THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
R. Ferrell Cothran Jr., Circuit Court Judge

Appellate Case No. 2019-000292

The State, ...Respondent,

v.

Shawn Douglas Custer,.....Appellant.

INITIAL BRIEF OF APPELLANT

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Shawn Custer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional

Rules

QUESTIONS PRESENTED

Question I

The trial judge erred as a matter of law by failing to direct a verdict of acquittal when the State failed to present any direct or substantial circumstantial evidence that Shawn Custer had actual or constructive knowledge that the backhoe, dump truck, and trailer stolen from High Hills Rural Water Company were located on his property.

Question II

The trial judge erred as a matter of law by instructing the jurors Shawn Custer's knowledge and possession of stolen backhoe, dump truck, and trailer, belonging to the High Hills Rural Water Company, may be inferred because the stolen property was found on real property under his control.

Question III

The trial judge erred as a matter of law by failing to suppress the GPS data showing times and movements of the backhoe, dump truck, and trailer, belonging to the High Hills Rural Water Company, when the Solicitor failed to disclose that evidence prior to trial as required by to Rule 5, SCRCrimP.

STATEMENT OF CASE

The Sumter County Grand Jury indicted Shawn D. Custer for one count of receiving stolen goods valued in excess of ten thousand dollars regarding a backhoe belonging to the High Hills Rural Water Company and one count of receiving stolen goods valued between two thousand and ten thousand dollars regarding a dump truck and trailer belonging to the same water company. Tr. 5, R. *. From February 13-15, 2019, the State of South Carolina tried Mr. Custer before the Honorable R. Ferrell Cothran, Jr. and a jury. Edgar R. Donnald, Jr., of the Third Circuit Solicitor's Office, represented the State. Patrick M. Killen represented Mr. Custer. Tr. 1. The jurors convicted Mr. Custer as charged; however, while the jurors were deliberating, the State dismissed the count of receiving stolen goods valued

between two thousand dollars and ten thousand dollars.[1] Tr. 419-20, 422-23. Judge Cothran sentenced Mr. Custer to seven years imprisonment, suspended to time served, with credit for time served, and probation for three years with a special condition requiring him to complete forty hours community service. Tr. 426-27, R. *. This appeal follows.

STATEMENT OF FACTS

Shawn Custer was born in Ohio. He enlisted in the United States Air Force on February 21, 1991 and moved to South Carolina when he was stationed at Shaw Air Force Base in Sumter. Initially, his career specialty was "aircraft armament for the F-15 Strike Eagle." After receiving additional training, his specialty became "satellite wide band," which "consisted of airborne communications, tactical communications, [and] networking communications." His position required a security clearance. He obtained the rank of an E-5 staff sergeant.

After ten years in the Air Force, Mr. Custer received an honorable discharge. He then entered the civil service with the Department of Defense. After three years in the civil service, Mr. Custer became a contractor working for the Air Force Central Command ("AFCENT") "general as his communications engineer" at Shaw Air Force Base. In 2007,

[1] At some point, the trial court and counsel discussed whether or not this case should have involved one charge or two charges for receiving stolen goods. "To alleviate that" concern, the Solicitor agreed to "dismiss the receiving stolen goods two thousand [to] ten thousand" dollars charge. *See* S.C. Code Ann. § 16-13-180(D) ("For purposes of this section, the receipt of multiple items in a single transaction or event constitutes a single offense."). *Cf. United States v. Dixon*, 509 U.S. 688, 696 (1993) (Double Jeopardy Clause "applies both to successive punishments and to successive prosecutions for the same criminal offense"); *State v. Greene*, 423 S.C. 263, 284, 814 S.E.2d 496, 507 (2018) ("the conviction itself is considered a punishment and that, too, must be vacated") (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985)); *State v. Brown*, 319 S.C. 400, 408, 461 S.E.2d 828, 832 (Ct. App. 1995) (where the alleged possession with intent to distribute and distribution arise from the same conduct, such that the possession would merge into the distribution").

after working for AFCENT for over ten years, Mr. Custer pursued his "longtime dream to have an automotive shop that did custom repair of vehicles" by opening Sumter County Customs. He later changed the name of the business to Sumter County Tire, Auto, and Lift so people would understand he also offered general automotive repair. Tr. 322-28.

