THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Circuit Court

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-GS-38-01561 - 01563
Case No. 2013-GS-38-00287
Appellate Case No. 2013-000784

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

v.

Richard Lanard Sprinkle,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from a verdict finding Richard Lanard Sprinkle guilty of one count of burglary, two counts of armed robbery, and one count of assault and battery in the first degree. (R. pp. 331-333.) Sprinkle was sentenced to 35 years in prison for burglary, 30 years for the two counts of armed robbery, and 10 years for assault and battery in the first degree. (R. p. 330; pp. 346-349.)

Sprinkle was arrested on June 29, 2011, and indicted on October 1, 2012, for two counts of armed robbery, two counts of attempted murder, and burglary in the first degree. (R. p. 5; pp. 350-360.) On January 30, 2013, Sprinkle was indicted for first degree burglary. (R. p. 359.)

The case was tried before a jury in Orangeburg County on April 9 and 10, 2013, nearly two years after Sprinkle was arrested. The jury found Sprinkle guilty of first degree burglary, two counts of armed robbery, and one count of first degree assault and battery. (R. pp. 331-333.) The jury found Sprinkle not guilty as to attempted murder and not guilty as to assault and battery of one of the victims.

This appeal follows.

FACTS

This case involves a crime that occurred in a gambling house in Orangeburg on the early morning hours of June 26, 2011. The victims were James Wright and Robert Rumph. Wright and Rumph lived together. (R. p. 106, lines 20-24.) Rumph makes his money playing cards and gambling. (R. p. 153, lines 19-20.) On the night of the crime,

there had been a card game at the house. (R. pp. 154-155.) Wright, who is 74 years old, drank a "half of a half a pint" of liquor.[1] (R. p. 115, lines 20-21; p. 130, lines 5-18.)

According to Wright, he and Rumph were sleeping when there was a knock at the door. The person asked if "Uncle Rocky," meaning Rumph, was home. (R. p. 107, lines 11-12; p. 117; p. 119, lines 12-18.) The person said he wanted to use the phone. (R. p. 107, lines 11-12). Wright looked out the window to see who was there. Wright said he could see the faces of the men from the city streetlight. (R. p. 130, lines 22-24.) He testified that he went to the back bedroom to tell Rumph that someone was at the door asking for him. Rumph said to let them in. (R. p. 119, lines 13-14.) Wright opened the door and the men came inside. It was dark inside and Wright did not turn on the lights. (R. p. 16, lines 16-19; p. 22, lines 2-4; p. 130, lines 19-22.) Once inside, one of the men immediately hit Wright on the head with a pistol and demanded money. (R. p. 109, line 25 – p. 110, line 8; p. 119, lines 18-24.)

The other man went to Rumph's room. Rumph testified that a "black guy with long dreads on his hair" came into his room and demanded money. (R. p. 137; p. 143, line 7.) Rumph testified that his bedroom light and TV were on. (R. p. 148, lines 15-17.) When Rumph did not immediately give the man money, the man cut Rumph with a knife. (R. p. 138.)

Rumph testified that Wright and the other man eventually came into his bedroom. Rumph recognized the other man as Sean Echols, Vivian's son. Vivian was a woman whom Rumph "socialized" with. (R. p. 139; p. 145.) Vivian knew that Rumph kept a lot of money in the house, and Rumph had loaned money to Echols in the past. (R. p. 139;

[1] In the pre-trial hearing, Wright testified that he draft "about a half a pint." (R. p. 16, lines 4-7.)

pp. 145-146.) Vivian had called the house twice that evening. (R. p. 151, lines 17-22.) The second time she called, she asked if she could come over. Rumph said no, that he was in bed. (R. p. 155, lines 19-20.) Rumph testified that a little over $1000 was stolen. (R. p. 153, lines 11-12.) Rumph also testified that his car, a pair of pants, and a hat were taken. (R. p. 140; p. 143.)

