STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2019-000292

THE STATE, Respondent,

v.

SHAWN DOUGLAS CUSTER, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

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

ERNESY A. FINNEY, III
Solicitor, Third Judicial Circuit

215 N. Harvin Street
Sumter, SC 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge properly decline to direct a verdict of acquittal on the charge of possessing stolen goods when the State produced circumstantial evidence that stolen vehicles were found in a location on Appellant's property where they were visible from Appellant's home?

II.

Did Appellant fail to preserve any issues regarding the trial judge's instruction to the jury on constructive possession when Appellant explicitly waived his objection to the jury instruction? And even if this issue is preserved, did the trial judge err in charging the jury on the correct law of constructive possession when his charge did not improperly comment on or emphasize the evidence presented at trial?

III.

Did the trial judge err in failing to suppress the GPS report showing the movements of the stolen vehicles and the times they were moved when Appellant did not move to suppress the report, thereby failing to preserve this issue for appeal? And even if this issue is preserved, did the State violate Rule 5 of the South Carolina Rules of Criminal Procedure or violate Brady v. Maryland when the State never possessed the GPS report?

STATEMENT OF THE CASE

In September 2016, a Sumter County Grand Jury indicted Appellant for one count of possession of stolen goods with a value of $10,000 or greater and one count of possession of stolen goods with a value greater than $2,000 but less than $10,000. (R. 3). On February 13-15, 2019, a jury trial was held in the Sumter County Court of General Sessions with the Honorable R. Ferrell Cothran presiding. Appellant was represented by Patrick M. Killen, Esq. The State was represented by Assistant Solicitor Edgar R. Donnald, Jr.[1], Esq. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the State dismissed the count of possession of stolen goods with a value greater than $2,000 but less than $10,000. (R. 416). The trial judge sentenced Appellant to a term of seven years' imprisonment suspended upon the service of three years' probation. Appellant timely filed a notice of appeal and an initial brief.

[1] The Honorable Edgar R. Donnald, Jr. is currently the Third Circuit Public Defender.

STATEMENT OF FACTS

On Monday, September 21, 2015, Melvin Dawson arrived to begin his scheduled shift at the High Hills Rural Water Company (High Hills) at approximately 7:30 AM. (R. 64). When he arrived, Dawson noticed a dump truck with an attached trailer, and the backhoe that was previously loaded on the trailer were all missing. (R. 66-67). Dawson recalled locking the chain link fence that surrounded the missing vehicles when he left work the previous Friday. (R. 68-69). Dawson observed that a link of the chain that was used to lock the gate had been cut. (R. 69). John Loney, the director of High Hills, estimated the value of the missing backhoe to be in excess of $10,000 and the value of the dump truck to be greater than $2,000 but less than $10,000. (R. 113-14). Loney testified that the missing dump truck was outfitted with a GPS tracking device. (R. 115-16). Loney was able to use his computer to locate the missing dump truck based on data transmissions from the tracking device. (R. 118, 439-41). The GPS data revealed the dump truck was started at High Hills at 12:27 AM on Monday, September 21st. The truck traveled to 2960 Ben Sanders Road where it was turned off at 12:54 AM on the 21st. (R. 127, 439-41). Appellant owned the property at 2960 Ben Sanders Road. (R. 188-89, 322-23).

Deputy Randall Hilliard of the Sumter County Sheriff's Office arrived at High Hills at approximately 8:30 AM on the 21st. (R. 160-61). Hilliard examined a map showing the general location of the missing truck and then traveled to Ben Sanders Road to search for the missing vehicles. (R. 163, 437). When Hilliard arrived at Appellant's address he traveled through an open gate and saw Appellant's home, but he was unable to locate the missing vehicles. (R. 163). Hilliard returned to High Hills to get a better idea where the vehicles might be located. (R. 163-64). Hilliard reviewed a second map that contained a more detailed location of the missing vehicles and then he returned to Appellant's address. (R. 163-64, 435-36). When Hilliard arrived

