

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Hon. Carmen T. Mullen, Circuit Judge

RECEIVED

APR 12 2017

SC Court of Appeals

Adrian Jenkins -- Appellant,

-vs-

State of South Carolina -- Respondent,

Appellate Case No.2016-000908

APPELLANT'S PRO-SE ANDERS BRIEF

Adrian Jenkins
SCDC# 273602
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

TABLE OF CONTENTS

TABLE OF CONTENTS,i
ISSUE (A),1
CONCLUSION,11
APPELLANT'S OPPOSITION TO APPELLATE COUNSEL'S PETITION TO BE
RELIEVED AS COUNSEL,12
EXHIBIT (A),13

ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for a directed verdict where the evidence presented failed to prove Appellant entered the victim's house and therefore the State's evidence failed to establish the information alleged in the indictment and Appellant is entitled to a directed verdict on the burglary offense.

ARGUMENT

Whether the trial court erred in denying Appellant's motion for a directed verdict where the evidence presented failed to prove Appellant entered the victim's house and therefore the State's evidence failed to establish the information alleged in the indictment and Appellant is entitled to a directed verdict on the burglary offense.

FACTS

On September 17, 2015, Deputy Matthew Rios responded to a call for assistance in a burglary in the Shell Point area of Beaufort County. ROA. 102.

While interviewing the alleged victim George Lawson, Lawson provided Rios with a possible suspect.. "Ron Jenkins" (Appellant), ROA. 102.

Lawson provided video surveillance from the incident at which time Rios used his BCSO issued camera to record it at that time. ROA. 102. Rios testified that he processed the crime scene and determined from the video that "it looks as though" he entered the rear door of the residence. ROA. 103.

Lawson showed Rios that by using a little bit of force the door would still open even when locked. ROA. 103. Rios said he took the video he recorded over to Beaufort City Police; SGT Kattenhorn and Officer Knapp and showed them and [they] identified Appellant as being the individual in the video. ROA. 103, 1.21-p.104, 1.8.

A photo-line up was obtained with Appellant in it and Lawson identified Appellant as the person. ROA.104-106. On

cross-examination Rios confirmed that the call reporting the burglary came from Lawson about 9:00 pm, some five hours [after] noticing his home had been burglarized at 4:00 pm. ROA. 107.

Rios confirmed that Lawson provide [no] information regarding his actions during the five hour time period [after] finding his home burglarized. ROA. 108.

Rios testified he took approximately two (2) photos at the incident. A cigarette and the actual location of the residence. ROA. 108. Noting the cigarette was found on the ground by the gate. ROA. 108.

Rios candidly admitted that although he was trained in lifting finger prints he never attempted to lift any prints off the back sliding door. ROA. 110-111.

Rios learned the previous day the victim, appellant and Miranda Brock road around together in Lawson's truck. Lawson said the suspect had been inquiring about selling the speakers, but they did not go to try sell the speakers. ROA. 111. Even though Rios obtained information from Lawson that he, appellant and Miranda did go to a trailer park together, where Appellant had gotten out of the truck and knocked on a couple of doors. ROA. 111.

George Lawson testified that the day before the incident he was at home and he heard a knock at the door. When he answered the door Miranda was there ad said someone was coming to pick her up. ROA. 115.

Lawson said after 10-15 minutes there was another knock at the door. When he opened the door there was a black fellow

standing there. Lawson said he asked the man who he was and Miranda said "oh that's my ride" so Lawson let him in.

Lawson said at that time the individual asked to borrow a T-shirt, so he gave him one. According to what Appellant has allegedly told him, Lawson said whoever dropped Appellant off had ran off and left him, so Lawson got stuck driving the two around. ROA. 115.

Lawson said he and his 10-year old son live at the home and Miranda had stayed over a couple of times in the past, but never lived there. ROA. 116-117. Lawson testified that as they were leaving Appellant asked Lawson about some speakers that he had sitting in the kitchen, as to whether or not they were for sale, at which time Lawson replied, "yes." ROA. 118, 1.22-p.119, 1.3.

According to Lawson at that time Appellant called someone he thought would be interested in purchasing the speakers, so they loaded up the speakers and took them to a mobile home park. Appellant was to have knocked on one door and a lady came up like she didn't know him so he went to the next door and no one answered, so he drove them to Food Lion and told them he had to go pick his son up, and according to Lawson they refused to get out of the truck. Lawson said they argued with him a few minutes and then he took them to Burton Wells and dropped them off. ROA. 119.

On the day in question Lawson said he went to work around 9:00 am and returned home at 4:00 pm. He said he picked his son up and went home. Lawson said he didn't realize the items missing right away. ROA. 120, 1.1-12. He later realized that at least fifty x-box 360 games and ten to twelve x-box one games and two

x-box controllers, a flat panel 32 in. TV with a DVD player and one surround sound speaker were missing. ROA. 120-121.

Lawson said he went and checked his video surveillance and he seen a blue car pull up and seen some one get out and then jump the fence. At that time Lawson said he recognized the individual. He said he seen him go in and around towards the back of the house and then a few moments later the person started loading stuff over the fence to the females waiting by the car. Lawson confirmed the items were inside his home. ROA. 121.

