

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHAVIS ODELL PULLEN,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT

The trial court erred by failing to declare a directed verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure, as well as the Due Process Clause, for failure to prove the existence of each element of the offenses charged where the evidence of Appellant’s identity and participation was premised on someone saying “Koolaid” during the incident.5

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

TABLE OF AUTHORITIES

Cases

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)..... 5

State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004)..... 7

State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) 5, 6

State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001) 7

State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008)..... 5

State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990) 7

State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978) 7

State v. Lollis, 343 S.C. 580, 541 S.C.2d 254 (2001) 7

State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)..... 7

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) 7

Constitutional Provisions

U.S. Const. amend XIV, § 1 5

Statutes

S.C. Code Ann. § 16-11-311(A) (West, Westlaw current through End of 2011 Sess.)..... 6

Rules

Rule 19, SCRCrimP 5, 8

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to declare a directed verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure, as well as the Due Process Clause, for failure to prove the existence of each element of the offenses charged where the evidence of Appellant's identity and participation was premised on someone saying "Koolaid" during the incident?

STATEMENT OF THE CASE

Appellant Chavis Pullen was indicted by the Spartanburg Grand Jury for first degree burglary, assault and battery of a high and aggravated nature (ABHAN), and three counts of armed robbery. R. 4, ln. 18—R. 5, ln. 5; R. 275 (Indictments).¹ Appellant was tried jointly with one codefendant, Kenddeal Jones (Jones), on March 9 through 10, 2011, before the Honorable J. Mark Hayes, II., and a jury. R. 1. Appellant was represented by Robert Hall, while Jones was represented by Max Singleton. The State was represented by Derrick Balsa. R. 7, ll. 4-12. The charges arose due to an incident involving Jones, two masked assailants, and several occupants of an apartment on June 11, 2009, at approximately 10:30 to 10:45 pm. R. 69, ln. 19—R. 78, ln. 14; R. 84, ll. 7-10.

Appellant was found guilty as charged on all counts. R. 264, ln. 23—R. 265, ln. 11. The trial court sentenced Appellant to the following concurrent terms of incarceration: twenty-five years for first degree burglary and all three armed robbery charges; and ten years for ABHAN. R. 272, ll. 17-25.

¹ Two trial transcripts were produced and separately enumerated for each day of trial. For purposes of this Initial Brief, the transcript of March 9, 2011, will be referred to as Tr. I., while the transcript of March 10, 2011, will be referred to as Tr. II.

ARGUMENT

The trial court erred by failing to declare a directed verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure, as well as the Due Process Clause, for failure to prove the existence of each element of the offenses charged where the evidence of Appellant's identity and participation was premised on someone saying "Koolaid" during the incident.

The State's case linking Appellant to the incident is premised upon one of the two masked assailants saying "Koolaid" during the robbery of the apartment. One of the occupants assumed the second masked robber was someone she knew as "Koolaid." This identification of Appellant based on one person's assumption amounts mere suspicion of guilt rather than substantial evidence reasonably tending to prove the guilt of the accused. Accordingly, the trial court erred by failing to direct a verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure, and Due Process of law for failure to prove the existence of each element of the offenses charged.

Rule 19 provides that, "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 . . . if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCRCrimP (West, Westlaw current through Dec. 1, 2011) (emphasis added). Stated differently, a trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also U.S. Const. amend XIV, § 1; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt

standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). When considering a motion for directed verdict of acquittal, “the trial court is concerned the existence or non-existence of evidence, not its weight.” Brown, 360 S.C. at 586, 602 S.E.2d at 395.

The offenses for which Appellant was convicted—first degree burglary, armed robbery, and ABHAN—each indicate a person is guilty if he carries out the actus reus of the respective crimes.² Therefore, identity of the accused is an essential element of the offenses for which Appellant was indicted.