at Appellant's address the second time, he witnessed Appellant locking his front gate. (R. 166). Hilliard explained to Appellant why he was there and Appellant denied Hilliard access to his property[2]. (R. 166-67). Investigator Wayne Dubose arrived at Appellant's address to assist Hilliard. While awaiting the arrival of a search warrant, Dubose spoke briefly with Appellant. (R. 186). Dubose explained that a GPS signal indicated a stolen dump truck and backhoe were located on Appellant's property, and Dubose advised Appellant that a search warrant was on the way. (R. 186). Appellant responded by saying he didn't know anything about a dump truck, backhoe, or trailer. (R. 186-87). Investigator Tripp Mayes of the Sumter County Sheriff's Office obtained a search warrant for Appellant's property and the warrant was executed the same day. (R. 226).

Law enforcement located the stolen backhoe approximately 150 feet[3] from Appellant's residence. (R. 190, 425-27). The backhoe had been removed from the trailer. (R. 131). Dubose testified the backhoe was visible from Appellant's house. (R. 195). The dump truck and trailer were located a significant distance[4] away from the backhoe. (R. 197, 432-33). The dump truck and trailer were partially hidden by brush and cut tree limbs. (R. 130, 197, 433). Dubose testified there were visible tire tracks in Appellant's grass leading to the dump truck. (R. 196). As law enforcement conducted their search, Appellant's dogs barked at Dubose and Mays. (R. 202, 230).

Appellant testified in his own defense at trial. Appellant claimed he attended a wedding in Greenville on Saturday, September 19th and returned to his home by 8:00 PM on Sunday,

---

[2] Outside the presence of the jury, Hilliard revealed when he spoke to Appellant that Appellant complained about being harassed by the sheriff's office and stated he had already been served with family court paperwork. (R. 57-59).

[3] Appellant measured a distanced of 80 feet between his house and the location where the backhoe was found. (R. 340).

[4] Appellant measured a distanced of 322 yards between his house and the dump truck. (R. 342).

September 20th. (R. 330-33). Appellant estimated he went to bed at approximately 9:15 PM and woke up at 5:00 AM the following morning. (R. 334). Appellant slept through the night and was not awakened by any noises. (R. 335). Appellant left for work at 7:45 AM on Monday morning. (R. 335-36). Appellant returned home later that morning to drop off a tractor when he encountered law enforcement. (R. 354). According to Appellant, after he was informed that law enforcement was looking for a stolen backhoe and dump truck, Appellant returned to his house and called his lawyer. (R. 356). When asked why he didn't look to see if there were stolen vehicles on his property, Appellant responded: "I wasn't gonna look for anything. I went straight in. I'm quite familiar with what he was trying to do. For all I knew [law enforcement] were hiding in the woods trying to set me up with something." (R. 358, lines 18-22). At the conclusion of trial, Appellant was convicted of both counts.

STANDARD OF REVIEW

I.

"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. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003). When reviewing a denial of a directed verdict at the trial level, the appellate court "views the evidence and all reasonable inferences in the light most favorable to the State." State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016).

II.

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. A jury charge is correct if, when read as a whole, the charge adequately covers the law." State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). "A jury charge that is substantially correct and covers the law does not require reversal." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011).

III.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "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).

ARGUMENT

I.

The trial judge properly declined to direct a verdict of acquittal on the charge of possessing stolen goods when the State produced circumstantial evidence that stolen vehicles were found in a location on Appellant's property where they were visible from Appellant's home.

Appellant argues the trial judge erred by failing to direct a verdict of acquittal because the State failed to present any evidence Appellant had actual or constructive knowledge that the stolen vehicles were located on his property. On the contrary, the State presented circumstantial evidence that Appellant knew or had reason to believe stolen vehicles were located on his property. Therefore, evidence existed from which a rational trier of fact could find the State proved the elements of possession of stolen goods beyond a reasonable doubt. Accordingly, the trial judge properly allowed the jury to determine the weight of the evidence presented.

