STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2013-001620

The State, Respondent,

vs.

Marvin Xavier Porcher, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2013-001620

The State, Respondent,

vs.

Marvin Xavier Porcher, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied Appellant's motion for a directed verdict because there was substantial circumstantial evidence supporting sending the case to the jury.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Mr. Salgado was a neighborhood resource officer for the North Charleston Police Department. (T.124-125; R. 34-35). Just after midnight on November 4, 2011, he was patrolling on shift when he passed a bicyclist wearing dark clothing and without a rear light. (T.128; R. 38). He made a U-turn and made contact with the bicyclist. Salgado recognized the bicyclist, but when asked for his name, the cyclist gave him a different name from the one Salgado knew. (T.130-131; R. 40-41). Appellant gave him the name Marvin Swinton and his date of birth and then told Salgado he was from New York. Salgado had the North Charleston Police run the name and birthdate through South Carolina and New York records and found no one with that combination. (T.131-133; R. 41-43).

Salgado testified Appellant appeared nervous and sweaty. He also indicated there was a bulge under Appellant's jacket. Salgado asked consent to search Appellant's person and Appellant gave consent. Salgado found a laptop and charger under Appellant's jacket, and his wallet with ID in his pant pocket. The ID contained Appellant's real name, Marvin Porcher. (T.133-134; R. 43-44). Salgado also found a pearl necklace in Appellant's jacket pocket and a cylinder, ultimately found to contain jewelry, in Appellant pant pocket. (T.135; R. 45). Appellant also had a razor knife, a wrench, an allen wrench, and a zip tie in his pocket. (T.137; R. 47). Appellant tried to explain the laptop indicating he was going to a friend's house to use the internet. (T.137; R. 47).

Salgado arrested Appellant for providing false information to a police officer. Appellant was taken to the North Charleston City Hall to meet with a detective. He met

with Detective Evans. (T.137-138; R. 47-48). Evans was a detective assigned to the persons crime unit. (T.149; R. 57). Evans met with Salgado and was given the laptop and charger taken off Appellant's person. Evans turned on the laptop and located information linking the laptop to the victim. He called the victim, provided his name and job title, and asked if she knew where her laptop was located. The victim responded it was at her residence. (T.151; R. 59). Evans asked her to return to her residence and meet someone from Charleston County Sheriff's Office and North Charleston Police Department. (T.152; R. 60).

Evans then interviewed Appellant. After reading Miranda warnings to Appellant, Evans discussed the laptop. Appellant indicated he bought it from someone on Remount Road. He did not provide any details about from whom he purchased the laptop, where exactly on Remount he purchased it, or "any other pertinent details." (T.157-158; R. 65-66). He did not provide the name of the person or even a description of the person that allegedly sold him the laptop. (T.158; R. 66).

The victim lived in a mobile home with a roommate. The home was near the residence of Appellant and his girlfriend. (T.169-171; R. 76-78). Appellant came to her house to do some exterior work several weeks before the burglary. (T.172-173; R. 79-80). On November 2, 2011, Appellant, his girlfriend, and another friend came over to the victim's home so Appellant could put a tattoo on the victim. While in the victim's home, Appellant used her laptop to go on Facebook. (T.175; R. 82).

On November 3, the victim and Appellant's girlfriend visited Appellant where he worked so the victim could give him a payment for the work he performed on her house. While there, he asked if the victim and his girlfriend were planning to go out that night.

(T.176-177; R. 83-84). At that time, the victim did not plan to go out, but later changed her mind and around 9:30 p.m. picked up Appellant's girlfriend at Appellant's house. (T.178; R. 85).

While out with Appellant's girlfriend, the victim received a phone call from a detective who asked if she reported a burglary and also if she owned an Acer laptop. The victim indicated the laptop was left on her bed on top of papers. (T.179; R. 86). The victim then met a county sheriff and someone from North Charleston Police at her home. (T.180; R. 87). Walking through her home with the officers, the victim indicated her laptop, some of her jewelry, and her roommate's television was missing. (T.182; R. 89). The victim later learned Appellant was found with her laptop. She was surprised he would have it. (T.188; R. 95). She also indicated she never gave him permission to be in her home or have her computer. (T.185; R. 92).

Deputy Baldwin was the Charleston County Deputy who met the victim at her residence. (T.206-207; R. 111-112). He indicated that upon entering the residence and making certain it was secure, he noticed the rear door was pried open from the outside. He testified the door frame was pried so the door could open. (T.208-209; R. 113-114). He explained many metal objects could be used to pry the door open, including some of the objects found on Appellant's person when he was arrested. (T.209; 215-216; R. 114; 120-121).

ARGUMENT

I. The trial court properly denied Appellant's motion for a directed verdict because there was substantial circumstantial evidence supporting sending the case to the jury.

Appellant contends the trial court erred in denying his motion for a directed verdict. He contends because there was no forensic evidence and no eyewitnesses showing he entered the victim's home and took the laptop and jewelry then he was entitled to a directed verdict. However, there is substantial circumstantial evidence supporting the denial of his motion for a directed verdict, including the fact he was found in possession of the victim's laptop and jewelry shortly after the burglary occurred. Accordingly, the trial court properly denied his motion for a directed verdict and allowed the jury to perform its function as fact finder.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Pursuant to section 16-11-311 of the South Carolina Code:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> . . . .
>
> (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
>
> (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311(A) (Supp. 2013).