² The pertinent portion of the first degree burglary statute is as follows:

- (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
- (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm;

S.C. Code Ann. § 16-11-311(A) (West, Westlaw current through End of 2011 Sess.) (emphasis added). The pertinent portion of the armed robbery statute provides following:

A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony

S.C. Code Ann. § 16-11-330(A) (West, Westlaw current through End of 2011 Sess.) (emphasis added). Finally, the elements of the common law offense of ABHAN is

A case based solely upon circumstantial evidence should be submitted to the jury only “if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” Id. 392 S.C. 134, 708 S.E.2d at 776 (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)) (emphasis added). The trial court “should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.” State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) (citing State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978)); see also State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (“The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty.”). “‘Suspicion’ implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing State v. Lollis, 343 S.C. 580, 541 S.C.2d 254 (2001)).

In the present case, although one of the occupants, Ms. Rhashawn Middleton (Middleton), who was in the apartment where the incident occurred, testified she could tell it was “Koolaid,” a person she knew, because of his eyes, and “the way the mask cut, the way his face made, when---when the other suspect called his name Koolaid, I don’t forget a face, and I looked and I could see that was---” R. 85, ll. 15-18; R. 87, ll. 4-10. She further indicated that Appellant was the only person she knew with the nickname “Koolaid,” and that was why she immediately thought of Appellant even though she admittedly “never like had a . . . conversation with him.” R. 86, 2-6; R. 110, ll. 7-9. Therefore, the State’s evidence showing Appellant’s identity is founded upon

defined as “an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation.” See, e.g., State v. Frazier, 302 S.C. 500, 502, 397 S.E.2d 93, 94 (1990) (emphasis added).

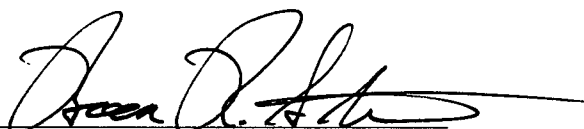
Middleton's assumptions about who was wearing the mask after she heard the word "Koolaid" spoken by one of the assailants during the incident, and not upon her actual witnessing of the perpetrator's face.

Under these circumstances, the State's proof regarding the essential element of identity in all of the indicted charges against Appellant amounts to mere suspicion of guilt rather than evidence of the element. Accordingly, the trial court's failure to direct a verdict of acquittal on its own motion pursuant to Rule 19(a) of the South Carolina Rules of Criminal Procedure constituted an abuse of its discretion and a denial of Appellants fundamental Due Process rights.

CONCLUSION

For the foregoing reasons, Appellant Chavis Pullen respectfully requests reversal of his convictions, and directed verdict of acquittal granted on all counts.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

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V.

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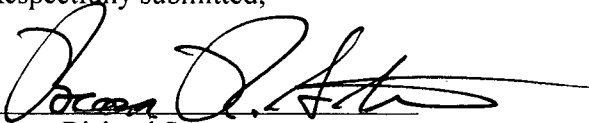
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chavis Odell Pullen states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Mark Hayes, II, which was held on March 10, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Chavis Odell Pullen.

Respectfully submitted,


Breen Richard Stevens
Appellate Defender

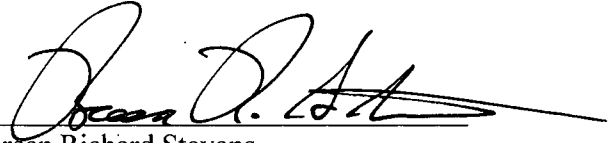
ATTORNEY FOR APPELLANT

This 30th day of July, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

July 30th, 2012

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

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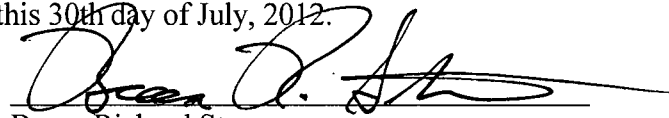
V.

CHAVIS ODELL PULLEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Chavis Odell Pullen, #345139 at McCormick Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 30th day of July, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013