

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LIVINGSTON,

APPELLANT

APPELLATE CASE NO. 2013-000071

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
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STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in coercing the jury to reach a verdict after the jury indicated it was deadlocked by suggesting to the jury that it would deliberate until it reached a unanimous verdict.

STATEMENT OF THE CASE

On October 25, 2012, Appellant Robert Livingston was indicted by the Horry County Grand Jury for one count of second degree burglary. R.p. 96.

Appellant was tried before the Honorable Edward B. Cottingham and a jury on January 8, 2013. R.p. 1. Appellant was represented by Melinda Knowles, and the State was represented by Assistant Solicitor Lauree Richardson. Id.

The jury found Appellant guilty of second degree burglary. R.p. 87, ll. 5-10; 100. Judge Cottingham sentenced Appellant to seven years imprisonment. R.p. 90, ll. 15-16; 102.

Appellant timely filed and served his Notice of Appeal on January 9, 2013.

ARGUMENT

The Trial Court erred in coercing the jury to reach a verdict after the jury indicated it was deadlocked by suggesting to the jury that it would deliberate until it reached a unanimous verdict.

Kenneth Cox testified that on July 7, 2012, he had walked to a neighbor's house to have some hotdogs. While he was at his neighbor's house, Cox said that he spotted Appellant across the street. After Cox ate his hotdog, he walked back to his house and entered through the front door. Cox alleged he saw Appellant coming from his master bedroom, walking down the hallway. Cox asked Appellant how did he get into his house, and Appellant apparently replied that the front door was opened. When Cox confronted Appellant and asked him what he was doing in Cox's house, Appellant informed Cox that he was looking for him. Cox told Appellant to "hold on a second" while Cox went to see if anything was missing from his bedroom. Cox did not see anything missing. Cox told Appellant that he was going to call the police, and Appellant took off at that point. R.p. 28, l. 13 – 29, l. 23.

When the officers arrived at Cox's home, Cox told them that he could not find anything missing from his home. R.p. 43, l. 23 – 44, l. 4. After the officers left, Cox realized his Gucci necklace was missing. R.p. 44, ll. 12-13. His wife later noticed that her jewelry was also missing. R.p. 35, l. 25 – 36, l. 1.

The officer who testified at trial, Joseph Gabriel Manjarrez, confirmed that Cox did not report anything stolen the day of the incident, but that Cox's wife later called to report some jewelry missing. The officer said they were not able to determine what exactly was missing. The officer never prepared a supplemental report regarding the missing jewelry because he "didn't have much to go on. [He] didn't have a description, [he] didn't have any

value of property.” R.p. 48, l. 24 – 49, l. 15. Cox’s wife never got back with the officer with any description of the property taken and its value. R.p. 59, ll. 3-16.

At trial, the officer also acknowledged that he did not process the scene for any fingerprints and that the home was not ransacked as in most burglaries. R.p. 52, l. 3 – 53, l. 24; 59, ll. 17-19.

The case was sent to the jury, and when the jury was out for less than forty-five minutes, the jury sent a note to the trial judge asking, “What if we cannot reach a unanimous decision?” R.p. 84, ll. 19-22; 108. The trial judge replied, “We will continue deliberations this afternoon and tomorrow if necessary.” R.p. 84, l. 23 – 85, l. 1; 108. The jury reached a verdict of guilty on the second degree burglary charge against Appellant later that afternoon. R.p. 87, ll. 5-10.

The Trial Court erred in coercing the jury to reach a verdict after the jury indicated it was deadlocked by suggesting to the jury that it would deliberate until it reached a unanimous verdict. “A judge has a duty to urge the jury to reach a verdict, but he may not coerce them.” State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007); see also State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (“While there is no requirement that the judge inform the jury that its consent is necessary [to continue deliberations], we do not permit coercion.”).

“The typical judicial mechanism for encouraging an indecisive jury is the Allen¹ charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.” State v.

¹ Allen v. United States, 164 U.S. 492 (1896).

Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) (noting the Allen case defines the charge used to encourage a deadlocked jury to reach a verdict).

Here, the jury indicated to the trial judge that it was deadlocked and wanted to know what would happen if the jury could not reach a unanimous verdict. Instead of giving the jury an Allen charge which would encourage the jurors to keep an open mind and consider the opinions of their fellow jurors but which would also remind the jurors to not give up their firmly held beliefs, the trial judge responded that the jury would have to continue deliberations that afternoon and into the morning if necessary. This statement suggested to the jury that they would have no choice but to continue deliberating until they reached a unanimous verdict. In State v. Shuman, 106 S.C. 150, 90 S.E. 596 (1916), the court observed:

An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinion, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury to order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion.


Id. at 597 (internal citations omitted).

The trial judge in this case therefore improperly coerced the jury to reach a unanimous verdict by intimating that the jury would continue to deliberate for however long it took to reach a unanimous verdict. Accordingly, Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Robert Livingston respectfully requests that this Court reverse his conviction and remand the case for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of October, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Livingston 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 Edward B. Cottingham, which was held on January 8, 2013, 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 an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Robert Livingston.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of October, 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) Arrest warrant;
- (2) True-billed indictment;
- (3) Entire transcript of trial held January 8, 2013;
- (4) Verdict;
- (5) Sentencing Sheet;
- (6) State's Exhibits 1-4; and
- (7) Court's Exhibit 1.

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

October 11th, 2013



Carmen V. Ganjehsani
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PO Box 11589
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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."

October 11th, 2013



Carmen V. Ganjehsani
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CERTIFICATE OF SERVICE

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 Robert Livingston, #313183 at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 11th day of October, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of October, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.

ORIGINAL

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CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal 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 Mr. Robert Livingston #313183, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 11th day of October, 2013.
(dated

Brandon Hall
Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 11th day of October, 2013.

Lawrence (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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