THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

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Case No. 2012-213734

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The State of South Carolina,..... Respondent,

v.

James Lamont Moore, ..... Appellant.

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# INITIAL BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Rules

## STATEMENT OF THE ISSUES ON APPEAL

I. **The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.**

II. **The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.**

III. **The trial court improperly allowed Appellant to be tried in absentia.**

## STATEMENT OF THE CASE

Appellant was indicted by a grand jury for distribution of crack cocaine in the November 2009 Term of the Charleston County Court of General Sessions. (True Bill and Indictment). Appellant was tried in his absence on October 18, 2012 by the Honorable Kristi L. Harrington and a jury. Stephanie Linder and Randall Stoney represented the State of South Carolina ("The State"). Jason King represented Appellant. Appellant was found guilty as charged under S.C. Code Ann. § 44-53-375. (*See* Verdict Form). Judge Harrington sentenced Appellant to seventeen (17) years in prison. (*See* Sentence Sheet). On December 12, 2012, Judge Harrington denied Appellant's motion to reconsider the sentence. (Motion to Reconsider p. 10). This Appeal followed.

## STANDARD OF REVIEW

"An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013). The standard of review for whether the trial court properly admitted evidence a defendant's "prior bad acts" is an abuse of discretion standard. *State v. Mathis*, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). The standard of review for the denial of a motion for mistrial is an abuse of discretion standard. *State v. Bantan*, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (S.C. Ct. App. 2010).

## ARGUMENT

**I. The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.**

The State presented a fifteen minute video, which captured the alleged drug buy as a trial exhibit. (Tr. p. 131; State's Exh. 3). The State played this video on three separate occasions, twice during the State's case in chief and once during Appellant's pre-trial motions. (*Id.* at 131, 181). The video contained a conversation between law enforcement and the confidential informant Joseph Ancrum ("Mr. Ancrum") en route to the location previously targeted by law enforcement. (*Id.* at 18). The conversation lasted approximately six minutes and a half minutes. (*See* State's Exhibit 3 0:00-6:30). Upon exiting the car, Mr. Ancrum began to narrate his experience to law enforcement. (*Id.* at 7:32-15:10).

Appellant's trial counsel moved *in limine* to redact portions of the video based on the fact that (1) the conversation constituted improper comments on Appellant's character and (2) that any probative value of the video recorded conversation was substantially outweighed by unfair prejudice to Appellant. (*Id.* at 17-23). The trial court denied Appellant's motion and did not

redact any of the statements in the video made by the officers or by Mr. Ancrum. (*Id.* at 40). Counsel for Appellant renewed his objection to the video during trial. (*Id.* at 131). Over the objection of Appellant's counsel, the trial court allowed the State to present the video for the jury both while Mr. Ancrum and Detective Jonathan Shealy were on the witness stand. (*Id.* at 131, 181).

### A. The trial court's failure to redact the statements that Appellant was "always hollering" at Mr. Ancrum violated Rule 404 of the South Carolina Rules of Evidence.

Rule 404(b) of the South Carolina Rules of Evidence provides that, as a general rule, evidence of a defendant's "other crimes, wrongs, or acts" is not admissible to prove "the character of a person in order in order to show action in conformity therewith." Rule 404(b), SCRE. The trial court improperly allowed the following conversation regarding Appellant's prior bad acts:

> Officer: I'm going to drop you off at the same spot . . . you know that house right across from that gas station the boys always holler at you?
>
> Mr. Ancrum: Oh you want that one?
>
> Officer: Yep.
>
> Mr. Ancrum: If he out there.
>
> Officer: Yep. He be always out there . . . always hollering at you right there right across from that gas station.
>
> Mr. Ancrum: Yeah . . . Oh you talking about the one holler at me all the time when I go through there on the left-hand side?
>
> Officer: First intersection.
>
> Mr. Ancrum: Yeah, okay.

(State's Exh. 3 at 1:12-1:44).

During Appellant's motion *in limine*, the trial court posited whether "hollering" was more of a salutation than a solicitation of a drug purchase. (Tr. p. 36). The trial court reasoned, "I'm concerned because I like to work in my yard and when my neighbors walk by I holler at them, and so is that to assume that I'm – I mean, that's where I'm getting at." (*Id.*). The State argued, "I holler at my neighbors when they go by, have a baby, they walk by with a stroller. I holler at those people, some people holler at me." (*Id.* at 38).

