

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

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JUN 03 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GABRIEL JON RIOS,

APPELLANT

APPELLATE CASE NO. 2013-000493

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial?

STATEMENT OF THE CASE

In November of 2010, the Spartanburg County Grand Jury indicted Rios for burglary first degree, armed robbery and possession of a weapon during the commission of a violent crime, kidnapping and assault and battery first degree, indictments #2010-GS-42-6830 – 6834. On February 26, 2013, Rios proceeded to jury trial before the Honorable R. Lawton McIntosh. Attorney Matthew Shealy represented Rios at trial. Attorney Timi Poulos and Russell Ghent prosecuted the case. The jury returned verdicts of guilty and Judge McIntosh sentenced Rios to 40 years for burglary first, 30 years concurrent for armed robbery, 30 years concurrent for kidnapping, 10 years for assault and battery first degree and 5 years consecutive for the weapon charge. A timely notice of intent to appeal was filed on March 1, 2013. This appeal follows.

STATEMENT OF FACTS

Gail Holt testified that on the morning of Saturday, August 14, 2010, she woke up a bit before 7:30 AM and after being awake for a little bit she heard glass breaking. When she went to investigate, she encountered a man in her hallway. (R. pp. 58, line 1 – pp. 59, lines 1-3). Mrs. Holt testified that she recognized the man as “Gabe,” a man who had previously worked on and off for her husband both at his business and in the Holts’ home. (R. pp. 59, line 4 – pp. 60, lines 1-15). According to Mrs. Holt, the man forced her down the hall to her husband’s office and demanded that she open the safe. (R. pp. 61, line 9 – pp. 62, lines 1-16). When she was unable to open the safe, the man forced her into the bedroom where he taped her hands and then stole a gun from the bedroom and money, a cell phone and car keys from her purse. (R. pp. 63, line 2 – pp. 64, lines 1-18). Mrs. Holt testified that the man then stole her car. (R. pp. 64, lines 19-25).

Officer Brandon Howard with the Spartanburg County Sheriff’s Department testified that he responded to the scene and found that a window pane had been broken in the door from the garage into the kitchen and there was shattered glass on the floor. (R. pp. 144, lines 10-16). Officer Ted Saar with the Spartanburg County Sheriff’s Department testified that a fingerprint from a piece of shattered glass matched the Appellant. (R. pp. 186, lines 12-23). Mr. Holt testified, however, that Appellant previously worked inside the Holt home painting, roofing and installing a safe. (R. pp. 101, lines 14-17).

Marie Ollinger, a neighbor who lived about seven houses away from the Holts, testified that on Saturday August 14, 2010, she went for a walk between 7:30 AM and 8:00 AM and saw an African American man in the neighborhood who she did not recognize. (R. pp. 113, line 20 – pp. 114, 115, lines 1-5). Ms. Ollinger testified that the man was walking

toward the Holts' house. (R. pp. 115, lines 22 – pp. 116, lines 1-25). Ms. Ollinger did not identify the Appellant as the person she saw in the neighborhood. On cross examination she clarified that she probably started her walk at 7:30 and saw the man at the start of her walk. (R. pp. 119, lines 4-10).

Estar Boyd testified that on August 14, 2010, she was living on Florida Avenue and during this time frame she would allow Appellant to use her cordless phone, at her home. (R. pp. 215, line 1 – pp. 216, lines 1-17). Ms. Boyd testified that her phone number at the time was (864) 582-2858. Sonia Rios, Appellant's wife testified that on August 14, 2010, she received a phone call from her husband at 7:25 AM. (R. pp. 219, lines 15-20). Ms. Rios testified that the phone call from her husband the morning of August 14, 2010 was from the telephone number 582-2858. (R. pp. 224, lines 6-25).

Curtis Jones, an investigator with the Public Defender Office testified that the Holts' house on Perrin Drive was 5.2 miles from Estar Boyd's house on Florida Avenue (R. pp. 229, lines 4-25). Investigator Jones testified that the drive took about 16 minutes. (R. pp. 230, lines 1-25).

ARGUMENT

The trial judge erred in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial.

During the charge conference the judge advised the parties that he was not going to charge the jury with the law on alibi but would allow counsel to argue alibi. (R. pp. 236-239). The judge cited State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) in support of his decision not to charge the jury with the law on alibi. Counsel for Appellant argued that an alibi instruction was warranted because the jury could believe that the neighbor saw the intruder at 7:30 making it impossible to have been the Appellant as he was making a phone call at 7:25 and was 16 minutes away. (R. pp. 238, line 12 – pp. 239, lines 1-2). The judge noted that the victim testified that the incident took place between 7:30 AM and 8:00 AM and found that “there’s insufficient evidence in the record for alibi to be charged because the entire time period in which the crime occurred, at least on the, based on the evidence in the record, is not covered by the other evidence presented in this matter.” (R. pp. 237, lines 17-21).

