

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

RECEIVED
OCT 15 2013
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LISA COSACCHI,

APPELLANT

APPELLATE CASE NO. 2011-191569

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charges of kidnapping when the State failed to present any substantial evidence beyond a reasonable doubt that appellant possessed the mental state to kidnap?

STATEMENT OF THE CASE

Appellant was convicted of two (2) counts of kidnapping after a jury trial held before the Honorable Carmen T. Mullen on April 26, 2011, in Beaufort County. She was sentenced to five years suspended to one year and five years probation with inpatient treatment and counseling. Matthew Walker, Esquire, was the trial attorney. Carra Henderson, Esquire, was the Assistant Solicitor.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charges of kidnapping when the State failed to present any substantial evidence beyond a reasonable doubt that appellant possessed the mental state to kidnap.

The indictments charging appellant with kidnapping alleged that on or about October 23, 2010, appellant “unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim[s], Armando Montes [and Samantha Montes], without authority of law, all in violation of Section 16-3-910...”

At trial, Corporal Morris testified that he was employed with the Beaufort County Sheriff's Office. On October 23, 2010, he was on night patrol in Hilton Head Island. Dalton Anderson, an Explorer, was riding with him as an observer. He stopped at a Circle K and went inside. He saw an individual, Kenneth Allison, standing in line who he knew had warrants on him. He observed Allison walk outside and get into the rear passenger side of a small green pickup truck. Appellant was sitting in the truck next to a male driver. Corporal Morris got Allison out of the truck and put him in handcuffs. Appellant got on her phone making calls. Corporal Morris told her to stop several times. After Allison was put into the backseat of a patrol car, Morris turned his attention back to appellant, but she was gone. He learned through investigation that she had jumped into a white Ford Expedition that fled the area. Several minutes later, the Expedition came back. The driver, Mr. Montes, gave a statement and turned over appellant's shoes which she had left behind. (R. 25, line 1 – R. 32, line 15). On cross-examination, Corporal Morris said he did not see a knife when he saw appellant sitting in the truck. (R. 36, line 25 – R. 37, line 2).

Dalton Anderson testified that he saw a white female run across the parking lot at the Circle K and get into a Ford Expedition. (R. 41, lines 7 – 10). He did not see a knife in her hand. (R. 45, lines 4 – 5).

Armando Montes testified that he picked up his five and a half-year old daughter on the night of October 23, and drove to the Circle K. His daughter was sitting behind him on his side of the car. (R. 48, line 7 – R. 49, line 17). He said he was getting ready to leave when appellant opened the door of his car and got in. She said to him she was rather desperate. She told him to drive and she would tell him where to stop. He saw something in her hand. He didn't know what it was, but he was frightened. Appellant asked if somebody was following them. He said whatever she had in her hand was small. He could not see it well. He was afraid it could be a knife. (R. 50, line 7 – R. 51, line 14). Appellant demanded him to stop in a dark area. When he stopped, she opened the door and left running. She forgot her shoes. (R. 52, lines 8 – 11).

Corporal Kaminski testified he was not working on October 23. He was home having a cookout. They were outside on the patio area and all of a sudden appellant came running and yelled, "Hide me." (R. 63, lines 4 – 23). He did not see a knife in her hand. (R. 65, lines 22 – 25).

Sergeant DiCarlo testified that he arrested appellant on October 24. (R. 71, lines 16 – R. 72, line 16). She did not have any weapons on her. (R. 73, lines 8 – 10).

After the State concluded his case, defense counsel moved for a directed verdict to the kidnapping charges. The trial court denied the motions. (R. 81, line 4 – R. 82, line 20). 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, the prosecutor wrongly focused on the victim’s mental state – that he was fearful of what was going on. Criminal law instead focuses on the mens rea of the defendant for a particular crime. As the Court noted in State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994), “Criminal liability is normally based upon the occurrence of two factors, ‘an evil meaning mind [and] an evil doing hand.’” (citations omitted). The Court held the mens rea for kidnapping was “knowledge.” Appellant in this case, however, was acting under duress. She was frightened someone was after her. That is the only reason she got in the vehicle and asked the driver to drive on. Her conduct should be excused because duress and necessity are a defense. See, State v. Cole, 304 S.C. 47, 403 S.E.2d 117 (1991). Appellant did not possess the criminal intent of a kidnapper.¹

¹ At sentencing, defense counsel said all that appellant had in her hand was a metallic silver cell phone. There was no weapon. (R. 136, lines 20 – 23).

CONCLUSION

A directed verdict should be granted on the kidnapping charges.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 2013.

STATE OF SOUTH CAROLINA

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THE STATE,

RESPONDENT,

V.

LISA COSACCHI,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lisa Cosacchi states:

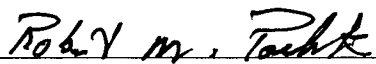
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on April 27, 2011, 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 Lisa Cosacchi.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 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(s);
- (2) Entire Trial Transcript (April 26, 2011)

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

October 15th, 2013



Robert M. Pachak
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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."

October 15, 2013

Robert M. Pachak

Robert M. Pachak

Appellate Defender

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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 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 Lisa Cosacchi, at Post Office Box 3378, Myrtle Beach, SC 29578, this 15th day of October, 2013.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of October, 2013.

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