

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOMONEIK ANTWAN WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2013-001616

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Washington's motion for a mistrial when one state's witness referred to the autopsy of Antwon Wilson, who was one of the victims of the attempted murder charge, and another state's witness referred to Wilson as the decedent after the state and defense had agreed to a stipulation that no mention would be made of the subsequent death of Wilson because there was no connection between the death of Wilson and Appellant Washington?

STATEMENT OF THE CASE

On November 14, 2011, the Charleston County Grand Jury indicted Domoneik Washington on three counts of attempted murder. On July 15 – 17, 2013, Washington proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Washington was represented by Lorelle Proctor and John J. Kozelski, III. The state was represented by D. Bruce DuRant. The jury returned a verdict of guilty on two of the attempted murder charges, and a verdict of guilty on one lesser charge of assault and battery of a high and aggravated nature (ABHAN). Judge Jefferson sentenced Washington to twenty years on each of the charges with all to run concurrent to each other. R. 568, ll. 1 – 25. Washington's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Appellant Washington's motion for a mistrial when one state's witness referred to the autopsy of Antwon Wilson, who was one of the victims of the attempted murder charge, and another state's witness referred to Wilson as the decedent after the state and defense had agreed to a stipulation that no mention would be made of the subsequent death of Wilson because there was no connection between the death of Wilson and Appellant Washington.

On March 30, 2011, a famous rapper named Lil Phat was to perform at the Palm Tree club on James Island in Charleston County. About 2:30 in the morning a fight broke out between the James Island people, which included Domoneik Washington, and three people from downtown which included the victims in this case: Antwan Wilson, Edward Witrell, and Ronald Bryant. The club closed after the fight, and the crowd went to the Kangaroo Station nearby. The three downtown men pulled up in a gold impala to get gas but had to wait. Shots rang out from the adjacent car wash. Then Washington appeared and began arguing with the guys in the Impala. Appellant Washington pulled a gun and began shooting into the Impala where the three downtown guys were. The only one hit was the driver, Antwan Wilson, who was hit in the leg. The Impala took off heading towards town. All of this was caught on the store's video. R. 145, ll. 12 – R. 146, ll. 5; R. 136, ll. 17 – R. 142, ll. 17.

Equette Robinson, the clerk at the Kangaroo Station during the incident, testified at the Neil v. Biggers¹ hearing to identify Washington. She had seen Washington come in the Kangaroo almost every Saturday for over a year, usually late at night after the clubs closed.

¹ Neil v. Biggers, 409 U.S. 188 (1972).

However, she did not know his name. She identified Washington as the person who shot at the gold Impala on March 20, 2011. When Washington came to the door of the station just prior to the shooting, she was going to ask him to pay for the hot dog he had stolen the Saturday before. He took the hot dog without paying for it. But he did not come in the store but began arguing with the guys in the gold Impala. She saw Washington shoot into the Impala at the people inside. R. 106, ll. 16 – R.111, ll. 25.

Edward Wittrell, one of the young men from downtown who was a passenger in the Impala, testified that they had been to the Palm Club to celebrate his birthday. They were involved in the fight at the club. They left and went to the Kangaroo when the club closed. R. 190, ll. 18 – R. 195, ll. 25. Wittrell admitted that he was intoxicated that night, and did not remember much. He did remember Antwan Wilson getting shot at the Kangaroo, and they left to go downtown to the hospital. R. 196, ll. 1 – R. 197, ll. 1.

He, and Antwan, and Ronald Bryant did not shoot at the Kangaroo station. In an in-camera hearing, Wittrell explained that as they were on the way to the hospital traveling down Folly Road, someone started shooting at them from behind from a vehicle. The car wrecked because Antwan, who was driving, was shot in the back of his head and died. Wittrell was shot in his shoulder, and Bryant was shot in his head but survived. A gun was found in the Impala that Wittrell was in but he did not remember anyone shooting. R. 200, ll. 3 - R. 205, ll. 16.

Defense counsel objected to any testimony concerning this subsequent chase and shooting because it was not relevant to whether Washington shot at and allegedly attempted to murder these downtown men. The defense also argued it was too prejudicial even if the court felt it was relevant. The state conceded that there was no evidence that Washington

was associated with the subsequent shooting nor the vehicle from which the shooting came. But the state argued, it was part of the *res gestae* and should come in because the jury needed to know Antwan Wilson was dead and that was the reason he was not present at the trial. The state also wanted to show that the gun and shell casings found in the Impala were from the victims shooting at during the chase and not at the Kangaroo because the defense was claiming self-defense. The men in the Impala had gunshot residue on them as well. Defense counsel argued that their theory was not that the gold Impala occupants shot at Washington but other people were shooting at him, and he was shooting in self-defense. At least twenty-seven shots were fired during this "shoot-out." R. 205, ll. 15 – R. 215, ll. 17.

The judge told the state and defense to work out a stipulation that both could agree to since the defense was not going to say the victims were shooting at Washington. The state agreed to say Antwan was killed in an unrelated incident. The state then said he would have to put up the medical examiner but he would not go into the cause of death but he did have to go into the bullet removed from Antwan's leg. R. 215, ll. 18 – R. 217, ll. 25.