In determining whether a directed verdict should be granted, "the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Rule 19 SCRCrimP. When reviewing a denial of a directed verdict at the trial level, the appellate court "views the evidence and all reasonable inferences in the light most favorable to the State." Bennett, 415 S.C. at 235, 781 S.E.2d at 353. "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." Lindsey, 355 S.C. at 20, 583 S.E.2d at 742. When an appellate court reviews the sufficiency of the evidence to support a criminal conviction, "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

South Carolina Code section 16-13-180 provides "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 § 16-13-180. When a defendant stands trial for the crime of receiving stolen goods, a jury may consider "that the person receiving the goods knew the same were stolen, from the surrounding circumstances under which they were received, and it is proper for the jury, in passing upon such issue, to take into consideration the surrounding circumstances under which the goods were received." State v. Hamilton, 166 S.C. 274, 164 S.E. 639, 640 (1932). "Guilty knowledge or belief may be proved by direct evidence, or, since it is rarely the subject of direct and positive proof, by any surrounding facts and circumstances from which such guilty knowledge may be inferred." State v. Atkins, 205 S.C. 450, 32 S.E.2d 372, 374 (1944). In determining whether a defendant is guilty of receiving stolen goods, the question to be considered by a jury "is not a question of what effect the circumstances under which the goods were received would have upon the mind of a person of ordinary reason, judgement, and prudence, but the question to be answered is, What effect did such circumstances have upon the mind of the person receiving the goods?" Hamilton, 166 S.C. at 274, 164 S.E. at 640. A defendant may not escape criminal liability in South Carolina "when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious." State v. Thompkins, 263 S.C. 472, 484, 211 S.E.2d 549, 554 (1975).

Here, the State presented circumstantial evidence that Appellant knew or had reason to believe he possessed stolen property. The evidence presented by the State showed that a dump truck, trailer, and backhoe were stolen from High Hills at approximately 12:27 AM on September 21st. (R. 127, 439-41). The dump truck traveled to Appellant's address were it was turned off at approximately 12:54 AM. (R. 127, 439-41). The same stolen vehicles were located

later that morning on Appellant's property. Investigator Dubose estimated the backhoe was approximately 150 feet away from Appellant's home. (R. 190, 425-27). Appellant later clarified Dubose's estimate when he testified the backhoe was only 80 feet from his home. (R. 340). Dubose and Investigator Mays each testified the backhoe was visible from Appellant's house. (R. 195, 229). In fact, the backhoe was so obviously visible from Appellant's house, Dubose opined "there's no way [Appellant] couldn't" see the backhoe. (R. 209, lines 5-8). When Appellant was informed there were stolen vehicles on his property, rather than seeking to confirm law enforcement's assertion, Appellant went inside his home for fear that law enforcement was "hiding in the woods trying to set me up with something." (R. 358, lines 21-22). The State did not have to prove that Appellant stole the vehicles from High Hills. The State merely had to prove Appellant was in possession of stolen property and Appellant knew or had reason to know the property was stolen. The State proved this by showing the jury that a stolen backhoe was visible from Appellant's house and that Appellant made no effort to contact law enforcement or to return the vehicle to High Hills.

The evidence presented against Appellant was circumstantial, but was evidence nonetheless. The trial judge recognized as much when he made the following ruling: "It is all circumstantial, but at least there's sufficient circumstances in this record. It's the existence of evidence at this point, not the weight of the evidence, so I think there's enough circumstantial evidence in this and I'm gonna deny your motion for directed verdict." (R. 251, lines 16-21). The trial judge's ruling indicates he used the correct directed verdict standard and properly declined to weigh the evidence presented. Rather, the trial judge appropriately allowed the jury to evaluate the weight of the evidence. Therefore, the trial judge did not err in denying Appellant's motion for a directed verdict. Appellant's conviction and sentence should be affirmed.

II.