Appellant's counsel correctly argued, albeit unsuccessfully, that in this context, the only logical implication was that "hollering" meant solicitation of a drug purchase. (*Id.* at 25-26). As Appellant's counsel noted:

> "If they are just out there saying, 'Hey, how you doing,' just yelling and being friendly, that wouldn't give the police a reason to make them investigate. It's the context of the whole video becomes clear what that means. Just taking the statement isolated [] hollering doesn't necessarily mean that but it becomes clear that's what that means when you watch the whole video and hear all the statements, and when you think about why would the police – why would the police send the informant to go – why are they even guarding him to go send the informant to him? Because they are out there selling drugs . . . [i]t's just not as innocent as they are out there hollering greetings, or . . . there would be no reason to try to buy drugs from someone who is just being friendly. That doesn't raise any suspicion at all.

(*Id.* at 36-37).

Other statements in the video confirm that Mr. Ancrum and law enforcement meant "solicitation of drug purchases" by use of the term "hollering." During Mr. Ancrum's narration of the drug buy, Mr. Ancrum stated, "[h]e getting ready to go up the street to go get the one with the blue cast on . . . [t]hat the same guy that be in the yard all the time, be yelling at me . . . [t]hat where he going." (State's Exh. 3 at 9:43-10:09). Later in the video, Mr. Ancrum states, "Yeah. Okay. I can thank you. I'll holler back" in the context of contacting the person again for drugs in the future. (*Id.* at 11:06-11:25).

The trial court abused its discretion because these statements improperly weigh on Appellant's character and call into question Appellant's prior bad acts. "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." *State v. Coleman*, 301 S.C. 57, 60 389 S.E.2d 659, 660 (1990). Moreover, "[t]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Wilson*, 274 S.C. 635, 637, 266, S.E.2d 426, 427 (1980). In a criminal case, the State cannot attack the character of the defendant unless the defendant himself or herself first places his or her character in issue. *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992).

The Supreme Court offered guidance with respect to the admissibility of "prior bad acts" in *State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008) as follows:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must *logically* relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.; State v. Beck,* 342 S.C. 129, 135–36, 536 S.E.2d 679, 682-83 (2000).

*Id.* at 23-24, 664 S.E.2d at 483 (emphasis added) (holding that the defendant's alleged prior bad acts were inadmissible absent "clear and convincing evidence" that the defendant committed the prior bad acts.).

In this case, Mr. Ancrum's conversation with law enforcement that "the boys always holler at [Mr. Ancrum]" and "[he] be always out there . . . always hollering at [Mr. Ancrum]" in the context of a prospective drug buy, is a direct reference to Appellant's prior bad acts, namely that the Appellant "always" solicited Mr. Ancrum to purchase drugs. These statements, coupled

with Appellant's cocaine distribution charge, improperly suggest that Appellant acted in conformity with the asserted bad character and criminal propensity. Furthermore, the conversation between law enforcement and Mr. Ancrum occurred well before law enforcement dropped off Mr. Ancrum to walk to the targeted location. (*See* State's Exh. 3 at 1:12-1:44). By asserting that Appellant was "always" out there "hollering," the officers and Mr. Ancrum cast aspersions that Appellant had a prior history of soliciting drug purchases. These statements logically relate to the crime for which Appellant was charged. Therefore, the trial court improperly allowed the State to offer these statements to the jury.

### B. The trial court abused its discretion by allowing the statements that Appellant was "the one that caused all the problems."

Several minutes into the video, before Mr. Ancrum exited law enforcement's vehicle, an occupant in the vehicle identified who he believed to be Appellant stating "one of those guys has a cast on . . . [t]hat's the one that caused all the problems." (State's Exh. 3 at 6:01-6:17). The State's main theory of the case was that Appellant wore a cast. In the State's closing argument, the assistant solicitor made the following comments:

> You can watch the video, I can watch the video, law enforcement can testify, Joseph testified. Who is the guy in the blue arm cast? *That's what it comes down to.* Who is the guy in the blue arm cast? You heard not one, not two but three officers tell you who the guy in the blue arm cast is. The guy in the blue arm cast is James Lamont Moore.

(Tr. p. 202) (emphasis added); (*see also id.* at 29, 117-18; 154-55, 183, 201). Similar to the statements regarding Appellant's criminal propensity to solicit drug sales, the statement that Appellant "caused all the problems" improperly weighed on Appellant's character and called into question Appellant's unspecified bad acts. The declarant never clarified what "problems" Appellant "caused." Rather, by admitting this statement, the trial court left the matter for the intrigue of the jury.

