

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAREN BAILEY,

APPELLANT

APPELLATE CASE NO. 2012-212618

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to instruct the jury that they could not take appellant's failure to appear for her trial as an admission of guilt?

STATEMENT OF THE CASE

Appellant was convicted of shoplifting after a jury trial held in her absence before the Honorable Howard P. King on September 20 – 21, 2010. A sealed sentence of ten (10) years was imposed. Darla Pierce, Esquire, was the assistant solicitor. John Britton, Esquire, was trial counsel.

On July 19, 2012, appellant was brought before the Honorable George C. James, Jr., and she was advised of her ten (10) year sentence.

This appeal follows.

ARGUMENT

The trial court erred in refusing to instruct the jury that they could not take appellant's failure to appear for her trial as an admission of guilt.

Appellant was tried in her absence for shoplifting. A co-defendant was also tried and she was not present at the beginning of the trial, but appeared later. In his introductory remarks to the jury, the trial judge told them that the defendants were not present and they were not to presume anything by their absence. (R. 3, lines 14 – R. 4, line 11).

During opening argument, the assistant solicitor described how appellant, co-defendant Brewer, and a third female went into the Rugged Warehouse in Sumter on January 2, 2009. (R. 8, lines 14 – 16). Peggy Witherspoon, who was the assistant manager of the store, testified as to what she saw. She said she noticed three young ladies walk in and one of the cashiers called her and told her they looked suspicious. She walked out from the back and noticed them at a rack. She said they were rolling clothes and one of the young ladies tucked something in her bag. She called security and she stayed in front of the store. The ladies exited the store and Witherspoon asked them to come back into the store. One of the ladies said, "I am not stopping." There was a police officer outside and she told him what happened. (R. 12, line 4 – R. 13, line 25). All three of the ladies got into a gold Honda Accord. (R. 14, lines 1 – 12). She identified photographs of the appellant, the co-defendants and items that had been taken from the store. (R. 14, line 22 – R. 24, line 13).

On cross-examination, Witherspoon said all three ladies had a bag and as they were leaving the store, an alarm went off. She did not know whether one bag caused the alarm to go off or if all three bags caused the alarm to go off. (R. 33; line 3 – R. 34 line 18). She said she only saw one girl rolling clothes. (R. 38, lines 18 – 20).

After the trial judge instructed the jury on the law, defense counsel noted that he failed to instruct them that they should not draw any advance inference from appellant's absence from the trial. The trial court stated it had already told the jury that at the beginning of the trial and it was not going to over-emphasize that point. (R. 78, lines 12 – 20). That ruling was in error.

In State v. Jackson, 301 S.C. 49, 389 S.E.2d 654 (1990), the Court held that when “a defendant is tried in absentia, the trial courts should instruct the jury that the defendant's failure to appear may not be construed as an admission of guilt.” The reason this charge should be given is obvious because the jury could very likely construe a defendant's absence at trial as an admission of guilt.

In McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000), the Court held a defense attorney ineffective by failing to request an instruction not to consider the defendant's absence as evidence of guilt. It did not matter in that case that the defendant appeared but did not remain after jury selection. The Jackson instruction is still required.

In State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), the Court wrote:

Even assuming, arguendo, that the statement of law by counsel during the course of trial were legally correct, the adversarial nature of our trial system mandates that the jury have a complete statement of the law from the trial judge. Arguments of counsel simply cannot substitute for instructions by the court.

276 S.C. at 267, 277 S.C.2d at 701. Citing, Taylor v. Kentucky, 436 S.C. 478, 98 S.Ct. 1930 (1978).

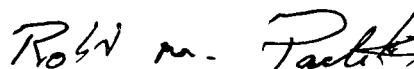
It has been written before that jurors are presumed to follow their instructions. Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987). But, they can not follow what is not given them.

It is not up to the trial judge's discretion to refuse to instruct the jury that they should not consider appellant's failure to appear as an admission of guilt. Article V; § 21 of the South Carolina Constitution mandates that judges "shall declare the law." "The circuit court must charge the current and correct law to the jury." Daves v. Cleary, 355 S.C. 216, 584 S.C.2d 423 (Ct. App. 2003).

CONCLUSION

Because the trial judge failed to instruct the jury on a correct statement of the law, appellant's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 29, 2013

Robert M. Pachak

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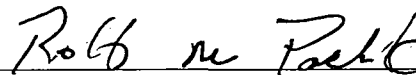
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CERTIFICATE OF SERVICE

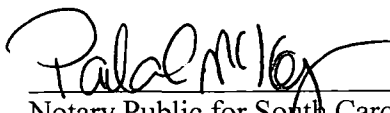
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of March, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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