Lawson admitted he gave law enforcement "only a portion" of the surveillance video that showed Appellant on it. Lawson said law enforcement did not want surveillance from the entire day. ROA. 135-136.

Kelsey Krimmer testified for the State. Krimmer said she was with Appellant on the day in question. ROA. 141-142. Krimmer said Appellant told her he needed to get some stuff from his ex-girl friend's house. ROA. 142.

Krimmer said that Stephanie was giving her a ride to work, after going to Peacock Run (the location in question). ROA. 143. Krimmer said Appellant got out of the car and went over the fence and went through the back door of the house. ROA. 143. Krimmer said Appellant came out of the house with a TV and some games. ROA. 143.

Krimmer also said Appellant never told her the name of his ex-girl friend, but Krimmer admitted to using drugs (xanax) that day. ROA. 144-145.

During cross-examination Krimmer admitted to telling the

detective during her interview of her taped statement, that she had "no memory" of that day and that she had to ask Stephanie about what happened that day. ROA. 146. Krimmer admitted she did not see Appellant enter the home. ROA. 146, 1.24-25, and that she did not see Appellant come out of the house. ROA. 147, L.1-2.

Investigator Jennifer Snider testified that she interviewed Appellant after Miranderizing him and Appellant stated that he knew Lawson, only from purchasing drugs for Lawson. ROA. 150.

Snider confirmed that she met with Lawson a couple of days later at her office. She said that Lawson gave her a thumb drive with the surveillance on it and as she viewed it, it was "in individual segments" a couple of minutes long. ROA. 151.

Snider confirmed that she located Stephanie Campbell and Kelsey Krimmer and [both] after being Miranderized provided consistent stories and that neither of the two were charged in the incident. ROA. 154-155.

During cross-examination Snider admitted that she never looked at the video surveillance from the entire day in question. ROA. 162. Snider admitted she only had what was provided to her by Lawson of what "Lawson thought she should have" and she never asked for anything further. ROA. 162.

Snider admitted no DNA swabs were taken from the dead-bolt which was told to Snider as being the point of entry or exist of the crime. ROA. 163, 1.14-p.165.

No DNA or finger prints or eye witnesses ever placed Appellant [inside] the residence. Counsel thereafter moved for a directed verdict and the Court denied that motion. ROA. 167.

DISCUSSION

It must be remembered, that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused's motion for a directed verdict." State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). Indeed, the more stringent test by which circumstantial evidence is to be measured by the jury is illustrated by the modified circumstantial evidence charge recently approved by the Court, which provides:

There are two types of evidence which are generally present during a trial - direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. However, to the extent the State relies on circumstantial evidence, all of the circumstantial evidence must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, (2013)(emphasis original). A similarly stringent standard, and one nearly identical to South Carolina's previously abandoned circumstantial evidence requirement that "all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis, Littlejohn, supra at 328, 89 S.E.2d at 926, is set forth by statute in our sistering state of Georgia. "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save the guilt of the accused." Ga.Code Ann.§24-14-6 (2013). Yet, even under this strict test by which a jury must measure circumstantial evidence, the Georgia Court of Appeals has held: "it is not necessary that circumstantial evidence exclude every other hypothesis except that of guilt, but rather, only reasonable inferences and hypothesis, and it is for the jury to decide whether all reasonable hypothesis have been excluded. Wooten v. State, 507 S.E.2d 202, 203 (GaCt.App.1998)(emphasis original). It further explained:

Questions as to the reasonableness of hypothesis are generally to be decided by the jury which heard the evidence and saw the witnesses, so where the jury is authorized to find that evidence, although circumstantial, was sufficient to exclude every reasonable hypothesis save the guilt of the accused, that finding will not be disturbed on appeal unless the verdict of guilty is insupportable as a matter of law.

Ross v. State, 524 S.E.2d 255 (Ga.Ct.App.1999)(emphasis added)(citations omitted).

By comparison, when an appellate court is reviewing the denial of a directed verdict motion in a case solely involving circumstantial evidence, this Court has instructed:

when the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with it's weight. The circuit court should not refuse to grant a direct verdict motion when the evidence merely raises suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based on facts and circumstances which do not amount to proof. However, a judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)(citations omitted). Accordingly, an analysis of the trial judge's ruling hinges on whether all of the other circumstantial evidence taken together was sufficient for the jury to reasonably infer the defendant's guilt for the crimes beyond a reasonable doubt. Id at 595, 606 S.E.2d at 478. Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a direct verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct.App.1986)(emphasis original).

In Bostick, the victim's body was found in her kitchen on Sunday afternoon when the fire department was called to extinguish a fire at her house. She had been struck in the head with a blunt force object, but actually died as a result of carbon monoxide from the fire. Rudy Polite, the victim's son, lived with the victim, and would have known that she typically brought a brief case containing money from the church on Sunday for deposit at the bank on Monday. Bostick, 392 S.C. at 136-37, 708 S.E.2d at 775. Thus, Rudy had both motive and opportunity. Also two witnesses provided testimony specifically casting suspicion on Rudy as the person other than Bostick who might have murdered the victim the day of the fire. Sarah Howell overheard an argument between Rudy and the victim the day of the fire, and Gladys Polite described Rudy's demeanor on the night of the fire, saying he did not express any emotion or feeling as his mother's body was carried out of the house. id at 137-38, 708 S.E.2d at 776. Combined with the fact that there was no direct evidence linking Bostick to the crime scene and no evidence Bostick had knowledge the victim would have had money, the Court held the trial court erred in failing to direct a verdict in favor of Bostick. Id at 141-42, 708 S.E.2d at 778.