Shortly after the men left, the police arrived. Wright said that the man who hit him was "dark skinned" and had dreadlocks. (R. p. 128.) The police showed Wright three or four different photo lineups on three different days. (R. p. 113, line 24 - p. 114, line 1; p. 133, lines 1-7.) Wright was not able to identify anyone in the first lineup. (R. p. 133, line 14 – p. 133, line 7.) After Wright told the police that he thought the man's name was Ricky, the police created a photo lineup with a photo of Richard Sprinkle. (R. pp. 38-40.) Wright identified Sprinkle as one of the perpetrators. (R. p. 334.) Wright also identified Echols. (R. pp. 113-114; p. 335.)

Rumph, on the other hand, was not able to identify Sprinkle. (R. p. 180, lines 1-8.) He was only able to give a description, which was that the man was "shorter and had dreads and dark skin." *Id.* Rumph identified Echols, however. (R. p. 142; p. 336.)

Sprinkle was arrested on June 29, 2011, three days after the crime. In January 2013, Sprinkle met with the police and told them that he was present at the scene of the crime, but that when he saw Echols assaulting someone, he got scared and ran out of the house. (R. p. 187; p. 190; p. 193; p. 197.) He said that he was on drugs and that is why he went to the house. (R. p. 190, lines 21-23.) He never said that he had a weapon and he never said that he hit anyone. (R. p. 194, lines 1-4.) He also testified that Echols's mom, Vivian was there. (R. p. 197, lines 18-21.) He said that he was afraid of Echols.

(R. p. 192, lines 23-25.) Echols had been threatening him and he wanted to be moved from Orangeburg Detention Center. (R. p. 197, line 24 – p. 198, line 4.)

STANDARD OF REVIEW

"In criminal cases, appellate courts review errors of law only and are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Senter*, 396 S.C. 547, 551, 722 S.E.2d 233, 235 (Ct. App. 2011).

ARGUMENT

I. The trial court erred in denying the motion to suppress the identification of Richard Sprinkle.

The trial court erred in denying the motion to suppress the identification of Richard Sprinkle because the testimony presented by Wright was unreliable and the lineup was unduly suggestive because Sprinkle appears in prison garb.

"An in-court identification of an accused is inadmissible if a suggestive out-of-court procedure created a very substantial likelihood of irreparable misidentification." *State v. Cheeseboro*, 345 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001). "To determine the admissibility of an identification, the court must determine (1) whether the identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Id.* at 540, 552 S.E.2d at 308. In evaluating the likelihood of misidentification, courts consider the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

In the case at hand, the identification of Sprinkle was unreliable. Wright testified that he was immediately hit over the head when the men came into the house and that it was dark inside and he never turned the lights on. He further testified that he had been drinking that night.[2]

Further, the description Wright gave the police did not match a description of Sprinkle. Wright initially told the police that the person who assaulted him was a dark-skinned black man with shoulder length dreadlocks. But he later identified Sprinkle as the perpetrator. Wright admitted that Sprinkle "changed a little bit" since the night of the crime. (R. p. 14, lines 1-4.) He said, "He ain't quite as black in the face." *Id.* He also said his hair is shorter and his skin's a little cleaner that it was then. It was more darker." (R. p. 26, line 22 – p. 27, line 3.)

Additionally, Wright did not identify Sprinkle in a photo lineup until after Wright gave the police Sprinkle's name. Wright did not give the police Sprinkle's name during the initial interview. (R. p. 39, lines 12-15.) Wright was shown a total of four different lineups on three different days. (R. p. 24, line 17 – p. 25, line 2.) He said he was shown the first one the day after the crime, but was not able to identify anyone. *Id.* He was shown additional lineups the next day, and again, no identification. *Id.* It was not until after Wright told the police that someone named "Ricky" was involved that the police produced a lineup with Sprinkle's photo. (R. p. 39, line 24 – p. 40, line 7.) Wright said that the police handed him the lineup and said, "The suspect's on here, see if you can pick him." (R. p. 25, lines 17-19.) Wright circled the photo of Sprinkle

[2] The jury ended up not believing Wright's testimony that Sprinkle was the one who hit him. The jury found Sprinkle not guilty as to assault and battery of Wright. (R. pp. 331-333.)

even though it did not match the description he gave the police. If Wright knew who the perpetrator was, then there should not have been a need to create a lineup. The creation of a lineup that contained a photo of a suspect who matched the name giving to the police but not the description was unduly suggestive and created a very substantial likelihood of irreparable misidentification.

