

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

 ORIGINAL

THE STATE,

RESPONDENT,

V.

EDWARD EARL MCELVEEN,

APPELLANT

APPELLATE CASE NO 2018-000147

ANDERS BRIEF OF APPELLANT

RECEIVED
MAR 04 2019
SC Court of Appeals

WANDA H. CARTER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing the solicitor to argue at closing that the prosecutrix in the case was the innocent one clothed in a robe of righteousness under the presumption of innocence theory because such a principle applies only to defendants.

STATEMENT OF THE CASE

Appellant Edward Earl McElveen was convicted of kidnapping, first degree criminal sexual conduct, and possession of a weapon during the commission of a violent crime during the January 2018 term of the Sumter County General Sessions Court before Judge R. Ferrell Cothran. Michael Routzong and Phillip Little represented appellant at trial, and Assistant Solicitor John Meadors appeared at trial on behalf of the state. Appellant was sentenced to imprisonment for an aggregate eighteen-year term.

Appellant appealed his case. This brief follows.

STANDARD OF REVIEW

“The trial court has broad discretion when dealing with the propriety of the solicitor’s argument, including the question of whether to grant a defendant’s mistrial motion.” State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). “The trial court’s discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant.” Id. “On appeal, the appellate court will view the alleged impropriety of the solicitor’s argument in the context of the entire record.” Id. at 324; 468 S.E.2d at 625. “The appellate has the burden of proving she did not receive a fair trial because of the alleged improper argument.” Id. at 324, 468 S.E.2d at 625,

ARGUMENT

The trial judge erred in allowing the solicitor to argue at closing that the prosecutrix in the case was the innocent one clothed in a robe of righteousness under the presumption of innocence theory because such a principle applies only to defendants.

At trial, Adelene Gaudig testified that while appellant was inside her trailer on February 21, 2017, he put her in a chokehold while holding a gun, and took her to the bedroom where he threatened to kill her, and tried to place his penis inside of her. R. 89, l. 22-p. 129, l. 20.

At the close of the case, the solicitor made the following remarks:

Defendants are presumed innocent unless and until the State proves them guilty beyond a reasonable doubt. Once you get back in that jury room after Mr. Routzong's finished and the judge has charged you, you'll be able to start considering the evidence. And as you do that, you symbolically, we submit, if you believe the evidence take off that robe of righteousness, presumption of innocence, you'll start to take it off if you believe the State has proved its case beyond a reasonable doubt. And we believe you'll take it off. Take it off as you listen. Take it off as you look at her injuries, but don't throw it away. When you come back in here with your verdict, we respectfully ask symbolically bring that robe of righteousness, that blanket, bring it back in here, give it to the true innocent person in this case. Let her use it to warm herself in her years that she has left, give her the innocent liking because she's innocent. Thank you.

MR. ROUTZONG: Your Honor, I have a matter of law to take up. I object to that comment by the Solicitor. We're not here to give ---

MR. MEADORS: You want to approach.

THE COURT: You all come up here.

(WHEREUPON, a bench conference was held in the presence of the jury, but out of the hearing of the jury.)

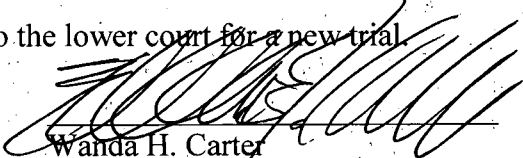
R. 369, l. 20-p. 370, l. 20- p. 370, l. 19

All presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty. State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1968). The state has the burden of proof as to all of the essential elements of the crime and the obvious rationale behind the principle that the burden of proof is on the state in the safeguard of the presumption of innocence, and when the burden is shifted then likewise the safeguard is removed. State v. Altardo, 263 S.C. 546, 211 S.E.2d 868 (1975). The “presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant and it remains with him and assigns him to that class, the innocent.” Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003).

Here, the solicitor’s closing shifted the burden of proof¹ by assigning innocence to the prosecutrix rather than to the defendant, i.e., the appellant in this instance. The defendant does not have to prove his innocence. To the contrary, the state has the burden of proving his guilt beyond a reasonable doubt. This error made by the solicitor violated appellant’s presumption of innocence status and his due process Fourteenth Amendment right requiring the state to prove his guilt beyond a reasonable doubt.

CONCLUSION

Based on the forgoing argument, counsel would request that appellant’s convictions and sentences be reversed, and his case remanded to the lower court for a new trial.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 4th day of March, 2019.

¹ In Re Winship, 397 U.S. 358 (1970). The Fourteenth Amendment requires the prosecution to prove every element of the offense charged against a defendant beyond a reasonable doubt. See also Jackson v. Virginia, 443 U.S. 307 (1979).

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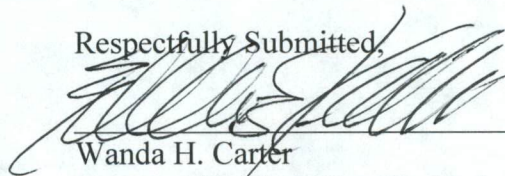
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Edward Earl McElveen states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Ferrell Cothran, which was held on January 24, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Edward Earl McElveen.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 4th day of March, 2019.

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

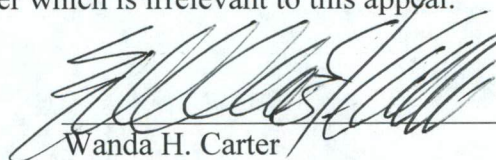
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Entire Trial transcript dated January 22-24, 2018

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

March 4, 2019


Wanda H. Carter
Deputy Chief Appellate Defender

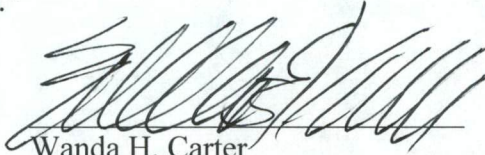
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ATTORNEY FOR APPELLANT

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 4, 2019



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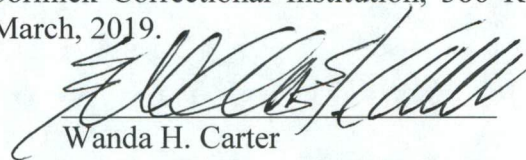
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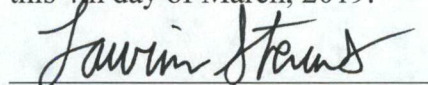
CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Edward Earl McElveen, 311202, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of March, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.