

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Roger L. Couch, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES HAGAN,

APPELLANT

APPELLATE CASE NO. 2013-001806

---

ANDERS BRIEF OF APPELLANT

---

LARA M. CAUDY  
Appellate Defender

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ATTORNEY FOR APPELLANT

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SC Court of Appeals

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

Whether the court erred in allowing a state witness to testify about Appellant's prior guilty plea to malicious injury to real property, a charge that arose out of the same facts and circumstances as the burglary charge for which Appellant was standing trial, since defense counsel did not "open the door" to such evidence being admitted and since evidence of the prior guilty plea was unduly prejudicial and denied Appellant a fair trial?

STATEMENT OF THE CASE

On January 31, 2013, a Horry County Grand Jury indicted Appellant for second degree burglary. R. 329-330. His case was called to trial on August 14, 2013 before the Honorable Roger L. Couch, and a jury. R. 1. Melinda Knowles represented Appellant. Joshua Holford was the assistant solicitor. R. 1.

At the conclusion of the trial on August 16, 2013, the jury found Appellant guilty. R. 316, ll. 17-24. Judge Couch sentenced Appellant to six years suspended to four years imprisonment and two years probation. R. 324, l. 20 – 325, l. 2.

This appeal follows:

## ARGUMENT

The court erred in allowing a state witness to testify about Appellant's prior guilty plea to malicious injury to real property, a charge that arose out of the same facts and circumstances as the burglary charge for which Appellant was standing trial, since defense counsel did not "open the door" to such evidence being admitted and since evidence of the prior guilty plea was unduly prejudicial and denied Appellant a fair trial.

### **Relevant Facts**

Zachary Elliott testified that on August 16, 2012 around 12:30 pm he came home for lunch and noticed a suspicious car in his driveway. He approached the man inside the car, which was a white Ford Taurus, and asked him "what he was doing." Elliott testified that as he was talking to the man inside the car, he heard the front door of his residence open and close and realized there was somebody else inside the house. Elliott testified that he then entered the house through the front door and noticed that the back door was kicked in and that several items were placed by it, including a jewelry box and several gaming devices. Elliott did not see anyone inside the house, but he claimed that he knew there had been someone else inside because he heard the front door shut and "we don't have ghosts or nothing." Upon realizing his home, which he shared with his mother, had been burglarized, Elliott called 911. R. 135, l. 8 – 141, l. 2.

Officer Tabitha Smith of the Horry County Police Department testified that she was sent out to the complainant's residence in reference to a burglary and was informed by dispatch before arriving that the suspect vehicle was a white Ford Taurus with South Carolina tag HUT457. After arriving at the scene and confirming with Elliott the description of the suspect vehicle, Smith left to search the area for the car, but was unable to

locate it or any suspects. Smith claimed that a short time later she advised over the radio that one of the suspects was a “white male, bald, with a blue shirt and khaki shorts.”<sup>1</sup> Smith testified that her only other involvement in the case was to collect witness statements and write a report. R. 93, l. 5 – 95, l. 3. She also dusted the residence for fingerprints, but was unable to lift any usable prints. R. 96, ll. 17-25.

Lance Corporal William Hilburn of the Horry County Police Department testified that on August 16, 2012, he was dispatched to the complainant’s residence regarding a burglary in progress and was provided with the description of a white Ford Taurus with South Carolina tag HUT457. Hilburn testified that he was familiar with the registered owner of the vehicle and, after contacting the owner, he learned that the vehicle was usually in the possession of Charles Hagan, Appellant’s uncle. Hilburn claimed he spoke to Charles on the phone and that Charles admitted he was driving the white Ford Taurus at the time of the phone call. The two set up an interview for later that evening. R. 159, l. 17 – 160, l. 18. Hilburn claimed that when Charles showed up for the interview, he was driving the white Ford Taurus. R. 171, ll. 3-14.

Hilburn testified further that while he was searching the area for the suspects, he spoke with employees of the Anderson Oil Company, which is less than a mile from the complainant’s residence, who stated that they had seen a man get into a white Ford Taurus. The description they provided of this suspect was a white male, shaved head, muscular build, wearing khaki shorts and blue shirt. R. 160, l. 19 – 161; l. 7; R. 170, ll. 5-22.

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<sup>1</sup> It is unclear from the record how law enforcement initially obtained this description as Zachary Elliott, as previously noted, never saw the alleged second person inside his residence.