More importantly, Rumph never identified Sprinkle, even though he was in the best position to do so. Rumph described the person who came into his bedroom as "a black guy with long dreads on his hair." (R. p. 143, lines 3-7.) Rumph said that the TV and light were on his bedroom. Rumph testified that eventually the other perpetrator, whom both Wright and Rumph identified as Sean Echols, came into the room. (R. p. 157.) Rumph had a much better opportunity to observe the men than Wright did. His room was lit, he had not been immediately hit over the head, and there was no testimony presented that he had been drinking that night. Wright testified that the robbery lasted approximately 25 minutes, which gave Rumph plenty of time to view the perpetrators. (R. p. 23, lines 16-21.) Rumph never identified Sprinkle in any of the lineups he was shown.

Finally, the lineup itself is unduly suggestive because Sprinkle appears in prison garb. (R. p. 334.) The other men are wearing t-shirts and tank tops. Sprinkle is the only one who appears in a gray, scrub-like shirt that is worn in prison.

Given these circumstances, there is a substantial likelihood that a misidentification has occurred. The in-court identification made by Wright and the photo lineup should have been excluded.

II. The trial court erred in limiting the cross-examination of Sean Echols, who testified on behalf of the State.

The trial court erred in limiting defense counsel's cross-examination of Sean Echols, who was one of the perpetrators and a key witness for the State. Echols was the only witness who testified that Sprinkle helped plan the crime. Without Echols's testimony, the jury could not have convicted Sprinkle of burglary, and may not have convicted him of armed robbery and assault and battery.

At trial, defense counsel sought to cross-examine Echols regarding (1) several prior convictions, (2) Echols's sentence for the conduct in this case, (3) a plea deal that Echols was offered, and (4) pending charges related to a federal investigation of a shooting of a corrections officer. The State moved to exclude cross-examination on these subjects. (R. pp. 54-57; pp. 215-216; pp. 234-241.) Although the trial court allowed the defense to cross-examine Echols about his prior convictions and the maximum sentence he faced the conduct in this case, the trial court refused to allow the defense to cross-examine Echols regarding the federal charges and any plea deal offered by the State. (R. pp. 87-88; pp. 240-42.)

A. The federal charges

Prior to trial, the State made a motion to limit the cross-examination of Echols regarding federal charges pending against him. (R. pp. 54-57). The defense opposed the motion, arguing that cross-examination should be permitted to impeach the witness. *Id.* The trial court granted the State's motion. (R. pp. 86-89). The trial court ruled that the examination was prohibited because it violated Echols's Fifth Amendment right to refuse to offer incriminating testimony. *Id.* The trial court relied on *State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997), for the proposition that the defense should not be allowed to call a witness whom it knows will invoke the Fifth Amendment in front of the jury, and

ruled that the attempted murder is not a crime that is probative of truthfulness, and therefore cross-examination was not permitted.[3] *Id.*

At trial, the State called Echols to testify. (R. p. 203, line 17.) At the beginning of the cross-examination, the jury was excused, the State renewed its objection, and the Court sustained the State's objection. (R. pp. 215-17.) This was error.

The Sixth Amendment rights to notice, confrontation, and compulsory process require that a defendant be allowed to answer charges "through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994).[4] A criminal defendant has the right under the Confrontation Clause to cross-examine a witness against him with regard to bias. *State v. Mizell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). A defendant's rights under the Confrontation Clause are violated where the he is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors [] could appropriately draw inferences relating to the reliability of the witness.'" *Id.* at 331, 563 S.E.2d at 317 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). "The trial judge retains discretion to impose reasonable limits on the scope of cross-examination." *Mizell*, 349 S.C. at 331, 563 S.E.2d at 317. "Before a trial judge may limit a criminal defendant's

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[3] Although not specifically mentioned by the court, the basis for this part of its ruling appears to be Rule 609, SCRE.

