 416, ll. 20-22. However, Appellant indicated he did not know where Elvis lived. The solicitor indicated the jury knew Appellant knew where Elvis lived because Appellant "didn't say a dang word about going down" to the area where Elvis lived "that night." R. 416, ll. 16-19. This was enough to prove that Appellant "knew she lived there," in the solicitor's estimation. R. 416, ll. 16-19.

Additionally, Appellant did not tell police that "he had been down by Long Beard's." R. 416, ll. 23-25. This was somehow significant because Elvis made that same route after Appellant called her from a payphone. R. 417, ll. 1-3.

All of this indicated, according to the solicitor, that Appellant "was misleading the police in a very deliberate way that night with his story of where he had been." R. 417, ll. 21-23.

Recognizing the weakness in her case – the lack of evidence that Appellant's statements to the police did not actually hinder the investigation – the solicitor argued that Martin's

testimony that "as soon as he told the lie," the police had "to start all over now" was enough to support an obstruction of justice conviction. R. 422, ll. 18-20. The police "had to start the interview back over" when Appellant admitted to not telling the police the truth, just ten seconds prior. R. 422, l. 25 – R. 423, l. 1. According to the solicitor, instead of re-starting the interview, the police "should have been out on good information looking for this woman that was missing." R. 423, ll. 104. This was "20 more, 30 more minutes lost" per the solicitor. R. 423, ll. 4-5.

ARGUMENT

The trial judge erred in failing to direct a verdict where the state failed to present any direct or substantial circumstantial evidence that Appellant obstructed justice.

Relevant facts

At the conclusion of the state's case, Appellant moved for a directed verdict. R. 384, ll. 5-10. As defense counsel explained, the state's evidence failed to "add up to an obstruction of justice." R. 384, ll. 7-9.[9] Defense counsel and the judge agreed that the law concerning obstruction of justice "is kind of murky." R. 384, ll. 9-11. Specifically, defense counsel noted that "misrepresent" was undefined, leaving the offense and the challenge before the jury vague. R. 392, ll. 3-7; R. 393, ll. 8-9. Additionally, defense counsel observed that when trying to determine what conduct by Appellant was alleged to be obstructive, the evidence was "kind of murky also." R. 384, ll. 21-24.

First, defense counsel noted that the first officer who spoke to Appellant indicated that he would have contacted "investigations" regarding the case. R. 385, ll. 1-4. However, the evidence revealed that the case was assigned to an investigator within seven hours of the first officer speaking to Appellant. R. 385, ll. 4-6.

Second, defense counsel noted that the officer who testified about the meeting with Appellant at Appellant's home – Scales – indicated that he took *no action* after the meeting. "He didn't have to go prove a lie. He didn't have to prove that [Appellant] in some way impeded the investigation." Defense counsel noted the "glaring omission" in the state's case due to its failure to present Cantebury as a witness. R. 385, ll. 15-20. When the officers arrived at Appellant's home, he allowed the officers to examine his cell phone, which revealed prior contact with Elvis

[9] Based upon the state's evidence, defense counsel noted that the proper charge was the statutory offense of "false information to a police officer." R. 384, ll. 16-20.

and a telephone conversation with her the day before. R. 385, l. 21 – R. 386, l. 9. This was consistent with Appellant's statement to police during the interrogation on the afternoon of December 13, 2010, just hours after the meeting at Appellant's home. R. 386, ll. 3-5. Appellant told the officers that he last talked to Elvis "last night or the night before." R. 386, ll. 7-8.

Finally, defense counsel noted that "each of the cases involving obstruction of justice under South Carolina involve[d] a court official." R. 393, ll. 13-16. Neither the judge nor defense counsel could find a case involving common law obstruction of justice involving the conduct of a private citizen as obstructive. R. 393, ll. 17-24. More specifically, the case law concerning obstruction of justice concerned "the administration of justice" and court officers "hampering the administration of justice." R. 394, ll. 19-22.