Michelle Collins, a secretary at Anderson Oil Company, testified that on August 16, 2012, she observed a man walking on the highway in front of her office building. She stated that the man was pacing back and forth and that she “thought it was suspicious because of the way he was walking.” Collins claimed that the man was talking on the phone and that she saw “a white Ford Taurus pull up, didn’t even come to a complete stop and [the man] jumps in and they head off . . .” Collins described the man as a white male with a bald head who “looked like he worked out.” She testified that the man was wearing khaki shorts and a blue shirt, but that he did not have the shirt on and instead was “slinging” it around. R. 205, l. 12 – 207, l. 24.

William Alexander, also an employee of Anderson Oil Company, testified consistent with Collins. He stated that on August 16, 2012 he saw a man walking back and forth on the road in front of his office and that it “seemed odd.” He claimed the man was eventually picked up by a white car that “looked like a Ford Taurus.” Alexander further testified that the man was wearing khaki shorts and a blue shirt that he originally had “over his shoulder,” but later put on. Alexander identified Appellant in the courtroom as the man he saw that day. R. 216, l. 10 – 217, l. 23.

Charles Hagan testified that on August 16, 2012, he drove to the incident location in a white Ford Taurus and remained in the car while Appellant entered the residence. Charles testified that Appellant must have damaged the door since he never got out of his car. Charles also denied ever entering the residence. He testified that someone approached him in the driveway of the residence and that he later picked Appellant up down the road. R. 121, l. 6 – 123, l. 22. Charles admitted that he pled guilty to both second degree burglary

and malicious injury to real property and received a probationary sentence and restitution in exchange for his testimony. R. 124, ll. 3-23.

On cross-examination, Charles admitted to feeling pressured when he was being interviewed by law enforcement. He stated, “You’re always pressured when you’re being interrogated.” R. 127, ll. 6-22. In Charles’ first statement to law enforcement, he told the police that he “never knew [Appellant] to steal.” R. 124, l. 24 – 125, l. 19. Charles testified that he was a single father and concerned about losing the custody of his child. Charles also stated that the fear of losing his child was his motivation for confessing to the crime and for testifying in court at Appellant’s trial. R. 131, ll. 4-23.

Debra Chaffin, the owner of Platinum Plus Cleaning Services in Myrtle Beach, testified that Appellant was employed by her company on August 16, 2012 and that he was issued a pay check for the time period of August 13, 2012 through August 19, 2012. Chaffin, however, could not verify whether Appellant actually showed up to work on August 16, 2012 because she was in the company’s office in South Myrtle Beach and Appellant was to report to a location in North Myrtle Beach on that date. R. 141, l. 22 – 145, l. 15.

Jeanette Andrews, a supervisor at Platinum Plus Cleaning Services, testified that she met with the “cleaners” every morning to give them the keys to the units they were supposed to clean. She explained that the “cleaners” work in teams and that Appellant was working with Ashley Henry and Tonya Bowles that week. According to Andrews, on the morning of August 16, 2012, Ashley and Tonya came to pick up the keys, but Appellant was not with them. Andrews claimed that she did not see Appellant that day and that he did not work that day. R. 146, l. 16 – 153, l. 23.

After the state rested, both Ashley Henry and Tonya Bowles testified for the defense. Henry, Appellant's wife at the time of trial, testified that Bowles picked up both her and Appellant on August 16, 2012 and the three of them travelled to work together. R. 239, l. 13 – 243, l. 5. Bowles testified that she did not remember the specific date, but that she drove Appellant and Henry to work every day and that she drove Appellant to work at Platinum Plus Cleaning Services on his first day of work, which Lance Corporal Elliott had informed her was August 16, 2012. R. 252, l. 20 – 255, l. 11.

### **Guilty Plea to Malicious Injury to Real Property**

Prior to the start of trial, the state raised the issue regarding whether it would be permitted to introduce evidence of Appellant's guilty plea to malicious injury to real property. The solicitor argued, "That was injury to the door which [Appellant] kicked in, in connection with this burglary. It happened on the same date, the same time, the same location, the same victim, the same officer took out the warrant, and [Appellant] pled in Magistrate's Court admitting that he was there. Therefore, the state would seek to introduce that and read it into the record that [Appellant] has already admitted to being present at the crime and kicking the door in." R. 26, l. 20 – 27, l. 7. The state specifically sought to introduce the warrant as a self-authenticating document under Rule 902, SCRE.

Defense counsel objected ultimately arguing that admitting evidence of Appellant's prior guilty plea would be "overly prejudicial" and that the "conviction should in no way be relevant here to meeting the elements of the burglary." R. 27, ll. 22-23; R. 30, ll. 22-24.

