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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHAD JUNIOR BUSSELL,

APPELLANT

APPELLATE CASE NO. 2015-000303

ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in charging the jury that it could infer that appellant committed a burglary because he was found in the possession of "recently stolen goods," in violation of South Carolina's constitutional proscription against judges charging juries on the facts of the case?

STATEMENT OF THE CASE

On December 19, 2013, a Jasper County grand jury indicted appellant for second-degree burglary. R. 326-27. On February 9, 2015, appellant was tried before the Honorable Brooks P. Goldsmith and a jury. R. 1. M. Alexander Toporek represented the State. R. 2. Robert M. Hughes represented appellant. R. 2. The jury convicted appellant. R. 316, l. 11 – 317, l. 2. Judge Goldsmith sentenced appellant to eight years' imprisonment, suspended upon the service of six years' imprisonment and five years' probation. R. 324, ll. 10 – 13. This appeal follows.

ARGUMENT

The trial court erred in charging the jury that it could infer that appellant committed a burglary because he was found in the possession of "recently stolen goods," in violation of South Carolina's constitutional proscription against judges charging juries on the facts of the case.

On October 17, 2013, police officers responded to a potential burglary at the home of Terry Williamson ("Williamson"). R. 170, ll. 12 – 14. R. 209, l. 18 – 210, l. 6. Williamson's neighbor, O'Neal Able ("Able"), was keeping an eye on Williamson's property because Williamson was out of town. R. 132, l. 22 – 113, l. 11. Able saw a man walk into Williamson's yard. R. 134, l. 17 – 135, l. 5. Able lost sight of the man. R. 134, l. 17 – 135, l. 5. When the man came back into view, he "had two big bags in his hand." R. 134, l. 17 – 135, l. 5. Able walked over to the man and "asked him what he was doing." R. 135, ll. 23 – 25. The man did not answer, picked up his bags, and walked away. R. 136, ll. 1 – 3. Able admitted on cross-examination that he never saw the man go into Williamson's house. R. 139, ll. 21 – 22.

Able called a friend, Keefe Blatchley ("Blatchley") and told him he suspected the man "of breaking into my neighbor's house." R. 136, ll. 11 – 17. Blatchley was a former law enforcement officer. R. 148, ll. 9 – 12. Able continued to follow the man. R. 137, ll. 3 – 5. Able followed him for approximately "a half a mile." R. 137, ll. 9 – 14. The man knew Able was following him but made no attempt to run or drop the bags. R. 140, ll. 6 – 18. Blatchley and the police arrived and confronted the man, who was the defendant, Chad Bussell ("Bussell"). R. 137, ll. 15 – 23.

Bussell testified in his own defense. Williamson was his uncle. R. 211, ll. 12 – 13. Bussell went to his uncle's house "to get some cigars and cigarettes that I had there, and go back into town." R. 263, ll. 13 – 21. Bussell kept some of his belongings behind a shed at his uncle's house. R. 264, ll. 13 – 24. He gathered his belongings and left. R. 264, ll. 13 – 24. The cigarettes were given to Bussell in exchange for work he had done at his uncle's house. R. 266, l. 1 – 267, l. 24. Bussell lived at a relative's house with a lot of dogs, so he kept some of his belongings at his uncle's house so "the dogs wouldn't get into them." R. 269, ll. 2 – 11.

Williamson testified there "was a bunch of stuff missing out of our house." R. 224, ll. 23 – 25. Among the missing items were \$2000 in cash, a Glock .45 automatic pistol, pain medication, and a large amount of change. R. 225, ll. 1 – 5. None of these items were found on Bussell when he was stopped by the police. R. 158, l. 10 – 163, l. 22. The police found tobacco in containers with loose cigarettes, two cans of soda, and some coins. R. 162, l. 9 – 163, l. 22. Williamson testified the cigarettes and tobacco in the containers were similar to how he stored his tobacco. R. 217, ll. 2 – 19.

The burglar's point of entry was a broken window with a bucket underneath it. R. 172, l. 18 – 177, l. 6. A piece of firewood was used to break the window. R. 216, ll. 1 – 4. Bussell emphatically denied going into his uncle's house and stealing anything. R. 271, ll. 9 – 10. R. 274, l. 14 – 275, l. 8. Bussell knew where his uncle kept a hidden key and would not have needed to force his way into the home. R. 274, ll. 16 – 17.

After the close of testimony, and without any such request from the State, the trial judge told the parties about a potential charge he was considering giving to the jury. R. 280, ll. 4 – 281, l. 7. The trial judge stated the following:

But there is a charge – and I'll be glad to hear from you all on this. There's a separate charge of possession of recently stolen goods. Arguably, there is evidence that the defendant recently stole property. The charge would go something like:

If the defendant is found possessing recently stolen goods, this may be used as evidence that the defendant stole the goods. This could simply be an evidentiary fact to be taken into consideration by you, along with other evidence in the case, and you may give it the weight you decide it should have.

That's a possible charge, but I'm not sure mere presence is appropriate in this case.

R. 280, ll. 4 – 19. Trial counsel objected stating he was “not particularly thrilled” with the court's proposed charge. R. 280, ll. 20 – 25. The trial judge stated he understood “there's evidence going both ways on the issue of whether he did, in fact, possess stolen goods.” R. 281, ll. 4 – 7. Without resolving the issue, the court adjourned for the day.