Appellant failed to properly preserve any issues regarding the trial judge's instruction to the jury on constructive possession because Appellant explicitly waived his objection to the jury instruction. However, even if this issue is preserved, the trial judge properly charged the jury on the correct law of constructive possession and his charge did not improperly comment on or emphasize the evidence presented at trial.

Appellant next argues the trial judge erred in instructing the jurors that Appellant's knowledge and possession of the stolen vehicles may be inferred from the vehicles being found on Appellant's real property. Specifically, Appellant alleges the trial judge's jury instruction was an "improper court-sponsored emphasis of a fact in evidence." (Final Brief of Appellant 12). Appellant's argument fails for two reasons. First, Appellant did not preserve this issue for appeal because he explicitly waived his objection to the trial judge's jury instruction. Even if Appellant preserved this issue for appeal, the trial judge charged the correct law and his instruction did not improperly comment on the evidence presented at trial.

Error Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to

preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). An issue is not preserved for appellate consideration if it has been conceded in the trial court. State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000).

Here the trial judge informed the parties he would offer the following charge on possession:

> The Court: In the possession charge it has to prove possession (sic) the State must prove beyond a reasonable doubt that defendant had both the power and the intent to control the disposition or use of the stolen property. Possession may be either actual or constructive. Actual possession means that the stolen property was in the actual physical control of the defendant. Constructive possession means that defendant had the dominion and control over either the stolen property itself or the property on which the stolen property was found. 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, (sic) 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.

(R. 365, lines 14-25 –R. 366, lines 1-9). To the extent that Appellant objected to the aforementioned instruction, he stated "I would ask that that sentence about the mere presence be last before all that about inferences." (R. 366, lines 24-25 –R. 367, line 1). Assuming that Appellant's request can be read as an objection, 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." (R. 368, lines 11-12). The trial judge subsequently charged the aforementioned language to the jury. (R. 403-04). Because Appellant explicitly waived his objection to the trial judge's jury instruction, Appellant cannot challenge the propriety of the jury instruction on appeal. This issue has not been preserved for appellate review.

Merits of the Jury Instruction

Even if Appellant preserved this issue for appeal, the trial judge's jury instruction was not an improper emphasis of a fact in evidence. 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.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (*quoting* State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)) A jury charge that is substantially correct and covers the law does not require reversal. Mattison at 478, 697 S.E.2d at 583. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

"The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). "The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and

possession depending upon its view of the evidence." Adams, 291 S.C. at 135-36, 352 S.E.2d at 486. "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981). "Inference and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic facts." Cty. Court of Ulster Cty., N.Y. v. Allen, 442 U.S. 140, 156 (1979).

Here, Appellant complains the trial judge's instruction on the inferences to be drawn from the presence of the stolen vehicles on Appellant's property negated the trial judge's mere presence instruction and constituted "an improper court-sponsored emphasis of a fact in evidence." (Final Brief of Appellant 17). In support of his argument, Appellant relies exclusively on our Supreme Court's holdings in State v. Burdette and State v. Cheeks. Appellant's reliance on the aforementioned cases is misplaced.

In Burdette the Supreme Court addressed the propriety of any jury instruction that tells a jury it may infer the existence of malice from the use of a deadly weapon. State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The Supreme Court held the implied malice charge was no longer appropriate because in doing so a trial court "has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." Burdette, 427 S.C. at 502, 832 S.E.2d at 582. Unlike in Burdette, the trial judge here did not elevate or emphasize a fact in evidence. The trial judge merely stated "The defendant's knowledge and possession may be inferred when the stolen property is found on the property under the defendant's control." (R. 404, lines 2-5). The trial judge did not tell the jury the vehicles were found on Appellant's

property, nor did her tell them the vehicles were under Appellant's control. Whether the vehicles were found on Appellant's property or were under his control was a fact for the jury to decide. However, even if the trial judge instructed the jury that the vehicles were found on Appellant's property, it was undisputed that the vehicles were found on Appellant's property. Appellant never contested this fact. In fact, Appellant conceded in his opening statement and closing argument that the stolen vehicles were located on Appellant's property. (R. 21, 145, 384). Appellant's defense was that he did not know there were stolen vehicles on his property. (R. 383-94). Therefore, the trial judge's jury instruction did not improperly elevate or emphasize a fact to the jury as the trial judge did in Burdette.

