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Aug 26 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Alex Kinlaw, Jr., Circuit Court Judge
Appellate Case No. 2018-001257

THE STATE,

Respondent,

vs.

CHARLES DENT,

Appellant.

PETITION FOR REHEARING

On August 18, 2021, in a divided opinion, a majority of this Court reversed Appellant's convictions for first degree criminal sexual conduct with a minor and disseminating obscene material to a minor by finding the trial judge erred in failing to charge the jury with the requested circumstantial evidence instruction established by State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). State v. Dent, Opinion No. 5850 (S.C. Ct. App. filed August 18, 2021) (Howard Adv. Sh. No. 28). A majority of this Court further ruled the trial judge's error was prejudicial to Appellant considering the circumstantial nature of the evidence. The State respectfully submits this Court misapprehended or overlooked relevant facts in the record and case law in reaching the conclusions in the majority opinion. Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the petition for rehearing and hold the trial judge's failure to charge the jury with the Logan instruction was harmless because the evidence presented against Appellant was almost exclusively direct and not circumstantial. Furthermore, this Court should hold that the trial judge's instruction, as a whole, properly conveyed the applicable law and correctly instructed the

jury on reasonable doubt and the presumption of innocence. For this reason also, this Court should find the trial judge's failure to give the Logan charge was harmless error. Therefore, this Court should affirm Appellant's convictions and sentences.

Evidence against Appellant was Direct, Not Circumstantial

In support of its conclusion that Appellant was prejudiced by the trial judge's failure to read the Logan charge, the majority asserts "There was no physical evidence, and the State spent substantial time in summation explaining to the jury that the case was 'about circumstantial evidence.' Further, the State read part of the trial court's planned charge on circumstantial evidence to the jury, noting that [Appellant] 'didn't want to read out the [planned] definition of circumstantial evidence.'" State v. Dent Opinion No. 5850 (S.C. Ct. App. filed August 18, 2021) (Howard Adv. Sh. No. 28 at 80). Contrary to the majority's opinion, the State's case against Appellant was based almost entirely, if not entirely, on direct evidence. The majority correctly identified that there was no physical evidence against Appellant, however the testimony presented against Appellant was direct evidence nonetheless. Because the State's case against Appellant was predominantly based on direct evidence, the trial judge's failure to read the Logan instruction was entirely harmless.

In Logan our Supreme Court defined direct evidence as evidence that "directly proves the existence of a fact and does not require deduction." Logan 405 S.C. at 99, 747 S.E.2d at 452. Here, Appellant was charged with, and convicted of, first degree criminal sexual conduct with a minor and disseminating obscene material to a minor. Contrary to the majority's conclusion, the evidence against Appellant was almost entirely, if not entirely, direct. The State proved that Appellant committed first degree criminal sexual conduct with a minor through Victim's eyewitness testimony at trial and Victim's second recorded forensic interview. Victim testified

that she was forced to perform fellatio on Appellant. (R. 377). Victim repeated this accusation in her second forensic interview. (State's Exhibit #17). Victim's eyewitness testimony directly proves the existence of the fact that Appellant forced Victim to perform fellatio and does not require a deduction. Therefore, Victim's testimony was direct evidence of Appellant's guilt. Appellant acknowledged as much when he told the jury in closing argument "Certainly, things like testimony, eyewitness accounts are what we call direct evidence." (R. 727, lines 3-5)

The State proved that Appellant disseminated obscene materials to Victim through Victim's testimony at trial and Victim's first forensic interview. (R. 376-77, State's Exhibit #16). This too was direct evidence of Appellant's guilt. Victim's testimony directly proved that Appellant forced Victim to view photos of his penis and pornographic videos and did not require deduction. Indeed, Appellant emphasized that the State's only evidence proving dissemination of obscene material came from the testimony of Victim, when he told the jury in his opening statement and closing argument that the State could not produce pictures of Appellant's penis or pornographic videos. (R. 251, 732-33). In regards to the pornography, Appellant specifically told the jury in closing "And once again, we've had some testimony, but we haven't had anything that has confirmed or corroborated showing of pornography." (R. 733, lines 9-11). Thus, Appellant seemed to acknowledge at trial that the evidence against him was entirely direct, particularly in regards to the crime of disseminating obscene material to a minor¹.

