RECEIVED
Apr 19 2021
SC Court of Appeals

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 REPLY 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

Rules

IN REPLY

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.

The State acknowledges the prosecution failed to produce any direct evidence that Shawn Custer knowingly received or possessed property he knew or had reason to believe was stolen. *E.g*. Brief of Respondent, at 8 ("Here, the State presented circumstantial evidence that Appellant knew or had reason to believe he possessed stolen property.") and 9 ("The evidence presented against Appellant was circumstantial, but was evidence nonetheless."). The State, however, fails to acknowledge the proper standard of review for a directed verdict motion when the State relies on circumstantial evidence. It is well settled the prosecution must produce "substantial circumstantial evidence" to survive a directed verdict motion:

> 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.

State v Odems, 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 State never addressed the requirement of "substantial circumstantial evidence." Brief of Respondent, at 6-10.

The State seemingly suggests that the mere presence of stolen property on Mr. Custer's land is sufficient to survive a directed verdict motion, but the law requires more. Mr. Custer's opening brief discussed *Hernandez* where the defendants' presence at the location of illegal drugs, under suspicious circumstances, was insufficient for the prosecution to survive a directed verdict motion. Brief of Appellant, at 11. This Court should also consider *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), where a mother's presence in the home where her child died as a result of foul play was insufficient for the prosecution to survive a directed verdict motion in a homicide by child abuse case.

Here, the State's evidence merely raised a suspicion that Shawn Custer knowingly possessed stolen property. This Court, accordingly, should reverse the trial court and direct a 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.

The State contends this question is not preserved for appeal. Brief of Respondent, at 10-11. Shawn Custer disagrees. "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). This Court has stated:

> There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (internal quotations omitted) (citing Jean Hoefer Toal *et al*., *Appellate Practice in South Carolina* 57 (2d ed.2002)).

As pointed out in the Brief of Appellant, at 14, counsel for Mr. Custer specifically requested the trial judge to remove the following language from the charge to the jury:

> 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.

The State, however, contends, "Appellant immediately waived that objection when he told the trial judge "I'm not gonna— Judge, if you say that's what it's gonna be, that's fine." Brief of Respondent, 11 (citing Tr. 374, lines 11-12). The State overlooks the colloquy between the trial judge and trial counsel that immediately followed this statement:

> THE COURT: And 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 him there.
>
> MR. KILLEN: That's right.
>
> THE COURT: 'Cause they don't have anything else –
>
> MR. KILLEN: Well, that's what you, that's why you denied my two directed verdict motions.
>
> THE COURT: Right, 'cause it was on his property and they may infer the fact it was on his property and how it got there and the location and the time that he had possession and control over. But, and that's the only theory the

> State can get it there if they believe his testimony he didn't have any knowledge of it, and therefore, he's not guilty.
>
> MR. KILLEN: Yes, sir. I'm not gonna argue, Judge, with you. I'm not interested in –
>
> THE COURT: I understand.
>
> MR. KILLEN: If you'll just note my, if that's just noted and let's just go from there.
>
> THE COURT: And I understand your issue. And then the charge, defendant's charged with receiving stolen goods. The State must prove beyond a reasonable doubt the defendant bought, received, or possessed goods, chattels, or other property, and that the defendant knew or had reason to believe that the property was stolen. Whether the defendant knew or had reason to believe the property was stolen may be shown by direct or circumstantial evidence, and the State must prove the defendant knew or had reason to believe that the property was stolen by showing that defendant knew fact that would make a reasonable person believe the property was stolen.

Tr. 374-76.

The trial court and trial counsel thus continued to discuss the objection. Trial counsel asked the trial judge to "note" Mr. Custer's position. This continued discussion satisfied the four prongs of *Rogers*. This Court should not allow the State to confuse trial counsel not continuing to argue after the trial judge ruled with waiver.

On the merits, the State argued:

> The trial judge properly instructed the jury they could draw an inference regarding Appellant's knowledge and possession of the stolen vehicles from the fact that the vehicles were found on Appellant's property. The trial judge's instruction charged the correct law of South Carolina and did not improperly comment on the evidence presented at trial.

Brief of Respondent, at 12. Shawn Custer disagrees with the State's position. Brief of Appellant, at 12-17.

Mr. Custer predicts resolution of this issue will be controlled by our Supreme Court's decision in *State v. Stewart*, Appellate Case No. 2019-001584. The Supreme Court convened oral arguments in *Stewart* on November 18, 2018, and a decision is pending.[1]

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.

The State argues this question is not preserved for appeal because "Appellant never moved to exclude the GPS report, but rather Appellant moved for a mistrial." Brief of Respondent, at 16. Although trial counsel initially moved for a mistrial, it is clear the trial judge analyzed the issue as a Rule 5, SCRCrimP violation, including making a determination of whether the prosecution could use the evidence. The trial judge ultimately allowed the prosecution to use the evidence, finding Rule 5 was not violated. Tr. 95-115. Trial counsel objected when the State moved the exhibit into evidence. Tr. 129. This question, accordingly, is preserved for appellate review. *Oxner*, *In re Michael H.*, and *Rogers*, *supra.*

The State continues to argue the prosecution did not violate Rule 5 because "the State received the GPS report at lunchtime on the first day of trial." Brief of Respondent, at 17. This Court must reject the State's argument for two reasons. First, this argument overlooks the fact that the Solicitor requested Mr. Loney locate this information prior to trial but claimed he was not able to locate it before the lunch recess. Tr. 95-107. Second, Rule 5 not only requires disclosure of information, but also recognizes the defense is

[1] The oral argument in Stewart is found at http://media.sccourts.org/videos/2019-001584.mp4 (last viewed April 18, 2021).

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). It was an abuse of discretion for the trial judge to allow the State to disclose new evidence during trial. *See, e.g. State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009). This Court, accordingly, should reverse the trial court.

CONCLUSION

For the reasons set forth in Shawn Custer's Brief of the Appellant and this Reply Brief, this Court should reverse the trial court and direct a verdict of acquittal. Alternatively, 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

April 19, 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 Reply Brief of Appellant 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:

Jonathan Scott Matthews, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
smatthews2@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

April 19, 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

April 19, 2021

RECEIVED

Apr 19 2021

SC Court of Appeals

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 Reply Brief of Appellant, along with a certificate of service.

Also enclosed for filing, please find Mr. Custer's Motion for Extension of Time and Motion to Accept Initial Reply Brief of Appellant as Filed, along with a certificate 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: Jonathan Scott Matthews, Esquire