[4] These Sixth Amendment protections are extended to state defendants through the Due Process Clause of the Fourteenth Amendment. *E.g., Duncan v. State of La.*, 391 U.S. 145, 148 (1968).

right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Id.*

The trial court's reliance on the Fifth Amendment and *Hughes* was error, and violated Sprinkle's rights under the Confrontation Clause. Echols should not have been allowed to invoke his Fifth Amendment right not to testify when he was simply asked whether he had "been charged in a federal case involving the shooting of a corrections officer." (R. p. 215, lines 18-20.) "It is . . . black-letter law that a witness cannot assert a Fifth Amendment privilege not to testify if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 273 (Blackmun, J. concurring). Here, the question posed sought merely a factual answer regarding whether the witness had been charged with a crime. The question was not intended to elicit incriminating testimony. Accordingly, defense counsel was entitled to question Echols regarding the existence of these charges.

The trial court's reliance on *Hughes* and Rule 608(b)(1), SCRE, is misplaced. In *Hughes*, the South Carolina Supreme Court held that a defense counsel may not put a defendant "on the stand *solely* to allow the jury to draw adverse inferences from his refusal to testify." 328 S.C. at 152-53, 493 S.E.2d at 824 (emphasis in original). In this case, Echols was not being put on the stand solely to allow the jury to draw an inference regarding his refusal to testify. The purpose of the examination was to demonstrate that Echols had additional charges pending against him, which may influence his testimony against Sprinkle. Cross-examination to elicit such bias is permissible under the Sixth Amendment and state law.

Similarly, Rule 609, SCRE, does not apply. Rule 609 applies to the use of past convictions to impeach a witness. But the testimony in question did not relate to Echols's prior convictions. It concerned pending charges.

The purpose of the cross-examination was to demonstrate the potential for bias by Echols, a purpose which is allowable under Rule 608(c), SCRE, and *Mizell*. The mere fact that a witness has "neither agreed to a plea bargain nor pled guilty" does not allow a court to exclude such testimony. *Mizell*, 349 S.C. at 332, 563 S.E.2d at 318.

Accordingly, the trial judge erred in prohibiting cross-examination on the federal charges.

B. Plea discussions with the State

The trial court also erred in prohibiting the defense from cross examining Echols about his plea discussions with the State. Defense counsel sought to question Echols about whether "he [was] given an offer of a cap of 20 years. And obviously that goes along with the same issue of, he could be facing life, he was offered 20 and he's looking for ten [years]." (R. p. 237, lines 17-20.) Although the basis for the trial court's ruling is not entirely clear on the record, it appears to be based on Rule 410, SCRE.[5]

Rule 410, SCRE, reads:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible *against the defendant* who made the plea or was a participant in the plea discussions:

[5] The trial court ruled that "[w]ith regards to Mr. Echols asking, you know, for ten years or asking for a cap of 20 years, whether or not that was given or not, all of that is part of plea negotiations and we're not going to get into that." (R. p. 240 line 24 – p. 241 line 2). This was in response to the State's argument that their objection to the proffered cross-examination was that that no plea had been reached as a result of Echols' discussions with the State. The State referred the court to Rule 410, SCRE, which is "specifically discussing plea negotiations." (R. p. 239, line 5.)

> . . . (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(emphasis added). The language in the rule suggests that the rule applies only in a civil or criminal proceeding "against the defendant."

