

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Antonio Rodriguez Jordan

APPELLANT

APPELLATE CASE NO. 2015-000237

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal on the charge of burglary in the first degree where the state failed to produce any direct or substantial circumstantial evidence that Appellant committed the burglary?

STATEMENT OF THE CASE

On May 29, 2014, a York County grand jury indicted Appellant for burglary in the first degree (2014-GS-46-1543). R. 359 - 360. The state, represented by Christopher Epting and Ryan Newkirk, called the case for trial before the Honorable Roger L. Couch and a jury on January 26, 2015. R. 1. David Cook represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 345, line 25 – R. 346, line 6. Judge Couch sentenced Appellant to twenty-five years' imprisonment. R. 351, lines 2-7; R. 361.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the charge of burglary in the first degree where the state failed to produce any direct or substantial circumstantial evidence that Appellant committed the burglary.

Relevant facts

State's case-in-chief

On November 8, 2013, the police received a call at 1:45 p.m. regarding a burglary. R. 117, lines 6-18. Derek Clark's home was burglarized while he was out running errands between the 9 a.m. and 1:30 p.m. R. 120, line 8 – R. 122, line 1. He noticed four pistols were missing, one of which was a Kel-Tec .380 semiautomatic pistol. R. 122, lines 6-17.

Randy Clinton, an officer with the K-9 unit of the York County Sheriff's Office, arrived at Clark's home to search the area with his dog, Hatty. R. 144, lines 9-20. Clinton gave Hatty the command to "find it" and Hatty dragged him along a trail through the woods adjacent to Clark's home. R. 146, line 8 – R. 150, line 4. Along the trail, Clinton found numerous items, including a white plastic bag, a small gun box, a box of shells for a pistol, a toboggan, a black skull cap, a metal change box, and Clark's voter registration card. R. 148, line 5 – R. 149, line 10; R. 154, line 24 – R. 155, line 1. Clark identified some of the items found in the woods as items that belonged to him and his family and that were removed during the burglary. R. 129, line 18 - R. 134, line 13.

Although the police recovered some latent prints from the Clark home and items found in the woods, none of the prints matched Appellant's fingerprints. App. 173, line 25 – R. 175, line 16. Further, the police developed DNA profiles from several items found in the woods, including the toboggan, black skull cap, and small gun safe. R. 233, lines 15-18.

The mixture of DNA found on the toboggan was too complex for comparison. R. 234, lines 2-5; R. 356 - 358. The profile developed from the skull cap showed a mixture of at least two individuals with the major contributor being consistent with Appellant's DNA profile. R. 234, line 20 - R. 235, line 8; R. 356 - 358. The police developed a DNA profile from the swab of the top of the gun safe, which was a mixture of at least two individuals. Appellant was "excluded as a potential contributor" to this mixture. R. 236, lines 10-16; R. 356 - 358.

Six days later, on November 14, 2013, Travis Shealy with the York County Sheriff's Office stopped Appellant for failing to stop for a stop sign. R. 213, line 15 - R. 214, line 19. While preparing to write the ticket, Shealy moved Appellant's moped farther from the road so that he could get the VIN. R. 216, line 12 - R. 217, line 12. As he was going back to his patrol car, he saw a gun laying on the ground where Appellant's moped had been. R. 217, lines 13-20. Believing the gun was similar to the one listed on an internal memorandum concerning recent incidents, Shealy contacted Detective Schettler. R.206, lines 4-25; R.217, line 25 - R.218, line 7. Learning the gun was the same one stolen during the burglary of the Clark home, Shealy detained Appellant and called for the detectives. R. 218, lines 8-19.

Motion for directed verdict

At the close of the state's case, Appellant moved for a directed verdict explaining the state had "failed to prove every element of the[] case" and "the cloud on the evidence" prevented the state from "reaching beyond-a-reasonable-doubt standard." R. 254, lines 10-17. The state argued "substantial circumstantial evidence sufficient to carry the case to the jury" had been presented. R. 254, lines 19-22. The state relied upon (1) Appellant being "found with an item that was stolen from this burglary six days within this burglary happening" and (2) the dog tracking to items from the burglarized house and a piece of

clothing found within the area that contained Appellant's DNA. R. 254, line 22 – R. 255, line 5.

Judge Couch found there was "sufficient evidence to allow the case to go to the jury." R. 255, lines 8-9. Specifically, the judge found there was "substantial circumstantial evidence that would indicate that the defendant was present at or participated in the crime." R. 255, lines 9-12.