Defense counsel explained that Appellant requested a jury trial for the malicious injury charge on October 22, 2012 and that, on the day he pled guilty to that charge, he had misplaced his notice and arrived late to his trial. By the time Appellant arrived at court, the

jury was already deliberating and Appellant was thus barred from presenting a defense. Defense counsel explained that the judge informed Appellant that he could either wait for the jury verdict and be sentenced accordingly or that he could plead guilty to the charge and receive time served. Without an attorney to advise Appellant of his rights and the consequences of his actions, Appellant “chose the lesser of the two evils” and pled guilty to avoid the risk of receiving more jail time. R. 27, ll. 10-23; R. 28, ll. 21-22.

Defense counsel also informed the court that Appellant intended to present an alibi defense. R. 29, ll. 16-17. The solicitor argued in response that Appellant should be precluded from presenting an alibi defense because Appellant is “gonna try and say he wasn’t there and he can’t do that if he’s already told a magistrate judge under oath that he was there.” R. 29, ll. 10-15. The solicitor also argued that the evidence was more probative than prejudicial because “he’s already admitted to being the one that kicked the door in at the place that he claims he wasn’t there.” R. 31, ll. 19-23.

The court ultimately ruled that Appellant was not precluded from raising an alibi defense under judicial estoppel because, even if judicial estoppel applied to criminal cases in South Carolina, all the elements had not met in this case. The court, however, never made a specific ruling as to whether the state would be permitted to introduce evidence of Appellant’s guilty plea to malicious injury to real property.

During the testimony of Lance Corporal Terry Elliott of the Horry County Police Department, the following colloquy took place between defense counsel and the officer:

Q: Okay. And did you ever speak with my client?

A: I did.

Q: And you asked him his whereabouts on this particular day?

A: I'm sure I did.

Q: And what did he tell you?

A: He told me he had a job he was working.

Q: So he said he was at work?

A: He did.

R. 107, ll. 17-24.

Before the solicitor began redirect-examination, he asked to approach the judge and the judge ultimately asked the jury to step out. The solicitor argued:

Defense counsel opened the door when she asked Mr. [Terry] Elliott what [Appellant] said where he was on the day and Officer Elliott testified that [Appellant] told him he was working. Detective Elliott was actually present in Central Jury Court. He was trying the case for the malicious damage to personal property [sic] where he heard [Appellant] testify under a guilty plea that he was the one that kicked the door in. The defense opened the door giving an inconsistent statement by [Appellant] and I wish on redirect ask the officer if he's heard different where he was and how he heard that.

R. 108, l. 18 – 109, l. 3.

Defense counsel argued that she did not open the door to the state presenting evidence of Appellant's prior guilty plea to the related malicious injury charge. R. 112, ll. 4-8.

The court said that its prior ruling was that Appellant would not be estopped from presenting an alibi defense because of the prior plea. The court stated, "However, in this case, you asked the witness what your client said to him concerning his presence. This gentleman was present, was the prosecuting officer, would've . . . been present when the plea was taken and this has to do with whether or not he's heard a prior inconsistent

statement from your client.” The court ruled that the solicitor could ask Lance Corporal Elliott about the guilty plea as a prior inconsistent statement because defense counsel “opened the door” to such testimony. R. 112, l. 9 – 113, l. 16.

Lance Corporal Elliott then thoroughly testified in front of the jury about Appellant’s guilty plea to malicious injury to real property on March 13, 2013 in which Appellant admitted to damaging the door to the complainant’s residence “by forcibly entering” the home. During this testimony, defense counsel repeated her objection. Lance Corporal Elliott even read the contents of the malicious injury warrant into the record. He also stressed that Appellant was under oath when he admitted to damaging the door. R. 114, l. 6 – 116, l. 18.

Lance Corporal William Hilburn also thoroughly testified about Appellant’s prior guilty plea to malicious injury to real property. He testified that he was present during Appellant’s guilty plea to that charge and that Appellant admitted under oath that he was guilty of the charge. The state also admitted the malicious injury warrant into evidence during Hilburn’s testimony over defense counsel’s objection. R. 161, l. 8 – 170, l. 4.

