RECEIVED
JUN 26 2017
SC Court of Appeals
ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARY HELEN ROBERTS,

APPELLANT

APPELLATE CASE NO 2017-000526

INITIAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

The trial court erred in denying defense counsel's motion for a directed verdict to the charge of shoplifting because the facts did not warrant a charge of shoplifting 3

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994). 7

Jackson v. Virginia, 443 U.S. 307, 316 S.Ct. 2781 (1979). 6

State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976) 6

State v. Cutler, 274 S.C. 376, 2C4 S.E.2d 420 (1980) 7

State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) 6

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) 6

State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93 (1974) 6

State v. Totherow, 263 S.C. 275, 210 S.E.2d 228 (1974) 6

State v. Turner, 117 S.C. 470, 109 S.E. 119 (1921) 6

State v. Williams, 306 S.C. 89, 410 S.E. 2d 563 (1991) 7

United States v. Ortiz, 445 F.2d 1100 (10th Cir. 1971) 6

United States v. Varoz, 740 F.2d 772 (10th Cir. 1984) 6

Statutes

S.C. Code §16-1-57 (1976, as amended) 3

S.C. Code §16-13-110 (A) 3, 4, 5, 7

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying defense counsel's motion for a directed verdict to the charge of shoplifting when the facts did not warrant a charge of shoplifting?

STATEMENT OF THE CASE

Appellant was convicted of shoplifting (3rd or subsequent offense) on December 14, 2016, at a bench trial held before the Honorable R. Lawton McIntosh in York County. Appellant was sentenced to six (6) years suspended on two (2) years service with five (5) years probation thereafter. Appellant was also put on trespass notice to any and all Walmart stores and was ordered to undergo mental health counseling if the Department of Probation finds it appropriate. James Boyd, Esq. was trial counsel. Ryan Newkirk, Esq. was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in denying defense counsel's motion for a directed verdict to the charge of shoplifting because the facts did not warrant a charge of shoplifting.

The indictment charging appellant read as follows:

The defendant, Mary Helen Roberts, did on or about January 20, 2016, in York County, take possession of, carry away, transfer from one person to another or from one area of a store to another area, or cause to be carried away or transferred any merchandise valued at less than two thousand dollars ($2,000) displayed, held, stored, or offered for sale by Walmart with intent to deprive Walmart of the possession, use, or benefit of the merchandise without paying full retail value, and said defendant has been convicted of two or more offenses for which the term of imprisonment is contingent upon the value of the property involved, all in violation of Sections 16-13-0110(A) and 16-1-57, Code of Laws of South Carolina (1976, as amended).

Steve Flowers, who worked in loss prevention for Walmart, testified that he observed appellant on camera as she came into the store with no merchandise in her hands or in her cart. She went to the automotive section and got two jugs of oil off the shelf and put them in her cart. She then went up to the front of the store to return them. She was told that she would have to do an even exchange. Flowers reviewed the video on her and determined she did not come into the store with anything and that the store did the return. They decided to stop her for shoplifting. (Tr. p. 5, line 6- p.6, line 24). When appellant returned the oil, the store gave her a gift card which she

used to buy groceries. Flowers tried to get appellant to go to the loss prevention office but she refused to go and left her cart with all the groceries in the store. (Tr. p.10, line 12- p. 11, line 2).

Detective Olsen with the Rock Hill Police Department gave a similar account of the events:

> On the said day and time of my report I received a call from dispatch to respond to Walmart in reference to a shoplifter that already left the store. Upon my arrival I met with Mr. Flowers who provided me with statements that a woman came into the store. Took jugs of oil off of the shelf and return them for a gift card. He also stated due to Walmart's return policy that if a customer does not have a receipt they take a photo ID for the return and that's when he provided me a license number and the name of Mary Roberts.

(Tr. p. 16, lines 15-23).

