

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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FEB 19 2015

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Appeal from Anderson County

SC Court of Appeals

R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

DEVON S. THOMAS,

APPELLANT

APPELLATE CASE NO. 2014-001182  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

TIFFANY L. BUTLER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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The trial judge erred by allowing Lt. Wayne Mills to testify that, before arresting Appellant, he considered the fact that the statements of the witnesses were “the same story” alleging that Appellant shot Anquavious Smith, since the officer’s testimony improperly bolstered the credibility of the State’s witnesses, which prejudiced Appellant. .... 5

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial judge erred by allowing Lt. Wayne Mills to testify that, before arresting Appellant, he considered the fact that the statements of the witnesses were “the same story” alleging that Appellant shot Anquavious Smith, since the officer’s testimony improperly bolstered the credibility of the State’s witnesses, which prejudiced Appellant?

## STATEMENT OF THE CASE

On June 19, 2012, an Anderson County Grand Jury indicted Appellant on four counts of attempted murder. R. 477 – 484. On February 24, 2014, Appellant's case proceeded to a jury trial before the Honorable R. Lawton McIntosh and a jury. R. 1. Scott McElhannon represented Appellant. Rame Campbell and Austin McClain represented the State. R. 1.

After a three-day trial, Appellant was convicted of all counts. R. 439 – 41. Judge McIntosh sentenced Appellant to ten years imprisonment. R. 451.

Appellant appealed his convictions and sentence. This brief follows.

## ARGUMENT

The trial judge erred by allowing Lt. Wayne Mills to testify that, before arresting Appellant, he considered the fact that the statements of the witnesses were “the same story” alleging that Appellant shot Anquavious Smith, since the officer’s testimony improperly bolstered the credibility of the State’s witnesses, which prejudiced Appellant.

### **Relevant Facts**

The State’s case consisted of thirteen witnesses and very little forensic evidence. Appellant offered a defense of third-party guilt.

Anquavious Smith was shot in the leg on the night of March 24, 2012 at the Shrine Club in Anderson County. R. 215, line 13 – R. 227, line 22. She and nearly thirty other people were celebrating a friend’s sixteenth birthday. R. 215, lines 19 – 25. During the party, a fight started and people ran outside of the club. Smith claimed that Appellant was involved in the fight and was “being jumped on.” R. 223, lines 10 – 12. Smith stated that after the fight, she observed Appellant run outside. R. 223, lines 24 – 25. After finding her sister, Smith and her sister got into a truck with two other people. R. 225, lines 3 – 8.

Smith claimed that the man who fought Appellant during the party ran towards the truck. R. 225 lines 14 – 21. She claimed to also see Appellant coming towards the truck and pointing a gun at the truck. R. 226, line 16 – R. 227, line 2. She heard one shot and realized she had been shot in the leg. R. 227, lines 13 – 25. In her first statement to police, however, Smith stated that she did not know who shot her. R. 51, lines 6 – 18.

LaJames Glass also attended the birthday party. R. 57, lines 7 – 8. Glass arrived at the party with three other friends in a van. R. 57, lines 20 – 25. Glass also stated that Appellant was involved in the fight that started during the party. R. 61, lines 6 – 7. Glass

claimed that Appellant ran outside to the van that Glass and his friends rode in, and grabbed a gun. R. 63, lines 13 – 23. According to Glass, the gun was a “forty-five.” R. 64, lines 6 – 7. After grabbing the gun, Appellant allegedly ran across the parking lot “looking for the people who jumped on him.” R. 64, lines 20 – 22.

Glass claimed that Appellant started shooting the gun, but the clip fell out. Glass stated that he picked up the clip and handed it to Appellant. R. 65, lines 1 – 4. He claimed that when the gun went off, Appellant was aiming it at the guy who fought him at the party. R. 67, lines 8 – 15.