The Bostick court reached this conclusion after considering "three seminal cases from our jurisprudence analyzing the proof necessary in cases with circumstantial evidence." State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); & State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). The Court noted that in Schrock and Arnold, there was no evidence placing the defendant at the

scene of the crime. In Mitchell, a fingerprint placed Mitchell at the scene of the crime, however, he had been in and around that scene at least three times prior to the burglary, providing a reasonable explanation for the fingerprint. Bostick, 392 S.C. at 139-41, 708 S.E.2d at 777-78

In the instant case the evidence fails to establish the allegations alleged in the indictment to sustain a conviction for burglary. At the very most the evidence or lack thereof only establishes suspicion especially in light of Lawson's contradictory stories provided to Rios and Lawson's trial testimony and the fact Krimmer had "no memory" of what had happened that day and had to rely on Stephanie to fill in the blanks. Appellant is entitled to directed verdict in this matter.

CONCLUSION

Based on the foregoing Appellant should be granted a new trial, and appellate counsel's petition to be relived should be denied and Appellant Counsel should be required to fully brief the issues that are preserved for appellate review.

Respectfully Submitted,

/s/ 

Adrian Jenkins

APPELLANT'S OPPOSITION TO APPELLATE COUNSEL BEING RELIEVED AS
COUNSEL

FACTS

In this matter appellate counsel has filed a no merit Anders Brief raising only one issue that is not preserved for this Court's review. See attached exhibit (A). Appellant counsel clearly admits he has raised an issue that is not preserved and Appellant is therefore being denied his right to the effective assistance of appellate counsel in his one and only direct appeal.

A defendant is constitutionally entitled to effective assistance of appellate counsel. See *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985).

Appellate counsel has a professional duty to chose among potential issues according to their merit. See *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Id at 752-53, 103 S.Ct. at 3313.

In this case appellate counsel filed an Anders brief raising an issue that "is not" preserved for appellate review based on appellate counsel's own concession. Appellate counsel should not be relieved but rather this Court in all fairness should reject counsel request and order counsel to draft the issues that are preserved.

Exhibit

(A)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Hon. Carmen T. Mullen, Circuit Judge

Adrian Jenkins -- Appellant,

-vs-

State of South Carolina -- Respondent,

Appellate Case No.2016-000908.

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Pro-Se Anders Brief on the attorney for Respondent, Mr. Donald J. Zelenka, Assistant Attorney General, P.O. Box 11549, Columbia, SC. 29211. By placing the aforesaid in the U.S. Mail this ___ day of April 2017.

SWORN TO AND SUBSCRIBED BEFORE ME

this 10th day of April 2017.

Nancy C. Merchant
NOTARY PUBLIC

MY COMM. EXPIRES 1-23-2023

Respectfully Submitted,

/s/ Adrian Jenkins

Adrian Jenkins

RECEIVED

APR 12 2017

SC Court of Appeals



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 10, 2017

Mr. Adrian Jenkins, #273602
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Re: Your case

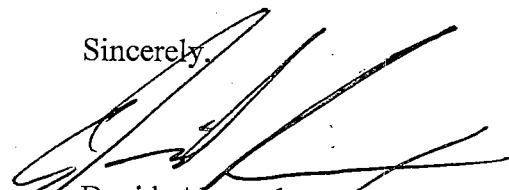
Dear Mr. Jenkins:

This is in response to your letter I received yesterday asking why I filed an Anders brief. I assume this is a follow-up to our telephone conversation of January 26, 2017, during which I explained that I briefed the best issue I could find so that you could use it in PCR because, in my judgment, it is not preserved. None of the identification issues had any merit because you stipulated that you were in the video. The video showing you entering the property and leaving the property with items combined with testimony that the items were in the house is sufficient to support the court's denial of a directed verdict on burglary. I do not think the Court of Appeals would find insufficient deliberation time by the jury to be a meritorious issue given the State's evidence.

I hope this answers your question. The Anders procedure lets you file your own brief with the Court. You may raise any issues that you think I missed. I strongly encourage you to raise any and all issues that you think have merit in the brief you submit to the Court. The Court will read your brief, the record, my brief, and consider whether anything has been merit. You should submit your brief directly to the Court, and not to me.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



David Alexander
Appellate Defender

Adrian Jenkins
SCDC # 273602
Perry Crm. Inst.
430 Oaklawn Rd
Pelzer, SC
29669

105
RECEIVED

APR 12 2017
SC Court of Appeals

S.C. Court of Appeals
Clerk's Office

P.O. Box 11629

Columbia, SC
29211

RECEIVED

APR 10 2017
P.C.I. MAILROOM