¹ As with all eyewitness testimony, the jury was asked to make a credibility finding regarding the weight to be given to Victim's testimony. Here, the trial judge provided the following instruction regarding credibility: "I also told you at the beginning of the case that evidence consists of several things. The first is sworn testimony, and the second is exhibits. You judge the credibility of the evidence. And you, as jurors, would have to necessarily gauge the credibility or believability of the evidence presented. That's within your purview....But I will tell you that you may also consider in deciding credibility of the witnesses testimony in such a way that you believe everything that they say, or you would believe nothing a witness says. You may believe parts of a witnesses testimony, and disbelieve the other part of a witnesses testimony." (R. 755

Tellingly, on appeal, Appellant was unable or unwilling to provide examples of how the State's case was based on circumstantial evidence in either his 52 page final brief or his 15 page reply brief. (Final Brief of Appellant 49-50; Final Reply Brief of Appellant 12-13). Rather, Appellant asserts in a conclusory fashion "In this case, the State relied on a combination of direct and circumstantial evidence." (Final Brief of Appellant 49-50). The majority adopts Appellant's conclusory reasoning and does not specify how the evidence against Appellant was circumstantial other than to criticize the State's brief focus on circumstantial evidence in its rebuttal closing argument and the State's attempt to quote the trial judge's jury instruction. However, a closer examination of the record reveals the State spent very little time in closing addressing circumstantial evidence.

Far from "spending substantial time in summation" explaining that Appellant's case was about circumstantial evidence, the State merely responded in their rebuttal argument to Appellant's specious assertion during his closing argument that the State "rel[ie]d] on a lot of circumstantial evidence." (R. 727, lines 2-3). In fact, the State spent the entirety of their primary closing argument telling the jury about the direct evidence against Appellant and never once used the words "circumstantial evidence" in an argument that spanned 17 pages of the record. (R. 706-23). When the State did address Appellant's circumstantial evidence argument, the solicitor merely explained that the State didn't have direct evidence of Appellant's crimes in the form of "photos of [Victim] licking [Appellant's] penis" or "[Victim's] clothes covered in [Appellant's] semen" because sexual assaults occur in secret. (R. 748). The solicitor correctly noted that

lines 16-21 and 25—R. 756 lines 1-5). The fact that the jury was asked to make a credibility finding does not diminish the status of Victim's eyewitness testimony as direct evidence. The jury necessarily had to determine whether they believed Victim's testimony, but Victim's testimony was direct evidence of Appellant's guilt nonetheless because it directly proved Appellant forced Victim to perform fellatio and view pornographic materials and it did not require a deduction.

Appellant told the jury he would not quote what the trial judge's circumstantial evidence charge would be², but to the extent that the State "read part of the trial court's planned charge on circumstantial evidence to the jury", as the majority alleges, the solicitor merely told the jury: "Crimes may be proven by circumstantial evidence. The State can rely on direct evidence, circumstantial evidence, or some combination of the two. The Judge is going to read that to you." (R. 748, lines 8-11). The solicitor's anodyne statement was not a quote from the trial judge's eventual instruction to the jury, but is a correct statement of law that does not conflict with the instruction recommended in Logan. (R. 756, lines 10-25 – R.757 line 1).

In Logan, our Supreme Court endeavored to "articulate for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the State's burden and the jury's responsibility." Logan, 405 S.C. at 94-95, 747 S.E.2d at 450. However, the Supreme Court ultimately held the trial judge's error in that case was harmless because the trial judge properly instructed the jury on reasonable doubt and the instruction, as a whole, properly conveyed the applicable law. Logan, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8.

The Supreme Court recently addressed the failure to give a Logan instruction in State v. Herndon, 430 S.C. 367, 845 S.E.2d 499 (2020). The Court found the trial judge's failure to give the Logan instruction was reversible error because the evidence against Herndon "was almost exclusively circumstantial." Herndon 430 S.C. at 373, 845 S.E.2d at 502. However, the Court "acknowledge[d] there may be a case in which a trial court's failure to give the Logan charge might be harmless error." Id.

This court's dissenting opinion correctly noted the evidence against Appellant "was not 'almost exclusively circumstantial' like in Herndon." State v. Dent Opinion No. 5850 (S.C. Ct.

² Appellant told the jury "I'm not going to try to quote the exact words as to what [the trial judge is] going to say." (R. 726, lines 22-23).

App. filed August 18, 2021) (Howard Adv. Sh. No. 28 at 80). Here, the evidence against Appellant was **almost exclusively direct**. Because so much of the evidence against Appellant was direct, Appellant's case is precisely the kind of case the Supreme Court envisioned in Herndon where the failure to give the Logan instruction would be deemed harmless error. This Court should grant the petition for rehearing and determine the trial judge's failure to give the Logan instruction in Appellant's case was harmless error.

Jury Instructions Correctly Conveyed the Law

The dissent also correctly found the trial judge's "instruction, as a whole, properly conveyed the applicable law." State v. Dent Opinion No. 5850 (S.C. Ct. App. filed August 18, 2021) (Howard Adv. Sh. No. 28 at 80). Here the trial judge provided a thorough and correct instruction to the jury on the definition of reasonable doubt and Appellant's presumption of innocence. The trial judge provided the jury the following instruction on reasonable doubt and the presumption of innocence:

[Appellant], in these four indictment, has plead not guilty. And that puts the burden of proof solely and squarely upon the shoulders of the State. And he can only be convicted if all 12 of you agree that the State has proven each and every element of the charges against [Appellant] beyond a reasonable doubt.

....

[Appellant] is presumed innocent. And that presumption of innocence is not some legal technicality. It is a fundamental right that all of you – every person enjoys in this country. And it can only be removed if the State convinces you with proof beyond a reasonable doubt as to every element of a crime.

What is a reasonable doubt? A reasonable doubt is defined as the kind of doubt that would cause a reasonable, sincere, honest, and conscientious person to hesitate to act in an important matter in their own affairs. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt.

....

If based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crimes charged, you should find the Defendant guilty. If, on the other hand, you think that there is a real possibility that the Defendant is not guilty, you should give the benefit of the doubt and find him not guilty.

(R. 758-59, lines 5-10, lines 18-4, lines 10-15). The trial judge's instruction on reasonable doubt substantially mirrored the language given by the trial judge in Logan³. Notably, after citing the trial judge's reasonable doubt instruction in Logan, the Supreme Court held the "trial court's jury instruction, as a whole, properly conveyed the applicable law." Logan, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8.

In addition to the Supreme Court finding that the failure to give a Logan charge was harmless error in Logan, this Court has found such a failure harmless on multiple occasions. As the dissent correctly identified, this Court previously held a trial judge's failure to include language from the Logan charge was harmless in State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014), State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015), *aff'd in result and vacated in part on other grounds by State v. Drayton*, 415 S.C. 43, 780 S.E.2d 902 (2015), and State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015). Notably, in both Jenkins and Drayton this Court found the failure of the trial court to include language from Logan in its jury instruction was harmless in light of the trial judge's reasonable doubt instruction, because the jury instruction, as a whole, properly conveyed the applicable law. See Jenkins 408 S.C. at 573-

³ The trial judge in Logan provided the following instruction on reasonable doubt: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty... You should weigh all the evidence in this case, and, after weighing the testimony, you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty... The burden of proof remains on the state to prove guilt beyond a reasonable doubt." Logan, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8.

74, 759 S.E.2d at 766 (“As our supreme court ultimately concluded in Logan, we conclude the trial court’s instructions in the present case, as a whole, properly conveyed the applicable law.”); See also Drayton, 411 S.C. at 546, 769 S.E.2d at 261 (“As this court concluded in Jenkins, we conclude the trial court’s instructions in the present case, as a whole, properly conveyed the applicable law.”).

Because the trial judge in Appellant’s case properly instructed the jury on the reasonable doubt burden of proof and Appellant’s presumption of innocence, the trial judge’s instruction, as a whole, properly conveyed the applicable law. This Court should find, like our Supreme Court in Logan and this Court in Jenkins and Drayton, that the trial judge’s failure to give the Logan instruction was harmless error.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, and find the trial judge's failure to give the Logan instruction was harmless error because the State's evidence against Appellant was almost exclusively direct and not circumstantial and because the trial judge's instruction, as a whole, properly conveyed the applicable law. This Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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Appeal from Beaufort County
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PROOF OF SERVICE

I, Leigh Ann Stone, certify that I have served the within Petition for Rehearing on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.
This 26th day of August, 2021.


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Leigh Ann Stone

From: Leigh Ann Stone
Sent: Thursday, August 26, 2021 2:24 PM
To: 'charles@groselawfirm.com'
Cc: Scott Matthews; William Blich
Subject: The State v. Charles Dent (2018-001257)
Attachments: DENT Charles - Petition for Rehearing - 2018-001257 (02692234xD2C78).PDF;
DENT Charles - Cover Letter - Petition for Rehearing (02692248xD2C78).PDF

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Aug 26 2021

SC Court of Appeals

Good Afternoon Mr. Grose,

Attached please find a copy of the Petition for Rehearing in The State v. Charles Dent (2018-001257), along with its cover letter. This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. In addition to this email, a hard copy will be placed in the mail.

If you will, please reply to confirm receipt of this email.

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