The parties agreed on a stipulation which provided:

1. The parties agree that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo in the early morning of March 30, 2011.
2. The parties agree that Antwan Wilson died from causes unrelated to being shot at the Kangaroo and is not available to testify.

R. 1 – 20.

During the testimony of Suzanne Cromer, the SLED expert in fire arms' identification, she referred to the bullet removed from Antwan Wilson during his autopsy. Defense counsel objected at a bench conference because the use of the word "autopsy" by the witness was outside their agreement and should be in the stipulation. Defense counsel

said it was out of the bag, and she asked for a mistrial. The judge told her she was not getting one, but offered to give a curative instruction which defense counsel rejected. R. 392, ll. 20 – R. 395, ll. 24; R. 400, ll. 3 – R. 402, ll. 17.

The medical examiner, Dr. Ellen Riemer, testified that she removed the bullet from the leg of Antwan Wilson. When explaining the trajectory of the bullet, she referred to Wilson as the “decēdent.” The judge immediately asked for a bench conference with the attorneys. The doctor/witness admitted that she made an error in referring to Wilson as the decedent. Defense counsel said it had happened twice, and she made a motion for a mistrial. The judge denied the motion but again offered to give a curative instruction. Defense counsel again refused the curative instruction. R. 427, ll. 17 – R. 432, ll. 7.

At the completion of the doctor’s testimony, the state proffered the stipulation to which the parties had agreed to the jury. There was no objection by the defense. The state rested, R. 434, ll. 1 – R. 435, ll. 3.

In State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013), the Court of Appeals held that the decision to grant or deny a mistrial is within the sound discretion of the trial court. In State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010), the Court of Appeals ruled that the trial court’s decision to grant or deny a mistrial will not be overturned on appeal absent an abuse of discretion amounting to an error of law.

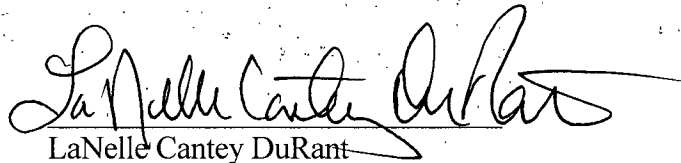
In State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009), the Court of Appeals held that the granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.

Washington was prejudiced by the two witnesses telling the jury through their testimony that Antwan Wilson was deceased. The jury had not heard the stipulation that Wilson died from an unrelated incident before these two witnesses testified. Therefore, the first impression of the jury was that Antwan Wilson died at the hands of Washington in some way. The state reading the stipulation to the jury after the testimony was too late to erase the impression from the minds of the jurors.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2014.

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Appeal from Charleston County
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THE STATE,

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V.

DOMONEIK ANTWAN WASHINGTON,

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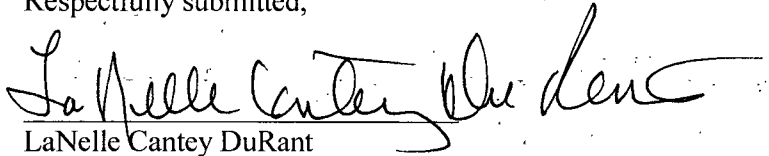
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Domoneik Washington 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 Deadra L. Jefferson, which was held on July 17, 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 Domoneik Washington.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
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THE STATE,

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V.

DOMONEIK ANTWAN WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2013-001616

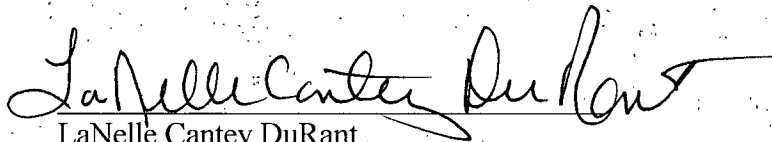
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Complete Trial Transcript July 15-17, 2013

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

March 14th, 2014



LaNelle Cantey DuRant
Appellate Defender

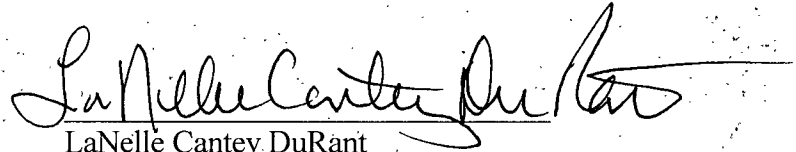
South Carolina Commission on Indigent Defense
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PO Box 11589
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Attorney for Appellant

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."

March 14th, 2014


LaNelle Cantey DuRant
Appellate Defender

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
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THE STATE,

RESPONDENT,

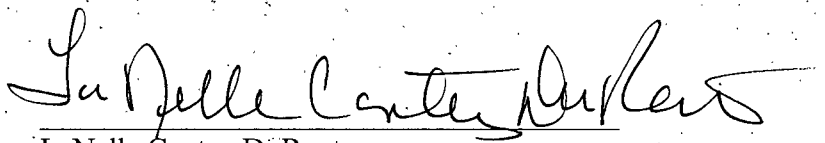
V.

DOMONEIK ANTWAN WASHINGTON,

APPELLANT

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 Mr. Domoneik Washington, #356158, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; this 14th day of March, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.