*German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) is similar to this case. In *German*, two agents performing undercover drug operations received tips that Mr. German "was distributing or selling crack cocaine." 325 S.C. at 26, 478 S.E.2d at 688. The agents received identifiable information about Mr. German, specifically that "[h]e had a large cast on his arm. It was a very ornate cast." *Id.* The Supreme Court held that the statements were improper comments on Mr. German's character because the statements specifically referenced Mr. German. *German*, 325 S.C. at 27, 478 S.E.2d at 688. The court remanded the case for a new trial, finding that defense counsel's failure to object to the improper character statements prejudiced Mr. German. *German*, 325 S.C. at 28, 478 S.E.2d at 688. Moreover, the Court distinguished its holding in *German* from *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). In *Brown*, the Court held that statements offered to prove why the police began surveillance did not amount to hearsay because the statements were not offered to prove the truth of the matter asserted. 317 S.C. at 63, 451 S.E.2d at 894. Namely, the statements in *Brown* referred to "drug activity in the apartment complex in which the defendant lived." *German*, 325 S.C. at 28, 478 S.E.2d at 688.

This identifying information, which the Court held improperly weighed on the defendant's character in *German*, is strikingly similar to the information Appellant's counsel moved to exclude. The statements attributed to Appellant as "that one" and "the one holler at me" and then later "one of those guys has a cast on . . . [t]hat's the one that caused all the problems" violates Rule 404.

### C. The trial court failed to employ a "clear and convincing" standard to exclude character evidence presented in the video testimony and improperly relied on the present sense impression exception to hearsay.

As basis for denial of Appellant's motion to exclude improper statements in the State's video exhibit, the trial court stated as follows:

> I have observed the video and then both of you know that prior to taking the bench I did prosecute drug offenses, and based upon my review of the video there is nothing that causes me any concern that that's the automatic implication that I go to. I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. . . . And so I deny your motion that it's improper character evidence because I do not think that it's a comment on anyone's character, let alone [Appellant]. I do find that based upon my observation of the video and reading the rules that it is clearly a present sense impression . . .

(Tr. p. 40).

The trial court incorrectly applied the "clear and convincing" standard necessary for evidence of prior bad acts. Rather, the trial court's basis for admitting the entire video exhibit was that "nothing" caused the trial court "any concern" that the statements made by Mr. Ancrum and law enforcement gave the "automatic implication" that the State called Appellant's, or "anyone's," prior bad acts into question. (*Id.*). The record does not indicate whether the trial court considered any exception to Rule 404(b) in making its ruling. As set forth above, the video statements logically relate to the Appellant and to the crime for which Appellant was charged.

Furthermore, the trial court cited "present sense impression" exception to the rule on hearsay, SCRE Rule 803(1), as basis to admit the video in its entirety. Rule 803(1) provides that "a statement describing or explaining an event or condition" is admissible if "made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE; *See also State v. Garcia*, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999) (holding that the trial court erred in admitted testimony when "there was no indication of when Appellant had "kicked or threatened the deceased.").

In *Wilson v. Childs*, this Court affirmed the trial court's exclusion of testimony of statements made by a decedent just before his death as inadmissible hearsay. 315 S.C. 431, 434 S.E.2d 286, 292 (Ct. App. 1993). This Court reasoned that because the decedent made the

statement in reflection of a past event, the statement did not qualify as a present sense impression. *Wilson*, 315 S.C. at 439, 434 S.E.2d at 291-92.

In this case, the first six and a half minutes of the State's video exhibit consists of a conversation between Mr. Ancrum and law enforcement. (*See* State's Exh. 3 at 0:00-6:31). The statements in that conversation were not made while the declarants perceived an event, namely the purchase of drugs, but rather consisted of details in reflection of past events. The statements that Appellant, or his associates, "always holler[ed]" at Mr. Ancrum and that the person suspected to be the Appellant "ha[d] a cast on" and "caused all the problems" were not made while "perceiving the event or condition, or immediately thereafter." In addition, after completing the alleged transaction Mr. Ancrum stated to the officers, "I get it from the dude with the cast on." This statement occurred three and a half minutes after the event occurred and while Mr. Ancrum had reached a point of safety in law enforcement's vehicle. (*See* State's Exh. 3 14:30-14:40).