Terry Jackson, who ran outside the club after the fight, claimed that Appellant had a gun and was trying to shoot in the air. R. 155, lines 15 – 16. However, when no bullets came out, “somebody handed him something.” R. 155, lines 17 – 20. Jackson could not recognize who handed the “thing” to Appellant. R. 155, line 23 – R. 156, line 1. Jackson ran back inside the building before hearing gunshots. R. 156, lines 2 – 16. He admitted that he did not see Appellant shoot the gun. R. 156, lines 17 – 18.

Keyaija Smith, Coretta Woody, and Charles Lindey, who were also at the party and ran outside after the fight, all claimed they saw Appellant outside with a gun. However, each person admitted that they did not see Appellant pull the trigger. R. 118, lines 14 – 15; R. 145, lines 19 – 20; R. 195, lines 9 – 12.

Officers with the Anderson Sheriff’s Office responded to the scene. The police recovered a “spent .45 shell casing” and an “unspent .45 shell casing.” R. 305, lines 7 – 17. The gun, however, was never recovered. After interviewing witnesses who were at the party and who claimed Appellant was the shooter, Lieutenant Wayne Mills arrested Appellant. R. 264, lines 14 – 17.

Nalshia Martin and Charles Edwards both testified for the defense. R. 351, lines 10 – 11; R. 363, line 21. Neither witness named Appellant as the shooter. Edwards stated that Glass was the shooter. R. 366, lines 8 – 11.

### **Testimony of Lt. Wayne Mills**

Lt. Mills stated that after receiving the incident report from the shooting on March 24, 2012, he began his investigation by interviewing and re-interviewing witnesses who attended the party. R. 266, line 2 – R. 272, line 6. The solicitor asked Mills if, in his opinion,

“[W]ere each of the witnesses’ statements, were they the same . . . and [d]id they all have the same story?”

R. 312, lines 7 – 9.

Lt. Mills replied that the witnesses had “[t]he gist of the same story . . . [t]here were also some differences.” R. 312, lines 10 – 11.

Defense counsel objected to the solicitor’s question and officer’s response as improper bolstering of the State’s witnesses. R. 312, lines 12 – 16. Counsel explained that the jury had already heard the statements by way of testimony and cross-examination of the witnesses. R. 313, lines 2 – 6. Allowing the jury to hear testimony from Lt. Mills that the witnesses are telling the truth would be bolstering the State’s case. R. 313, lines 6 – 12.

The trial judge overruled counsel’s objection and ordered the solicitor to re-phrase the question. R. 314, lines 1 – 2. The solicitor then asked Lt. Mills if before Mills “took” warrants out on Appellant,

“[D]id [he] take into consideration the discrepancies in the written statements that the witnesses had given...”<sup>1</sup>

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<sup>1</sup> Defense counsel failed to object again when the solicitor re-phrased his question, which elicited improper bolstering testimony from the officer.

R. 315, lines 13 – 16.

Lt. Mills answered that he “took into account all statements that [he] had read . . . and all the information that [he] had at that time.” R. 315, lines 17 – 20.

### **Discussion**

The trial judge erred by allowing Lt. Wayne Mills to testify that, before arresting Appellant, he considered the fact that the statements the witnesses were “the same story” alleging that Appellant shot Anquavious Smith. Mills’ testimony improperly bolstered the credibility of the State’s witnesses, which prejudiced Appellant.

The assessment of a witness’s credibility is “within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Therefore, a witness “may not offer an opinion regarding the credibility” of other witnesses. State v. Perry, 410 S.C. 191, 208, 763 S.E.2d 603, 611 (Ct. App. 2014). Similarly, a witness “may not improperly bolster the testimony” of another witness. Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010). Improper bolstering occurs when a “witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth.” State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013).

