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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

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**RECEIVED**

MAY 07 2014

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

EVERETTE M. JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-002513

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INITIAL BRIEF OF APPELLANT

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WANDA H. CARTER  
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TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE .....4

ARGUMENT .....5

The trial judge erred in failing to direct a verdict of acquittal on the offense of shoplifting charged against appellant because the identity of the perpetrator, i.e., the main issue at trial, was based on an unreliable and uncorroborated cross-racial identification submitted by the sole eyewitness in the case, which meant that no sufficient proof of guilt existed.

CONCLUSION ..... 8

TABLE OF AUTHORITIES

**Cases**

McFadden v. Harrison, F Supp. 2d (WL 32334392 D.S.C. 2002) ..... 8

State v. Nelson 331 S.C. 501 S.E.2d 716 (1998) ..... 6

State v. Stroman, 281 S.C. 508, 316 S.E.2d 345..... 6

State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991)..... 7

**Constitutional Provisions**

U.S. Const amend. XIV.....8

S.C. Const. art. I, § 3..... 8

### STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to direct a verdict of acquittal on the offense of shoplifting charged against appellant because the identity of the perpetrator, i.e., the main issue at trial, was based on an unreliable and uncorroborated cross-racial identification submitted by the sole eyewitness in the case, which meant that no sufficient proof of guilt existed.

## STATEMENT OF THE CASE

Appellant Everette M. Jenkins was convicted of shoplifting (3<sup>rd</sup>/subsequent offense) per jury trial held during the November 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Appellant was sentenced to imprisonment for a period of eight years. Timothy Sullivan represented appellant at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state.

Appellant appealed his conviction and sentence. This brief follows.

## ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the offense of shoplifting charged against appellant because the identity of the perpetrator, i.e. the main issue at trial, was an unreliable and uncorroborated cross-racial identification submitted by the sole eyewitness in the case, which meant that no sufficient proof of guilt existed.

The state's case was comprised of the testimony of three witnesses: the sole eyewitness and two arresting police officers. At trial, Serbando Garcia testified that he was working as an assistant manager at an Advanced Auto Parts Store located on West Blue Ridge Road in Greenville County on the afternoon of March 17, 2013, when he encountered a male customer browsing inside the store. Garcia stated that he watched the male customer pick up objects and then put them down and noticed that he was inching closer and closer to the store's exit doors. Finally, the male departed and began walking away from the store. Garcia looked out and saw this male carrying a tool box as he proceeded down the road. Garcia asked the other sales associates if any among them had sold a toolbox to a customer on that day and learned that none had done so. Then, Garcia quickly checked the inventory computer list, which showed that no recent toolbox sales had been entered on that date. Immediately thereafter, Garcia hopped into his vehicle, followed this male, and subsequently reported the theft to police. Tr. 30, l. 12 – p. 60, l. 11.

Shortly after 4:00 pm on that same date, Officers John White and Jonathan Horne arrested appellant on White Horse Road near West Blue Ridge Road in response to Garcia's report. Garcia was present during the arrest and identified the male apprehended by police as the one who lifted the toolbox set from the store where he was employed. Tr.65, l. 15 – p. 72, l. 17; Tr. 73, l. 22 – p. 80, l. 8. The male was subsequently identified as appellant.

Note that Officer Horne learned that the store in question had a video surveillance camera installed, but that apparently the camera did not tape the activities of the store's customers, particularly appellant's movements on the afternoon the events at issue occurred. Tr. 79, l.23 – p. 80, l. 3. This meant that the state's case hinged primarily on Garcia's unreliable and uncorroborated cross-racial identification of appellant as the shoplifter. Therefore, there was insufficient proof of appellant's guilt on the shoplifting charge. As a result, defense counsel moved for a directed verdict at the close of the state's case due to the sufficiency of the evidence presented at trial and because the best evidence, i.e., the surveillance camera videotape, which would have been the most reliable evidence, was not available in the case. Tr. 81, lines 16-24. The Court denied the motion. Tr. 81, l. 25.

Since the identity of the perpetrator was central to the case, the questionable cross-racial identification pointing to appellant as the shoplifter made by Garcia, which was unreliable and uncorroborated, constituted reasonable doubt regarding the issue of whether appellant committed the crime of shoplifting charged against him. First, note that corroborating evidence is defined as evidence supplementary to what has already been given and thus tends to strengthen or confirm it. State v. Nelson 331 S.C. 501 S.E.2d 716 (1998). State v. Stroman, 281 S.C. 508, 316 S.E.2d 345 (1984). In the case at bar, corroborating evidence on the identification issue was needed because the cross-racial identification submitted by Garcia, who is probably of Latin descent, of appellant, who is African American, as the perpetrator standing alone could not qualify as proof of appellant's guilt beyond a reasonable doubt in the case.

