

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 21 2013

SC Court of Appeals

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAWONE Q. DAVIS,

APPELLANT

APPELLATE CASE NO. 2012-212710

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of criminal domestic violence of a high and aggravated nature (CDVHAN) when the statute failed to define “serious bodily injury?”

STATEMENT OF THE CASE

Appellant was convicted of criminal domestic violence of a high and aggravated nature after a jury trial held before the Honorable John C. Hayes, III, in York County on August 6 – 7, 2012. Appellant was sentenced to ten (10) years imprisonment and that sentence was ordered to be served consecutively to a probation violation sentence he was currently serving. Ashley Anderson, Esquire, and Melissa Inzerillo, Esquire, were the trial attorneys. Johanna Valenzuela, Esquire, and Teasa Weaver, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of criminal domestic violence of a high and aggravated nature (CDVHAN) because the statute failed to define “serious bodily injury.”

The victim, Sherika Robinson, testified that appellant, the father of their children, came into her apartment around 5:30 AM on March 15, 2012. She said she was not scared because they were on good terms. Appellant wanted to know what was on her mind. She wanted to know if appellant did not think their son was his and if he wanted a DNA test. Suddenly, appellant became hostile and he said “there’s no God.” He then said, “Bitch, you know you can’t destroy the Devil; right?” So, Bitch you can’t destroy me. I’m something like the Devil.” He then said, “the Devil told me to dress your family in black.” (Tr. p. 180, line 15 – p. 186, line 24). Appellant grabbed her by the neck and pushed her down on the bed putting all his force on her neck. (Tr. p. 189, lines 9 – 15). She said appellant hit her either with a closed fist or a gun.¹ She fell onto the bed and was out of it. The only thing she could feel and hear was his fist pounding against her head. Appellant hit her four or five times. (App. p. 191, line 5 – p. 192, line 3).

Defense counsel’s defense was that this was not high and aggravated CDV, but just CDV. After the victim testified, defense counsel remarked that the indictment on CDVHAN referenced an allegation of “serious bodily injury,” but there was no definition for serious bodily injury. The trial court said absent a statutory definition it would just charge the jury “serious bodily injury” and leave it as a jury question. (Tr. p. 218, line 22 – p. 219, line 23).

¹ Appellant was found not guilty of all weapon charges.

After the State rested, defense counsel moved for a directed verdict to the charge of CDVHAN. The trial court denied the motion. (App. p. 241, line 16 – p. 242, line 11). That ruling 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 from 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.

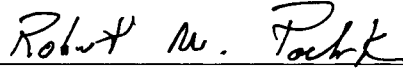
311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 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).

In this case, S.C. Code § 16-25-65 provides no definition of what “serious bodily injury” is. Reasonable jurors could differ as to what is a serious bodily injury. S.C. Code § 16-25-20 which deals with criminal domestic violence makes it unlawful to “cause physical harm or injury.” How is that different from “serious bodily injury?” A juror is forced to speculate on what it means. The statute covering CDVHAN should be held void for vagueness and a directed verdict should be granted on that charge.

CONCLUSION

A directed verdict should be granted to the charge of CDVHAN.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of June, 2013.

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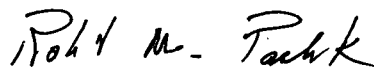
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dawone Q. Davis 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 John C. Hayes, III, which was held on August 7, 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 Dawone Q. Davis.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of June, 2013.

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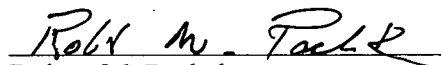
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Entire Trial Transcript (August 6 – 7, 2012)

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

June 21st, 2013



Robert M. Pachak
Appellate Defender

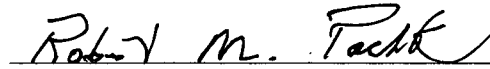
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 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."

June 21, 2013



Robert M. Pachak
Appellate Defender

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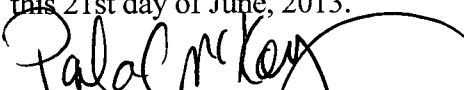
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Dawone Q. Davis, #309434 at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 21st day of June, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of June, 2013.

 (L.S.)

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