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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Daniel McLeod Coble, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH GLENN LEWIS,

APPELLANT

APPELLATE CASE NO. 2024-000488

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to grant a continuance or a mistrial where the record showed appellant's ability to assist his attorneys and participate in his own defense -- his competence to stand trial -- continued to be severely compromised during his trial because of his medical problems and the injuries he suffered during the trial?

STATEMENT OF THE CASE

Appellant was indicted at the March 31, 2021 term of the Spartanburg County grand jury for offenses of murder and possession of a weapon during the commission of a violent crime. R. 513-514. His case was called to trial on February 12, 2024, before the Honorable Daniel Coble and a jury. Ryan Beasley and Mark Moyer represented appellant. The assistant attorneys general were Joel Kozak and Jason Bridges. R. 1.

On February 15, 2024, the jury found appellant guilty on both counts. R. 508, ll. 1-8. Judge Coble sentenced appellant to thirty years' imprisonment for murder and imposed a five-year concurrent term for possession of a weapon during the commission of a violent crime. R. 510, l. 24 – 511, l. 4.

This appeal follows.

STANDARDS OF REVIEW

Competence: The trial judge's determinations of competency must have evidentiary support and not be against the preponderance of the evidence. State v. Nance, 320 S.C. 501, 504-505, 466 S.E.2d 349, 351 (1996).

Continuance: A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). In South Carolina "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

"'The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.'" State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). "'An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.'" Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Even if there was no evidentiary support, "'[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.'" Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995) (stating that error without prejudice does not warrant reversal).

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. State v. White, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct.App.1993). Reversals of refusals of continuances "are about as rare as the proverbial hen's teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citation omitted) (stating this comparison, but ultimately reversing the trial court's refusal to grant a continuance)

Mistrial: A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000).

"Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

ARGUMENT

The court erred by refusing to grant a continuance or a mistrial where the record showed appellant's ability to assist his attorneys and participate in his own defense -- his competence to stand trial -- continued to be severely compromised during his trial because of his medical problems and the injuries he suffered during the trial.

Facts of the shooting

Appellant's daughter, Terri, was living with the decedent. She was badly burned by kerosene and had to be airlifted to a burn center in Augusta, Georgia. Appellant was seventy-three years old at the time and he believed from talking to other people that the decedent deliberately poured kerosene on his daughter and set her on fire. Appellant also thought the decedent abused his daughter in a prior incident involving a "bottle." R. 297, l. 4 – 324, l. 8

Appellant had an angry confrontation with the decedent before appellant shot him. Appellant testified that the decedent was threatening him with a "sword" or machete that the decedent carried with him immediately before appellant shot him.[1] R. 297, l. 4 – 324, l. 8

Appellant said in his recorded statement to the Investigator that it was "me or him," and that he had to shoot the decedent. The trial judge charged the jury on the law of self-defense. R. 496, l. 10 – 499, l. 23.

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[1] What portion of appellant's videotaped statement to the police would be played for the jury was a matter of contention at trial. That was because of appellant's illness during the trial, and his inability to recall what happened. The state wanted to keep the jury from learning of a past allegation of domestic abuse by the decedent against appellant's daughter where he was said to have hit her with a bottle. R. 285, l.11 – 296, l. 7. While appellant's recorded statement was referred to as "Court's exhibit 11," a copy of that exhibit forwarded to appellate counsel does not contain appellant's statement. Instead, appellant's recorded statement was contained in Defense Exhibit 1 which appellant has designed for this Court's viewing. Appellant has also designed appellant's testimony during the immunity hearing since it contains a discussion of some of appellant's health problems and because this Court may consider it relevant to the legal issue before this Court. The trial judge took the immunity matter under advisement at the conclusion of that pre-trial immunity hearing, and later denied the motion for immunity. R. 149, ll. 18-19.

Relevant facts

Prior to pretrial hearings, the judge briefly questioned appellant about his injuries and his understanding of the criminal trial process. Appellant answered the judge that his attorney's name was Beasley, and his job was to "defend me." R. 4, ll. 1-20.

Appellant told the judge his understanding was that the prosecutors were supposed "to help me." Appellant said he did not know what the judge's role was in the trial: "I really couldn't say for sure." R. 4, l. 21 – 5, l. 13. Appellant maintained that he had been able to talk to his attorneys and to understand them. R. 5, ll. 14-20.