Defense's case-in-chief

Appellant presented an alibi defense. His mother, Maryann Jordan, testified that on November 8, 2013, Appellant returned home from his girlfriend's house at 8:02 a.m. R. 273, lines 21-22; R. 273, line 24 – R. 274, line 2. Then, at 8:30 a.m., Appellant, and three other family members went to work at their family-owned tire shop. R. 274, lines 2-4; R. 275, lines 4-19; R. 276, lines 4-8. Work was slow that day, and everyone left between 10:30 and 11:00 a.m. R. 274, lines 4-6. On the way home, Maryann Jordan dropped off Appellant at his girlfriend's house. R. 274, lines 6-7.

Appellant's girlfriend, Eddielena Boyd, confirmed Appellant's mother's testimony. She and Appellant left her home at 8 a.m. on November 8, 2013 to go to work. R. 281, lines 7-10. Boyd worked as a home health care provider. R. 280, lines 23-24. Around 10 a.m., her client was rushed to the hospital due to an emergency. R. 281, lines 10-13. As a result, her services were no longer needed. R. 281, lines 14-15. She contacted Appellant to let him know she was returning home. R. 281, lines 16-22. Appellant arrived at her house at 11:15 a.m. R. 282, line 15. At 2:30 or 2:45 that afternoon, Boyd got a call from her employer to go to the home of another client. R. 282, lines 18-21. When Boyd left at 3:15 p.m. to attend to the other client, Appellant remained at her home with her son. R. 282, line 25 – R. 283,

line 4. Boyd returned home shortly after 9 p.m. and Appellant was still there with her children. R. 283, lines 11-13.

Renewed motion for directed verdict and motion for new trial

At the close of the defense case, Appellant renewed his motion for directed verdict based on the same grounds explained mid-trial. R. 290, lines 20-21. Judge Couch denied the motion again. R. 290, lines 22-25. After the jury returned its verdict, Appellant moved for a new trial “based on the cloud of evidence.” R. 347, line 25 – R. 348, line 1. Judge Couch denied this motion as well. R. 348, lines 2-3.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant’s favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v.

Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant’s favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained

by the Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances 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.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The prosecution presented no direct evidence against Appellant concerning the burglary. The entirety of the state's case rested upon circumstantial evidence. Thus, the question is whether the state presented substantial circumstantial evidence that Appellant was the individual or one of several individuals who committed the burglary. The only evidence against Appellant was the gun found under his moped six days after the burglary

during the traffic stop and the black skull cap found in the woods with his DNA on it. Concerning the evidence of the gun, this merely showed he was in possession of stolen goods. This evidence provided little proof that he was the person who actually stole the gun, particularly in light of the fact that the gun was stolen six days prior to the traffic stop. The DNA profile developed from the skull cap was a mixture indicating Appellant's DNA was not the only DNA on the cap. Thus, more than one person wore the cap. To the degree the cap implicates Appellant as the burglar, the cap implicates the other person whose DNA was on the cap to the same degree. Therefore, the cap did little to support the state's theory that Appellant was the person who burglarized the Clark home. Additionally, the state could not link the cap to the burglary. The cap was found in a wooded area, which was easily accessible by any member of the general public, with no indication of when the cap was left there. The state's evidence against Appellant failed to rise to the level of substantial circumstantial evidence and the trial judge erred in failing to direct a verdict in his favor.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in his favor on the charge of burglary in the first degree.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Antonio Jordan 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 Roger L. Couch, which was held on January 26-28, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Antonio Jordan.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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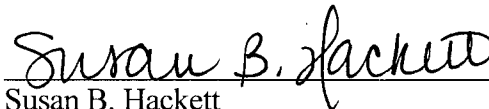
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire trial transcript dated January 26-28, 2015;
- (2) State's Exhibit #6 (forensic lab report);
- (3) State's Exhibit # 7 (forensic lab report);
- (4) True-billed indictment (2014-GS-46-1543); and
- (5) Sentence sheet.

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

November 24th, 2015



Susan B. Hackett
Appellate Defender

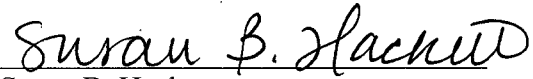
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

November 24, 2015



Susan B. Hackett
Appellate Defender.

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STATE OF SOUTH CAROLINA

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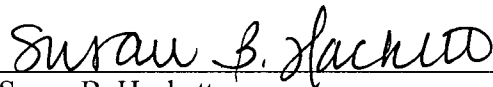
V.

ANTONIO JORDAN,

APPELLANT

CERTIFICATE OF SERVICE

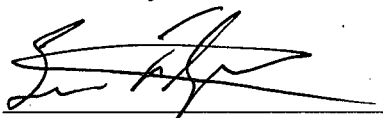
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Antonio Jordan, #292329, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of November, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of November, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.