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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN ALLEN FINNEY,

APPELLANT

APPELLATE CASE NO. 2014-001270

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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

Did the trial court err in instructing the jury on the “hand of one is the hand of all” charge when no other person was charged with this crime other than the Appellant Finney?

STATEMENT OF THE CASE

On December 2, 2013, the Oconee County Grand Jury indicted Jonathan Allen Finney on the charges of burglary first degree and petite larceny \$2000 or less. On May 27, 2014, May 29-May 30, 2014 Finney proceeded to trial before the Honorable R. Lawton McIntosh and a jury. He was represented by R. Daniel Day, Jr., and the state was represented by David R. Wagner, Jr. R. 1. The jury found Finney guilty of both charges as indicted. R. 318, ll. 4 – 22. Judge McIntosh sentenced Finney to thirty days on the petit larceny, and to twenty years suspended to the service of sixteen years with five years probation on the burglary first degree. R. 327, ll. 4 – 17. Finney's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Mary Jane Giordano lived in Greenville with her husband, Joe, and their two children. Often on weekends and during the summer, they visited the old family home in Oconee County which Mary Jane had inherited from her father. Her brother, David McMahan who was a deputy with the Oconee County Sheriff's Office, owned adjoining property. R. 135, ll. 11 – 19.

On August 10, 2013, when Joe Giordano visited this weekend home, he discovered that it had been burglarized. Items missing included an old family heirloom 12 gauge shotgun, keys, and liquor from the liquor cabinet. Two weeks later, he realized that a BB gun and airsoft toy rifle were also missing. R. 141, ll. 15 – R. 146, ll. 10; R. 227, ll. 18 – R. 228, ll. 17.

Investigator Scott Arnold with the Sheriff's Office was assigned to this case. He asked Investigator David McMahan, who knew the area, to assist him. R. 232, ll. 19 – R. 234, ll. 11. After canvassing the area, Sgt McMahan developed Jonathan Finney as a suspect. After more investigation, the officers learned that Finney was at the home of Tina Elrod. R. 234, ll. 12 – 19.

The officers went to Tina Elrod's. She gave consent for them to search her home. They found a BB gun and airsoft toy rifle and a blue bag. The blue bag was significant because another witness had seen a white male leaving the incident location carrying a blue bag. The officers determined that these items belonged to the Giordanos. R. 188, ll. 9 – 25; R. 194, ll. 4 – R. 196, ll. 11.

The officers waited there until Finney returned. Finney went with them to the Sheriff's Office where he gave a written statement on August 28, 2013. R. 196, ll. 11 – R.

201, ll. 8. In this written statement, Finney stated that he and Josh were at the house, and Josh left. When Josh returned a couple of hours later, he had a blue bag, a 12.gauge shotgun, airsoft gun and BB gun. Josh said he had found a "lick" and needed to sell the items to make some money. Finney had not seen Josh since then. He identified Josh as Josh Burrell. R. 235, ll. 1 – R. 237, ll. 15. Finney was then held at the detention center on unrelated charges. R. 76, ll. 9 – 21.

The officers talked with Finney again two days later on August 30, 2013. He would not give a written statement but said he would talk with them. When the officers told him they had items from the burglarized property that linked him to the burglary, Finney told them: "I did it." Finney said that he was the lookout man. Josh Burrell went in the house. R. 201, ll. 11 – R. 205, ll. 12. Later, on September 4, 2013, Finney took the officers to the incident location. R. 205, ll. 13 – R. 208, ll. 15.

Finney was arrested and charged with the burglary. At his trial, Finney chose not to testify in his own defense. R. 252, ll. 1 – 21. Following a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), his written statement and oral statements were admitted into evidence. R. 103, ll. 5 – R. 104, ll. 10.

At the close of the evidence, the judge held a charge conference. He told the attorneys the list of charges he planned to give to the jury. When he said he planned to give the "hand of one is the hand of all" charge, defense counsel objected. Counsel argued that Finney had not been charged as a co-defendant and no one else had been charged. Although Finney said in his statement that someone else was involved, the officers said they did not believe him. There had been no other testimony nor evidence that someone else was involved. R. 262, ll. 1 – R. 264, ll. 1.

