

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Berkeley County

J. C. Buddy Nicholson, Jr., Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

RYAN CARL NEWMAN,

APPELLANT

Appellate Case No. 2012-212986  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE .....4

ARGUMENT

The trial judge erred in allowing the prosecution to present evidence that Appellant was wearing an electronic monitoring device on his ankle during the alleged incident because the evidence suggested to the jury that Appellant had prior criminal convictions, which created the danger of unfair prejudice that substantially outweighed any probative value. ....5

CONCLUSION.....13

PETITION TO BE RELIEVED AS COUNSEL .....14

**TABLE OF AUTHORITIES**

**Cases**

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) ..... 11

State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) ..... 11

**Rules**

Rule 403, SCRE..... 9, 11

### **STATEMENT OF ISSUE ON APPEAL**

The trial judge erred in allowing the prosecution to present evidence that Appellant was wearing an electronic monitoring device on his ankle during the alleged incident because the evidence suggested to the jury that Appellant had prior criminal convictions, which created the danger of unfair prejudice that substantially outweighed any probative value.

## STATEMENT OF THE CASE

On November 2, 2011, a Berkeley County grand jury indicted Appellant for possession of a weapon during the commission of a violent crime (2011-GS-08-1670), kidnapping (2011-GS-08-1671), and assault and battery, first degree (2011-GS-08-1672). On March 9, 2011, the grand jury indicted Appellant for armed robbery (2011-GS-08-0453). R. 858. On September 10, 2012, the state represented by Ashley Cornwell and Benjamin Shelton called the case for trial before the Honorable J.C. Nicholson, Jr. and a jury. Chad Shelton and Debbie Littlejohn represented Appellant. Appellant was tried with a co-defendant, Jessica Clark, who was represented by Christopher Biering. R. 1.

The jury found Appellant guilty of kidnapping, assault and battery, first degree, and common law robbery. The jury found Appellant not guilty of possession of a weapon during the commission of a violent crime. R. 777, line 21 – R. 779, line 7. On September 14, 2012, Judge Nicholson sentenced Appellant to fourteen years' imprisonment for kidnapping, fourteen years' imprisonment for common law robbery, ten years' imprisonment for assault and battery, first degree. R. 811, line 17 – R. 812, line 5; R.860.

Appellant filed a timely notice of appeal. This brief follows.

## ARGUMENT

The trial judge erred in allowing the prosecution to present evidence that Appellant was wearing an electronic monitoring device on his ankle during the alleged incident because the evidence suggested to the jury that Appellant had prior criminal convictions, which created the danger of unfair prejudice that substantially outweighed any probative value.

### **Relevant facts**

The prosecution claimed that in the very early morning hours of January 6, 2011, Jessica Clark picked up Andre Mendoza from his home and took him to a dark dirt road called Wide Awake Circle in Berkeley County. R. 208, line 21 – R. 212, line 15. Mendoza believed the two were going to buy drugs, use the drugs, and then have sex. R. 211, lines 5-9; R. 211, lines 18-25; R. 269, lines 9 – 15. Thereafter, three men, one of whom Mendoza identified as Appellant, beat him with a gun and robbed him. The men also stripped him naked. R. 212, line 16 – R. 213, line 7; R. 254, lines 4 – 18. After the alleged assault and robbery, Mendoza stopped a passing motorist, who gave him a ride home. R. 256, lines 2 – 5.

Upon arriving at home, Mendoza called the police. R. 250, lines 24 – R. 259, line 1; R. 259, lines 22 – 20. He was unwilling to give a written statement to police at the time due to alleged dizziness, but he informed the responding officer that Appellant and Appellant's brother were responsible. R. 259, lines 17 – 18; R. 260, lines 3 – 13; R. 373, lines 20 – 25; R. 466, lines 14 – 23; R. 470, lines 3 – 6; R. 476, lines 2 – 7. Mendoza testified he was absolutely certain of their involvement at the time. Subsequently, he was convinced that Appellant's brother was not involved. R. 378, lines 6 – 15. Although

EMS reported to Mendoza's home, he refused medical treatment. R. 189, lines 14-17; R. 215, lines 11 – 14; R. 461, lines 10 – 13.

Despite Mendoza's alleged dizziness, Mendoza drove his mother to the home of Appellant and to where the incident allegedly occurred shortly after the police left. R. 186, lines 5-25; R. 189, lines 12-13; R. 61, line 1 – R. 262, line 25; R. 374, lines 1 – 3. Eventually, Mendoza gave a written statement to police. R. 375, lines 14 – 20. Mendoza claimed Appellant, Clark, Tommy Weathers, and Appellant's brother, Shane Newman, were responsible. R. 377, line 14 – R. 378, line 3; R. 489, lines 4 – 25. Although a Mendoza named Shane as one of his perpetrators in his oral statement to the responding officer and in his written statement to the investigator, he retracted the allegation at trial. R. 378, lines 6 – 12.

