

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENIA DAWKINS,

APPELLANT

APPELLATE CASE NO. 2012-212529

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

Whether depriving appellant of making her closing argument last, even though she introduced a single photograph, shifted the burden of proof to her and violated due process?

STATEMENT OF THE CASE

Appellant was convicted along with a co-defendant of armed robbery, attempted murder, burglary in the first degree, and conspiracy after a jury trial held before the Honorable G. Edward Welmaker on April 9 – 11, 2012, in Greenville County. Respective sentences of fifteen (15) years, fifteen (15) years, fifteen (15) years, and five (5) years were imposed on both defendants on July 11, 2012. Katryna Salisbury, Esquire, was the assistant solicitor and appellant was represented by Cassandra Gorton, Esquire.

This appeal follows.

ARGUMENT

Depriving appellant of making her closing argument last, even though she introduced a single photograph, shifted the burden of proof to her and violated due process.

The State's theory of this case was that appellant and the co-defendant, Juwan Lomax, conspired with three other gang members to rob the victim, Demetrius Benson, at his apartment. (Tr. p. 145, line 7 – p. 149, line 25). Appellant's defense was that she was Benson's ex-girlfriend and she called him up to see if she could come over to buy some marijuana. She drove over there with the co-defendant and another girl. The three gang members followed them and apparently plotted to rob the victim without appellant's knowledge. (Tr. p. 150, line 2 – p. 155, line 4).

During the cross-examination of Investigator Brandon Brown, who was an expert on gangs, defense counsel asked him about several photos showing some gang members and the black and grey clothing colors they are associated with in the gang. Defendant's Exhibit No. 4 showed appellant dressed in pink or white. (Tr. p. 344, line 24 – p. 346, line 16). This exhibit was introduced into evidence. (Tr. p. 353, lines 4 – p. 24). No other evidence was introduced by the defendants and neither of them testified.

Defense counsel asked if they would get to argue last and the trial court said since she introduced a photograph the State would get to argue last. Defense counsel then asked if she could withdraw the exhibit and the trial court changed the subject. (Tr. p. 450, line 13 – p. 451, line 12). Later, defense counsel again asked to withdraw the photograph. The trial court said it did not know of any way she could withdraw a piece of evidence. Defense counsel said she would put some evidence up in that case. (Tr. p. 454, line 11 – p. 455, line 9).

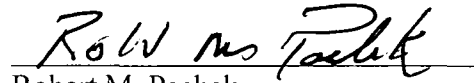
The current state of the law in South Carolina is that a defendant waives the right to last argument if he intentionally introduces an exhibit. State v. Battle, 304 S.C. 191, 403 S.E.2d 331 (1991); State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005). This is equally true of co-defendants who are jointly tried. If one defendant introduces any evidence, both defendants lose the right to make the last argument. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

This rule of law is old and behind the times. The accused has the fundamental right to put the State to its burden of proof. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). The State is required to prove every element of an offense beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). Burden shifting presumptions are no longer allowed. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). Self-defense is no longer an affirmative defense. The burden is on the State to disprove self-defense by proof beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). There is no reason to shift the burden to the defendant merely because a piece of evidence is introduced. The State still has the burden of proof. To compel a defendant to choose between getting closing argument last or presenting a defense with evidence puts a chilling effect on a defendant's right to present a defense and violates due process of law. The right to open and close the argument to the jury is a substantial right. State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808 (1977).

CONCLUSION

Appellant's convictions should be reversed and she should be given a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of December, 2012

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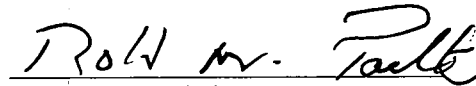
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Denia Dawkins 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 G. Edward Welmaker, which was held on July 11, 2012, 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 Denia Dawkins.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of December, 2012.

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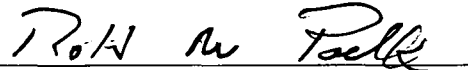
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript pages 145 – 228; 235 – 432; 447 – 455; 461 - 522

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

December 13th, 2012



Robert M. Pachak
Appellate Defender

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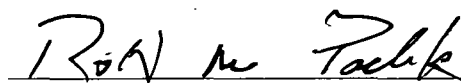
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CERTIFICATE OF SERVICE

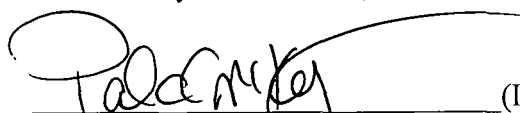
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a true copy of the Anders Brief of Appellant and Designation of Matter with accompanying Record on Appeal was served upon Denia Dawkins, #351499, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 13th day of December, 2012.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of December, 2012.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.