In 2006, Mr. Custer purchased sixty-five acres in Sumter County and built a log home. He sold seven and one-half acres to a close friend who built a house on the land. In 2015 and at the time of his trial, Mr. Custer still owned fifty-five acres. His property is wooded, has multiple entrances, and includes paths for riding four wheelers.[2] Tr. 328-35.

On Saturday, September 19, 2015, Shawn and Nicole Custer[3] attended Jason Reddick's wedding in Greenville, South Carolina. On Saturday afternoon, they checked into the Hilton Hotel on Haywood Road. The wedding started at 6:00 p.m. on the campus of Furman University. They stayed for the reception, which was also on the Furman University campus. They returned to the Hilton at midnight. On Sunday, September 20, 2015, Shawn and Nicole Custer checked out of the Hilton and ate lunch at TGI Fridays. After lunch, they shopped at Target, and Nicole bought Halloween decorations. They finished shopping at 6:45 p.m. and returned to Sumter. When Shawn and Nicole Custer got home between 8:00 and 8:30 p.m., it was dark. Ms. Custer started the laundry. Mr. Custer

[2] At the time of this incident, Maria Brewington lived on land adjoining Shawn Custer's land. She is familiar with Mr. Custer's land and confirmed there are four entrances large enough to drive a car or truck onto Mr. Custer's land. Tr. 265-72. For forty years, Francis Campbell, Sr. lived a mile from Mr. Custer's land. He testified its "a secluded area" where people frequently illegally dump trash. Tr. 279-86.

[3] Desiree Nicole Custer grew up in Houston, Texas. She was a resettlement specialist in the United States Army and was stationed in Sumter. She met Shawn Custer in 2013, and they got married in 2014. She was a paralegal for Jason Reddick until she retired in 2017. Her maiden name was Desiree Nicole Jackson. Tr. 303-307, 311.

brought their four dogs inside the enclosed garage. They went to bed between 9:00 and 9:30 p.m. and watched TV. Tr. 303-16, 335-40; Defense Ex. 12 and 13.

The next morning, Ms. Custer woke up around 6:00 a.m. During the night, she did not hear anything unusual. When she left for work at 7:15 a.m., she did not see the backhoe, dump truck, or trailer. Mr. Custer woke up between 6:30 and 7:00 a.m. He was still at the house when his wife went to work. During the night, Mr. Custer did not hear anything unusual. Nor did he see the backhoe, dump truck, or trailer when he left for work at 7:45 a.m. After he opened his shop and his employees got settled, Mr. Custer took his tractor home and planned to return to work with a pickup truck, belonging to Brad Dollar, that needed repair work. Tr. 316-19, 340-54, 360.

At 7:30 a.m. on Monday, September 21, 2015, Melvin Dawson, a maintenance worker at the High Hills Rural Water Company,[4] arrived at work and discovered the company's backhoe was missing. A dump truck and the eighteen-to-twenty feet long trailer used to pull the backhoe were also missing.[5] He also discovered a link had been cut from the chain that secures the gate to the chain link fence when the company is closed. He called John Loney, who is the executive director of High Hills Rural Water Company, to report the theft. Tr. 69-88, 116-17; State's Ex. 4 and 10.

[4] High Hills Rural Water Company "provide[s] potable drinking water to the northern section of Sumter County." The company has an executive director, ten employees, and a nine-member board of directors. Tr. 117-18. Although High Hills is Mr. Custer's water company, he does not know anyone who works there; nor is he familiar with their day-to-day operations. Tr. 353-54.

[5] In 2015, the backhoe was valued at $45,000.00, and the dump truck and trailer, together, were valued between $2,000.00 and $10,000.00. Tr. 119-20.

According to Mr. Loney, the backhoe and dump truck had satellite tracking devices. Locations and movements of these vehicles are tracked by "a company called Fleet Maddox." Because of the tracking devices, Mr. Loney was able to determine the backhoe and dump truck were located on Shawn Custer's land. He produced a detained report showing the vehicles left the company's property at 12:27 a.m. on September 21, 2015 and arriving at Mr. Custer's property at 12:42 a.m. He also generated a map showing the route followed from the water company to Mr. Custer's land. Mr. Loney provided the location of the vehicles to the Sumter County Sheriff's Office. Tr. 116-53; State's Ex. 12 and 15.