During a pre-trial hearing, Appellant moved to exclude evidence that Appellant was wearing an electronic monitoring device on his ankle at the time of the crime. Appellant argued the evidence was unfairly prejudicial to him and would cause the jury to react emotionally because the jury would surmise that Appellant was wearing the monitor due to prior criminal activity. He further argued the evidence was not relevant to the elements of the offenses. R. 131, lines 5-14. Appellant explained he was wearing the monitor as a condition of his bond for a charge of violation of parole. R. 132, lines 16-25. Appellant agreed to stipulate that he was present at the scene. R. 133, lines 24-25. When the court inquired if the ankle monitor were part of the identification made by Mendoza, the alleged victim, Appellant responded that Mendoza informed police that he recognized Appellant by his voice and a scar on his face because the two had been friends and had lived together shortly before the incident. Mendoza's mentioning of the ankle

monitor was an “afterthought.” R. 134, lines 4-15. Appellant argued the danger of unfair prejudice substantially outweighed any probative value presented by the introduction of evidence that Appellant was wearing a GPS monitoring device on his ankle. R. 134, lines 18-25.

The prosecution argued that evidence that Appellant was wearing an ankle monitor established an element of the offense of assault and battery because Mendoza would testify that although he was attacked by three men, he knew Appellant was kicking him in the head because he observed the ankle monitor. R. 135, lines 6-15. The prosecution admitted Mendoza recognized Appellant by his voice, but argued he confirmed the identification “by seeing the GPS monitor on his ankle.” R. 136, lines 2 – 4. The prosecutor then claimed that Appellant had a brother of similar age, similar build, similar height, and a similar sounding voice. The ankle monitor would serve to distinguish Appellant from his brother. R. 136, lines 16 – 20. The prosecution argued that the ankle monitor not only went to identification, but that it also addressed an element of the offense by showing that it was Appellant, as opposed to the other two suspects, who kicked Mendoza. R. 137, lines 13 – 17. The prosecution agreed to keep out the fact that the monitor was a condition of bond and would instruct the witnesses to say only that Appellant was being monitored by a monitoring company. R. 138, lines 2 – 12.

Appellant, appreciative of the prosecution’s willingness to avoid mentioning the monitor was a condition of a bond, noted that the witness who would testify regarding the ankle monitor was a well-known bondsman in the area, who appeared in the newspaper the previous day concerning his work as a bondsman. R. 138, line 13 – R. 139, line 4.

The trial judge declined to make a ruling until he could hear the testimony in context. Thus, he took the matter under advisement pending an in-camera hearing of Mendoza's testimony. R. 140, lines 1 – 14.

During the in-camera hearing concerning the testimony relating to the ankle bracelet, Mendoza testified that he was not immediately able to identify Appellant when Appellant approached his window with the gun. He testified that after he was pistol-whipped, he stumbled toward the back of the car where the brake light illuminated the area. Mendoza began to recognize Appellant's voice, but was absolutely confident that it was Appellant when he saw the ankle bracelet monitor with its red light blinking on Appellant's ankle. He also identified the other individuals as Timothy Weaver and Appellant's brother, Shane. R. 215, line 10 – R. 216, line 14. Contrary to the prosecutor's earlier assertion, Mendoza testified that Appellant and Shane did not have similar features, did not look alike, and did not sound alike. R. 216, lines 18 – 23; R. 222, lines 4 – 14. Mendoza also testified that he was able to see a scar on Appellant's face in the light of the brake light. It was seeing the scar that allowed him to determine it was actually Appellant. R. 217, lines 5 – 12. He also testified that when he was being kicked, he felt the monitor hitting him and saw the monitor with the red blinking light. R. 16 – 19. On cross-examination, Mendoza testified that his identification of Appellant was based mostly upon the scar and his voice. R. 220, lines 16 – 18. Although Mendoza testified that he was certain that Shane Newman was involved in the armed robbery at the time it was occurring and subsequently when he provided his two statements to law enforcement, he no longer believed that at trial. R. 221, lines 14 – 21.

The trial court explained that the monitor would insinuate to the jury that Appellant had been involved in some type of criminal activity. R. 223, line 25 – R. 224, line 2. When the judge inquired of the prosecutor if all the monitor did was to bolster the identification, the prosecution responded that evidence of the monitor was probative to prove Appellant was actually kicking Mendoza, as opposed to being merely present. R. 230, lines 15 – 23; R. 239, lines 11 – 15. The trial judge found the evidence of the monitor was a “probably essential” to the charge of assault and battery, but was not probative of the charges of armed robbery and kidnapping. R. 231, lines 16 – 19. The judge indicated that he would instruct the jury that evidence of the ankle monitor could be used concerning the assault and battery charge on late. R. 232, lines 17 – 18.

Appellant argued that the State could prove assault and battery without even discussing the alleged kicking because Mendoza also claimed he had been pistol whipped. R. 233, lines 1 – 25.

Concerning the analysis pursuant to Rule 403, SCRE, the judge found the evidence to be “very probative,” as to the assault and battery charge because it identified which of the 3 men were kicking Mendoza. However, the judge determined the evidence of the monitor was not admissible as to the other 2 charges. R. 235, lines 16 – R. 236, lines 6. Nonetheless, Appellant objected making it clear that the instruction did not cure the unfair prejudice of permitting the jury to learn that Appellant for an ankle monitor. R. 237, lines 11 – 14.

