STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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OCT 17 2016
SC Court of Appeals

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON MORTON,

APPELLANT

APPELLATE CASE NO 2015-002641

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in overruling appellant's objection to the solicitor's closing argument that it was defense counsel's "job to create reasonable doubt in your minds," which improperly shifted the burden of proof to the defendant?

STATEMENT OF THE CASE

On September 8, 2015, the Chester County grand jury indicted appellant for safecracking and receiving stolen goods in the amount of $2,000.00 or less, third offense. R. ___. On December 15, 2015, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Julie Hall represented the State. R. 1. Devon Nielson represented appellant. R. 1. The jury convicted appellant. R. 284, ll. 8 – 23. Judge Gibbons sentenced appellant to concurrent terms of twenty years' imprisonment for safecracking and ten years' imprisonment for receiving stolen goods. R. 292, l. 21 – 293, l. 4. This appeal follows.

ARGUMENT

The trial court erred in overruling appellant's objection to the solicitor's closing argument that it was defense counsel's "job to create reasonable doubt in your minds," which improperly shifted the burden of proof to the defendant.

Appellant was charged with safecracking and receiving stolen goods that related to two burglaries (for which he was not charged). Amberly Lee Ann Freeman testified that one of her residences was "ransacked." R. 51, ll. 19 – 25. She noticed a television and a microwave oven were missing. R. 51, ll. 19 – 25. She used the television as collateral for a loan. R. 54, ll. 2 – 4.

Mary Talbert testified that the house she still owned, but no longer lived in, was robbed. R. 89, ll. 2 – 10. A safe was stolen. R. 90, ll. 4 – 6. The safe contained baseball cards, "change, and old money." R. 90, ll. 7 – 9. Two other safes were gone. R. 90, ll. 10 – 22. A scooter was taken. R. 92, ll. 11 – 20. Dale Earnhardt memorabilia was missing. R. 92, l. 21 – 93, l. 21. Firearms were stolen. R. 93, ll. 11 – 13.

Natasha Hatcher ("Hatcher") moved into appellant's house. R. 105, l. 15 – 106, l. 12. Hatcher was tangentially related to appellant's wife and had grown up with her. R. 101, l. 19 – 103, l. 6. Hatcher also grew up with Linsey Yarborough ("Yarborough"), appellant's brother-in-law. R. 102, l. 12 – 103, l. 6.

About a week after Hatcher moved into appellant's house, she claimed that one night Yarborough arrived carrying a television. R. 107, l. 11 – 108, l. 9. Appellant entered with a white microwave oven. R. 108, ll. 2 – 9. Several nights later, Yarborough and his girlfriend came to the house with "a pocketful of coins." R. 110, ll. 6 – 15. Hatcher heard appellant ask where they got the coins and if there was another safe in the house. R. 111, ll. 15 – 21.

Appellant, his wife, and Yarborough then left and returned several more times. R. 112, l. 15 – 113, l. 24. Hatcher claimed they returned from these trips with Dale Earnhardt memorabilia, a scooter, baseball cards, and a white safe. R. 112, l. 15 – 113, l. 24. When they began trying to open the safe with tools, Hatcher went to bed. R. 113, ll. 14 – 24.

Hatcher did not see them open the safe. R. 113, l. 14 – 114, l. 10. She claimed that from her bedroom, she could tell by the sound that the safe door opened with a "pop" and heard it hit the floor. R. 113, ll. 14 – 19. The next morning she saw the safe opened, but admitted she had no idea what was taken out of it, if anything. R. 114, ll. 4 – 10. A police officer found a safe behind the house "in a pile of junk." R. 146, ll. 6 – 17. The officer also determined that the television brought into the house by Yarborough had the same serial number as the television used by Freeman for collateral. R. 153, ll. 1 – 4.