### **Discussion**

In State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), our Supreme Court distinguished prior inconsistent statements and guilty pleas as used for impeachment purposes. The Court stated, “A plea of guilty differs in purpose and effect from a mere admission or extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive.” Id. at 592, 340 S.E.2d at 540 (quoting Kercheval v. United States, 274 U.S. 220 (1927)). The Court held that unlike prior inconsistent statements, withdrawn guilty pleas are inadmissible because of “the highly prejudicial potential of such evidence.” Id.

at 592-593, 340 S.E.2d at 540. The Court further ruled that evidentiary use of such pleas “denies the defendant the benefit of the presumption of innocence.” Id. at 591-592, 340 S.E.2d at 540 (quoting State v. Joyner, 228 La. 927, 84 So.2d 462 (1955)).

Additionally, in State v. Derringer, 378 S.C. 101, 106, 661 S.C.2d 387, 389-390 (2008), our supreme court held that the defendant’s testimony that he “hated to see a female cry” did not open the door to the admission of the defendant’s prior convictions for criminal domestic violence and criminal sexual conduct and that the trial court erred in allowing the state to use these convictions to impeach Young.

The trial court erred in this case by allowing Lance Corporal Elliott and Hilburn to testify about Appellant’s prior guilty plea to malicious injury to real property, a charge that arose out of the same facts and circumstances as the burglary charge for which Appellant was standing trial, because admission of such evidence was “highly prejudicial” and denied Appellant “the benefit of the presumption of innocence.” See Mathis, 287 S.C. at 591-594, 340 S.E.2d at 540. The jury likely presumed Appellant was guilty of burglary because he had already pled guilty to the related malicious injury to real property charge. This was improper.

Evidence of Appellant’s prior guilty plea also should have been excluded under Rule 403, SCRE, because its probative value was substantially outweighed by unfair prejudice to Appellant. Appellant was prejudiced because evidence of his prior guilty plea, in which he did not have the advice of counsel, prevented the jury from fully considering his alibi defense.

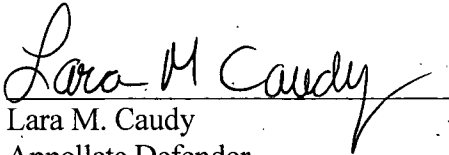
Additionally, defense counsel did not “open the door” to such evidence being admitted. The trial court had earlier ruled that Appellant was not judicially estopped from

presenting an alibi defense due to his prior guilty plea to malicious injury to real property. When defense counsel asked Lance Corporal Elliott about whether Appellant had informed him of his whereabouts on the day of the burglary, trial counsel was merely attempting to properly present the alibi defense. See Derringer, 378 S.C. at 106, 661 S.C.2d at 389-390.

CONCLUSION

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

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of December, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

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APPELLATE CASE NO. 2013-001806

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PETITION TO BE RELIEVED AS COUNSEL

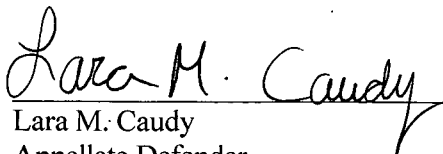
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Counsel for James Hagan states:

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 Roger L. Couch, which was held on August 14-16, 2013, 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 James Hagan.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of December, 2013.

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IN THE COURT OF APPEALS

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Roger L. Couch, Circuit Court Judge

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THE STATE,

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APPELLATE CASE NO. 2013-001806

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

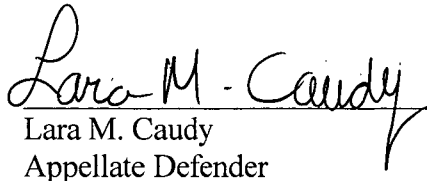
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire trial transcript dated August 14-16, 2013;
- (3) State's Exhibit #3 (arrest warrant)

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

December 27th, 2013

  
Lara M. Caudy  
Appellate Defender

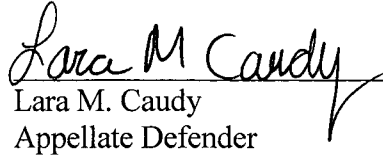
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Attorney for Appellant

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."

December 27, 2013

  
Lara M. Caudy  
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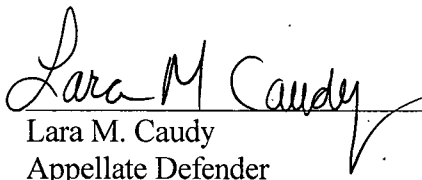
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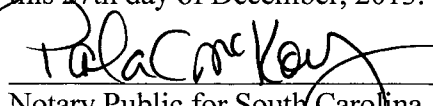
CERTIFICATE OF SERVICE

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 James Hagan, #356690 at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 27th day of December, 2013.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 27th day of December, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.