At 8:27 a.m. on September 21, 2015, the Sheriff's Office dispatched Deputy Randall Joseph Hillard to the High Hills Rural Water Company.[6] Mr. Loney gave him the map with the location of the backhoe and dump truck. Deputy Hillard went to Mr. Custer's property, but he did not see the equipment. He returned to the water company and inquired whether additional information existed. Mr. Loney provided Deputy Hillard with State's Ex. 12 showing the precise location of the dump truck. Deputy Hillard returned to Mr. Custer's property, introduced himself to Mr. Custer, who was locking his gate, and explained his reason for being there. Deputy Hillard contacted his supervisor, who instructed him to wait while Investigator Lowman C. Mays, III obtained a search warrant. Tr. 164-73, 231-32.

Sheriff's Office Investigator Wayne Dubose arrived and informed Mr. Custer he was investigating the theft of the backhoe, dump truck, and trailer that satellite tracking

[6] Investigator Mays acknowledged the Sheriff's Office did not conduct any forensic investigation at the High Hills Rural Water Company. Nor did they interview any employees. Tr. 241-47.

placed on his property. Mr. Custer "didn't know anything about a dump truck, trailer, or backhoe." Tr. 189-93.

Five or six police officers, including Deputy Hillard, Investigator Dubose, and Investigator Mayes served the search warrant. Law enforcement located the backhoe, parked under some trees 150 feet from the corner of Mr. Custer's home. They located the dump and trailer "a short distance" from the backhoe.[7] "[S]ome cut limbs" covered the back of the trailer "camouflaging it." The trailer was still connected to the dump truck. Tr. 173-81, 193-228, 231-36; State's Ex. 1-10, 12, 16, 17. Mr. Loney went to Mr. Custer's property and identified the missing equipment as belonging to the water company. Tr. 135-41; State's Ex. 10.

Investigators Dubose and Mays testified about the forensic investigation. Officers dusted for fingerprints and took swabs from the steering wheels of the two vehicles and the buckles "that attach the tractor to the trailer" for comparison with Mr. Custer's known DNA sample. Officers also photographed footprints located near the equipment for comparison with Mr. Custer's boots. Both investigators acknowledged no evidence—forensic or otherwise—connected Mr. Custer to the backhoe, truck, or trailer—other than discovering it on his property. Tr. 210-28, 236-47.

[7] Based on the scale to the map, Investigator Dubose testified the backhoe was 150 feet from the corner of Mr. Custer's home. Tr. 196-97; State Ex. 17. Investigator Mays placed dump truck and trailer "several hundred yards" down a path. Tr. 235. Mr. Custer testified the dump truck was found 322 yards form his house. Tr. 348.

ARGUMENTS

Question I

The trial judge erred as a matter of law by failing to direct a verdict of acquittal when the State failed to present any direct or substantial circumstantial evidence that Shawn Custer had actual or constructive knowledge that the backhoe, dump truck, and trailer stolen from High Hills Rural Water Company were located on his property.

At the conclusion of the State's case, Shawn Custer moved for a directed verdict because the State failed to produce any evidence that he knowingly received or possessed property he knew or had reason to believe was stolen. Tr. 248-56. He renewed the directed verdict motion at the close of all evidence. Tr. 369-71. The trial judge denied the motion because of the inference that arises when stolen "property is found on the property under the defendant's control." Tr. 371-57. The trial judge erred as a matter of law[8] because the State failed to produce any direct evidence or substantial circumstantial evidence that Mr. Custer knowingly possessed the stolen backhoe, dump truck, and trailer. This Court should reverse the trial court and enter a directed verdict of acquittal.

"It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen." S.C. Code Ann. § 16-13-180(A). "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCRCrimP. *State v. Odems* summarizes the standard for reviewing the denial of a directed motion:

[8] "In criminal cases, appellate courts sit to review errors of law only." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019).