At the conclusion of the State's case, defense counsel made a directed verdict motion to the shoplifting charge. The following discussion occurred:

> MR. BOYD: Your Honor, the State has made out a case of obtaining property by false pretenses but they have not made out a case of shoplifting. If you look at section 16-13-110 and I guess it will go going under (A). It talks about the statute provides a person is guilty of shoplifting if he takes possession of, carries away, and then it goes to other things that wouldn't be applicable to this case -- any merchandise displayed, held, stored, offered for sale, with the intention of depriving the merchant of the possession, use or benefit of the merchandise. What clearly happened, my client took possession of oil. She took it up to the service counter. There was no depriving the merchant of the establishment of the oil. The oil was going right back to them. What she got in return was some gift cards which they gave to her. It's definitely a false pretense. The false pretense being that she had purchased the oil earlier and that she was then in there returning that. That was an untruthful statement based on the facts that were presented. But there is no depriving the merchant of the possession, use or benefit of that oil. It went from one place in the store back to them. It wasn't concealed. It was clearly a case that wouldn't apply to the facts of a shoplifting-case.

So I would submit, Your Honor, that the case -- the State has failed to make out a case of shoplifting. They made out a case of an entirely different crime.
THE COURT: Let me ask you this, Mr. Boyd, would you agree that if I went into Walmart or any other mercantile establishment and changed the tag of the price to a lower level, went and purchased it that would constitute shoplifting.
MR. BOYD: It would.
THE COURT: What would be the effective difference between that and what this lady in this store.
MR. BOYD: Effective difference is that what you described is definitely covered in the statute under subsection two, about altering a label. What she did is not covered by the statute and of course the criminal statute has to be interpreted most strictly against the State in interpreting, and I would submit it's not covered by the statute. That's basically the difference. Like I said, it's clearly a case of obtaining property by false pretenses. It's not a shoplifting.
MR. NEWKIRK: Thank you, Your Honor. I wrestled with this issue myself before sending this Indictment to the Grand Jury and I think that the same subsection (A) (1) that Mr. Boyd is referring to covers is a little unusual of a shoplifting but I think it's clearly covered in the statute that Miss Roberts did take possession of merchandise valued at less than $2,000 and the subsequent end portion of the statute "With the intention of depriving the merchant of the possession, use or benefit of the merchandise without paying the full retail value. That is directly out of the statute. She clearly didn't pay the full retail value and even if Walmart had placed the oil back on the shelf and it had sold they're out the initial purchase because they would have had to issue a gift card to Miss Roberts. So I think the statute while unusual -- an unusual case of shoplifting, I think it's covered in (A) (1) of 16-13-110.
THE COURT: I agree. I think it's a clear shoplifting.
MR. NEWKIRK: Thank you.
THE COURT: And I will point out on the record as well, that although the oil stayed in the store that gift card left with her when she left which is the value of the oil which she said she took it with her and so your motion would be denied. It's a good point but I think it is not applicable in this case.

(Tr. p. 19, line 13- p. 22, line 11).

The trial court's decision to deny the motion for a directed verdict was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971).

Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

It should be noted as did defense counsel that the legal maxim is that a penal statute is to be construed strictly against the State and in favor of a defendant. State v. Cutler, 274 S.C. 376, 2C4 S. E. 2d 420 (1980); Williams v. State, 306 S.C. 89, 410 S.E. 2d 563 (1991). To be guilty of shoplifting under S.C. code §16-13-110 (A)(1) a person has to take merchandise from a store "with the intention with depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value..." Appellant had no intent to take the oil from Walmart. As defense counsel noted, this was obtaining goods by false pretenses.

CONCLUSION

A directed verdict should be granted in appellant's favor.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2017.

STATE OF SOUTH CAROLINA

RECEIVED

JUN 26 2017

SC Court of Appeals

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

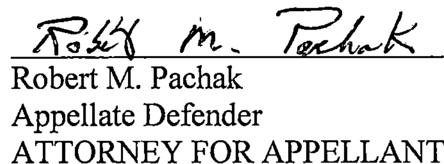
V.

MARY HELEN ROBERTS,

APPELLANT

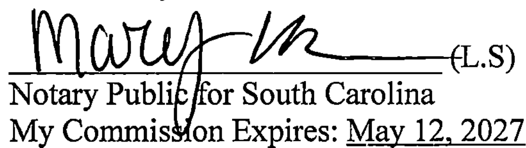
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Ben Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Mary Helen Roberts, #294122, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 26th day of June, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of June, 2017.


(L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027