Appellant confirmed to the judge that he had fallen and hit the back of his head. "I mean, I had a concussion before. I fell in the shower. I can't walk too good." Appellant had not been to the doctor to be examined despite his injuries. Appellant said that he had also injured his shoulder "and my thumb. I sort of feel like it's broke." R. 5, l. 21 – 6, l. 6. The following occurred between defense counsel Beasley and the judge:

> MR. BEASLEY: Your Honor, I would just make note that I can see the injury to the back of his head. And I know we had -- we've been meeting with Mr. Lewis for several years now. And we've never had any question about his competency. He may have some memory issues. We never had any question about his competency. I know this morning Mr. Moyer was having trouble communicating with Mr. Lewis. That's when the family told us that he fell in the shower. Appears to me, appears okay. I don't have anything else to add.
>
> THE COURT: Thank you, Mr. Beasley. What we're going to do, any issues of competency, ability to assist in his own defense, I believe at this point, I'm satisfied that he is. I'm not too concerned about it. I'm going to monitor that. My ruling right now is that he's fine to go forward with trial. He understands his attorneys, their role, he understands my role, and the jury process. I'm going to continue to monitor it throughout the pretrial as well as the rest of the trial. If there's any other issues that need to be brought to The Court's attention, don't hesitate to do that; okay?

MR. BEASLEY: Okay.

R. 6, l. 23 – 7, l. 19.

Defense counsel would later move for a continuance or a mistrial when appellant's health problems worsened and affected his ability to consult with his attorneys and to participate in his own defense. On the second day of trial, during the early afternoon break, the judge noted that the defense was moving for a continuance. Defense counsel Beasley then reminded the judge that appellant "had a fall [a] couple days ago, and we questioned him on the record. He seems fine and coherent. He was ready to go forward. Yesterday, I think during the lunch break, *he fell on the floor downstairs and cracked his skull. And he still wanted to go forward and came in here and he testified.* He was having, sounds like, some memory issues. He's had a history of memory issues." R. 175, ll. 12-20. (emphasis added). Defense counsel continued:

> However, *he also fell again when he was leaving yesterday.* I don't think it hurt as bad as the second fall during lunch, but he does have a big, you know -- blood was coming out the back of his head we noticed yesterday. When he left here yesterday, *he ended up going to the emergency room. And he didn't get out of the emergency room until 3:00 a.m. last night. He's had no sleep. He was diagnosed with a fractured skull and concussion and fractured ribs.* But he's here again. As hard as it was, he's still here again today, Judge. I was trying to get the medical records from Spartanburg Regional. Obviously, since I just found out this morning, it's very hard to get a HIPPA form signed and figure it out, the doctors and everything else. I passed it up to the Court, the HIPPA form I got signed and the doctor information that treated him last night. *But I think, based on the fact that he may be suffering from a concussion, which could affect his ability to participate in this court and assist us at the table as well as being in*
> *extreme pain with fractured ribs and a fractured skull, I think a continuance is appropriate based on -- especially what we're dealing with here, which is a murder trial and, you know, the chance of him going to jail for the rest of his life.* Thank you, Judge.

> THE COURT: Thank you, Mr. Beasley. As to – we discussed this potential issue earlier when Mr. Lewis had fallen and hit his head. I questioned him yesterday just to get his understanding of what was happening, if he could assist his Counsel. I believe he could have been. I talked with him early this morning as well. He seemed like he was still able to understand what's happening. My biggest concern is pain and comfort throughout this trial. We made sure he does have a wheelchair at all times. I talked with him and his family members to indicate he is complying with his doctor's orders. He was discharged from the hospital yesterday. I'm going to continue to make sure he's complying with his doctor's treatment, taking the proper medication. I have received this HIPPA form. We need to get this faxed over to the Spartanburg Regional Medical to get more information as well. *At this point I'm going to deny the continuance. I believe he's able to assist. What I will do is ensure that he is comfortable as much as possible during this trial. I know it is a lot. However, we have to balance our judicial system with the needs of Mr. Lewis as well. Typically, a Defendant is required to be here every single day for their trial.* Based on, so far, what I've heard and I need to see the medical records as well to confirm the level of issues with Mr. Lewis. If he needs to be excused during this trial, he may be. And I'll consider as well a jury instruction to explain to them where Mr. Lewis is. That's something I'll consider. Typically that's not done but based on the circumstances, I have to balance whether to continue the trial or not. So I have to find a little bit of balance in my determination. At this point it's noted for the record. I'm going to deny the continuance. We'll continue to address this just like we have all week. I know defense Counsel will bring it to my attention if he needs a break, if he's uncomfortable, make sure he has water, he's able to take his medication. If he needs to be excused, we'll make sure he can do that at any point.