> On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. However, if there is any direct or *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. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty.

395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (emphasis original) (internal citations omitted). *Cf. State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009); *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004); *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000); *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984).

The facts set forth below support this issue on appeal and, by this specific reference, the facts and legal arguments raised elsewhere in this brief relevant to this issue are fully incorporated herein.

None of the prosecution's witnesses provided any evidence linking Mr. Custer to the stolen backhoe, dump truck, and trailer—other than recovering the items on Mr. Custer's land. Mr. Loney acknowledged he had "no evidence that Shawn Custer took or knew that the equipment was on his land." Tr. 150-51. Nor did any of the law enforcement officers who testified for the State. Deputy Hilliard "found no evidence connecting Shawn Custer to any of those three items." Although Investigator Dubose believed Mr. Custer "should have seen it from his house and he should have called somebody," he admitted it was not possible to see "the entire backhoe" form the house. Investigator Dubose based his belief on a photograph taken at the location where the backhoe was found, looking "through the woods," to the house, but he acknowledged law enforcement did not take a single picture looking "from the house to the backhoe." Investigator Mays acknowledged "it is

possible that [Mr. Custer] could not see the truck and trailer from the residence." As seen above, Investigators Dubose and Mays acknowledged no forensic evidence connected Mr. Custer to the stolen property. Tr. 183-84, 210-28, 236-47. None of the defense witnesses—Shawn Custer (Tr. 321-67) and Nicole Custer (Tr. 303-20) in particular—provided the missing link to the prosecution's evidence. *See, e.g., State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 453 (2016) ("when a defendant presents evidence in his own defense, he waives the right to limit the appellate court's consideration of the denial of his motion for directed verdict to only the evidence presented in the State's case-in-chief"); *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (same); *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996) (same).

In the directed verdict motion, counsel for Mr. Custer argued, viewing the evidence in a light most favorable to the State, the prosecution proved equipment stolen from the water company ended up on Mr. Custer's land, "close to his house," where it was theoretically possible "you could see it from his house," raising a suspicion that Mr. Custer is guilty of receiving stolen goods because he must have seen it and failed to call the police. Trial counsel argued the State "presented no evidence that [Mr. Custer] knowingly received goods that he believed to be stolen." Counsel argued convicting Mr. Custer merely because the stolen property was found "close to his house" would be "a tragic conclusion." Tr. 248-49.

The Solicitor relied on *State v. Atkins* and argued, "Guilty knowledge is seldom susceptible of proof by direct evidence and may be proved by circumstances from which

such knowledge may be inferred." 244 S.C. 213, 216, 136 S.E.2d 298, 299 (1964).[9] To infer knowledge the stolen goods were on his land, the Solicitor argued Mr. Custer should have heard his dogs barking in the middle of the night when the property was left there, "should have seen it" the next morning, and "only somebody with particular knowledge of this property would know where they could hide these two items." Tr. 250-53.

In response, counsel for Mr. Custer argued "some real mental gymnastics" are required to follow the State's theory regarding Mr. Custer's supposed knowledge, pointing out the Solicitor conflated the knowledge necessary to prove constructive possession with the knowledge necessary to created reasonable belief property must be stolen when someone offers to sale an obviously valuable item at a substantially reduced price without producing proper documentation. Counsel further observed:

> [A]s far as constructive notice that it was on his property, the testimony was it was around 1a.m. and then the first thing the next morning. I mean, we're talking about maybe six hours, maybe seven. It's not a situation where the stuff was out there for weeks or even days. They just, they don't have evidence that he knowingly possessed stolen goods or knew the goods were stolen. And it's just not good enough to say, well, he should have seen it was across from his house.

Tr. 253-55.

The Solicitor countered by arguing "circumstantial evidence is allowed to prove the evidence [that] is not in the record" and:

> The circumstantial evidence is he should have seen the backhoe from the house; and if he didn't already know it was there, he would have taken other actions than deny knowing that anything about it basically. So given the circumstantial evidence that we believe the State has put forward, we think we've met at least the burden, which is low, and it's any evidence, not what

[9] The Solicitor also relied on *State v. Evans*, No. 2014-UP-131, 2014 WL 2581485 (S.C. Ct. App. Mar. 26, 2014); however, unpublished opinions have "no precedential value." Rule 220(a), SCACR.