In State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), the Court acknowledged that the error rate of cross-racial identifications is higher than the error rate of same race

identifications, and ruled that this factor should be considered in addition to factors such as stress, fear, and fatigue in assessing the reliability of identification testimony. The Whaley Court reversed and held that the trial judge erred in not allowing an expert on the subject of the reliability of eyewitness testimony to testify regarding the subject of the unreliability of cross-racial identifications. Similarly, in Whaley, the state's eyewitnesses' identification testimony at trial was unreliable and uncorroborated. Specifically, in Whaley, a white female was accosted by a black male, whom she only viewed for a few seconds, whose lower face was covered by a black cloth; and her white boyfriend, who arrived on the scene as this black male fled, only viewed the black male's half-covered face for a few seconds also. Both of these witnesses stated out-of-court and in-court that the black man that had been arrested (defendant Whaley) was the perpetrator. The Whaley Court expounded on this issue as follows:

...An expert's testimony [on the unreliability of cross-racial eyewitness identification testimony] is admissible where...the main issue is the identity of the perpetrator, [and] the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability...We note that other factors favoring admission of [such expert testimony] in this case are [as follows]: the fact that the assailant's features were partially obscured during the entire incident; the cross-racial nature of the identification; and the short length of time each witness was exposed to the assailant...[thus] we hold that it was an abuse of discretion to exclude [such expert] testimony concerning eyewitness reliability because the main issue in this case was the identity of the assailant, the only evidence establishing Whaley as the assailant was the testimony of the two eyewitnesses, and other factors existed which could have affected the identification.

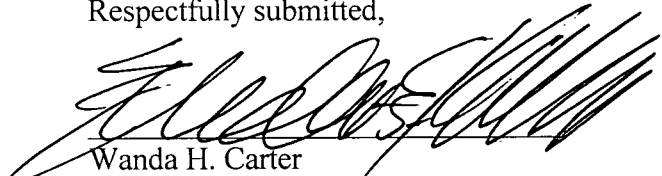
Compare McFadden v. Harrison, F Supp. 2d (WL 32334392 D.S.C. 2002), where the court held that there was no need for expert testimony regarding cross-racial identification testimony where corroborative testimony/evidence existed.

Therefore, in the case at bar, the trial judge erred in failing to direct a verdict of acquittal on the shoplifting charge lodged against appellant because the eyewitness' cross-racial identification testimony was unreliable and uncorroborated, which meant that there was insufficient evidence of proof beyond a reasonable doubt that appellant was guilty of shoplifting as charged in violation of the Fourteenth Amendment to the United States Constitution and Article 1, section 3 of the South Carolina State Constitution.

#### CONCLUSION

Based on the foregoing argument, appellant requests that his conviction and sentence be reversed and a directed verdict of acquittal entered.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2014.

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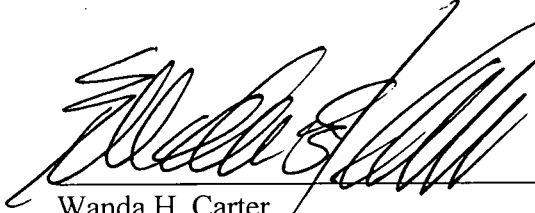
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

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

- (1) True-billed indictment(s);
- (2) Tr. 25-81; and Tr. 84-110

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

May 7, 2014



Wanda H. Carter  
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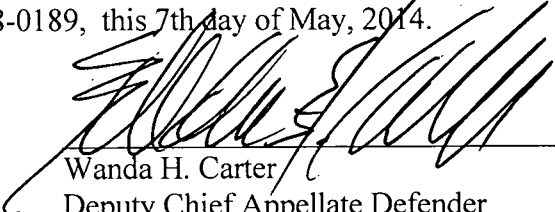
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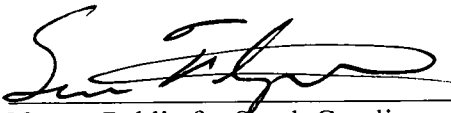
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon , Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Everette M. Jenkins, #343801, at Wateree River Correctional Institution PO Box 189, Rembert, SC 29128-0189, this 7th day of May, 2014.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of May, 2014.

  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .