

ORIGINAL

RECEIVED

DEC 08 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER ALLEN BOLING,

APPELLANT

APPELLATE CASE NO. 2014-001797

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

TABLE OF AUTHORITIES

Cases

<u>Evans-Smith v. Taylor</u> , 19 F.3d 899 (4 th Cir 1994).....	7
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781 (1979).....	6
<u>State v. Brown</u> , 267 S.C. 311, 227 S.E.2d 674 (1976)	6
<u>State v. Edwards</u> , 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989)	6
<u>State v. Littlejohn</u> , 228 S.C. 324, 89 S.E.2d 924 (1955).....	6
<u>State v. Matarazzo</u> , 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974)	6
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000)	7
<u>State v. Totherow</u> , 263 S.C. 275, 210 S.E.2d 228 (1974).....	6
<u>State v. Turner</u> , 117 S.C. 470, 109 S.E. 119 (1921)	6
<u>United States v. Ortiz</u> , 445 F.2d 1100 (10 th Cir 1971)	6
<u>United States v. Varoz</u> , 740 F.2d 772 (10 th Cir. 1984)	6

Statutes

S.C. Code § 16-11-311.....	7
----------------------------	---

Constitutional Provisions

U.S. Const. Amend. XIV	5
------------------------------	---

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying defense counsel's motion for a directed verdict to the charge of burglary in the first degree when the State failed to present any substantial evidence beyond a reasonable doubt that appellant entered the dwelling with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was convicted of burglary in the first degree after a jury trial held before the Honorable Deadra L. Jefferson on July 28-30, 2014, in Charleston County. A fifteen (15) year sentence was imposed. William Runyon, Esquire, was trial counsel. Emmanuel Ferguson, Esquire, and Jennifer Shealy, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in denying defense counsel's motion for a directed verdict to the charge of burglary in the first degree because the State failed to present any substantial evidence beyond a reasonable doubt that appellant entered the dwelling with the intent to commit a crime therein.

Joseph Owens testified that on New Year's Eve 2010 he was living at 2980 Cane Slash Road on John's Island. He lived with his girlfriend, Vivian Watkins. He knew appellant, the codefendant, Kevin Russell and Tad Dempsey. Around midnight or later, Tad Dempsey knocked on the door and wanted to know if Owens wanted to buy a cell phone. Owens did not know whose cell phone it was and he did not want to buy one. A short time later appellant and Kevin Russell kicked the front door in and started beating up Tad Dempsey. (R. p. 77, line 18 – pg. 82, line 3.) Owens tussled with appellant and Russell and got them to the back door and out of the house. He got hit during the tussle. (R. p. 87 ll. 14-24.) It became apparent that appellant and Russell were after Tad Dempsey who had taken their cell phone. It was the one he was trying to sell. (R. p. 102, line 21 – p. 103, line 13); (R. p. 104, line 13 – p. 105, line 5.)

At the conclusion of the State's case, defense counsel moved for a directed verdict to the burglary charge because there was insufficient evidence to prove that appellant entered the dwelling with the intent to commit a crime therein. (R. p. 208, line 1 – p. 209, line 1.) The trial court denied the motion. (R. p. 211, line 1 – p. 214, line 6.) 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 State had to prove that appellant entered the dwelling with the intent to commit a crime therein. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000); S.C. Code § 16-11-311. Instead, they only proved that he entered the dwelling with the intent to retrieve his cell phone. That was not a crime.

CONCLUSION

A directed verdict should be granted to the charge of first degree burglary.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 08 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER ALLEN BOLING,

APPELLANT

APPELLATE CASE NO. 2014-001797

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Allen Boling 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 Deadra L. Jefferson, which was held on August 1, 2014, 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 Christopher Allen Boling.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 08 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER ALLEN BOLING,

APPELLANT

APPELLATE CASE NO. 2014-001797

**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 (July 28 – 30, 2014)

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

December 8th, 2014

Robert M. Pachak

Robert M. Pachak
Appellate Defender

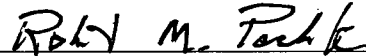
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 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."

December 8, 2014



Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

DEC 08 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 08 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER ALLEN BOLING,

APPELLANT

APPELLATE CASE NO. 2014-001797

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 Christopher Allen Boling, #360859 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of December, 2014.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO
before me this 8th day of December, 2014.

[Signature] (L.S.)

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