The judge explained that the state's evidence was "a misstatement," that Appellant "corrected." R. 387, ll. 14-16.[10] The judge indicated there was "no question" that Appellant's misstatement to police about not calling Elvis from a payphone was corrected within ten seconds. R. 390, ll. 5-7. Regarding the pay phone call, the judge explained "the one big misleading could be is if they conclude that [Appellant] in that telephone call didn't tell her to stay away, but wanted to renew his relationship. Now, would that be misleading? Maybe. May not. It doesn't necessarily go, but it is an investigation of a missing person, and that may change some things." R. 388, l. 21 – R. 389, l. 2. According to the judge, the evidence did not "categorically" prove such. R. 389, ll. 2-3. However, the judge found that the jury could make that conclusion. R. 389, ll. 3-4.

The judge struggled with what the term "impede" in the offense included: "Does it mean throughout? Does it mean momentarily? Does it mean two days? Does it mean a month? Does

[10] The judge indicated the state should have charged Appellant with misprision of a felony, not obstruction of justice. R. 387, ll. 16-18.

it mean three months?" R. 388, ll. 1-5. The judge noted that in some federal cases, the courts used the term "material" to define obstruction of justice. R. 388, ll. 8-9. However, according to the judge, South Carolina had not included "any such language" regarding common law obstruction of justice. R. 388, ll. 11-12.

Judge Dennis concluded it was "a jury issue of what is 'impede.'" R. 389, ll. 19-20. Additionally, the judge concluded the issue of "intent" was a matter for the jury. R. 391, ll. 24-25.

Concerning whether Appellant's conduct as a private citizen could be considered obstruction of justice where the matter allegedly obstructed as a police investigation, Judge Dennis explained he could not "find anything in South Carolina law that deals with any type of investigation." R. 394, ll. 8-10. Despite finding cases dealing with individuals misleading law enforcement, none of those cases involved the criminal offense of obstruction of justice. R. 394, ll. 10-15.

Judge Dennis revealed that he was "feeling" that he should direct a verdict. R. 389, l. 25 – R. 390, l. 1. However, ultimately, Judge Dennis denied the motion for directed verdict. R. 395, ll. 14-17.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346,

349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who

admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The state charged Appellant with common law obstruction of justice. R. 1100-1101. The indictment alleged Appellant "did in Horry County on or about December 20, 2013, intentionally do an act which prevented, obstructed, impeded, or hindered the administration of justice, in violation of the Common Law offense of Obstruction of Justice." R. 1100-1101.

According to South Carolina law, "[u]nder common-law obstruction of justice, 'it is an offense to do *any* act which prevents, obstructs, impedes, or hinders the administration of justice.'" State v. Lyles-Gray, 328 S.C. 458, 464, 492 S.E.2d 802, 805 (1997)(quoting State v. Cogdell, 273 S.C. 563, 567, 257 S.E.2d 748, 750 (1979)). According to the Court, "[s]uccess in the effort to obstruct justice is not necessary to constitute the offense; it is sufficient if some act is done in furtherance of the endeavor." State v. Love, 275 S.C. 55, 62, 271 S.E.2d 110, 113 (1980).

"All the offences which fall under the general head of 'obstructing justice' are considered to be of a very grave and high character, for the obvious reason that they strike at the very foundation of authority and government, and tend by the strong arm to defeat the administration of justice and to overthrow all peace and order." State v. Bowen, 17 S.C. 58, 60 (1882); see also State v. Yarborough, 363 S.C. 260, 262, 609 S.E.2d 592, 593 (Ct. App. 2005) (prosecution for obstruction of justice where a lawyer offered an alleged victim $500 to drop charges against his client); State v. Caskey, 273 S.C. 325, 328, 256 S.E.2d 737, 738 (1979) (considering an obstruction of justice charge where a lawyer and a magistrate conspired to dismiss charges in exchange for money). While the law is not entirely clear on what constitutes the obstruction of justice, some guidance regarding the character of conduct that would support such a charge is available:

> Attempts to suborn a witness to commit perjury or to prevent his giving evidence, are offences against public justice; and there can be no well founded reason why the fabrication of evidence not involving perjury, or the destruction and suppression of that which is good, should not equally be so; they are alike calculated to pervert the public justice of this country, and to do individual injustice.