At the close of jury instruction the judge asked if there were[o]ther than your prior objection to my not charging alibi, any additions or exceptions to the charge as given?” (R. pp. 297, lines 14-16). After the jury returned with verdicts of guilty counsel for Appellant renewed the objection to the failure to charge alibi. (R. pp. 319, lines 6-10).

In State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013) the South Carolina Supreme Court wrote, “In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is

correct if, when read as a whole, the charge adequately covers the law. Id ‘A jury charge that is substantially correct and covers the law does not require reversal.’ Id (citing State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).” The jury charge in the present case fails to inform the jury that, “An alibi charge places no burden on the defendant, but emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime.” Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (citing State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943)).”

In State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980), the South Carolina Supreme Court wrote, “A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act. Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission.” In Robbins the Court reversed and granted a new trial based on the judge’s refusal to charge alibi where Robbins testified that while he had been at the store earlier, he took his wife to work at 10:00 PM and then went straight home making it impossible for him to have robbed the store at 10:45 PM. The Court wrote, “The evidence, viewed as a whole, creates the inference that Robbins was submitting to the court that he was elsewhere at the time of the robbery. Accordingly, his first exception must be sustained and a new trial ordered.” Robbins, 275 S.C. at 376, 271 S.E.2d at 320

An alibi charge was warranted in the present case because the testimony of the neighbor established that she saw a stranger in the neighborhood walking toward the Holts’ house very close to 7:30 AM. The State offered this evidence in an attempt to establish that Appellant was the stranger seen by the neighbor. It would have been

impossible, however, for Appellant to have been the stranger the neighbor saw close to 7:30 AM as he was making a phone call at 7:25 AM and was 16 minutes away.

In State v. Smalls, 98 S.C. 297, 82 S.E.421 (1914) the South Carolina Supreme Court found the trial judge was in error in instructing the jury that the plea of alibi must be received with caution. The Court held that the defense of alibi is entitled to be considered by the jury the same as any other defense. As with self defense, if there is any evidence in the record from which it could reasonably be inferred that the defendant was asserting an alibi defense, the defendant is entitled to instruction on the defense and the refusal to charge alibi constitutes reversible error. In State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012), the South Carolina Court of Appeals wrote, “If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error. State v. Day, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000).”

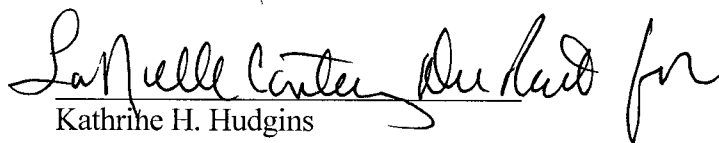
Under the any evidence standard, the judge erred in refusing to instruct the jury on the law of alibi. The failure to charge the jury on the law of alibi constitutes reversible error. While a harmless error analysis is not applicable when the judge refuses to charge the law on alibi and evidence of alibi is presented, as in the present case, the State in the present case failed to present overwhelming evidence of guilt. The State failed to prove how Appellant allegedly traveled from Florida Avenue to the Holts’ house and the neighbor was unable to identify Appellant as the stranger she saw in the neighborhood that morning.

Additionally, an alibi charge was necessary in the present case to correct the impression that may have been given by the State in closing argument that Appellant had the burden of proving alibi. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994). In closing the State reminded the jury that one of the alibi witnesses, Appellant's wife, had been convicted of giving false information to the police. (R. pp. 270, lines 8-15). The State further argued in closing, "He's had over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No One said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody." (R. pp. 270, line 24 – pp. 271, lines 1-3). The alibi charge was necessary to correct any impression that Appellant bore any burden of proof at trial. The trial judge erred in refusing to charge the jury with the law on alibi.

CONCLUSION

Based on the above argument, the Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

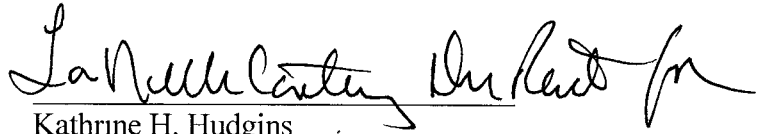
ATTORNEY FOR APPELLANT

This 3rd day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 3rd, 2014



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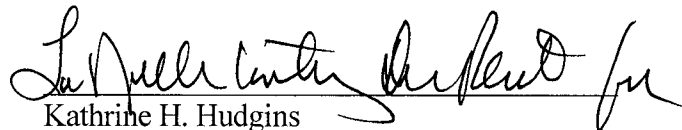
V.

GABRIEL JON RIOS,

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CERTIFICATE OF SERVICE

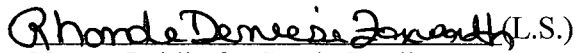
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 3rd day of June, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.