The next morning, the trial judge gave the “stolen goods” charge. R. 308, l. 22 – 309, l. 3. Trial counsel objected after the judge's charge, stating:

I was not aware that we were actually going to do the recently stolen property charge. You mentioned it yesterday. I would have probably objected stronger to it, but it's water under the bridge now, I'm afraid. So, no other objections.

R. 311, ll. 9 – 13. The trial judge did not bring the jury back to the courtroom to tell them to disregard the stolen property charge.

The trial judge erred in giving this “stolen goods charge.” This charge was a charge on the facts. “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. Art. V, § 21. The trial judge's charge comes from language in decisions analyzing directed verdict and harmless error issues. See e.g., State v.

Evans, 378 S.C. 296, 299-300 662 S.E.2d 489, 491 (Ct. App. 2008). In Evans, the defendant was tried for possession of a stolen vehicle. Id. In conducting its harmless error analysis, the Court cited State v. Lee, 147 S.C. 480, 145 S.E.2d 285 (1928) for the proposition that “guilty knowledge can be proved by showing a person was found in possession of recently stolen goods.” Id.

The language from the charge also appears in State v. Campbell, 131 S.C. 357, 127 S.E. 439 (1925). Campbell concerns the appeal of housebreaking and grand larceny convictions on a directed verdict issue. Id., 127 S.E. at 440-41. Citing a legal treatise and a case from South Dakota, the Court addressed the inferences to be drawn from the evidence: “The recent possession of stolen property whether in larceny or in burglary, and whether such possession be explained or unexplained, is a circumstance—an evidentiary fact—which may have a greater or lesser weight as proof of guilt, when considered with, and strengthened or weakened by, all the other evidence in the case.” Id. citing State v. Vierck, 120 N.W. 1098 (S.D.1909) overruled in part by State v. O’Connor, 194 S.W.2d 246 (S.D.1972). See also State v. Kimbrough, 212 S.C. 348, 352, 46 S.E.2d 273, 275 (1948) (stating, in analyzing a directed verdict issue in a burglary case, “If the jury found that he had possession of this recently stolen property, this fact, with the other circumstances in the case, was sufficient to warrant an inference of guilt.”).

While this statement of law may be a valid way for a trial judge to analyze the sufficiency of evidence at the directed verdict stage, it has no place in a jury charge. It may also be fodder for closing argument, but should not be charged to the jury. A close analogy of this principle is that flight is no longer charged to juries. State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980). “The charge on flight oftentimes has the

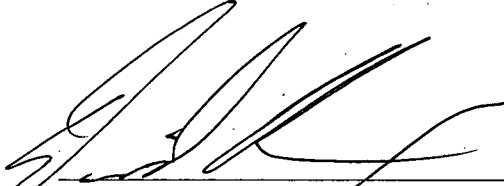
potential for creating more problems than solutions.” Id. “[T]he ‘law of flight’ in a judge’s charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.” Id.

Just as an improper charge on flight unduly emphasizes parts of a case’s evidence, so did the trial judge’s charge on “stolen goods” emphasize this portion of the State’s case. Bussell testified and explained that the cigarettes and tobacco in his possession were given to him as payment for work done. By giving the “stolen goods” charge, the trial judge undercut Bussell’s testimony and credibility. The giving of this charge prejudiced Bussell. This Court should reverse and grant him a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of October, 2015.

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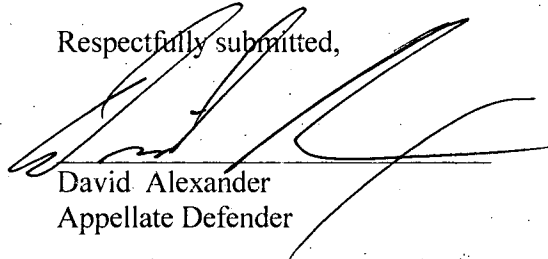
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chad Junior Bussell 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 Brooks P. Goldsmith, which was held on February 11, 2015, 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 Chad Junior Bussell.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of October, 2015.

STATE OF SOUTH CAROLINA

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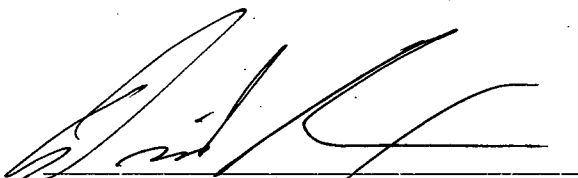
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript.

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

October 13th, 2015



David Alexander
Appellate Defender

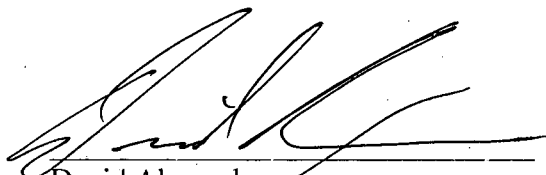
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(803) 734-1343

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."

October 13, 2015



David Alexander
Appellate Defender

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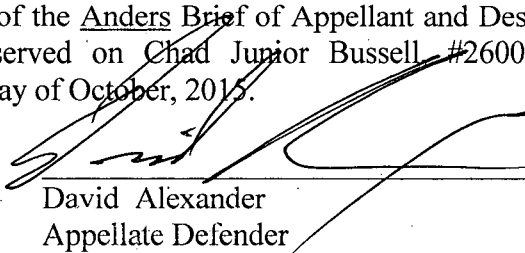
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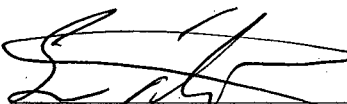
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal 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 Chad Junior Bussell, #260044 at Wateree River Correctional Institution, this 13th day of October, 2015.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.