

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON DEAN CHILDERS,

APPELLANT

APPELLATE CASE NO. 2018-000986

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to charge the jury the lesser-included offense of burglary in the second degree since it was a jury question whether the victim's residence was entered during the "nighttime"?

STATEMENT OF THE CASE

Appellant was indicted at the October 2016 term of the Horry County Grand Jury with the offense of burglary in the first degree. The indictment alleged appellant entered the residence during the nighttime in violation of S.C. Code § 16-11-311(A). R. 171 – 172. His case was called to trial on September 5, 2017, before the Honorable Larry B. Hyman, Jr., and a jury. This was a trial in the absence. Kenneth Massey represented appellant. Seth Oskin and Tyler Bratton were the assistant solicitors. R. 1.

On September 6, 2017, the jury found appellant guilty. R. 152, l. 23 – 153, l. 3. Appellant was sentenced on May 24, 2018, by Judge Hyman to fifteen years imprisonment. The motion for a new trial or to reconsider the sentence were denied. R. 165, ll.12-15.

This appeal follows.

STANDARD OF REVIEW

“The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” Id. at 570, 647 S.E.2d at 167. “In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). “The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense.” Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

ARGUMENT

The court erred by refusing to charge the jury the lesser-included offense of burglary in the second degree since it was a jury question whether the victim's residence was entered during the "nighttime."

Relevant Facts

Corporal Douglas Dishong of the Horry County Police Department remembered being dispatched to the Pines of St. James area on August 14, 2016, at approximately 4:30 in the morning on a Sunday. R. 67, l. 20 – 68, l. 19. Dishong was told by a supervisor that a burglary had occurred at that location. A 55-inch television, a smaller television, some jewelry, about forty dollars, some change, and a firearm were stolen according to the victim. R. 68, l. 20 – 69, l. 8.

Dishong later interviewed appellant. Appellant told him on the evening in question he had been celebrating his birthday when he had an altercation in a bar. Appellant had to leave that bar because of the altercation but he continued to celebrate elsewhere. Appellant had dated the victim in the past, but they had broken up several months prior to the burglary. Appellant denied going by the victim's house that night, much less having entered her house. Dishong told appellant that his automobile had been seen near the victim's house around the time of the burglary. Dishong maintained appellant made an inculpatory statement by stating that the victim could not have seen him even if he had entered her house. R. 71, l. 4 – 78, l. 13.

Teresa Overstreet was the victim in this case. She was forty-four years old and she was employed by the Horry County school system. R. 84, l. 15 – 85, l. 23.

Overstreet testified she went out with her boyfriend, Robert Walker, that Saturday night. They returned to her house at about one o'clock in the morning, and they went to bed at some

point after that. Overstreet claimed when she awoke in the “early morning hours” she saw appellant “standing in my bedroom at my dresser.” Overstreet said she thought at first she was dreaming. She had broken up with appellant about six months prior to that time. R. 86, l. 14 – 87, l. 24.

Overstreet started screaming “and yelling, what are you doing in my house, get out of here, what are you doing, what’s going on. And he took off running. And I ran right behind him the entire way through the house.” R. 93, ll. 5-15.

Overstreet said the intruder, whom she claimed was appellant, ran outside and got into his SUV. He drove away rapidly. Overstreet later claimed all of this occurred at about 3:30 in the morning. R. 93, l. 24 – 95, l. 3.

Overstreet noticed the 55-inch television, and a 32-inch television were stolen. Her boyfriend, Robert Walker’s cell phone was stolen as well. In addition, Overstreet maintained her daughter had forty dollars cash stolen from her bedroom, and a firearm was also missing. R. 96, ll. 3-24.

Rebecca Johnson was Overstreet’s neighbor. Johnson remembered the early morning hours of August 14, 2016, because “I had been having a lot going on at home and had been trying to quit smoking. And I woke up and just basically craved a cigarette real bad and got in the car and went up the street to get a pack of cigarettes.” R. 114, l. 23- 115, l. 4.

Johnson could only estimate this was about 3:30 in the morning. When she returned home she saw a white heavy-set male, who the state alleged was appellant, coming from Overstreet's house, and this man got into an SUV and drove away.¹ R. 114, l. 23 – 120, l. 12.

The judge refused to charge the jury on the lesser included offense of second-degree burglary: "It either occurred at night in the dwelling or it didn't." R. 151, ll. 10-16.