In the instant case, the State presented evidence demonstrating Appellant had prior convictions for burglary in the second degree and burglary in the third degree. (State's Exhibits 25 and 27; T. 238-240; R. 198, 199; 138-140). In the alternative, the burglary clearly occurred after the victim left her home to pick up Appellant's girlfriend. The victim picked her up at 9:30p.m. and they were out until after midnight when the victim received the call about her laptop and to return to her home. Accordingly, there is definitely evidence indicating the burglary occurred in the nighttime. The only issue remaining then is whether Appellant entered a dwelling without consent and with intent to commit a crime in the dwelling. The State provided substantial circumstantial evidence Appellant entered the victim's home and took her jewelry and computer without consent.

Appellant knew of and had used the laptop the day before the burglary. He was familiar with the victim's home having worked on its exterior and having been inside the day before to give the victim a tattoo. He also asked hours before the victim left home if she planned to go out with his girlfriend that night.

Most significantly, within hours of the victim leaving her home and before she could even return to find her laptop and jewelry stolen, Appellant is stopped with the items in his possession. He is carrying a laptop under his jacket and has the necklace in one pocket and other jewelry in a pant pocket. He tries to claim the laptop was purchased off Remount Road, but fails to provide any meaningful details to support his story, including no description of the person, no name, no location along the road, nor any other pertinent details. His possession of the laptop is left mostly unexplained, or at best with an unreasonable explanation. Additionally, his possession of the necklace and other jewelry identified by the victim is completely unexplained to the officers. (T.184-185; R. 91-92).

In State v. Campbell, 131 S.C. 357, 127 S.E. 439 (1925), the South Carolina Supreme Court recognized that recent possession of stolen goods was evidence from which the jury could infer the defendant's guilt of larceny or burglary. The Court explained the fact the defendant was found with property from a store which had been broken into and entered was evidence the weight and sufficiency of which was for the jury. The Court elucidated:

> The recent possession of stolen property whether in larceny or in burglary, and whether such possession be 'explained' or 'unexplained,' is a circumstance—an evidentiary fact–which may have a greater or lesser weight as proof of guilt, when considered with, and strengthened or weakened by, all the other evidence in the case. If the evidence tends to show the possession to be an honest one, the probative force of the fact of recent possession may be greatly modified or entirely destroyed. If wholly unexplained, it may carry a conviction of guilt to the minds of the jury, but, whether explained or unexplained, it is competent and relevant evidence upon the issue of guilt or innocence.

Campbell, 127 S.E. at 440-441 (quoting State v. Vierck, 23 S. D. 166, 120 N. W. 1098, 139 Am. St. Rep. 1040, 1043 (1909)); see also, State v. Shields, 217 S.C. 496, 61 S.E.2d 56 (1950) (dispelling the contention possession of stolen goods may be some evidence of participation in larceny, it affords no support for a conclusion that appellant committed burglary and finding the Courts of this state have long held it evidence of burglary).

The United States Supreme Court has upheld similar inferences. In McNamara v. Henkel, 226 U.S. 520 (1913), the appellant challenged the inference that recent possession of stolen property provides evidence supporting a conviction for burglary as it did a larceny. The Court explained:

> The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force.

Id. at 525; see also Barnes v. United States, 412 U.S. 837, 845-846 (1973) (approving of a jury instruction allowing for the jury to infer the defendant's guilt from his unexplained possession of recently stolen property and recognizing common sense and experience support such an inference).

The courts of this State have continued to hold that evidence of a defendant's recent possession of stolen goods is evidence tending to show his guilt of the burglary or larceny. See State v. Lyles, 211 S.C. 334, 339, 45 S.E.2d 181, 183 (1947) (instructing that proof of a defendant's possession of recently-stolen property supports an inference that the defendant was the person who stole the property); State v. Kimbrough, 212 S.C. 348, 352, 46 S.E.2d 273, 275 (1948) ("If the jury found that he had possession of this

recently stolen property, this fact, with the other circumstances in the case, was sufficient to warrant an inference of guilt."); State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (instructing that the inference to be drawn from recent possession of stolen property is an evidentiary fact as opposed to a rebuttable presumption and constitutes circumstantial evidence of guilt).

The State presented substantial circumstantial evidence, including Appellant's knowledge and prior use of the laptop; his knowledge of the exterior of the victim's mobile home; his interest in whether the victim would be out the night of the burglary; and most significantly, his being in possession of several of the items taken during the burglary without any reasonable explanation. Accordingly, this Court should affirm the decision of the trial court denying Appellant's motion for a directed verdict.

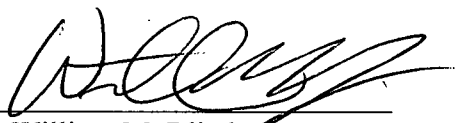
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 29, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2013-001620

The State, Respondent,

vs.

Marvin Xavier Porcher, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 29, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2013-001620

The State, Respondent,

vs.

Marvin Xavier Porcher, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 29th day of July, 2014.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

July 29, 2014

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Marvin Porcher
Appellate Case Tracking No. 2013-001620

Dear Ms. DuRant:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services