> kind of evidence, but any evidence taken in the light most favorable to the State, then we survive the directed verdict motion.

Tr. 255-56.

The trial judge recognized the State's evidence is "totally circumstantial" and acknowledged the State is required to prove Mr. Custer had "constructive possession of the stolen property and knowledge." Tr. 257-58. During the charge conference, the trial judge acknowledged "there is no other evidence that connects" Mr. Custer to the stolen backhoe, dump truck, and trailer other than the inference that arises when stolen "property is found on the property under the defendant's control." Tr. 371-57.

Hernandez, supra, is instructive. Federal agents intercepted a tractor-trailer transporting 900 pounds of marijuana from Mexico to Trenton, South Carolina. A federal agent took the place of the driver of the tractor-trailer and transported the contraband to its destination in Edgefield County. The three defendants in *Hernandez*, occupying a rented Ryder truck, joined a caravan including the tractor-trailer transporting the contraband. When the tractor-trailer and the Ryder truck got stuck in the mud on a dirt road, the federal agents arrested the three occupants of the Ryder truck and charged them with trafficking marijuana. "At trial, [the three defendants] moved for a directed verdict claiming that the State had only proved mere presence at the scene and had failed to prove the element of knowledge." 382 S.C. at 623, 677 S.E.2d at 604. The trial judge denied the motion, the jurors convicted, and the three appealed. Our Supreme Court held, "[T]his evidence does not constitute substantial circumstantial evidence of knowledge." 382 S.C. at 625, 677 S.E.2d at 605.

Here, the State failed to produce any direct evidence or substantial circumstantial evidence that Shawn Custer knowingly possessed the stolen backhoe, dump truck, and

trailer. This Court, accordingly, should reverse the trial court and enter a directed verdict of acquittal.

Question II

The trial judge erred as a matter of law by instructing the jurors Shawn Custer's knowledge and possession of stolen backhoe, dump truck, and trailer, belonging to the High Hills Rural Water Company, may be inferred because the stolen property was found on real property under his control.

Over objection, the trial judge instructed the jurors they may infer Shawn Custer's knowledge and possession of the stolen backhoe, dump truck, and trailer because the stolen property was found on land under his control. Tr. 409-10. This instruction constitutes an error of law because it "is an improper court-sponsored emphasis of a fact in evidence," *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019)—*i.e.*, that the property stolen from High Hills Rural Water Company was located on Mr. Custer's land. This Court should reverse the trial court and remand this case for a new trial.

"The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), *holding modified and extended by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Our Supreme Court consistently rejects jury instructions that constitute "an improper court-sponsored emphasis of a fact in evidence." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582 (abolishing "jury instruction that malice may be inferred from the use of a deadly weapon"). *And see, e.g., State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in

prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013) (a jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" is improper as an expression of the judge's view of the weight of certain evidence); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (charging specific examples of voluntary manslaughter is "a direct charge on the facts" because it "elevates the specific facts of the case") *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980) (improper to instruct jurors that flight raises an inference of guilt).[10]

[10] S.C. Const. Art. V, § 21 provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Our Supreme Court sometimes resolves these cases under our state's constitution. *See*, e.*g., Stukes, Hughey, State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244, 249 (1942) ("A Judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony of an accomplice without violating the prohibition of the Constitution as to charging upon the facts."). On other occasions, our Supreme Court resolves these cases under its "policy-making role under the common law." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582.

This paragraph cites criminal cases; however, our Supreme Court also rejects inference instructions in civil cases. *See, e.g.*, *Finch v. Atlanta & C. Air Line Ry.*, 87 S.C. 190, ___, 69 S.E. 208, 209 (1910) ("What inferences may be drawn from the circumstances appearing on the trial, from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent."); *Yarborough v. Southern Ry.*, 78 S.C. 103, ___, 58 S.E. 936, 937 (1907) ("The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts.").

The facts set forth below support this issue on appeal and, by this specific reference, the facts and legal arguments raised elsewhere in this brief relevant to this issue are fully incorporated herein.

During the charge conference, the trial judge announced the court's intention to instruct the jurors:

> Mere presence at the scene where the property was found is not enough to prove possession. The defendant's knowledge and possession may be inferred when a, when the property is found on the property under the defendant's control. However, the inference is simply an evidentiary fact to be taken into consideration by you, along with the other evidence in this case, give it the weight you decide it should have.

Tr. 371-72.

Counsel for Mr. Custer objected to the inference instruction and requested the trial judge delete the language following the mere presence instruction. The trial judge overruled the objection, observing:

> I understand your argument, but I just don't know how to deal with it in another way because if the jury can't make the inference that it was on his property, there is no other evidence that connects him to it. That's the only other thing that gets [the State] there.

Tr. 272-75.

Because of this instruction, the prosecution's final argument focused on the stolen property being found on Shawn Custer's land rather than Mr. Custer's knowledge the equipment was on his land. The Solicitor argued Mr. Custer should have been able to see the backhoe from his house. He argued "circumstantial evidence is the inferences you draw from that like Mr. Custer should have also been able to see that backhoe from his house" and asked the jurors to "draw the inference[s] that he must have known that it was on his property and should have known that it was on his property and is reasonable for him to

have known that it was on his property." He emphasized the trial judge "will give you the law." He emphasized the stolen items were recovered on Mr. Custer's land. Alluding to the upcoming inference instruction, he argued the State must "prove to you that he reasonably should have known that these things were stolen and ***within his control on his property.***" The Solicitor concluded the State's initial closing argument:

> Circumstantially from the circumstances you have to look at it's reasonable that he knew that stuff was on his property. ***Whether he actually knew or not is not material***, if he actually knew or if he reasonably knew is the standard. He may have actually known. I'd argue that he actually knew; but even if that's not enough, he should have known. A reasonable person would have known. And when you look at all this together I'm gonna ask you to return a verdict of guilty.

Tr. 378-88 (emphasis added). In the reply argument, the Solicitor argued, "Mr. Custer was arrested because there was stolen property, stolen vehicles on his property; and when he was told there was stolen property on his property he said, I don't know anything about it." Tr. 403.

The trial judge instructed the jurors on the presumption of innocence, the burden of proof, criminal intent, and defined and distinguished direct and circumstantial evidence as required by *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). Regarding possession, the trial judge defined actual and constructive possession and instructed the jurors "the State must prove beyond a reasonable doubt that [Mr. Custer] had both the power and the intent to control the disposition or use of the stolen property." The trial judge then instructed:

> Mere presence at the scene where the stolen property was found is not enough to prove possession. The defendant's knowledge and possession may be inferred when the stolen property is found on the property under the defendant's control. However, this is an inference simply and not an evidentiary fact to be taken in consideration by you along with all the other evidence in this case and to be given the weight that you decide it should be given.

Finally, the trial judge charged the elements of receiving stolen goods. Tr. 404-10. After the trial judge instructed the jurors, counsel for Mr. Custer renewed the objection to the inference instruction. Tr. 413-14.

As seen in Question I, none of the prosecution's witnesses (or defense witnesses for that matter) provided any evidence linking Mr. Custer to the stolen backhoe, dump truck, and trailer—other than it being recovered on Mr. Custer's land. No forensic evidence connected Mr. Custer to stolen property. The State based its entire case on the fact the stolen property was recovered on Mr. Custer's land. The Solicitor even argued Mr. Custer's actual knowledge **"*is not material*"** and the State merely has to prove the stolen items were **"*within his control on his property.*"**[11] The trial judge's jury instruction elevated this fact—that the stolen property was recovered on Mr. Custer's land—and constituted "an improper court-sponsored emphasis of a fact in evidence." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582.

Burdette, of course, is the most recent case from our Supreme Court rejecting instructions directing jurors to infer guilt from specific facts presented by the prosecution; however, *Cheeks, supra,* is particularly instructive as the trial judge in that case charged the jurors:

> Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or**

[11] The Solicitor's closing argument, very arguably, shifted the burden to Shawn Custer to prove he did not have actual knowledge the backhoe, dump truck, and trailer were located on his property. In a larceny case, jury "instructions which place the burden on the defendant to explain how he came to possess recently stolen goods are erroneous." *State v. Cooper*, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983); *see also State v. Legette*, 282 S.C. 11, 316 S.E.2d 411 (1984). In a receiving stolen goods case, the State has the burden of proving knowledge, and an accused should not have the burden of proving lack of knowledge.

> **use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

401 S.C. at 327, 737 S.E.2d at 483 (emphasis supplied by the Court). Cheeks "objected to this "actual knowledge/strong evidence" charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge." *Id.* Our Supreme Court held, "[T]his charge both improperly weighs the evidence, and that it largely negates the mere presence charge." *Id.,* 401 S.C. at 328, 737 S.E.2d at 484. *Cheeks* held:

> Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. ***It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.***

Id. (emphasis added).

Here, the trial judge's instruction negated the mere presence charge, improperly weighed the evidence, and did not allow the jurors to determine what inferences, if any, should be drawn from the backhoe, dump truck, and trailer being recovered on Shawn Custer's land. Because the trial judge's instruction constituted "an improper court-sponsored emphasis of a fact in evidence," this Court should reverse the trial court and remand this case for a new trial.

Question III

The trial judge erred as a matter of law by failing to suppress the GPS data showing times and movements of the backhoe, dump truck, and trailer, belonging to the High Hills Rural Water Company, when the Solicitor failed to disclose that evidence prior to trial as required by to Rule 5, SCRCrimP.

During its case in chief, the prosecution disclosed for the first time a report prepared by John Loney, based on GPS data maintained by Fleet Maddox, showing the locations, times, and movements of the backhoe, dump truck, and trailer belonging to the High Hills Rural Water Company. Over objection, the trial judge allowed the State to introduce this evidence. Because this evidence was not disclosed prior to trial, as required by Rule 5, SCRCrimP, this Court should reverse the trial court and order a new trial.

Due process requires the prosecution to disclose evidence necessary for an accused to prepare a defense—regardless of whether it intends to introduce the evidence at trial and regardless of whether the evidence is inculpatory or exculpatory. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995), *Brady v. Maryland*, 373 U.S. 83 (1963); *Roviaro v. United States,* 353 U.S. 53 (1957); *State v. Durant,* 430 S.C. 98, 105, 844 S.E.2d 49, 52 (2020); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). In addition to access to the information, "the defense is entitled to a reasonable opportunity" to investigate the prosecution's case. *E.g. State v. Burns*, 294 S.C. 338, 341, 364 S.E.2d 465, 467 (1988); *see also Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (Sixth Amendment requires trial counsel to make a "reasonable" and "**independent** investigation" (emphasis supplied by court)). Rule 5, SCRCrimP governs solicitors' compliance with their due process obligations. *See, e.g. State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009). Rule 5(a)(1)(C) expressly requires the State to "permit the defendant to inspect and copy" written materials "which are within the possession, custody or control of the prosecution, and which are material to

the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant." "A violation of Rule 5 is not reversible unless prejudice is shown." *State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

The facts set forth below support this issue on appeal and, by this specific reference, the facts and legal arguments raised elsewhere in this brief relevant to this issue are fully incorporated herein.

Prior to trial, Shawn Custer filed discovery motions pursuant to Rule 5 and *Brady*. R. *. During the trial, after the State called its first witness, the trial court recessed for lunch. Tr. 89. During the lunch break, John Loney located a Fleet Maddox report, based on GPS tracking data, documenting when the dump truck leaving the High Hills Rural Water Company at 12:54 a.m., showing the route it traveled for 4.35 miles, and arriving at Mr. Custer's land twenty-seven minutes later. Mr. Loney acknowledged the Solicitor requested this information prior to trial but claimed he was not able to locate it before the lunch recess. Tr. 95-107; State's Ex. 15.