Based on the above, the trial court incorrectly extended the present sense impression exception to hearsay to statements reflecting on past events concerning Appellant's character.

**D. The probative value of the statements, taken collectively, were substantially outweighed by the unfair prejudice caused to Appellant under Rule 403 of the South Carolina Rules of Evidence.**

The statements made by law enforcement and Mr. Ancrum in the video compounded on one another and caused Appellant unfair prejudice under SCRE, Rule 403. As the Supreme Court summarized in *State v. Fletcher*:

> Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); *State v. Gillian,* 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Braxton,* 343 S.C. 629, 541 S.E.2d 833

> (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

379 S.C. at 23-24, 664 S.E.2d at 483. Moreover, "[u]nder our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). "When as here, a previous alleged bad act is strikingly similar to the one to which the defendant is being tried, the danger of prejudice is enhanced. *Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

In *State v. Bostic*, an individual hired by the police to make drug buys testified that he had bought crack cocaine from the defendant at a variety store. 307 S.C. at 227, 414 S.E.2d at 176. A police officer providing testimony for the State blurted out that he had "intelligence" before the drug buy that the "'defendant had been selling crack cocaine from the store.'" *Id.* "His statement was not in response to any question." *Id.* The Supreme Court held that the probative value of the evidence in the case was "greatly diminished by its very nature because the police officer did not claim to have first hand knowledge that the defendant had previously sold crack cocaine." 307 S.C. at 229-30, 414 S.E.2d at 177. Instead, "he based his testimony to this effect on something he referred to, nebulously, as 'intelligence.'" *Id.* at 230, 414 S.E.2d at 177. The Court concluded that the "probative value of his testimony was substantially outweighed by its prejudice." *Id.*

In this case, the probative value of the statements captured in the video are substantially outweighed by the prejudice caused the defendant. The "intelligence" of law enforcement and Mr. Ancrum that Appellant was "always" out there "hollering" and that Appellant "ha[d] a cast on" and "caused all the problems" is equally nebulous and prejudicial. The trial court erred by

failing to exclude these statements because probative value of these statements were substantially outweighed by the unfair prejudice caused to Appellant.

## II. The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.

### A. The trial court erred in failing to grant Appellant's motion for mistrial.

"A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "A mistrial should only be granted when absolutely necessary, and movant must show both error and prejudice in order to be entitled to a mistrial" and "the determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865-66. A party must make a contemporaneous objection for an alleged error to be the basis of a mistrial motion. *State v. Sosebee*, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985).

In this case, during the State's redirect examination of Mr. Ancrum blurted "he guilty" in direct reference to Appellant. (Tr. p. 150). The State asked Mr. Ancrum about an affidavit that he signed in a previous case admitting to his dishonesty about statements he made about a criminal defendant at trial. (*Id.* at 145-50). Mr. Ancrum explained the circumstances surrounding the previous situation and took the opportunity to comment on Appellant's guilt:

> A: Yeah, I buy drugs from him, but I lied. Yeah, I did the wrong thing when I signed that paper but he know he guilty, and his lawyer know he guilt. Just like the guy who supposed to be on trial here, he guilty --
>
> Q: Joseph. Joseph.
>
> A: That's all I got to say.

(*Id.* at 150). Counsel for Appellant promptly objected to Mr. Ancrum's statements and asked the trial court for a curative instruction. (*Id.*). The trial court instructed the jury to "strike the last statement from your notes" and asked the foreperson not to consider Mr. Ancrum's statement in the jury's deliberations. (*Id.*). Upon a brief recess, Appellant's counsel moved for a mistrial:

> Based on the last statement by Mr. Ancrum on the stand I would make a motion for a mistrial. I know I requested a curative instruction but I don't believe that this is enough to cure any prejudice caused to Mr. Moore and would ask you to grant a mistrial.

(*Id.* at 161). The trial court denied the motion for mistrial. (*Id.* at 162). Appellant's counsel renewed the motion for mistrial following the trial. (*Id.* at 230).