Although state courts have not addressed what it means for the rule to apply "against the defendant," at least one federal court has. In *United States v. Mathis*, the Fourth Circuit stated that it "see[s] no error in the use of a statement of a witness made when he pleaded guilty to impeach his testimony in this trial [of another individual]."[6] 550 F.2d 180, 182 (4th Cir. 1976). The Court went on to hold that "Federal Rule of Evidence 410 . . . only prohibit[s] statements made in conjunction with a guilty plea from being used . . . against the person who made the plea." *Id.* Thus, there is no protection under Rule 410 where the statements sought to be introduced are only to be "used collaterally for the purposes of impeachment." *Id. See also* Wright, Miller, et al., 23 Fed. Prac. & Proc. Evid. § 5349 (1st ed.) ("Presumably the use of the statement [from plea negotiations] to impeach the defendant when he testifies in some case in which he is not a party would be permissible. Moreover, in some cases the invocation of the rule by the prosecutor to prevent the defendant from using a plea-related statement for impeachment purposes might run afoul of the Confrontation Clause.").

Here, the plea negotiations between Echols and the State should have been revealed to the jury as evidence of Echols's bias. Echols's testimony was not being

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[6] The Fourth Circuit noted that in addition to the fact that the statement was used in the trial of a third party, the rule did not apply because the guilty plea was not withdrawn by the witness. *Mathis*, 550 F.2d at 182.

introduced into evidence at his own trial, and therefore Rule 410, SCRE, did not bar cross-examination regarding this matter.

In *Mizell*, the witness "had neither agreed to a plea bargain nor pled guilty." 349 S.C. at 332, 563 S.E.2d at 318. Although *Mizell* specifically dealt with whether the maximum sentence the witness faced was admissible upon cross examination, the court's holding provides guidance in the instant case. As the supreme court stated in *Mizell*, "*any fact* may be elicited which tends to show interest, bias, or partiality of the witness." 349 S.C. at 331, 563 S.E.2d at 317 (emphasis added). The supreme court also held that "[t]he fact that a witness has yet to reach a plea bargain or been found guilty should not prevent the admission of [evidence indicative of bias]. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation of leniency." *Id.*

Echols' testimony regarding his plea negotiations is the type of evidence of bias envisioned in *Mizell*. Echols had been offered plea, but was hoping for even greater leniency in exchange for his testimony and therefore had not accepted the plea. (R. p. 237.) The failure to allow defense counsel to cross-examine Echols about this plea offer and his reasons for not accepting it violated Sprinkle's Sixth Amendment rights.[7]

Although a violation of the Confrontation Clause is not *per se* reversible error, in order to avoid reversal "the error must be harmless beyond a reasonable doubt." *Graham*, 314 S.C. at 386, 444 S.E.2d at 527 (1994) (quoting *Van Arsdall*, 475 U.S. 673, 680 (1986)). The determination of whether an error is harmless beyond a reasonable

[7] The prosecution also opened the door to this testimony in its direct examination of Echols, where the State elicited testimony that the defendant was testifying "out of the goodness of his heart" and had not been offered anything. (R. p. 212, lines 18-22.)

doubt "depends upon a host of factors" including "the importance of the witness' testimony[,] . . . whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution's case." *Graham*, 314 S.C. at 386, 444 S.E.2d at 527 (quoting *Van Arsdall*, 475 U.S. at 684).

Here, Echols's testimony was an essential part of the State's case. Without his testimony, the State had no evidence that Sprinkle helped plan the crime, and therefore no evidence of intent, particularly with respect to burglary. Additionally, Echols was the only person to testify that Sprinkle assaulted Rumph, which was directly contradicted by Rumph himself, who was never able to identify Sprinkle.

Given the importance of Echols's testimony and the limitations on Sprinkle's ability to confront him through cross examination, the trial court's ruling should be reversed.

III. The trial court erred in denying Sprinkle's motion for directed verdict and motion for new trial.

The trial court erred in denying the motion for directed verdict and a motion for new trial because the evidence presented did not support the convictions in this case.

