

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE GREEN,

APPELLANT

APPELLATE CASE NO. 2012-211994

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

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ATTORNEY FOR APPELLANT

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MAY 28 2013

SC COURT OF APPEALS

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STATEMENT OF ISSUE ON APPEAL

I. The Trial Court erred in admitting witness intimidation evidence where the State did not link such evidence to Appellant Green.

II. Appellant Green was entitled to a new trial where the Trial Court admitted into evidence a statement implicating Green made by a non-testifying alleged accomplice.

STATEMENT OF THE CASE

On December 15, 2011, Andre Green was indicted by the Beaufort County Grand Jury for (1) carjacking; (2) kidnapping; (3) armed robbery; and (4) unlawful carrying of a pistol. R. 344-45; 347-52.

On April 23-25, 2012, a trial was held before the Honorable J. Derham Cole and a jury. Tr. 1. Green was represented by Donald C. Colongeli, and the State was represented by Patrick A. Hall and Jeffrey Stephens. R. 1.

On April 25, 2012, the jury found Green guilty of carjacking and kidnapping. R. 281. The jury found Green not guilty for armed robbery and unlawful carrying of a pistol. Id.

Judge Cole heard post-trial motions on April 26, 2012, which he denied. R. 323-28. Judge Cole sentenced Green to a concurrent sentence of thirty years on the carjacking and kidnapping charges, to be suspended upon the service of twelve years. R. 285, l. 10 – 286, l. 12.

Green timely served and filed his Notice of Appeal on May 3, 2012.

ARGUMENT

I. The Trial Court erred in admitting witness intimidation evidence where the State did not link such evidence to Appellant Green.

One of the most contested issues at trial concerned the identity of one of the two perpetrators who carjacked and kidnapped Dennis Boskey. Boskey testified that shortly after the incident, he identified Appellant Green as the person who held the gun and robbed him in a photo lineup. R. 120, l. 1 – 121, l. 9. After a meeting between Boskey and Green, Boskey determined that Green was not the second perpetrator. R. 122, l. 7 – 123, l. 5.

During trial, the State improperly offered evidence of witness intimidation when the evidence did not establish Green as the source of the intimidation. The State offered evidence that Boskey received threatening phone calls from an Atlanta area code. R. 124, l. 6 – 125, l. 17; 134, l. 9 – 140, l. 10.

In its closing statement, the solicitor argued the following to the jury:

Couple of weeks after this happens, the phone calls start. Person says on the phone: *We need you to drop these charges. Are you going to do it or not?*

Then, we get to the day that Andre Green was arrested. About two hours after Dennis Boskey finds out that Andre Green's been arrested, he gets a phone call. And in that phone call, he's told and I quote:

You know they've picked that boy - - they've picked that boy up for what you did. Man, you better go down and drop those charges, or you going to have some serious problems with you and your family.

That was on the audio that you heard yesterday. But yet, we had somebody here in court, Mr. Boskey, in court yesterday, who would not identify Andre Green as the person that did this to him. Obviously, he was being threatened.

R. 228, ll. 4-19.

Witness intimidation evidence is admissible to show a consciousness of guilt only if such evidence can be linked to the defendant. State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009); Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994).

Here, the State made no effort to connect the phone calls received by Boskey to Green. The State never obtained Boskey's phone records to determine from who or where the calls were coming. R. 153, l. 24 – 159, l. 15; 206, l. 11 – 208, l. 17. Sergeant Massey, the investigating officer, testified that the phone calls could have been made by anybody. R. 208, ll. 16-18.

The witness intimidation evidence was improperly admitted because there was nothing to connect the alleged threats with Green.¹ See State v. Barroso, 320 S.C. 1, 20-23, 462 S.E.2d 862, 874-76 (Ct. App. 1995), *rev'd on other grounds by* 328 S.C. 268, 493 S.E.2d 854 (1997). Accordingly, Green is entitled to a new trial.

¹ The issue may be a matter more appropriately addressed by the post-conviction relief procedures set forth in S.C. CODE ANN. § 17-27-10 et al.

II. Appellant Green was entitled to a new trial where the Trial Court admitted into evidence a statement implicating Green made by a non-testifying alleged accomplice.

During trial, the State played a redacted video of an interview conducted by Sergeant Massey of Green. R. 197, l. 11 – 202. L. 18. During pre-trial motions, the trial court ordered the State to redact any references to Green's prior criminal history or to any statements attributable to Brandon Parker, the accomplice in the alleged carjacking and kidnapping. R. 36, l. 25 – 42, l. 21.

At the post-trial motion hearing, defense counsel for Green argued for a new trial on the ground that the video contained a question by Sergeant Massey to Green on "why would Brandon Parker, who was charged with the exact same charges, say that you were the one with him and did these things too, what would be his motive to lie?" R. 328, ll. 10-17.

"[A]dmission of a statement made by a non-testifying co-defendant and implicating the defendant violates the Confrontation Clause and is inadmissible." State v. Holmes, 342 S.C. 113, 118, 536 S.E.2d 671, 673 (2000). Brandon Parker did not testify at trial and therefore, Green had no ability to question Parker on his statement that Green was involved in the carjacking and kidnapping. The jury should not have heard this evidence, and Green is entitled to a new trial.²

² This issue may also be a matter more appropriately addressed by post-conviction relief.

CONCLUSION

Based on the foregoing argument, Appellant Andre Green's conviction should be reversed and remanded for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2013.

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Appeal from Beaufort County
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Andre Green states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on April 25, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed the arguable legal issues which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Andre Green.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2013.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Entire transcript of trial held April 23-25, 2012;
- (3) Entire transcript of hearing held April 26, 2012; and
- (4) Sentencing sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 28th, 2013



Carmen V. Ganjehsani

Appellate Defender

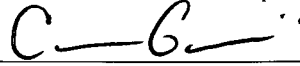
South Carolina Commission on Indigent Defense
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PO Box 11589
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(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

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

May 28th, 2013



Carmen V. Ganjehsani
Appellate Defender

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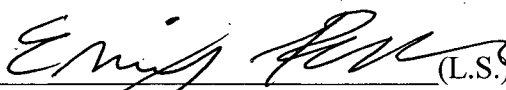
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Andre Green, #283773 at Lieber Correctional Institution, this 28th day of May, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.