Appellant's reliance on State v. Cheeks is also misplaced. In Cheeks the trial judge instructed the jury: "Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use." State v. Cheeks, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013). The Supreme Court held the words "strong evidence" were "improper as an expression of the judge's view of the weight of certain evidence." Cheeks, 401 S.C. at 329, 737 S.E.2d at 484. However, the Supreme Court did not find fault with the following language in the trial judge's charge: "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." Cheeks, 401 S.C. at 327, 737 S.E.2d at 483. The aforementioned language from Cheeks is nearly identical to the language used by the trial judge in Appellant's case. (R. 403-04). Our Supreme Court implicitly approved of this language in Cheeks. However, this Court need not rely solely on the implicit holding in Cheeks, but can look to the Supreme Court's explicit approval of the contested language in the

context of a drug possession charge in State v. Adams. In Adams, the Supreme Court articulated the correct language a trial judge should charge in a constructive possession of drugs case. Adams, 291 S.C. at 135-36, 352 S.E.2d at 483. The language prescribed in Adams[5] is nearly identical to the language used by the trial judge in this case. (R. 403-04). Therefore, the trial judge appropriately charged the correct law of South Carolina and did not improperly emphasize evidence to the jury. Appellant's conviction and sentence should be affirmed.

III.

The trial judge did not err in failing to suppress the GPS report showing the movements of the stolen vehicles and the times they were moved because Appellant did not move to suppress the report. Therefore, Appellant failed to preserve this issue for appeal. However, even if this issue is preserved, the State did not violate Rule 5 of the South Carolina Rules of Criminal Procedure or violate Brady v. Maryland because the State never possessed the GPS report.

Finally, Appellant alleges the trial judge erred by failing to suppress the GPS report showing the movements of the stolen vehicles and the times they were moved because the solicitor failed to disclose the evidence to Appellant prior to trial as required by Rule 5 of the South Carolina Rules of Criminal Procedure. As an initial matter, this issue has not been preserved for appellate review. When the State notified Appellant and the Court of the existence of the GPS report, Appellant did not move to exclude the report, but rather moved for a mistrial. (R. 101-03). In fact, Appellant indicated the report could be useful to his case and expressed a desire to use it to his advantage. (R. 103). Because Appellant is making a different argument on appeal than the argument he made at trial, this issue is not preserved for appellate review. However, even if preserved, the trial judge did not err in admitting the GPS report because it was

[5] "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." Adams, 291 S.C. at 135, 352 S.E.2d at 486. "The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence." Adams, 291 S.C. at 135-36, 352 S.E.2d at 486.

not in the possession of the prosecution and therefore the State did not violate Rule 5 by failing to give it to Appellant prior to trial.

Error Preservation

Here, Appellant never moved to exclude the GPS report, but rather Appellant moved for a mistrial. When the solicitor brought the existence of the GPS report to the Court's attention Appellant responded by making the following motion: "I mean, so Judge, respectfully I have to ask for a mistrial because I believe that, I believe that evidence could be at a minimum very, very helpful to my case and at a maximum could be exculpatory." (R. 103, lines 2-6). Far from moving to exclude the GPS report, Appellant noted the report could be helpful to him and he indicated his desire to use it. (R. 103). Appellant merely lamented that he did not have time to study the document, and thus he was moving for a mistrial. (R. 102-03). Appellant's motion for a mistrial is not equivalent to an objection to the admissibility of the GPS report. This is especially evident in light of Appellant's expressed desire to use the document to his advantage. The argument presented by Appellant at trial is not the same argument Appellant is making on appeal. Therefore, this issue is not preserved for appellate review.