"When reviewing the denial of a motion for directed verdict, an appellate court must review the evidence, and all inferences therefrom, in the light most favorable to the State." *State v. Senter*, 396 S.C. 547, 551, 722 S.E.2d 233, 235-36 (Ct. App. 2011). "If there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the appellate court must find the case was properly submitted to the jury." *Id.* at 551, 722 S.E.2d at

236. "The decision whether to grant a new trial rests with the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *Id.*

A. First-degree burglary

"A person is guilty of first-degree burglary if he 'enters a dwelling without consent and with intent to commit a crime in the dwelling' and either enters or remains in the dwelling during the nighttime." *State v. Gilliland*, 402 S.C. 389, 397, 741 S.E.2d 521, 525 (Ct. App. 2012) (quoting S.C. Code Ann. § 16-11-311(A) (2003)). "Although the intent to commit a crime must exist at the time the accused enters the dwelling, the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling." *Id.*

Here, the only evidence presented to support a conviction of burglary came from Sean Echols, whom defense counsel was not able to fully cross examine as explained above. Echols testified that Sprinkle, along with two other people, helped him plan the crime. (R. pp. 206-07; p. 212.) The two other people were Jasper Clark and Collins (Carlos) Shuler, people whom Echols had "known all of his life." (Rr. pp. 227-30; pp. 247-48.) Echols said that Clark, who was known as Little J, helped plan the robbery, drove them to the house, and shared in the proceeds. (R. p. 228.) Echols had only met Sprinkle "a couple, a few times prior." (R. p. 205, lines 12-15; p. 246, lines 5-7.)

Echols knew that there was a lot of money in the house. His mother "socialized" with Rumph and Echols had borrowed money from Rumph before. (R. p. 139; p. 145.) There was no evidence presented that Sprinkle knew any of this.

Echols testified that he (Echols) was the one who knocked on the door and asked to use the phone. (R. p. 208, lines 8-12.) Echols testified that he "robbed Mr. Wright while Richard Sprinkle went to Mr. Robert Rumph's room."[8] (R. p. 209, lines 20-21.) But Rumph never identified Sprinkle.

Despite this testimony, Echols was not indicted for burglary. Only Sprinkle was indicted. Echols understood that burglary carries a potential sentence of life imprisonment. (R. p. 234, lines 6-12; p. 243, lines 14-19.)

The jury was given a charge on mere presence. "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010). "However, presence at the scene of a crime *by pre-arrangement* to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." *Id.* (emphasis added).

Without Echols's testimony, there was no evidence that Sprinkle was at the scene by pre-arrangement to aid, encourage or abet, in the perpetration of the crime. The defense was not able to fully explore Echols's credibility because of the limitation on the cross examination as explained above.

Because the evidence presented in this case does not reasonably tend to prove the guilt of Sprinkle with respect to the charge of first degree burglary, the trial court should have granted the motion for a directed verdict or the motion for a new trial.

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[8] Echols previously gave a statement to the police saying that three men went into the house that night, and that one of the men did not help plan the crime; he just stood there. (R. p. 226.) Echols later said that he lied to the investigator because he did not trust him. *Id.*

B. Armed robbery

"Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon." *State v. Moore*, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (2007) (citing S.C. Code Ann. § 16-11-330 (2003)). "Included in armed robbery is the lesser included offense of robbery." *Moore*, 374 S.C. at 476, 649 S.E.2d at 88. "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence of by putting such person in fear." *Id.* "The gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation." *Id.* at 477, 649 S.E.2d at 88. "The elements of robbery and armed robbery include asportation of the property." *Id.*

In this case, there was no evidence presented that Sprinkle took anything from anyone, or that he participated in taking anything. Wright's testimony identifying Sprinkle is unreliable as explained above. The jury found Sprinkle not guilty of assaulting Wright, which means the jury did not believe Wright's testimony that Sprinkle is the one who assaulted him. And Rumph was never able to identify Sprinkle.

Given that there was no evidence presented that Sprinkle took anything from anyone or that he participated in the crime, the trial court should have granted a directed verdict or the motion for a new trial.

C. Assault and Battery

The trial court erred in failing to direct a verdict or grant a new trial as to the charge of assault and battery of Rumph.

"A person commits the offense of assault and battery in the first degree if the person unlawfully: injures another person, and the act . . . (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft . . . ." S.C. Code Ann. § 16-3-600 (2011).