Discussion

S.C. Code § 16-11-311 (A)(3) makes it unlawful to enter the dwelling of another without consent with the intent to commit a crime in the dwelling where "the entering or remaining occurs in the nighttime." The punishment is life imprisonment without parole or not less than fifteen years imprisonment. See S.C. Code § 16-11-311 (B).

When determining whether the evidence in the case requires an instruction on a lesser included offense, the trial court views the facts in the light most favorable to the defendant. It is reversible error to not give an instruction on a lesser included offense where it is supported by the evidence. See State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010); State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999).

Since there was evidence appellant entered a dwelling without consent and with the intent to commit a crime therein, pursuant to S.C. Code § 16-11-312 (A), the judge should have charged the jury with the lesser included offense of burglary in the second degree. Burglary in

¹ The defense initially objected to a photograph of appellant coming into evidence which it alleged was a "mugshot." The judge ruled pre-trial that the photograph was admissible, and overruled a Rule 403, SCRE objection. R. 60, l. 23 – 61, l. 24. However, when the solicitor went to introduce State's Exhibit 5, the alleged "mugshot, defense counsel did not object. R. 88, ll. 3-19. In addition, the victim's three page statement was introduced into evidence as State's Exhibit 10 without objection. This improperly bolstered that victim's testimony by unduly emphasizing it since the jury had the victim's written statement with them during deliberations. R. 103, l. 4 – 104, l. 10. See State v. Gullledge, 277 S.C. 368, 371-372, 287 S.E.2d 488, 490 (1982). Since there was no objection to these evidentiary matters they would have to be pursued as post-conviction relief (PCR) grounds if necessary.

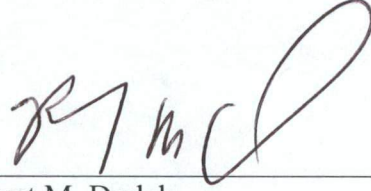
the second degree pursuant to this subsection does not carry a penalty of imprisonment for more than ten years. S.C. Code § 16-11-312 (C)(1).

In this case no witness testified it was dark at the time of the entry, and the victim and her neighbor were somewhat vague on the time the burglary actually occurred. The victim had been sound asleep, and she naturally was unsure of the exact time she was traumatically awakened.

“Nighttime . . . is, as was held at common law, that period between sunset and sunrise during which there is not daylight enough by which to discern or identify a man’s face, except by artificial light or moonlight.” Bannister v. State, 33 S.C. 298, 305, 509 S.E.2d 807, 810 (1998). It was unclear in this case whether the burglary occurred during the nighttime, and “nighttime” was therefore a jury issue. Consequently, the judge erred by not instructing the jury on the lesser-included offense of burglary in the second degree since there was evidence of that lesser-included offense. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). Appellant should be granted a new trial.

CONCLUSION

By reason of the forgoing argument, appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of May, 2019.

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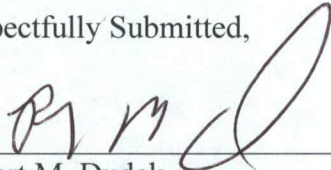
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Dean Childers states:

1. He is Chief 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 Larry B. Hyman, which was held on September 5-6, 2017, 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 Brandon Dean Childers.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 3rd day of May, 2019.

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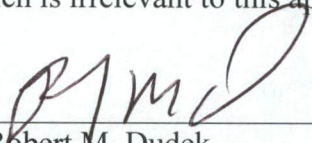
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Transcript (September 5-6, 2017);
- (3) Transcript (May 14, 2018).

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

May 3, 2019


Robert M. Dudek
Chief Appellate Defender

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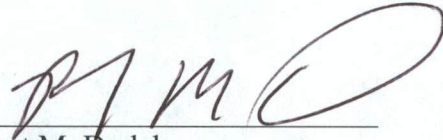
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CERTIFICATE OF COUNSEL

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."

May 3, 2019.



Robert M. Dudek
Chief Appellate Defender

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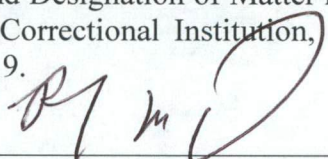
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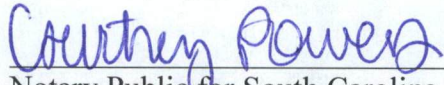
CERTIFICATE OF SERVICE

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 Donald J. Zelenka, 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 Brandon Dean Childers, 376268, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of May, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of May, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.