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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

SEP 17 2015
SC Court of Appeals

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DON RAY GIBSON,

APPELLANT

APPELLATE CASE NO. 2015-000612

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in upholding Appellant's conviction for physically attacking the victim where the jury found that the State did not prove beyond a reasonable doubt that Appellant used or possessed a knife and where the only testimony at trial was that the victim was cut with a knife.

STATEMENT OF THE CASE

On August 25, 2009, the Anderson County Grand Jury indicted Appellant Don Ray Gibson for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. R. 363—R. 364; R. 5, lines 7-11. On December 12, 2011, Appellant proceeded to trial before The Honorable R. Lawton McIntosh and a jury. Scott McElhannon represented Appellant and Rame Campbell represented the State. R. 1. The jury found Appellant guilty of the assault and battery charge and not guilty of the weapon charge. Based on the State's prior notice of intent to seek imprisonment for life without the possibility of parole, Judge McIntosh so sentenced him. R. 344, line 19—R. 348, line 4.

On December 19, 2011, Appellant filed a motion to vacate his conviction. R. 350—R. 352. On March 13, 2015, Appellant appeared at a hearing on the motion before Judge McIntosh. The same attorneys represented the parties. R. 353. After the hearing Judge McIntosh issued an order denying the motion. R. 361.

ARGUMENT

THE TRIAL JUDGE ERRED IN FAILING TO VACATE APPELLANT'S CONVICTION BASED ON THE JURY'S IRRECONCILABLE VERDICTS FOR THE TWO CHARGES.

STATEMENT OF FACTS

At trial the State alleged that early on the morning of April 26, 2009, Appellant exchanged words with another man at a bar in Sandy Springs. Appellant left and returned with a knife a short time later. Appellant and the other man again exchanged words, and Appellant cut him in the neck with the knife. R. 35, line 11—R. 37, line 16.

In his motion for a new trial, Appellant argued that the guilty verdict for the assault and battery charge was inconsistent with the not guilty verdict for the weapon charge because the only testimony presented at trial was that Appellant used a knife to physically harm the victim. R. 350. During the hearing on the motion, Appellant argued that the State could not have proved Appellant guilty of the assault and battery charge without proving that he physically harmed the victim with the knife. R. 357, line 22—R. 359, line 3. In the order denying the motion, Judge McIntosh concluded the verdicts were not inconsistent. R. 361.

DISCUSSION

The trial judge erred in failing to vacate Appellant's conviction based on the jury's irreconcilable verdicts. The common law offense of assault and battery with intent to kill is defined as an "unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." *State v. Foust*, 325 S.C. 12, 14, 479 S.E.2d 50, 51 (1996). South Carolina Code section 16-23-490 makes it illegal to possess or visibly display what appears to be a knife during the commission of a violent crime.

“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, . . . 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.” *In re Winship*, 397 U.S. 358, 364 (1970).


In this case, the not guilty verdict for the weapon charge meant the assault and battery charge could not stand. The State was required to prove to the jury beyond a reasonable doubt that Appellant attacked the victim in a physically violent manner. The only evidence presented at trial as to a physical attack was that Appellant cut the victim with a knife. However, based on the not guilty verdict for the weapon charge, the State did not prove to the jury beyond a reasonable doubt that Appellant used or even possessed a knife. Therefore the State could not have proved Appellant used a knife for purposes of the assault and battery charge.

Judge McIntosh erred in concluding that the verdicts were not inconsistent. Because of the plain inconsistency, allowing the conviction for the assault and battery charge to stand constituted a denial of due process. Accordingly, Judge McIntosh further erred by denying Appellant’s motion to vacate his conviction.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court vacate his conviction.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2015.

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APPELLATE CASE NO. 2015-000612

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Don Ray Gibson states:

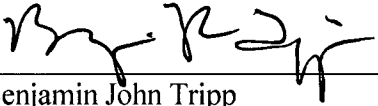
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on December 14, 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 Don Ray Gibson.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2015.

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."

September 17, 2015



Benjamin John Tripp
Appellate Defender

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Division of Appellate Defense
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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) Trial transcript;
- (3) Appellant's motion for new trial;
- (4) Transcript of March 13, 2015;
- (5) Order dated March 13, 2015.

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

September 17th, 2015


Benjamin John Tripp
Appellate Defender

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Attorney for Appellant

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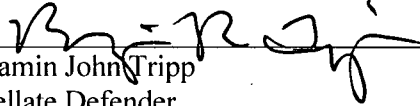
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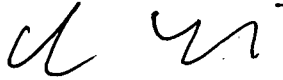
CERTIFICATE OF SERVICE

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 Don Ray Gibson, #082710 at Perry Correctional Institution, this 17th day of September, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of September, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.