State v. DeWitt, 2 S.C.L. (1 Hill) 282, 287 (1834).

The Supreme Court upheld Cogdell's convictions for twenty-one counts of obstructing justice where Cogdell, while Mayor of the Town of Landrum, failed to report traffic convictions to the highway department as required by law. Cogdell, 273 S.C. at 565, 257 S.E.2d at 749. The Court concluded that the failure of Cogdell to report the convictions prevented the imposition of the penalties mandated by statutory law of individuals convicted of certain traffic offenses. Id. at 566-567, 257 S.E.2d at 750. Thus, this intentional failure by Cogdell to report traffic violations, as the statute required, constituted the common law offense of obstruction of justice. Id. at 567, 257 S.E.2d at 750.

The Supreme Court found the evidence sufficient to deny a directed verdict for Police Officer Lyles-Gray for obstruction of justice, where there was evidence, including Lyles-Gray's conduct at the crime scene and her mishandling of evidence, that Lyles-Gray was on notice that her daughter was a suspect in a crime. Lyles-Gray, 328 S.C. at 466, 492 S.E.2d at 806-807. On December 2, 1994, Belk's store security observed two women who appeared to be shoplifting. Id. at 460-461, 492 S.E.2d at 803-804. The security officer saw one of the women go outside, place merchandise into a car, and return to the store. Id. at 461, 492 S.E.2d at 804. When the two women finally left the store, the security officer asked to look in the car. Id. The women denied any knowledge of the car and claimed to be using a different car, into which they got and drove away. Id.

A check of the car revealed it belonged to a police officer, Lyles-Gray, who was the mother of one of the shoppers. Id. When Lyles-Gray went to get the car, the security officer attempted to talk to her, but Lyles-Gray refused, asking if the officer knew who she was and then informing the security officer of her status as a police officer. Id. at 462, 492 S.E.2d at 804. Lyles-Gray then

prepared an arrest warrant for a third individual for the shoplifting incident. Id. The security officer learned of the arrest warrant for the third individual and refused to sign it because it was false. Id. at 462-463, 492 S.E.2d at 804-805. Additionally, the security officer explained Lyles-Gray never consulted with her about the arrest warrant prior to its preparation. Id.

As the shoplifting investigation progressed, Lyles-Gray was directed by an officer in charge of the investigation to turn over any evidence in her possession. Id. at 463, 492 S.E.2d at 805. Lyles-Gray never turned over any evidence to the officer. Id. Eventually, Lyles-Gray's daughter was charged with shoplifting. Id. When the daughter's case was called to trial, the state learned the daughter's lawyer had a sweater that was allegedly stolen from Belk. Id. The lawyer revealed that Lyles-Gray informed him that she had the sweater in her car and she gave it to the lawyer. Id.

In State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980), the Court confronted an obstruction of justice case involving a magistrate. One indictment alleged the magistrate promised to obtain a valid driver's license for an individual for $500 and that the magistrate obtained a driver's license for the individual, but the license was not valid. Id. at 61, 271 S.E.2d at 113. The other indictment alleged the magistrate promised to remove from the public record all references to the pending charge against the individual and the prevent any prosecution of that charge by bribing the necessary public officials in exchange for $5000. Id.

The Court concluded there was sufficient evidence to submit the case to the jury. Id. at 62, 271 S.E.2d at 113. The evidence showed the magistrate "told a driver's license examiner that, if he could get a driver's license for [the individual], it would be beneficial to the examiner." Id. Thereafter, the magistrate gave the individual an invalid temporary driver's license. Id. The evidence also showed the magistrate asked an investigator working at the public defender's office if

he knew anyone who could stop an indictment, and the magistrate admitted he had paid money to a public employee to help prevent the prosecution of the individual. Id.