Counsel for Mr. Custer argued, "[G]etting this document at lunch time in the middle of a trial is extremely prejudicial," moved to exclude the evidence, and moved for a mistrial. In doing so, he pointed out what was obvious under the circumstances—that neither he nor Mr. Custer had an opportunity to investigate this information. The Solicitor argued the evidence "wasn't in the possession of the State" and is not discoverable "until the police take it in their possession." The trial judge quickly rejected this argument by stating, "Anything you intend to use at trial is discoverable" under Rule 5. The trial judge also identified the prejudice to Mr. Custer by stating, "[I]f you introduce this [evidence],

at least the implications are that he stole it."[12] The trial judge, nevertheless, allowed the State to use the evidence by ruling, "[A]fter reviewing it I can't find any cases or any law to the contrary, and it doesn't seem to violate Rule 5 so based on that I think it's admissible." Tr. 107-15; State's Ex. 15. Mr. Custer renewed his objection when the Solicitor introduced State's Ex. 15 into evidence with the jurors present. Tr. 129.

During cross-examination, the Solicitor asked Mr. Custer whether he disputed the GPS data—even though Mr. Custer did not have a chance to review that evidence before trial. Tr. 355-57. During closing arguments, the Solicitor exploited the prejudice identified by the trial judge by referencing Mr. Loney's testimony. He summarized when the equipment was stolen, the route it took to Mr. Custer's property, and the time it arrived on his property. He acknowledged, "I don't know who stole it. I don't have proof of who stole that." And, "I'm not trying to tell you Mr. Custer stole it." Yet, he asked the jurors to consider, "[W]ho would know where to take that truck?" Tr. 381-85. As a result, counsel for Mr. Custer was forced to argue, "They've made an effort to make it look like he stole the dump truck and the backhoe from the water company, but that's not what he's charged with. He's charged with receiving stolen goods." Tr. 389.

The trial judge's ultimate ruling—that there are no "cases or any law to the contrary, and it doesn't seem to violate Rule 5—is an error of law. As the trial judge initially recognized, Rule 5(a)(1)(C) required the prosecution to disclose this evidence in order for

[12] The previously undisclosed evidence changed the complexion of the case. As counsel for Mr. Custer argued, "up until about 20 minutes ago," the State "didn't have any proof" of when the stolen equipment left High Hills Rural Water company or the "the route" it took to Mr. Custer's land. Tr. 107-09. Based on the testimony of Melvin Dawson, someone stole the backhoe, dump truck, and trailer after close of business on Friday, September 18, 2015, and prior to opening on Monday, September 21, 2015. Tr. 69-88.

the prosecution to use this evidence in its case in chief. In *Lawton*, *supra,* the State failed to produce a letter written by the accused until its cross-examination of the accused. This Court held the State was required to disclose the letter pursuant to Rule 5 and, "Lawton was prejudiced by the State's failure to turn over the letter before trial. Disclosure of the letter was clearly material to the preparation of Lawton's defense." *Lawton*, 382 S.C. at 127, 675 S.E.2d at 457.

Because Shawn Custer was prejudiced by the prosecution's failure to produce, prior to trial, as required by Rule 5, the report based on GPS tracking data, the trial judge erred allowing the State to introduce the evidence. This Court, accordingly, should reverse the trial court and order a new trial.

CONCLUSION

For the reasons set forth in Question I, this Court should reverse the trial court and direct a verdict of acquittal. Alternatively, for the reasons set forth in Questions II and III, this Court should reverse the trial court and remand this case for a new trial.

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Shawn Custer

January 4, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
R. Ferrell Cothran Jr., Circuit Court Judge

Appellate Case No. 2019-000292

The State, ...Respondent,

v.

Shawn Douglas Custer,.....Appellant.

Certificate of Service

I certify that I served the Initial Brief of Appellant and Designation of Materials to be Included in the Record on Appeal on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at the AIS email address, as reflected below:

William M. Blitch, Jr., Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
wblitch@scag.gov

s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
E-mail: charles@groselawfirm.com

January 4, 2021
Greenwood, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

January 4, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Shawn Douglas Custer*
Appellate Case No. 2019-000292

Dear Ms. Kitchings:

Enclosed for filing, please find Mr. Custer's Initial Brief of Appellant and Designation of Materials to be Included in the Record on Appeal, along with certificates of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.

cc: William M. Blitch, Jr., Esquire