R. 175, l. 21 – 178, l. 8. (emphasis added).

During another break, at 2:14 p.m. on the second day of trial, defense counsel Moyer told the judge: "I apologize for the abrupt interjection. *Mr. Lewis was sleeping or something.* His eyes were closed. I nudged him, and he came to. *He said he thought he was going to pass out. His head was pounding.*" R. 199, ll. 13-20. The judge responded that if appellant needed some water or to use the restroom or to take a short break to let him know. R. 199, ll. 21-25. (emphasis added).

At the start of the third day of trial, the judge noted that appellant had fallen several different times and he wanted to address appellant. R. 256, ll. 8 – 14. Appellant told the judge that he remembered "a little bit, not much" from the prior day in court. Appellant added that he was a little bit sore, and he explained: "*I'm hurting everywhere, my head and everything.*" Appellant confirmed he had been to the doctor after court and been discharged. Appellant said the doctor *"told me not to do nothing*...not to be driving or nothing like that there." Appellant explained that he was now in a wheelchair because "I can't walk." R. 257, l. 13 – 258, l. 18. (emphasis added). The judge told appellant if his attorneys knew he needed a break or needed water, they should let him know. R. 258, ll. 19-23.

Defense counsel Beasley then moved for a mistrial. Counsel noted that appellant had fallen three times during the trial. "He had one gash on his head when we got here the first day. And the second day he ended up getting a whole new gash in his head, and was actually bleeding during the course of the case." R. 259, ll. 2-8. Defense counsel Beasley continued:

> *He hasn't been able to participate very much. His memory is, obviously, as you've seen in court, is very bad. He has been -- I think after the first day of trial he went to the hospital, was there until 3:00 a.m. He didn't sleep. Then last night he was in the hospital almost to 11:00. We have been trying to get the medical records from Spartanburg Regional so we can help The Court and help us assess what's really going on. We were told that he fractured his scull, fractured his ribs, and suffered a concussion.* We have not gotten those records. We did e-mail general counsel for Spartanburg Regional. We have been communicating with her. She was supposed to be getting that. If we get those, we will obviously bring those to The Court's attention, let everybody review them and make an assessment from there. *I think, based on the fact that Mr. Lewis has, apparently, according to the family and what they were told by the doctor, suffered a concussion and has been -- he hasn't been participating very much during this trial, I would ask that a mistrial be granted,* Your Honor. I don't know if you have anything else to add.

> MR. MOYER: Just add a little bit from yesterday. I was sitting closest to Mr. Lewis during yesterday's proceedings. *He slept through a good bit of yesterday afternoon of the trial. When he wasn't sleeping, I would look over and he's mainly looking at me, kind of a blank stare. I'm not quite sure what his mental state is right now and the extent of participation he can be in this trial.*
>
> THE COURT: Thank you, Mr. Beasley and Mr. Moyer. At this point I'm going to deny the motion for mistrial. As stated earlier, I've been monitoring since Monday morning when apparently Mr. Lewis had his first fall the night before, to make sure he understands what he's doing here, able to assist as best he can. Since this trial is going forward, I'm going to continue to accommodate him both legally and physically in the sense of taking as many breaks as needed; allow him to be excused with my permission as much as is needed. As to any legal issues, if we need to do some type of instruction to the jury, or make a comment, that's something I will allow after we figure out exactly what terms that would be, if it's necessary. I've questioned him each day including this morning. I believe he understands what is happening, that he's able to assist at this point for The Court's purpose and point of view. I did see him sleeping. I noticed that yesterday. I also noticed that the Monday before. I've been able to view him and 20/20 for that hour-and-a-half interrogation to compare to his testimony. I believe that was Monday afternoon. He described then he had memory losses prior to anything as a natural progression of his memory loss. This already happened before. Your motion, everything is noted for the record. I will allow you to supplement this motion when you do get any records. And I'll just continue to monitor the situation. At this point I'm denying the motion for a mistrial.

