

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

RECEIVED
JAN 31 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DWAYNE CABBAGESTALK,

APPELLANT

APPELLATE CASE NO. 2013-0001378

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of criminal domestic violence when the State failed to present any substantial evidence beyond a reasonable doubt that appellant committed the offense?

STATEMENT OF THE CASE

Appellant was convicted of criminal domestic violence after a jury trial held before the Honorable Thomas A. Russo on June 17 – 18, 2013, in Lexington County. A five (5) year sentence was imposed. Erik Drylie, Esquire, and Dayne Phillips, Esquire, were the defense attorneys. Kate W. Usry, Esquire, and Shannon Davis, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of criminal domestic violence because the State failed to present any substantial evidence beyond a reasonable doubt that appellant committed the offense.

Tameshia Perry-Payne, the State's key witness and alleged recipient of criminal domestic violence, testified that she had three children with appellant. She said she never resided with appellant, they never lived together. She could not recall December 4, 2011, but she did remember the police coming that day. She and appellant got into an argument. That is why the police were called. She wanted appellant to leave. (Tr. p. 57, line 20 – p. 59, line 24). She was asked about a statement she wrote that evening. She claimed she said whatever it took to get appellant out of her house. When asked if she told police that appellant kicked and threw an iron candleholder at her, she replied, "Whatever it took." She admitted lying to the police. She denied telling the police that appellant said he was going to pull down the fire alarm and threaten to burn down the house. (Tr. p. 61, line 12 – p. 62, line 25). She did not know if he threatened to pour water on her TV. (Tr. p. 63, lines 7 – 8). She could not recall telling the police that appellant kicked her or showing a bruise on her leg. (Tr. p. 64, line 24 – p. 65, line 12).

At the conclusion of the State's case, defense counsel moved for a directed verdict to the charge of criminal domestic violence. The trial court denied the motion. (Tr. p. 108, line 16 – p. 109, line 16). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof— defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the

existence of every element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also; State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

As can be seen from Tameshia Perry-Payne's own testimony, she negated any proof beyond a reasonable doubt that appellant committed criminal domestic violence.

CONCLUSION

A directed verdict should be granted in appellant's favor.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2014.

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IN THE COURT OF APPEALS

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THE STATE,

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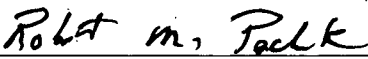
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dwayne Cabbagestalk states:

1. He is 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 Thomas A. Russo, which was held on June 18, 2013, 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 Dwayne Cabbagestalk.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2014.

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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 indictment(s);
- (2) Entire Trial Transcript (June 17 – 18, 2013)

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

January 31, 2014



Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(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."

January 31, 2014

Robert M. Pachak

Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
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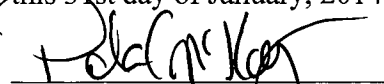
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Dwayne Cabbagestalk, #180546 at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 31st day of January, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of January, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.