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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID WINCE CHILES, JR.,

APPELLANT

APPELLATE CASE NO. 2014-002533

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal of armed robbery when the State failed to prove that Appellant feloniously took and carried away the goods of another against their will or without consent?

STATEMENT OF THE CASE

In April of 2012, the Greenville County Grand Jury indicted Appellant for armed robbery, possession of a weapon during the commission of a violent crime and conspiracy, indictments #2012-GS-23-965, 966. On November 5, 2014, Appellant proceeded to jury trial before the Honorable Alexander S. Macaulay. Marcus Smith represented Appellant at trial. Jeff Watson prosecuted the case. The jury returned with verdicts of guilty. Judge Macaulay sentenced Appellant to fifteen (15) years for armed robbery, five (5) years consecutive for possession of a weapon during the commission of a violent crime and five (5) years concurrent suspended with probation for five (5) years for conspiracy. A timely notice of intent to appeal was served on November 17, 2014. This appeal follows.

ARGUMENT

The trial judge erred in refusing to direct a verdict of acquittal of armed robbery when the State failed to prove that Appellant feloniously took and carried away the goods of another against their will or without consent.

Appellant, his girlfriend, Precious Harris, and his brother, Keith Williams, were charged with robbing the McDonald's on Old Spartanburg Road on June 26, 2011. Harris was a manger at the McDonald's and on duty at the time of the robbery. Williams pled guilty to the charge and was called as a State's witness at trial. Upon his arrest Williams allegedly made a statement implicating himself, Appellant and Harris in the robbery. Appellant and Harris were tried at the same time. At trial, Williams denied making the statement. A copy of the statement was admitted in evidence, without objection. (R. p. 310, lines 5-11; R. p. 428, State's Exhibit #8). The jury found Harris not guilty.

The State's case against Appellant and Harris was based primarily on the alleged statement of Williams. There was no forensic evidence linking Appellant to the robbery. There were three witnesses to the robbery but none of those witnesses were able to identify the robbers. At the close of the State's case Appellant moved for a directed verdict of acquittal. (R. p. 322, line 18 – p. 323, lines 1-18). Appellant argued:

They talk about an armed robbery. They talk about two men coming in the store and two men coming out of the store, but I never heard anybody testify that, you know, a certain amount of money was taken, hamburgers were taken, French fries were taken or anything else. I just don't remember that. So, you know, I'll defer to the record, but, Judge, I don't believe they have met their burden of proof to show that anything was taken from McDonald's.

(R. p. 323, lines 7-15). The State argued, "Specifically with regard to the issue of the money taken, Mr. Lomax specifically said \$1,200 was taken in his review of this." (R. p. 323, lines 22-25). The State also argued that Williams' statement constituted evidence of the armed robbery. (R. p. 324, lines 1-8).

The judge denied the motion for a direct verdict of acquittal stating, "And there has been some testimony, as Mr. Weston has said, that there was some funds taken from the manager – or was missing from the McDonald's receipts for that day and I think even from the safe as well, so I do find there is evidence." (R. p. 324, lines 21-25). The trial judge erred.

Mr. Lomax did not testify that \$1,200 was taken from McDonald's on the night of the robbery, as stated by the prosecutor. (R. pp. 185-221). Lomax was a district manager for McDonald's. At the time of the robbery, however, the McDonald's on Old Spartanburg Road where the robbery took place was not under his supervision. (R. p. 188, lines 7-25). The district manager at the time of the robbery was not called as a witness at trial. When asked on cross examination if McDonald's kept records in reference to this case, Lomax responded, "Well, I know we have records at our office as to how much – the cash that we lost, yes sir." In regard to policies and procedures that were not followed on the night of the robbery, Lomax testified, "Because you don't lose cash that way. If you follow all the procedures, you don't lose cash." (R. p. 213, lines 6-7).

The prosecutor told the jury in his opening statement that Appellant and Williams robbed the McDonald's of \$1,200. (R. p. 87, lines 14-19). The prosecutor told the jury in closing argument that they took \$1,200 from McDonald's. (R. p. 342, lines 21-22). Arguments made by counsel, however, are not evidence. S. Carolina Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be

considered.”); see also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct.App.1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986).

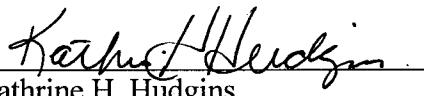
In State v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984), the South Carolina Supreme Court wrote, “In State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979), we defined robbery as the felonious taking and carrying away of goods of another against the will or without consent. The legislature has defined armed robbery as robbery while armed with a deadly weapon. S.C.Code Ann. § 16–11–330 (1976).” In the present case the State failed to prove that Appellant took or carried away the goods of another against their will or without consent. The only reference is in Williams’ statement that he denied at trial. In the statement Williams said, “I think he used the money to move out of Dixie and he bought some new stuff for Precious’s little girl.” (R. p. 428, State’s exhibit #8). This is not sufficient.

“When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). Viewing the evidence in the light most favorable to the State, the State failed to prove that Appellant took or carried away anything from the McDonald’s. The judge erred in denying the motion for directed verdict.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and sentences for armed robbery and possession of a weapon during the commission of a violent crime.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2015.

STATE OF SOUTH CAROLINA

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Alexander S. Macaulay, Circuit Court Judge

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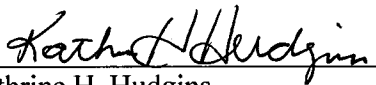
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David W. Chiles, Jr. 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 Alexander S. Macaulay, which was held on November 6, 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 David W. Chiles, Jr..

Respectfully submitted,

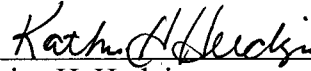

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of August, 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."

August 26, 2015



Kathrine H. Hudgins
Appellate Defender

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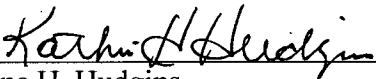
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Trial Transcript;
- (3) State's Exhibit #8 - Statement of Keith Williams.

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

August 26th, 2015


Kathrine H. Hudgins
Appellate Defender

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Attorney for Appellant

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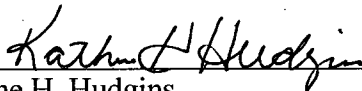
DAVID W. CHILES, JR.,

APPELLANT

APPELLATE CASE NO. 2014-002533

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 David W. Chiles, Jr., #362035 at McCormick Correctional Institution, this 26th day of August, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021