THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

RECEIVED

MAY 02 2014

SC Court of Appeals

Case Nos. 2012-GS-32-000397, 398

The State .... Respondent

v.

James Walker....... .... Appellant

APPELLATE CASE NO. 2012-213741

FINAL BRIEF OF APPELLANT

Daniel L. Blake
97 E. Market St. / POB 310
Bennettsville, SC 29512
(843) 479-2393
Lead Counsel for Appellant

Robert M. Dudek
SCCID, Division of Appellate Defense
1330 Lady Street, #401
Columbia SC 29201
(803) 734-1343
Co-Counsel for Appellant

TABLE OF CONTENTS

Table of Authorities.......... 2

Statement Of Issue on Appeal.......... 3

Statement of the Case.......... 4

Argument.......... 5

Conclusion.......... 18

Certificate of Counsel.......... 19

TABLE OF AUTHORITIES

Cases: Page

State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) 6

State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2002)......................... 6

State v. James, 362 S.C. 557, 608 S.Ed.2nd 455 (Ct. App. 2004) 6

State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) 12

State v. Meggett, 398 S.C. 516, 728 S.E.2d 492, (Ct. App. 2012) 7

State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) 5

State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) 5, 6

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) 12

State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607 (1971) 7

State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) ... 6,10-12, 17

Statutes and Rules:

S.C. Code § 16-15-140.. 7, 12

Rule 19, South Carolina Rules of Criminal Procedure 8

Other References:

Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2007, §1-11.. 11, 12

STATEMENT OF ISSUE ON APPEAL

Did the trial court err when the judge used an "at least circumstantial evidence" test and denied Mr. Walker's motion for directed verdict on the sole issue of intent?

STATEMENT OF THE CASE

Appellant was indicted for violation of the lewd act statute (2012-GS-32-000397 and 2012-GS-32-000398). The Appellant and his counsel went to trial beginning on November 6, 2012 before the Honorable Howard P. King and a jury. The jury found the Appellant guilty of Lewd Act on both indictments. The court sentenced the Appellant to twelve years concurrent on each indictment, with probation for five years after incarceration for eight years. Per statute, Appellant's name was also placed on the sex registry.

ARGUMENT

Did the trial court err when the judge used an "at least circumstantial evidence" test and denied Mr. Walker's motion for directed verdict on the sole issue of intent?

The law is settled in South Carolina as to the standard of proof required to withstand a directed verdict motion for acquittal in cases involving circumstantial evidence. As recently stated by our Supreme Court, "if there is any direct evidence or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (*emphasis in original*).

Depending on the type of evidence involved, the courts therefore make a distinction as to the degree of proof required to defeat a directed verdict motion. In this case, however, the trial judge did not make this critical distinction and wrongfully denied Mr. Walker's motion for directed verdict with regards to the element of intent.

The reason for this distinction lies in the difference between direct and circumstantial evidence. "Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption." State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247, footnote 1 (2001) (*citations omitted*). "Direct evidence immediately establishes the main fact to be proved." Id.

On the other hand, "[C]ircumstantial evidence immediately establishes collateral facts from which the main fact may be inferred, and is typically

characterized by inference or presumption. Circumstantial evidence is evidence based on inference and not on personal knowledge or observation. If the main fact sought to be proved is a matter of inference, the case is one of circumstantial evidence." Id.

As stated above, the courts hold that "any direct evidence" will defeat a motion for directed verdict while "substantial circumstantial evidence" is required to overcome the Appellant's directed verdict motion. The simple reason for this difference is because while one piece of direct evidence can establish an essential fact, a number of circumstantial pieces of evidence would need to be brought together to prove that same fact. Thus, there must be "substantial circumstantial evidence" on the record for the State to survive the defendant's summary judgment motion.

It is axiomatic that the State has the burden of proving each of the individual elements of a crime and that to overcome a directed verdict motion, the State must have sufficient proof for each of those elements. The issue of "substantial circumstantial evidence" therefore applies not only to the entire crime but to each of the elements of that crime. State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) (lewd act case, intent to gratify sexual desires); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) (intent to commit assault with intent to commit CSC); State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2002) (intent to distribute crack cocaine); State v. James, 362 S.C. 557, 608 S.Ed.2nd 455 (Ct. App. 2004) (intent to distribute crack cocaine).

In this case, Mr. Walker was accused of committing or attempting to

commit a lewd act upon his two daughters. The only issue raised by Mr. Walker in his directed verdict motion was whether he acted "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires" of himself or his daughters. S.C. Code Ann. § 16-15-140 (1976).