The state argued that Finney said someone else was involved and that was sufficient for the “hand of one is the hand of all” charge. The trial judge ruled that the charge was appropriate based on Finney’s statement that he was the lookout. R. 264, ll. 2 – 24.

The judge gave the charge, and defense counsel objected at the end of the jury charges. R. 281, ll. 16 – R. 283, ll. 2; R. 286, ll. 1 – 18.

ARGUMENT

The trial court erred in instructing the jury on the “hand of one is the hand of all” charge when no other person was charged with this crime other than the Appellant Finney.

Under the “hand of one, the hand of all theory”, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999); State v. Jackson, 410 S.C. 584, 765 S.E.2d 841 (Ct. App. 2014).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court’s decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Supreme Court reversed and remanded Fuller’s conviction of voluntary manslaughter because the Court held that it was reversible error where the trial court failed to charge on the elements of defense which were applicable to the issues raised by the defendant.

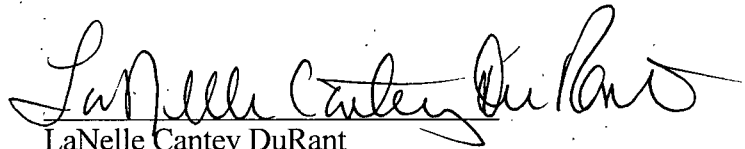
Just as a judge should give a requested jury charge if supported by the evidence presented, a judge should not give a charge if the evidence does not support that charge. In Finney's case, there was no evidence that any other person was charged with this crime. The officers doubted the truth of Finney's statements as they stated.

Finney was prejudiced by the "Hand of one is the hand of all charge" because there was a reasonable probability that the jury could have believed his written statement over his verbal statement. There was no forensic evidence linking Finney or anyone else to the crime scene. Therefore, the jury could have found him not guilty and blamed the crime on the third party but for the jury charge.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping initial "L".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2015.

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R. Lawton McIntosh, Circuit Court Judge

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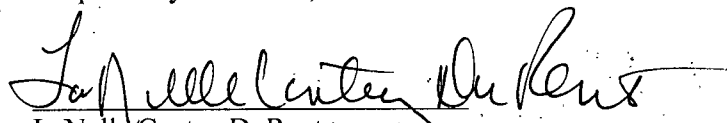
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Allen Finney 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 R. Lawton McIntosh, which was held on May 30, 2014, 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 Jonathan Allen Finney.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2015.

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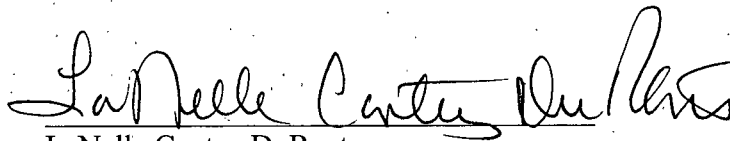
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

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

February 13th, 2015



LaNelle Cantey DuRant
Appellate Defender

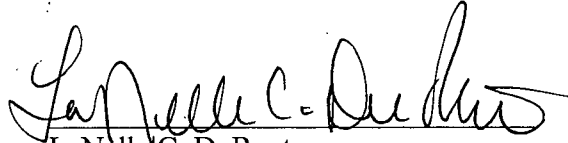
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 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."

February 13th, 2015



LaNelle C. DuRant
Appellate Defender

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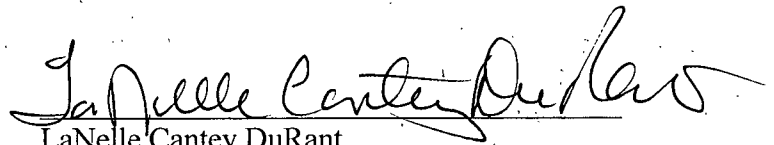
V.

JONATHAN ALLEN FINNEY,

APPELLANT

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 Jonathan Allen Finney, #360193 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of February, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3 2023.