Here, Lt. Mills’ testimony that he arrested Appellant after considering the witnesses’ statements, including the discrepancies in those statements, improperly bolstered the State’s case. While Mills was not qualified as an expert, the fact that he was the lead investigator in the case gave him heightened credibility in the eyes of the jurors. Since no forensic evidence was collected that tied Appellant to the shooting, the State’s case hinged on the credibility of the numerous witnesses who were at the party. Lt. Mills testified that he

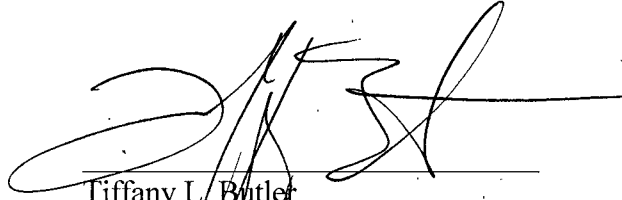
interviewed and re-interviewed several of the witnesses before deciding to arrest Appellant. Therefore, the only way to interpret the officer's testimony is that he believed the witnesses were truthful in their accounts of what happened.

Because the credibility of the witnesses was crucial in the State's case and Lt. Mills' testimony improperly bolstered that credibility, Appellant was unfairly prejudiced at trial.

CONCLUSION

For the reasons argued, Appellant Devon Thomas respectfully requests this court to reverse his convictions and sentence, and remand his case to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', written over a horizontal line.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of February, 2015.

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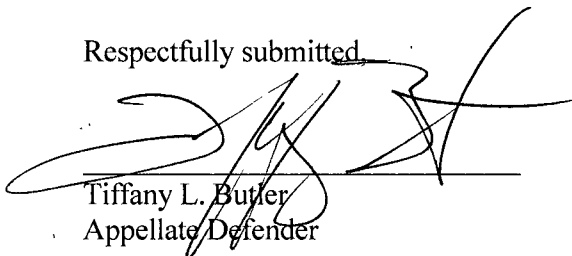
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Counsel for Devon S. Thomas states:

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 R. Lawton McIntosh, which was held on February 26, 2014, 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 Devon S. Thomas.

Respectfully submitted,



Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of February, 2015.

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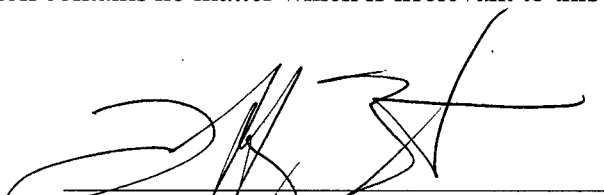
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript
- (3) Motion Hearing Transcript

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

February 19th, 2015



Tiffany L. Butler  
Appellate/Defender

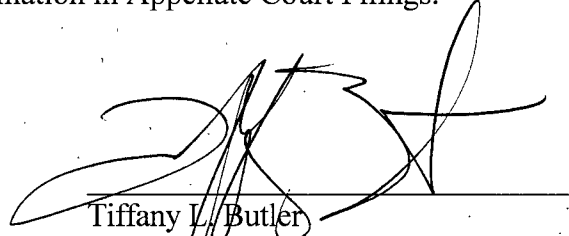
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

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 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."

February 19, 2015



Tiffany L. Butler  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

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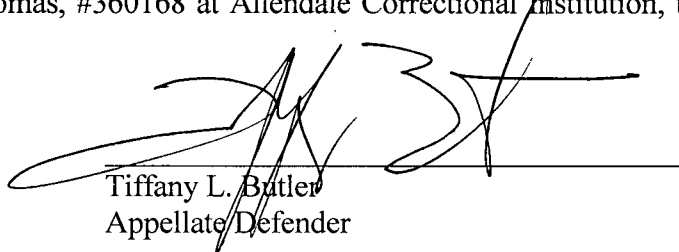
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CERTIFICATE OF SERVICE

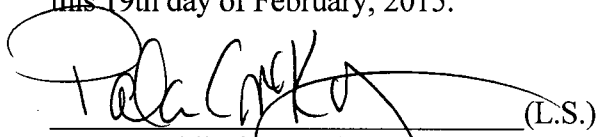
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Devon S. Thomas, #360168 at Allendale Correctional Institution, this 19th day of February, 2015.



Tiffany L. Butler  
Appellate/Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 19th day of February, 2015.



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