Intent is a matter of looking into the defendant's mind. This is rarely done through direct evidence and most often involves circumstantial evidence. "Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (cited by State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012)).

In his ruling on the Appellant's initial motion for directed verdict, the judge stated:

> I think it's pretty clear in this case there is *at least circumstantial evidence* of the intent that has been presented in the record if not direct evidence of the intent and (that the State, as I say) it is not the purpose of the Court to weigh or determine the weight to be given to that testimony but only its existence and *there is testimony in the record that meets that existence test* and I would, therefore, respectfully deny the motion (italics provided).

R. 111, l. 23 – R. 112, l. 6.

And then at the close of the evidence in the case, the judge asked Mr. Walker's attorney if she wished to renew her motion for a directed verdict. Mr. Walker's attorney responded in the affirmative. R. 150, ll. 22 – 25. At which point, the court responded:

> All right. And same grounds and same ruling. I think there is evidence in this record - - that - - which precludes me from granting

> a directed verdict. It's not my job to weigh the evidence or determine the believability of the evidence. That is a matter for the jury's determination. *My task is to determine the existence of the evidence* and I think there's evidence in this record by which a jury could make a decision in the case and I would respectfully deny the motions. (italics provided).

R. 151, ll. 1 – 10.

The experienced trial judge in this case chaired the South Carolina Criminal Rules Task Force. At the time of this trial, the task force had recently sent its report to our Supreme Court. In his denial of the directed verdict motion, the trial judge discussed some ambiguities in Rule 19 (Directed Verdict) of the South Carolina Rules of Criminal Procedure:

> Under Rule 19, of course, the Court shall direct a verdict in the defendant's favor on any offense charged if the - - after the evidence on either side is closed, if there's a failure of competent evidence tending to prove the charge of the indictment. I have long felt that the use of the word competent in that rule is unfortunate because it infers a weighing or a determination of - - by the Court of the weight to be given to the evidence. The rule does go on to say that in ruling on this motion, the trial judge should consider only the existence or nonexistence of the evidence and not its weight.

R. 110, l. 24 - R. 111, l. 9.

While there may be some confusion for the courts in their application of Rule 19, our appellate courts do require that there be "any direct evidence or substantial circumstantial evidence" for the State to prevail against the defendant's motion for direct verdict. In this case, it appears that the trial judge did not distinguish between the standard of proof required for direct evidence and circumstantial evidence.

Rule 19 does state that "the trial judge should consider only the existence or nonexistence of the evidence". However, the Court must also distinguish

between the type of evidence being presented. When the only proof of the crime (or an element of that crime) is of a circumstantial nature, then the "existence or nonexistence of the evidence" is measured by the "substantial circumstantial evidence" standard. In other words, when proof is of a wholly circumstantial nature, the State must have presented "substantial circumstantial evidence" that reasonably tends to prove the guilt of the accused.

In its ruling on Mr. Walker's directed verdict motion, the Court indicated that "there is at least circumstantial evidence of the intent that has been presented in the record if not direct evidence of the intent". Admittedly, the court was not completely clear on the standard by which it was measuring the degree of circumstantial evidence that was required to overcome Mr. Walker's motion. However, it would appear from the judge's comments that he was looking to the mere existence of circumstantial evidence on the record with regards to Mr. Walker's intent.

While "any circumstantial evidence" is not sufficient to overcome the defendant's motion for directed verdict, "any direct evidence" would be sufficient. However, if there is no direct evidence of Mr. Walker's intent to arouse, then the judge's standard of "any circumstantial evidence" is not the correct test for determining whether to grant a directed verdict.

The first question then is whether the record in this case contains direct evidence of Mr. Walker's intent to "arouse, appeal to, or gratify the lust or passions or sexual desires" of himself or his daughter(s). While there is ample testimony on the record as to Mr. Walker's acts of touching his two daughters

(some of which could be considered as "lewd or lascivious"), there is no direct evidence as to Mr. Walker's intention to arouse the lusts or sexual passions of himself or his daughters. The defendant denied going into his daughters' bedrooms "to achieve some sort of sexual gratification" or touching them so as "to arouse their sexual urges". R. 131, l. 19 – R. 132, l. 7.

Our appellate courts have on rare occasion grounded their affirmation of the trial court's denial of a directed verdict motion on "any direct evidence" of the defendant's intent. In State v. Whisonant, the defendant had been convicted of lewd act with a child under the age of 16 because he had fondled his daughter's best friend. State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999). The Defendant appealed the trial court's decision on two grounds. First, he argued that the court should have granted a directed verdict because "there was an insufficient showing that the alleged touching was done with the intent of gratifying the passion or lust of either himself or the victim." Second, he argued that corroborating testimony should not have been admitted under the excited-utterance exception to the hearsay rule. Whisonant, 335 S.C. at 151, 515 S.E.2d at 770.