Hatcher's credibility was significantly undermined on cross-examination. R. 125, l. 21 – 128, l. 14. After calling the police, Hatcher wrote a statement. R. 125, l. 21 – 126, l. 2. She claimed she gave this statement the morning after the safe was brought to the house. R. 131, ll. 14 – 15. Hatcher insisted the date the safe was brought to the house was April 21, but her statement was dated May 1. R. 125, ll. 21 – 24. R. 132, ll. 8 – 9. Her account in the statement differed significantly from her testimony in that nowhere in the statement did she say appellant and the others left the house and returned multiple times. R. 126, l. 16 – 127, l. 21.

Yarborough testified for the State and his testimony also contradicted Hatcher's story. R. 182, l. 22 – 189, l. 2. Yarborough bought the television from a man for ten dollars and sold it to appellant. R. 184, l. 9 – 185, l. 2. The television was cheap because it lacked a power cord. R. 184, ll. 16 – 19. Yarborough did not believe the television was stolen and never told appellant that it was stolen. R. 195, ll. 9 – 13.

Several witnesses testified for appellant. Appellant's son testified that appellant was not involved in anything regarding the safe or the stolen goods because appellant was in prison when these events occurred. R. 207, ll. 15 – 22. Appellant's daughter testified that he could not have had anything to do with the alleged crimes because she remembered getting baseball cards from Yarborough before appellant got out of prison. R. 213, l. 10 – 215, l. 4. Appellant's grandmother corroborated this testimony. R. 216, l. 14 – 218, l. 12.

During her closing argument, referencing defense counsel Nielson, the solicitor told the jury, "And its Mr. Nielson's job to create reasonable doubt in your minds. I ask you to do is not to get lost in the red herrings—" R. 265, ll. 5 – 7. Appellant immediately objected. R. 265, ll. 8 – 10. Defense counsel argued, "I believe that's burden shifting. Her saying I have a job of creating reasonable doubt I believe is burden shifting." R. 265, ll. 8 – 10. The trial judge disagreed, ruling, "The statement is on the record. You can go on, Ms. Hall." R. 265, ll. 11 – 13.

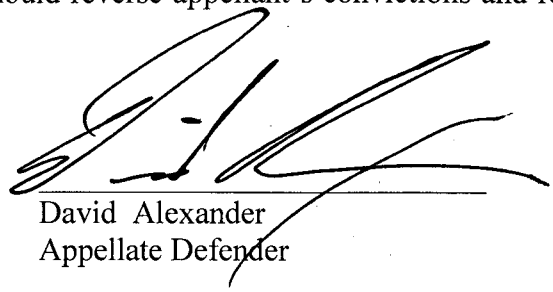
The trial court committed constitutional error in allowing the solicitor's burden-shifting argument to stand. The Due Process Clause requires the proof of every fact necessary to convict a defendant to meet the beyond-a-reasonable-doubt standard. U.S. Const. amends. V, XIV. In re Winship, 397 U.S. 358 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. The prosecution bears this burden of proof. Mullaney v. Wilbur, 421 U.S. 684, 703 (1975); Tot v. United States, 319 U.S. 463, 469-70 (1943).

The solicitor's improper argument violated this bedrock principle of constitutional law. Appellant has no "job" to create reasonable doubt in the minds of the jury. A criminal defendant may stand silent throughout the trial. U.S. Const. amends, V, XIV. Doyle v. Ohio, 426 U.S. 610 (1976). It is always the State's "job" to overcome the presumption of innocence and dispel reasonable doubts. The solicitor's argument was improper and the trial court erred in not sustaining appellant's objection.

The solicitor's flagrantly erroneous argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345–46 (4th Cir. 1996) (internal quotation marks omitted). Appellant has met this standard. The solicitor's argument was allowed to stand. No limiting instruction was given. The proof in this case was far from conclusive. At the directed verdict stage, Judge Gibbons noted that the case against appellant was circumstantial. R. 199, ll. 11 – 13. The State had last argument. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Scott Morton states:

1. He is an 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 the Honorable Brian M. Gibbons, which was held on December 15-17, 2015, 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 Jason Scott Morton.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of October, 2016.

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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) Transcript dated December 15-17, 2015.

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

October 17, 2016

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

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."

October 17, 2016.

David Alexander
Appellate Defender

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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 Jason Scott Morton, 357953, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 17th day of October, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.