The trial court abused its discretion by failing to grant the motion for mistrial based on the facts of this case and the circumstances surrounding Mr. Ancrum's unsolicited remarks that Appellant was "guilty." Mr. Ancrum cooperated with law enforcement "about over 20 years or longer." (Tr. p. 126). Law enforcement compensated Mr. Ancrum for his work. (*Id.* at 123, 129). At the time of this trial, Mr. Ancrum had made between one "hundred and two hundred" drug buys in his work with law enforcement. (*Id.* at 139). According to the Detective Charles Grill, Detective Grill had "worked with [Mr. Ancrum] a good bit" and that Mr. Ancrum "knows what he's supposed to do." (*Id.* at 122-23). Mr. Ancrum arrived "every time" at his assigned "pick up spot." (*Id.* at 177). Mr. Ancrum would "call [law enforcement] when instructed." (*Id.*). "In the past all the operations" that law enforcement "conducted with [Mr. Ancrum]" proved "successful." (*Id.*). With this background, coupled with the improper video statements, Mr. Ancrum's comments on the Appellant's guilt made an irreversible impact on the jury such that the trial court abused its discretion by failing to grant a mistrial.

### B. The trial court's curative instruction was not sufficient to cure the prejudice suffered by the defendant.

In opposition to the motion for mistrial, the State argued that the trial court's curative instruction sufficiently prohibited any potential prejudice suffered by Mr. Moore. (Tr. p. 161-62). The court offered to "review the context and make sure that the curative instruction" sufficed and to examine whether "any further instruction" in the charge was necessary at a later time. (*Id.* at 162). However, nothing in the record indicates that the trial court specifically revisited Mr. Ancrum's indictment of Appellant other than to state in the charge to the jury "if there was any testimony that was ordered stricken from the record you must disregard that testimony." (*Id.* at 212-13).

An instruction to the jury to disregard objectionable evidence *usually* cures the error of admitting the evidence unless, on the facts of the particular case, it is probable prejudice exists notwithstanding such an instruction. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) (emphasis added). By use of the word "usually" this Court has recognized that this is the general rule and that this rule is not absolute. Mr. Ancrum blurted out "he guilty," the State intervened, yet he added "that's all I got to say." No instruction to the jury could repair the prejudicial damage caused to Appellant. These intentional statements could not be removed from the minds of the jury and the trial court's instruction to the jury could not, and did not, cure prejudice caused to Appellant.

## III. The trial court improperly allowed Appellant to be tried in absentia.

Appellant's trial was originally scheduled for the November 2009 term of the Charleston County Court of General Sessions. (*See* True Bill and Indictment). The record does not provide specific guidance on the circumstances related to the continuance of the original trial date. However, Appellant appeared in court on Monday, October 15, 2012. (Tr. p. 5).

Appellant's trial did not go forward on Monday and the trial was continued to Wednesday October 17, 2012 at 2:30 p.m. (*Id.*). Appellant's counsel tried to reach Appellant, who at the time was on bond, by phone on Tuesday October 16, 2012 without success. (*Id.* at 6). Appellant's counsel previously informed Appellant that the trial would go forward either Monday October 15, 2012 or October 17, 2012. (*Id.* at 7). However, Appellant's counsel "had no luck" for "two days" in reaching Appellant but that Appellant "had shown up before . . . every time." (*Id.* at 8). The trial court "pass[ed] the case until 3:50[p.m.]" on October 17, broke for recess, and Appellant had not arrived when the trial court reconvened. (*Id.* at 10).

The trial court signed a bench warrant for Appellant's arrest. (*Id.*). Appellant's counsel expressed that Appellant "told [counsel] he was on his way" but that Appellant "was still looking for a ride [to court]." (*Id.* at 11). The trial court then heard pre-trial motions in Appellant's absence. (*Id.* at 12). Before breaking on Wednesday the trial court stated "regardless of what happens, be prepared to call the case at 9:30 a.m [Thursday, October 18, 2012]." (*Id.* at 55).

On Thursday, Appellant was not in court. (*Id.* at 58). The Charleston Police "put out a wanted flyer" for Appellant the previous evening but did not locate Appellant. (*Id.*). The trial court noted Appellant's objections not to proceed but elected to proceed in Appellant's absence because Appellant "knew that he was second up and close that we were going to have time to pick a jury this week for this case." (*Id.* at 58-59). Appellant's counsel agreed that Appellant knew he was second on the trial list but didn't think that Appellant "believed it was actually going to happen because of the history of the case and the fact it's been on the docket many times." (*Id.* at 61). Appellant's counsel agreed that "there was no indication that the case was not going to be called." (*Id.*)

After the jury was sworn, the State called three witnesses to testify, and then the trial entered a brief recess for lunch. (*Id.* at 163). When trial resumed, the trial court asked whether Appellant's counsel was able to reach Appellant to which Appellant's counsel replied, "I haven't heard anything . . . at this point any damage of him not being here has been done . . ." (*Id.*). The trial concluded without the presence of Appellant.