The court affirmed on the directed verdict issue and reversed with regards to the admission of the excited-utterance testimony. Id. In a two-sentence discussion of the directed verdict motion, the court ruled that there was "sufficient evidence to withstand a motion for directed verdict" by using the "any direct evidence" standard.[2] Whisonant, 335 S.C. at 153, 515 S.E.2d at 771.

---

[2] The court's discussion of the admission of the excited-utterance testimony was three pages in length. SC Reports, pp 153 – 156.

The twelve year old victim in Whisonant was spending the night at her friend's house. Whisonant, 335 S.C. at 151 - 152, 515 S.E.2d at 770. She testified that she fell asleep on the couch and woke up to the Defendant sitting next to her in a chair. Whisonant, 335 S.C. at 152, 515 S.E.2d at 770. The victim testified that the Defendant touched her breast area, both on top of and underneath her clothing. Id. She also testified that he unbuttoned her shorts, attempted to touch her below the waist and then told her to "open up," but she kept her legs closed. Id.

In its truncated opinion on the directed verdict issue, the court noted that "the evidence must be viewed in the light most favorable to the State, and *if any direct evidence exists* that tends to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." Whisonant, 335 S.C. at 153, 515 S.E.2d at 771 (*emphasis added*). All of the above testimony from the victim is clearly direct evidence of the Defendant's lewd or lascivious conduct. But in itself, it is not direct evidence of the defendant's intent to gratify either his sexual desires or those of his victim.[3]

However, the victim also testified that Whisonant verbally and physically threatened to kill her if she told anyone. Whisonant, 335 S.C. at 152, 515 S.E.2d at 770. This might have been construed by the appellate court as direct evidence of the defendant's intent. "Criminal intent is a state of mind which operates jointly with an act or omission in the commission of a crime. Criminal intent is a mental state of conscious wrongdoing." Ralph King Anderson, Jr., South Carolina

[3] There is certainly "substantial circumstantial evidence" in Whisonant to establish the defendant's intent to gratify his own sexual desires (discussed below).

Requests to Charge – Criminal, 2007, § 1-11. The criminal intent in a lewd act is clearly spelled out by the statute: "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child." S.C. Code 16-15-140.

In threatening to kill the victim if she told anyone about the incident, the defendant is obviously concerned that others would find out about his conduct. From this, we could infer that he was aware that what he had done to the victim was wrong. In Whisonant, the reference to "direct evidence" with regards to the defendant's intent to gratify his sexual desires is unclear. However, there was overwhelming circumstantial evidence of Whisonant's intent to gratify his sexual desires and the case was properly submitted to the jury.

Turning to the case at hand, the trial court apparently did not use the proper standard for determining if the State had overcome Mr. Walker's motion for directed verdict. However, the issue remains whether there was substantial circumstantial evidence in the record that Mr. Walker did act with the intent to gratify his own sexual desires or those of his daughters.

On appeal of the denial of a directed verdict of acquittal, the appellate court must look at the evidence in the light most favorable to the State. State v. Martin, 340 S.C. 597, 533 S.E.2d 572, 574 (2000). However, a circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984).

This case involves allegations of unwanted touching by a father of his two

daughters, both under the age of sixteen. Both girls testified that the father's behavior was ongoing. R. 18, ll. 13 – 16; R. 59, ll. 12 – 14. However, the allegations were made some two years after the conduct, around the time that the parents were in the middle of a divorce. R. 46, ll. 23 – R. 47, l. 11; R. 75, ll. 17 – 24. Both lay and expert witnesses testified that in their experience, delayed reporting was not uncommon. R. 78, ll. 5 – 12; R. 108, ll. 3 – 13.

The younger daughter, Minor 1, was the first to inform her mother about her father's conduct. Without a doubt, Mr. Walker's touching made Minor 1 uncomfortable. R. 19, ll. 19 – 23; R. 21, ll. 20 – 23. She also complained that "he would make us kiss him goodnight and it would make me uncomfortable and he would say, Love me, and stuff like that. . . he just wanted affection and he would say it in his voice and he would just say it all the time to me and my sister and sometimes my mom." R. 19, l. 19 – R. 20, l. 3. She alleged that she would wake up to her father rubbing her stomach "and he would whisper things like, love me, or Cuddle with me, or kiss me, or something like that." R. 21, ll. 3 – 7. She also testified that her father rubbed her breasts and went under her underwear but "he just went to the line" (top of the pubic area). R. 21, ll. 10, 14 – 19. Minor 1 also testified that "sometimes he wouldn't have a shirt on or he would be in his boxers." R. 36, ll. 20 – 21. However, Minor 1 also testified that Mr. Walker "never touched himself" during these incidents. R. 37, ll. 11 – 13.

