

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2012-212618

THE STATE,RESPONDENT

v.

SHAREN BAILEY,APPELLANT.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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¹ 301 S.C. 49, 389 S.E.2d 654 (1990).

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court complied with State v. Jackson and properly instructed the jury that it could not construe Appellant's failure to appear at trial "against [her] in any way," regardless of the timing of that instruction?

STATEMENT OF THE CASE

Appellant (Bailey) and her co-defendant, Keoshaws Brewer, were indicted by the grand jury for Sumter County for shoplifting (2009-GS-43-372). Bailey was represented by John Britton, Esquire, and Brewer was represented by Calvin Hastie, Esquire. On September 20, 2010, the case was called for trial; however, Bailey failed to appear and was tried in absentia on September 20-21, 2010. A jury found Bailey guilty as indicted and a sealed sentence was imposed by the Honorable Howard P. King. On July 19, 2012, Bailey was brought before the Honorable George C. James, Jr., and Judge King's sentence of ten (10) years' imprisonment was unsealed. Bailey timely filed a notice of intent to appeal her conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Before jury selection at Bailey's trial, the court instructed the entire jury pool as follows:

So first of all, let me tell you that neither of the Defendants are present in the courtroom at this time. I will tell you that a Defendant does not have to be present in court when a case is called for trial, provided they were given notice of the matter coming up for trial. If they were given the notice that the matter was coming up for trial, they have a right to be here but they don't have to be here. The State can proceed in their absence.

You are not to presume anything from the fact that the Defendant is not, neither of the Defendant's [sic] or both of the Defendants are not present. They are presumed in the law innocent of the charges against them. And the burden is on the State to prove their guilt beyond a reasonable doubt. The Defendant does not have to prove anything. So it is up to the State to prove guilty beyond a reasonable doubt. And while the Defendant has a right to be present, they do not have to be present. So you should not infer anything from the fact that they are not now present.

They may be present later, or they may not.

(R.p.3, line 14-p.4, line 13) (emphasis added). Immediately after the jury was selected and sworn, the trial judge further instructed the jurors as follows:

I want to tell you at this time that a Defendant does not have to be present in court for trial when the case is called. They have been given notice of the matter to come up here. They've had ample opportunity to be here if they chose to do so. However, they are presumed to be innocent. And the State has the burden of proving their guilt beyond a reasonable doubt. And the Defendant never has to prove his guilt.

So you should keep in mind that Defendants are presumed innocent. And it is up to the State to prove their guilt beyond a reasonable doubt. And you should not hold the fact that they are not here against them in any way.

(R. p.5, line 25-p.6, line 13) (emphasis added).

The State then presented testimony from two witnesses, the assistant manager of the store where the shoplifting was committed, and the police officer who chased the car

which fled the scene, arrested Bailey, Brewer, and a third participant, retrieved the stolen clothing items from the car, and returned them to the store. (R.p.11-p.51). At the end of trial, before the jury began deliberations, the trial court gave detailed instructions on the State's burden of proof and the presumption of innocence. (R. p.65, line 5-p.68, line 3). The trial court also charged the jury on Bailey's constitutional right to not testify, explaining that:

The fact that a Defendant has not taken the stand and testified in his or her own behalf does not create an inference of guilt against her. The jury must not permit that fact to weigh in the slightest degree against a Defendant. Nor is that fact to be considered in your deliberations in any manner whatsoever.

(R. p.75, line 8-p.76, line 2). Bailey took exception to the jury charge, noting the judge did not specifically charge the jury on Bailey's failure to appear, and that they should not draw any conclusions from her absence. The trial judge held: "Well I had previously told them that. And I think the same thing goes to the burden of proof and everything. I am not going to over emphasize that point. Your exception is noted." (R. p.78, lines 12-21).

The jury returned a verdict finding Bailey guilty of shoplifting. (R. p.79, lines 1-13). Bailey moved for a new trial on grounds that the judge failed to charge the jury not to hold her absence against her. (R. p.80, lines 11-19). The trial court held:

I respectfully deny that motion. I told them early on that the Defendants do not have to be present. It was pretty clear that the Defendants did not have to be present. The burden of proof is on the State to prove guilt of the Defendant beyond a reasonable doubt. And the Defendant doesn't have to present any evidence. And I even told them the Defendant did not even have to be present. So I did that.

(R. p.80, line 20-p.81, line 3).

ARGUMENT

In compliance with State v. Jackson, the trial court properly instructed the jury that it could not construe Appellant's failure to appear at trial "against [her] in any way," regardless of the timing of that instruction.

Bailey argues the trial court erred in refusing to instruct the jury that they could not take her failure to appear for trial as an admission of guilt. The State disagrees and submits Bailey's argument is without merit.

In State v. Jackson, the South Carolina Supreme Court held, "[w]hen a defendant is tried in absentia, the trial court should instruct the jury that the defendant's failure to appear may not be construed as an admission of guilt." 301 S.C. 49, 50, 389 S.E.2d 654, 655 (1990). In McFadden v. State, the Court stated that, "[w]hen the defendant appears but does not remain for the trial after jury selection a Jackson instruction is still required." 342 S.C. 637, 644, 539 S.E.2d 391, 395 (2000). McFadden found that counsel should have requested a Jackson charge and his failure to do so was deficient.

At the beginning of Bailey's trial the trial judge instructed the jury that Bailey did not have to be present, that the jurors could not infer anything from her absence, and that the jurors could not hold her absence against her in any way. (R. p.3, line 14-p.4, line 13; p.5, line 25-p.6, line 13). The judge not only properly instructed the jury that they could not construe Bailey's absence against her, but tied that specific jury instruction to the overriding presumption of innocence and burden of proof. Then, at the end of the trial, the court gave detailed instructions on the State's burden of proof and the presumption of innocence. (R. p.65, line 5-p.68, line 3). The trial court also charged the jury on Bailey's constitutional right to not testify. (R. p.75, line 8-p.76, line 2).

The State submits the trial court properly instructed the jury that it could not construe Bailey's failure to appear at trial against her in any way, and that simply because that charge was given at the start of the trial rather than the end is of no moment. This is particularly true where the trial court also charged the jury on Bailey's presumption of innocence and her right to not testify in her own defense. In considering the jury charge as a whole, the State submits it was given in full compliance with State v. Jackson and the failure to repeat the instruction to the jury at the end of trial does not warrant reversal. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

As to Bailey's reliance on State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), the State submits it is misplaced. In Woomer, the Court held that correct legal statements by counsel during the course of trial could not substitute for a complete statement of law from the trial judge. Here, the trial judge gave a complete statement of the law, arguably in a more effective fashion by giving the "failure to appear" instruction at the beginning of trial, and thereby emphasizing for the jury that Bailey's absence should not be held against her. Thus, the rationale in Woomer is inapplicable, and Bailey's conviction should be affirmed.

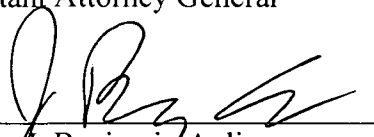
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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April 2, 2013

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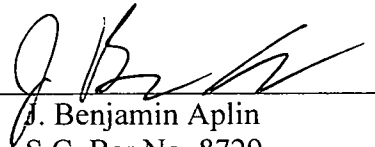
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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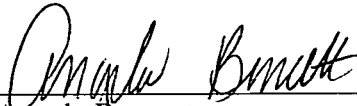
SHAREN BAILEY,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated April 2, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 2nd day of April, 2013.



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