The Court confronted the interpretation of a city ordinance making it "unlawful for any person to assault, resist, hinder, oppose, molest, or interfere with any employee of the police department of the city, in discharge of official duties." City of Charleston v. Mitchell, 239 S.C. 376, 393, 123 S.E.2d 512, 520 (1961), rev'd on other grounds, 378 U.S. 551 (1964). In the height of the civil rights movement, individuals refused to leave a store despite being requested to do so by the manager and the police. Id. The police arrested the individuals. Id. The judge found them guilty of violating the city ordinance because the individuals interfered with the police officer in the discharge of his duties by refusing to leave the premises after being ordered to do so. Id. at 393-394, 123 S.E.2d at 520.

When interpreting the ordinance, the Supreme Court cited a North Carolina case regarding the definition of "interfere." Id. (citing State v. Estes, 185 N.C. 752, 117 S.E. 581 (N.C. 1923)). Estes was convicted "was convicted on an indictment charging that he unlawfully and willfully did resist, hinder, delay, obstruct and interfere with an officer of the board of health in the discharge of his duty as such." Id. The evidence at Estes' trial revealed he used abusive and profane language towards the officer but did not get up from his desk where he was seated nor did he strike or offer to strike the officer and made no demonstration of violence whatever." Id.

The North Carolina court construed the word "interfere" to mean "to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty." Id. at 394-395, 123 S.E.2d at 521. The North Carolina court interpreted "obstruct" to mean "direct or indirect opposition or resistance to the lawful discharge

of [an officer's] official duty." Id. at 395, 123 S.E.2d at 521. Using those definitions as guidance, the South Carolina Supreme Court concluded the civil rights protesters did not interfere with the police officer in the discharge of his official duty because their conduct was "merely inaction." Id.

Considering a resisting arrest conviction, the South Carolina Supreme Court explained that "[r]esisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it." City of Columbia v. Bouie, 239 S.C. 570, 574, 124 S.E.2d 332, 333 (1962), rev'd on other grounds, 378 U.S. 347 (1964). According to the testimony of the arresting officer, "the only 'resistance' on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter 'had to pick him up out of the seat.'" Id. Examining the facts before it, the Court concluded that the defendant's "momentary delay in responding to the officer's command [did not] amount[] to 'resistance' within the intent of the law." Id.

The question presented is whether Appellant did any act that had the intent to prevent, obstruct, impede, or hinder the administration of justice. The answer is no.

The state's entire case was built upon the administration of justice being defined as a citizen lying during a police investigation.[11] Appellant is unaware of any case in South Carolina equating the two. Typically, the administration of justice involves a matter concerning the courts. As described supra, it may involve bribing witnesses, bribing court officials related to

[11] Appellant acknowledges that in State v. Hess, 279 S.C. 525, 527, 309 S.E.2d 741, 742 (1983), Hess was charged with obstruction of justice because Hess revealed information to third party that compromised an undercover investigation. However, Hess was the Chief of Police, not a private citizen, and the jury acquitted him of obstruction of justice; therefore, whether his revelation that compromised the investigation amounted to obstruction of justice was not before the appellate court.

criminal charges, and falsifying police reports. The state failed to prove that any of Appellant's actions interfered with any matter before any court of law.

There is no dispute that Appellant lied to Martin and Cauble when he denied calling Elvis from a pay phone. However, Appellant immediately – within ten seconds – admitted to the call. The state failed to present any evidence that Appellant's lie obstructed the administration of justice in any way. The state even failed to present any evidence that Appellant's lie hindered the investigation in any way. All of the evidence indicated the police investigation before and Appellant's interrogation was the type of investigation the police would have engaged in whether Appellant spoke to law enforcement or not. At best, the state could rely upon the officer's testimony that had Appellant not been caught in a lie to the police, then the police would have conducted a less then thorough investigation. In other words, by catching Appellant in a lie, the police were forced to conduct a more thorough investigation. By any measure, having the police conduct a very thorough investigation surrounding the disappearance of a young woman would not be the equivalent of hindering or impeding the investigation. In fact, Appellant's lie improved the investigation by forcing the police to investigate more thoroughly.

To the extent, the administration of justice could be equated with a police investigation, the state failed to present evidence that Appellant did any act that had the intent to prevent, obstruct, impede, or hinder the administration of justice.