No Violation of Rule 5/Brady

Rule 5 of the South Carolina Rules of Criminal Procedure provides in relevant part:

> (C) Documents and Tangible Objects. Upon request of the defendant, the prosecution shall permit the defendant to inspect and copy books, papers, documents photographs, tangible objects, buildings or places, or copies or portions thereof, 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

Rule 5 SCRCrimP. "A Brady[6] violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020).

Here, the State received the GPS report at lunchtime on the first day of trial. (R. 90-91). The State immediately brought the existence of the document to the trial court and Appellant's attention when the trial resumed after the lunch break. (R. 83-89). The State proffered John Loney's testimony for the Court's consideration. Loney revealed he printed the GPS report in 2015 in preparation for Appellant's bond hearing. (R. 94). After the bond hearing, Loney misplaced the report and did not locate it again until approximately 1:45 PM on February 13, 2019. (R. 90-94). Loney testified the report was never shared with the Sumter County Sheriff's Office nor was it shared with the Third Circuit Solicitor's Office[7]. (R. 92, 94). Loney specified he choose to look for the report during a break from trial and was not asked to search for it by the assistant solicitor. (R. 91-92).

The GPS report at issue does not fall within the confines of evidence the must be disclosed by the State under Rule 5, nor does it qualify as Brady material. The State was not required to disclose the report under Rule 5, because the report was not within the possession, custody, or control of the State. The document was created by a private company[8] and stored in another private company's office. The State never possessed the report, either through the Solicitor's Office or through the Sheriff's Office. Because the State never possessed the report, the report was not required to be disclosed under Rule 5.

---

[6] Brady v. Maryland, 373 U.S. 83 (1963).
[7] The assistant solicitor acknowledged discussing the existence of the report with Loney in preparation for trial, but Loney maintained the report could not be found (R. 91).
[8] Loney testified the GPS tracker was maintained by a company called Fleet Maddox.

Additionally, the GPS report does not qualify as material that must be disclosed under Brady v. Maryland. As Appellant argued in making his motion for a mistrial, the GPS report was favorable to Appellant. The State was not seeking to prove Appellant stole the missing vehicles, therefore; the information contained in the report about when they were taken and what time they arrived on Appellant's property was not offered to prove Appellant stole the vehicles. The GPS report merely established the vehicles were on Appellant's property for approximately eight hours before law enforcement arrived to search for them. (R. 160-61, 439-41). This information bolsters Appellant's argument that he was unaware the stolen vehicles were on his property. Without the information contained in the GPS report, the jury would have been free to speculate that the vehicles remained on Appellant's property from sometime after High Hills closed on Friday, September 18th to Monday, September 21st. Such a conclusion would render Appellant's claim that he was unaware the vehicles were on his property even more incredible.

However, merely establishing that the GPS report was favorable to Appellant does not end the Brady analysis. As previously noted, the State never possessed or had custody or control of the report. Additionally, because the State never had possession of the report, they certainly did not suppress the report or otherwise keep Appellant from obtaining it. Finally, the report was not material to Appellant's guilt or punishment. The report merely established the vehicles were taken from High Hills to Appellant's residence in the early morning hours of September 21st. If Appellant had been charged with the larceny of the vehicles, the report would have been material to Appellant's guilt. Because Appellant was only charged with possession of stolen goods, the report was not material to Appellant's guilt.

The State did not violate Rule 5 or commit a Brady violation in failing to provide Appellant with the GPS report because the State never possessed the report. Accordingly, the

trial judge did not err in declining to suppress the report. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

215 N. Harvin Street
Sumter, SC 29150
(803) 436-2185

BY: Scott Matthews
SCOTT MATTHEWS
Bar # 101464

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

ATTORNEYS FOR RESPONDENT

May 26, 2021

RECEIVED
May 26 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2019-000292

THE STATE, Respondent,

v.

SHAWN DOUGLAS CUSTER, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

215 N. Harvin Street
Sumter, SC 29150
(803) 436-2185

BY: Scott Matthews
Scott Matthews
Bar # 101464

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

ATTORNEYS FOR RESPONDENT

May 26, 2021