In front of the jury, Mendoza testified that he felt Appellant’s ankle monitor as he was being kicked. The combined effect of the familiar voice and the ankle monitor convinced Mendoza that Appellant was the person kicking him. R. 254, line 19 – R. 255,

line 11. Thereafter, Appellant, Clark, and did two other men drive off. R. 255, lines 18 – 24.<sup>1</sup> Judge Nicholson instructed the jury as follows

I was listening to the arguments of the attorneys, the state is going into an ankle monitor that was worn by one of the alleged defendants in this case. I'm going to allow the testimony about the ankle monitor. That testimony only goes to the charge of assault and battery. You are not to consider it in any other charge, i.e., the kidnapping, the armed robbery or the possession of a firearm during the commission of a violent crime. Only as to the assault and battery for identification purposes as who was doing the kicking.

R. 249, lines 7-17.

Mendoza's credibility was harmed by Officer Bruce Ashe's testimony that Appellant never informed the police that his cell phone was stolen or that someone gave him a ride from the scene to his home. R. 498, lines 2 – 23. Mendoza informed Ashe that he and his cousin, not his mother, had driven to Appellant's home after the incident. R. 499, lines 6 – 12. Further, Mendoza did not indicate that the alleged beaten took place at the back of the car, which enabled the illumination from the brake lights to show the faces of his perpetrators. R. 500, lines 16 – 21.

Finally, Larry Ballard testified that he was involved in GPS monitoring. R. 541, lines 20 – 21. Ballard testified that based on State's Exhibits 1 and 2, which were maps showing dots to indicate Appellant's location via GPS, Appellant was on Wide Awake Circle on January 6 between 1:15 a.m. and 1:28 a.m. R. 544, line 23 – R. 545, line 5; R. 548, lines 9 – 20. This was the location and timeframe indicated by Mendoza for the

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<sup>1</sup> Berkeley County Sheriff's Office employee, Bruce Ashe, also testified that Mendoza recognized Appellant by his voice, a scar, and a GPS monitor attached to his leg. Appellant objected to Ashe's reference to the monitor as well. The judge overruled his objection. R. 490, lines 12 – 25.

alleged armed robbery and assault. Ballard admitted that the GPS monitoring was accurate only within ten to fifteen meters. R. 559, lines 16 – 17.

### **Discussion**

Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). This Court’s analysis of Rule 403 in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) provides a four-step guide for analyzing whether the danger of unfair prejudice resulting from proffered evidence outweighs the probative value. The first step requires a determination of the probative value of the evidence. The second requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. Third, a court must balance the probative value and unfair prejudice. And finally, the appellate court reviews the decision of the trial court for an abuse of discretion. Id.

The probative value of the ankle monitor was very low. Mendoza testified that he recognized Appellant from his voice and his scar. The ankle monitor did not serve to indicate that Appellant was the person kicking Mendoza because Mendoza was able to testify that it was Appellant who kicked him based upon his identification of him, without resort to the ankle monitor. The danger of unfair prejudice was very high. As Judge Nicholson explained the jury would surmise that Appellant a prior criminal history due to the ankle monitor evidence. It would be a very short leap of logic for the jury to make such a conclusion. The jury would base its verdict on an improper basis – Appellant had a

propensity for criminal activity. Balancing the danger of unfair prejudice against its probative effect requires exclusion of the evidence. In light of the foregoing, the trial judge abused his discretion in permitting the prosecution to introduce evidence that Appellant wore a GPS monitoring anklet during the alleged commission of the crime for which he stood trial.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Berkeley County

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PETITION TO BE RELIEVED AS COUNSEL

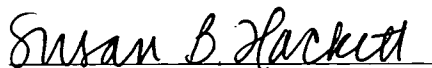
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Counsel for Ryan Carl Newman states:

1. She is 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 J. C. Buddy Nicholson, Jr., which was held on September 10-14, 2012, 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 Ryan Carl Newman.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County  
J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

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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) Entire trial transcript dated September 10-13, 2012 (4 volumes);
- (2) Sentencing Transcript dated September 14, 2012;
- (3) In-Chambers Supplement to Trial Record dated September 14, 2012;
- (4) Court's Exhibits: 1, 2, 3;
- (5) State's Exhibits: 1, 2, 3, 4, 5;
- (6) Defendant Newman's Exhibits: 1, 2, 3, 4;
- (7) True-billed indictments;
- (8) Sentence sheets

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

July 30th, 2013



Susan B. Hackett

Appellate Defender

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Division of Appellate Defense

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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."

July 30, 2013

*Susan B. Hackett*

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Susan B. Hackett  
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RYAN CARL NEWMAN,

APPELLANT

Appellate Case No. 2012-212986

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CERTIFICATE OF SERVICE

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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 Ryan Carl Newman, #317742 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of July, 2013.

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 30<sup>th</sup> day of July, 2013.

*Emily M.* (L.S.)  
Notary Public for South Carolina

My Commission Expires: November 16, 2022.