R. 259, l. 9 – 261, l. 14. (emphasis added).

Later, during the third day of trial, the attorneys discussed the admissibility of appellant's recorded statement, or part of his statement, to law enforcement. Defense counsel Moyer told the judge:

> MR. MOYER: Your Honor, he is so sketchy -- *if that video can't be played, his testimony is not coming in. We definitely have to renew our motion to have him examined for purposes of whether he's competent to stand trial. He just can't testify about it. He doesn't remember.* That's the whole point of Rule 803(5) for people whose memories have left them since an incident occurred. That's

> how the story is to come across. It says -- it doesn't even say if you don't remember at all. It just says -- one moment. Now has insufficient recollection to enable the witness to testify fully and accurately. It doesn't say testify at all. Of course, he can make a few comments about what he recalls vaguely happening, but he can't testify fully and accurately based on his memory loss.

R. 286, ll. 12-25. (emphasis added).

The judge and attorneys then discussed what parts of appellant's statement to the police would be played for the jury. The judge ultimately denied the defense motion to play appellant's entire statement to the police pursuant to the rule of completeness, Rule 106, SCRE. R. 287, l. 1 – 296, l. 12.

On the early afternoon of the third day of trial, defense counsel Moyer reminded the judge that while they were playing the video in the courtroom, and that "Mr. Lewis had fallen asleep at the stand. And when I began asking him questions again, I had to wake him up. Thank you." The judge responded, "noted for the record." R. 324, l. 20 – 325, l. 4.

Discussion

The test for determining competency to stand trial is whether the defendant has a sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960), State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998).

Competency is required to ensure that the defendant has the capability to:

(a) understand the proceedings and,

(b) to assist counsel in his defense.

Godinez v. Moran, 509 U.S. 389 (1993).

A defendant bears a burden of proving his lack of competence by a preponderance of the evidence, and the judge's ruling will be upheld on appeal if it is supported by the evidence and not against the preponderance of the evidence. See State v. Reed, *supra.*

In Drope v. Missouri, 420 U.S. 162, 180 (1975), the Supreme Court noted that the import of its decision in Pate v. Robinson, 383 U.S. 375 (1996), was that the trial court must be vigilant in observing the defendant's behavior, his demeanor, and any medical evidence on competence to stand trial, and always be vigilant to determine whether a further inquiry is required into the defendant's competence.

In this case, the attorneys updated the judge on appellant's continuing health problems which got worse as the trial progressed. As seen, the judge was told by defense counsel on more than one occasion that appellant was not competently able to participate in his own defense. There was no evidence or assertion that appellant was malingering. Further, appellant's attorneys were also very credible, as officers of the court, in updating the court about appellant's continuing but worsening medical and memory problems.

This record shows appellant fell numerous times and suffered concussions. Defense counsel Beasley told the judge that he had observed the injury to the back of appellant's head. On the morning of trial, his defense attorneys, Moyer and Beasley, were having trouble communicating with appellant. They were told by his family that he had fallen in the shower. Matters, as seen, only got worse from there.

The defense later moved for continuance or a mistrial, based on appellant's continuing health problems, and his injuries. They noted that during the lunch break, appellant fell downstairs in the courthouse, and he cracked his skull. He was having memory problems. R. 175, l. 21 – 178, l. 8.

At the end of the first day of court, appellant fell again. This time, he ended up in the emergency room until three a.m., he did not get any sleep before the next morning in court, and he was diagnosed with a fractured skull and a concussion, as well as fractured ribs. Defense counsel openly questioned appellant's ability to assist his attorneys and participate in his trial due to him being in extreme pain and from lack of sleep. R. 175, l. 21 – 178, l. 8.