The supervisor who spoke to Appellant around 1 a.m. on December 20, 2013, indicated that if he had known about a pay phone call from Appellant to Elvis or that Appellant talked to Elvis twice after midnight, the supervisor would have interviewed Appellant personally and would have contacted investigations. These suppositions fail to support the state's charge. An investigator was placed on the case within hours of the supervisor talking to Appellant, and there

is no indication that Appellant's statement to the supervisor would have been any different than the statement he provided to the two officers who interviewed him that morning. Additionally, there was no evidence that Appellant's omission of the pay phone call and other calls was intended to prevent, obstruct, impede, or hinder the administration of justice. In fact, there was no evidence regarding how Appellant's omissions could have done so. Also, it must be noted that the supervisor was well aware that Appellant and Elvis spoke by phone "last night," calling into question the supervisor's insistence that his conduct would have been different had he known about the pay phone and after midnight calls.

Scales, who interviewed Appellant around 2 a.m. on December 20, 2013, indicated that had he known about the pay phone call, then the police would have tried to locate the pay phone and video around it. Appellant's omission of the pay phone did not prevent, obstruct, impede, or hinder locating the pay phone or obtaining the video around the phone. From Elvis's phone records, the police were aware of the pay phone call and had directed an investigator to get the video around it. The video was obtained prior to the police meeting with Appellant during the afternoon of December 20, 2013. Thus, there was no evidence that Appellant's omission of the pay phone call to Scales and Cantebury was intended to prevent, obstruct, impede, or hinder the administration of justice regarding locating the pay phone and obtaining the video from the area around the phone.

Martin could only speak as to what "probably" would have occurred differently when describing how Appellant's omission of the pay phone call affected the investigation. Martin claimed that if Appellant had told the first officers with whom he spoke about the pay phone call, the police probably would have gone to the pay phone on the night of the incident and talked to witnesses. What Martin missed was that the first officer talked to Appellant just hours before

Martin talked to Appellant, which was approximately two or three days after Elvis went missing and two or three days after the pay phone call. Had Appellant told the first officer about the pay phone call, there would have been no way the police could have gone to the pay phone "on the night of the incident" because the conversation was days after the pay phone call.

Martin vaguely claimed that the investigation would have been furthered by a couple of hours had Appellant initially revealed the pay phone call. Martin could not identify how the investigation would have been furthered with the information, however.

Cauble's insistence that Appellant lied about his whereabouts was belied by the record. Appellant answered law enforcement's questions about his whereabouts to the best of his ability. He admitted to being near restaurants because he was working. He admitted he was unclear regarding everywhere he had been that night and early morning, which was reasonable and understandable, but he did provide accurate information about his whereabouts, including telling the police about going to gas stations and stores.

Cauble's claim that Appellant intentionally misled law enforcement about the length of his relationship with Elvis was unproven and not connected to any obstruction of the investigation, or more importantly, the administration of justice. Similarly, Cauble's claim that Appellant misled the police by claiming Elvis drove by his house when the phone records showed her phone did not use the tower by his house was an erroneous conclusion. The phone records only showed when the phone was in use with a voice call. The phone records could not show Elvis never drove by Appellant's house. Cauble's conclusion was based upon a false premise.

Most telling of the state's case was that Cauble, the lead investigator, admitted that the police would have investigated the disappearance, in much the same way as they did, had

Appellant never even spoken to police. Further, Cauble admitted that Appellant's omissions would not have resulted in a different investigation. He thought things "could have been different," but he was not able to say what those things were or how Appellant's omissions altered the investigation.

Quite simply, the state failed to present any direct evidence or substantial circumstantial evidence that Appellant did any act that had the intent to prevent, obstruct, impede, or hinder the administration of justice. As defense counsel succinctly put it, the police "never did anything that they weren't going to do. Anything." R. 434, ll. 4-5.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in favor of Appellant on the charge of obstruction of justice based upon the state's failure to present any direct or substantial circumstantial evidence of guilt.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of July, 2019.