Here, despite being shown multiple lineups, Rumph never identified Sprinkle as the person who injured him. Nor did he identify Sprinkle in court. Rumph had the best opportunity to view the perpetrator because the light was on in his room and Rumph was not immediately hit over the head like Wright was. Further, Rumph was able to positively identify Echols, who came into the room after Rumph had been assaulted.

Further, Wright's testimony was that someone else other than Sprinkle assaulted Rumph. Wright testified that Sprinkle assaulted him (Wright) by hitting him over the head while the other perpetrator went into the room and confronted Rumph. Wright testified that when he went into Rumph's room, he saw that Rumph had been cut on his leg and foot, but he did not see it happen. (R. pp. 126-127.)

The only person who testified that Sprinkle harmed Rumph was Echols, who as explained above, the defense was not permitted to fully cross-examine. Given the limited cross examination of Echols and Rumph's inability to identify Sprinkle as the person who assaulted him, the trial court erred in denying the motion for directed verdict and the motion for new trial as to the assault and battery of Rumph.

IV. The trial court erred in failing to charge the lesser-included offense of assault and battery in the second degree.

A defendant is entitled to a jury charge on a lesser included offense where "there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Dennis*, 402 S.C. 627, 637-38, 742 S.E.2d 21, 27 (Ct.

App. 2013). "To warrant reversal, a trial court's refusal to give a requested jury instruction 'must be both erroneous and prejudicial to the defendant." *Id.* at 637, 742 S.E.2d at 27.

Assault and battery in the first degree occurs where a defendant injures another and the act involves nonconsensual touching of the other's private parts, occurred during the commission of a robbery, burglary, kidnapping, or theft, or an offer or attempt to injury someone was "accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(C)(1) (Supp. 2012). Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, assault and battery of a high and aggravated nature, and attempted murder. S.C. Code Ann. § 16-3-600(D)(3) (Supp. 2012).

The statute defines "great bodily injury" as injury "which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1) (Supp. 2012). The statute defines "moderate bodily injury" as "physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues of the body that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia." S.C. Code Ann. § 16-3-600(A)(2) (Supp. 2012).

In the case at hand, the trial court refused to charge assault and battery in the second degree as to Rumph because the court found that Rumph's injury was more than "moderate bodily injury." This was error. Rumph's injury did not rise to the level of

"great bodily injury." There was no evidence presented that Rumph suffered a substantial risk of death or permanent disfigurement. Rumph's injuries required stitches. He was taken to the hospital and released that same day. Similarly, there was no evidence that the assailant—and certainly not Sprinkle—attempted to cause death or great bodily injury. Instead, the evidence presented was that the person cut him to try to make him give over the money.

Because there was evidence by which it could be inferred that Sprinkle committed only assault and battery in the second degree, the court should have charged the lesser-included offense, and the failure to do so constitutes reversible error.

CONCLUSION

Appellant respectfully requests that the convictions and sentences be reversed and the case remanded for a new trial.

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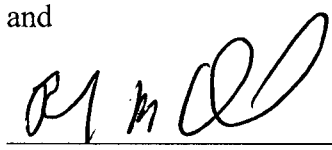

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Columbia, South Carolina
June 24, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Circuit Court

Edgar W. Dickson, Circuit Court Judge

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Case No. 2013-GS-38-00287
Appellate Case No. 2013-000784

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

v.

Richard Lanard Sprinkle,.....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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 24, 2014.

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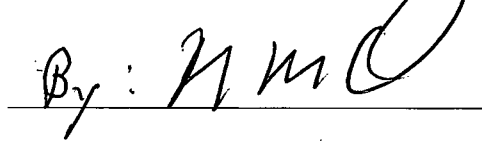
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Respondent State of South Carolina on June 24, 2014, addressed to the attorney of record, J. Benjamin Aplin, Assistant Attorney General, Office of the South Carolina Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

By: 

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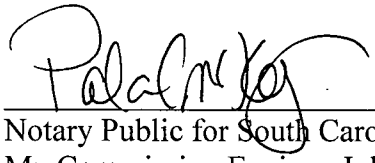

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