Later, on the second day of trial in the afternoon, defense counsel noticed that appellant was sleeping, that his eyes were closed, and appellant told his attorneys he thought he was going to pass out because his head was hurting so badly, "it was pounding." R. 199, ll. 21-25. Appellant told the judge that he was hurting everywhere, including his head. R. 258, ll. 9-23.

Defense counsel again moved for a mistrial, noting that appellant had fallen three times during the trial. Defense counsel told the judge that appellant had not been able to participate "much at all" in his trial. Counsel again cited the lack of sleep on appellant's part, and the fact he suffered a concussion. R. 259, l. 9 – 261, l. 14.

As seen, defense counsel Moyer renewed his motion to have appellant examined for purposes of his competence to stand trial since he could not adequately participate in his defense or give competent testimony. The defense needed appellant's prior recorded statement to the police played for the jury since appellant was in no condition to communicate adequately with the jury. *See* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Here, respectfully, the judge's decision to allow appellant's trial to continue and to deny their motion for a continuance or a mistrial was an abuse of discretion. The court's denial of motions for a continuance or for a mistrial when questions of appellant's competence were repeatedly raised also went against the preponderance of the evidence as to appellant's competence. *See* State v. Nance, 320 S.C. 501, 504-505, 466 S.E.2d 349, 351 (1996).

Further, the judge abused his discretion by not granting a continuance to allow appellant to recover from his injuries and to allow his attorneys to later report to the court whether appellant could sufficiently understand the proceedings against him and aid his lawyers in his defense. See Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

In State v. Black, 243 S.C. 42, 132 S.E.2d 5 (1963), the Supreme Court found the defendant was entitled to a new trial in a death penalty case because one of his most experienced attorneys became ill, and the trial judge had denied a continuance. Our criminal justice system has certainly come a long way from a possible death sentence being the deciding factor on whether the denial of a continuance was an abuse of discretion. It was an abuse of discretion in this case since appellant had a due process right to adequately participate in his defense and to be able to assist his attorneys. Godinez v. Moran, 509 U.S. 389 (1993).

This was an unusual self-defense case where appellant strongly believed his daughter's boyfriend, the decedent, had doused her with kerosene and set her on fire. Appellant admitted he was angry with decedent and that the decedent threatened to kill him outside of appellant's house, and immediately before appellant shot him a short distance away when the decedent threatened him again. Appellant testified that the decedent threatened to "cut my head of and my daughter's head off," with his sword or machete and that the decedent was coming towards him in a threatening manner when he shot him." R. 309, l. 4 – 320, l. 15. This record shows appellant struggled to remember what he said earlier, and it certainly does not display a coherence of thought on appellant's part. The trial judge correctly charged the jury the law of self-defense, but this was a legally complex case of self-defense wherein appellant's competence was important at trial. R. 496, l. 10 – 499, l. 23.

The judge also abused his discretion by refusing to grant a mistrial once it became apparent that appellant's injuries, particularly his head injuries, and his lack of sleep from being in the emergency room in the hospital during his trial made it improbable or impossible for appellant to stay awake and to be alert enough to assist his attorneys and assist in his defense. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000).

The trial judge here abused his discretion by refusing to grant the defense a continuance or to end this trial upon the proper motion by the defense for a mistrial where appellant could not adequately participate in his defense, nor could he competently assist his defense attorneys. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of August, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

August 27, 2025.

Sarah E. Shipe
Appellate Defender

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THE STATE,

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V.

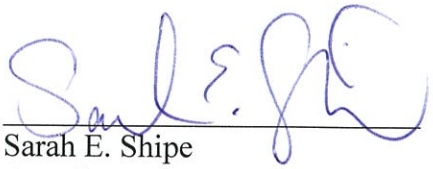
KENNETH GLENN LEWIS,

APPELLANT

APPELLATE CASE NO. 2024-000488

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of August, 2025.



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ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Wednesday, August 27, 2025 10:11 AM
To: Anthony Mabry
Cc: Donna D'Alessio; Shipe, Sarah
Subject: 2024-000488 - State v. Kenneth Glenn Lewis - Final Brief of Appellant
Attachments: 2024-000488 - State v. Kenneth Glenn Lewis - Final Brief of Appellant.pdf

Dear Mr. Mabry,

Attached please find a copy of the Final Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Sarah Shipe
Appellate Defense