The older daughter, Minor 2, also testified that her father came into her room at night, sometimes when she was asleep "and he start rubbing my belly and he would work his way up to my chest area or he would stick his hand under

my underwear and down towards my pubic area and he would tell me, I need you to love me, love me. He would say, I love you. Love me." R. 57, l. 24 – R. 58, l. 8. She more specifically indicated that he touched her "near my chest and breasts." R. 60, ll. 1 – 6. She also described an incident when she was twelve or thirteen years old where her father was eating a chocolate bar "and he put it in his mouth and it was melted and he made me open my mouth and he told me that he wanted me to try it and he came at me like he was going to make out with me with the chocolate bar in his mouth to taste it. And I pushed him away and I went under the covers but that was the moment that stuck with me as wrong." R. 57, l. 19; R. 55, l. 21 – R. 56, l. 12. Minor 2 also testified "[B]esides my face, he's kissed my stomach before, he's kissed my neck before, but other than that, I don't think he's kissed me anywhere else." R. 61, ll. 6 – 8.

During the case, testimony was brought out about two interviews that Detective Collins had with Mr. Walker. In the first interview, Mr. Walker was not under arrest and Mr. Walker denied the allegations of improper touching and stated that he would rub Minor 1's stomach due to her stomach problems, that Minor 2 had a problem with sleepwalking, and that he took "some kind of sleeping pills that made him act weird." Detective Collins also testified Mr. Walker indicated that "he did not think that his daughters would lie." R. 91, l. 12 – R. 92, l. 15.

Ten days later, Mr. Walker arrived at the Lexington County Sheriff's Office, was placed under arrest by Detective Collins and read his Miranda rights. R. 93, l. 10 – R. 95, l. 19. There is some confusion in the transcript

as to whether Mr. Walker initially did or did not wish to talk to Detective Collins.[3] Detective Collins testified that Mr. Walker was very emotional during the interview and that Mr. Walker had "considered suicide" during the weekend prior to their interview. R. 97, ll. 6 – 9. According to Detective Collins, "pretty much the last thing he said, he told me he was sorry for what he'd done, that he had failed his family and he loved his family." R. 98, l. 25 – R. 99, l. 2. During cross-examination, Collins stated that "the interview just flowed, I listened." R. 106, ll. 2 – 4.

It was also brought out during cross-examination that Mr. Walker was not given a Miranda rights form to sign and that the Sheriff's Department had video cameras and tape recorders but that none of these were used for this interview. Detective Collins also admitted that after the notation he made giving Miranda warnings to Mr. Walker, he did not take any notes during the actual interview. R. 103, l. 8 – R. 106, l. 5.

Mr. Walker took the stand and testified. R. 113, ll. 16 – 24. He denied any inappropriate touching. R. 121, ll. 16 – 18. He described the expression "Love me" as a "term of endearment" that had been used with his two sons and his two daughters. "When they were toddlers, you'd say, Love me, and they would give you a big ol' bear hug." He also said the same thing to his wife. R. 121, l. 19 – R.

[3] All the testimony in the trial indicates that Mr. Walker wished to talk with Detective Collins. However, on R. 95, ll. 22 – 23, the transcript reads "He indicated that he did understand his rights and that he didn't wish to talk to me about the incident." This contradicts Detective Collins' testimony on R. 95, ll. 17 – 19 and his notes on R. 161: "Again went over his rights and confirmed that he did want to talk and knew his rights – he said he did." On R. 96, l. 17, Detective Collins indicates that Walker wanted to talk with him. Mr. Walker had also called Detective Collins prior to the interview and indicated that he wanted to talk with him. R. 96, l. 22 – R. 97, l. 2.

122, l. 9.

Walker testified that he and his wife had "decided to separate and that he was looking for a place in Macon, Georgia." R. 125, ll. 22 – 23. Walker denied saying that he had failed his family. R. 126, ll. 20 – 22. Walker also testified that no one in the family had ever told him that he had "done something outrageous or totally inappropriate while (he was) on Ambien." R. 131, ll. 2 – 5.