At Appellant's Sentencing Hearing, Appellant's counsel moved for "a new trial so [Appellant] can be present for trial." (Sentencing Hearing, p. 5). The trial court denied the motion for a new trial. (*Id.*). Appellant's counsel agreed that Appellant received proper notice. (*Id.*).

Appellant's counsel moved to reconsider Appellant's sentence. (Motion to Reconsider p. 4). Appellant's counsel explained that he had reached Appellant by phone on Wednesday, October 17, 2012. (*Id.* at 9). The trial court heard from Appellant regarding his absence from the trial and Appellant explained the following:

> I apologize for missing my trial, but, Your Honor, as you can see, I never missed a court date ever before. If I know I was supposed to be at trial, I would have been here. I didn't get no paperwork – saying that I'm supposed to be here. I didn't get no paperwork at my house or nothing, so I didn't know about the trial. I would have been here, Your Honor.

(*Id.* at 7). In addition, Appellant's fiancé stated that Appellant did not receive court papers reflecting the date and time of the trial. (*Id.* at 8).

In order for a criminal defendant to be tried in absentia, certain requirements must first be met. *State v. Truesdale,* 345 S.C. 542, 548 S.E.2d 896 (Ct.App. 2001). Rule 16, of the South Carolina Rules of Criminal Procedure provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such

> person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16, SCRCrimP.

A trial judge must determine whether a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. *State v. Ritch,* 292 S.C. 75, 354 S.E.2d 909 (1987). Specifically, the trial judge must make findings of fact on the record that the defendant (1) received notice of his right to be present, and (2) was warned that the trial would proceed in his absence should he fail to attend. *State v. Jackson,* 288 S.C. 94, 96, 341 S.E.2d 375 (1986).

In this case, although the record indicates that Appellant appeared for trial on Monday, October 15, 2012, the record does not indicate whether Appellant was specifically warned that the trial would proceed other than to state that Appellant spoke with Appellant's counsel on Wednesday, October 17, 2012. Appellant should not be bound by this because the record does not fully address whether Appellant was actually warned before the trial proceeded.

As a result, this Court should reverse and remand this case for a new trial.

## CONCLUSION

The trial court erred by allowing the State to introduce testimony captured by the State's video exhibit that improperly weighed on Appellant's character and caused Appellant to suffer unfair prejudice. The trial court erred by failing to grant a mistrial after the State's witness blurted out that Appellant was guilty. Appellant was improperly tried in absentia. For the foregoing reasons, Appellant requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina

This 31st day of January, 2014

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge



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Case No. 2012-213734

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The State of South Carolina,..... Respondent,

v.

James Lamont Moore, ..... Appellant.

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**APPELLANT'S**
**DESIGNATION OF MATTER TO BE**
**INCLUDED IN THE RECORD ON APPEAL**

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Pursuant to Rule 209, SCACR, Appellant James Lamont Moore proposes the following to be included in the Record on Appeal:

1. Transcript of October 17 – 18, 2012 jury trial, pages 1, 5-23, 25-26, 29, 36-38, 40, 55, 58-59, 61, 99-105, 117-118, 122-123, 126, 129, 131, 139, 145-150, 154-155, 161-163, 177, 181, 183, 196-213, 224, 230

2. Transcript of Proceeding Sentencing, pages 1, 5

3. Transcript of Motion to Reconsider, pages 1, 4

4. Sentence Sheet

5. State's Exhibit 3 – Unofficial Transcript

6. Verdict Form

7. True Bill and Indictment

Pursuant to rule 209(c), SCACR, I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

**Nelson Mullins Riley & Scarborough, LLP**

By: _____

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina

This 31st day of January, 2014

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge



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Case No. 2012-213734

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The State of South Carolina,..... Respondent,

v.

James Lamont Moore, ..... Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the **Initial Brief of Appellant James Lamont Moore** and **Appellant's Designation of Matter to be Included in the Record on Appeal** on The State of South Carolina addressed to its attorneys of record, Salley Elliott, Senior Assistant Deputy Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

This 31st day of January, 2014

(*Signature on following page*)

Respectfully submitted,

**Nelson Mullins Riley & Scarborough, LLP**

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ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of January, 2014.

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