Mr. Walker described the second interview very differently than Detective Collins. R. 128, l. 13 – R. 129, l. 17. He indicated that "there was a lot of speculative questioning. Well, if you were on this medication, do you think it could be possible you could have done this - - a lot of who fors and whys." Id. Contrary to Detective Collins testimony, Walker stated that it was a dialogue and not a monologue and that Detective Collins "was leading the conversation." Id.

The jury deliberated for a little more than three hours before returning a verdict of guilty on both indictments. R. 152, ll. 16 – 17; R. 153, ll. 23 – 24.

There is certainly direct evidence as to the fact that Mr. Walker did touch his daughters on or near their "private areas." There is also testimony that this touching made his daughters uncomfortable. However, the only issue before the trial judge was whether that through these acts, Mr. Walker intended to gratify the sexual desires of himself or his daughters. Mr. Walker denied this allegation and so the only issue is whether there was "substantial circumstantial evidence" that Mr. Walker's intent was to arouse or gratify his own sexual desires or those of his daughters.

The facts in this case are significantly different than the facts in State v.

Whisonant. Both cases involve a directed verdict motion where the only issue was whether the appellant had acted with the intent to arouse or gratify his sexual desires or those of the victim(s). In Whisonant, the defendant was the father of the victim's best friend and had no reason to be touching the victim. In our case, the victims were the daughters of Mr. Walker and at least some of his behavior was merely playful or affectionate. R. 19, l. 19 – R. 20, l. 3; R. 120, l. 19 – R. 121, l. 15. In Whisonant, the victim reported the allegations to her father and her step-mother the next morning. In this case, the reporting was delayed for approximately two years. R. 46, l. 23 – R. 47, l. 11. In Whisonant, the defendant touched underneath the victim's clothing and also unbuttoned the victim's shorts. In this case, there is testimony of Mr. Walker touching underneath the girls' clothing but there is no testimony of his attempting to undo any clothing. R. 21, ll. 14 – 19; R. 58, ll. 1 – 4. In Whisonant, the defendant told the victim to "open up, but she kept her legs closed" and he also verbally and physically threatened to kill the victim "if she told anyone." In our case, Mr. Walker does say to his daughters "Love me"[4] but he never threatened them in any way. R. 121, l. 19 – R. 122, l. 9.

In our case, the proof of Mr. Walker's intent merely raises a suspicion that he acted with the intent to gratify his sexual desires or those of his daughters. There was evidence of inappropriate touching and there was also testimony presented that Mr. Walker was insensitive to his daughters' being uncomfortable with his touching. However, there does not appear to be "substantial circumstantial evidence" that Mr. Walker acted with the intent to arouse or gratify

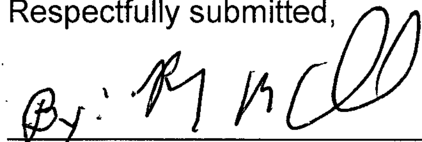
[4] This is discussed fully above.

his sexual desires or those of his daughters.

CONCLUSION

For all the reasons stated, the evidence fails on the element of intent, and the appellant was entitled to a directed verdict. The Appellant respectfully requests that this case be reversed and remanded for entry of a verdict of acquittal.

Respectfully submitted,



May 2, 2014

Daniel L. Blake
Attorney at Law

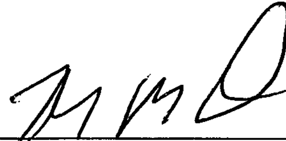
Robert M. Dudek
Chief Appellant Defender
Co-Counsel for Appellant

ATTORNEYS FOR APPELLANT

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 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."

May 2, 2014



Robert M. Dudek
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia SC 29211-1589
(803) 734-1343

RECEIVED
MAY 02 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 02 2014
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Case Nos. 2012-GS-32-000397, 398

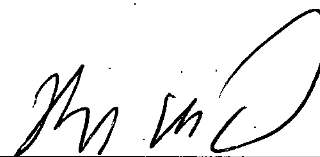
The State .... Respondent

v.

James Walker....... .... Appellant

CERTIFICATE OF SERVICE

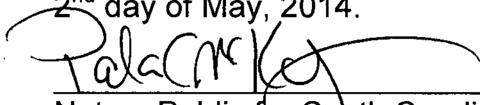
I do hereby certify that I have served the **Final Brief of Appellant** on Tracy A. Meyers, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2014.



Robert M. Dudek, Esquire
Chief Appellate Defender

ATTORNEY FOR APPELLANT

Sworn to before me this
2nd day of May, 2014.



Notary Public for South Carolina
My Commission expires: July 24, 2022