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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUANELL MARQUAN MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2014-002539

INITIAL BRIEF OF APPELLANT

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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 ....

CONCLUSION ....

TABLE OF AUTHORITIES

Cases

Boyd v. United States, 142 U.S. 450 (1892).. 14, 15

People v. Molineux, 6 Bedell 264, 61 N.E. 286 (N.Y. 1901)........................ 14

Plessy v. Ferguson, 163 U.S. 537, 552 (1896)...................................... 14

State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977)............................. 14

State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013)................................ 15

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).................................. 10, 14

State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996).............................. 10, 16

Rules of Evidence

Rule 403, SCRE.. 10, 13

Rule 404, SCRE.. 10, 11, 13

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing a witness to testify that appellant confronted him with a pistol fifteen minutes before a shooting that was completely unrelated to the confrontation?

STATEMENT OF THE CASE

On October 13, 2011, appellant Quanell Marquan McIlwain was indicted by a Lancaster County grand jury for murder and two weapons charges. R. ___. On November 10, 2014, appellant was tried before the Honorable Brian M. Gibbons and a jury. Tr. 1. Doug Barfield represented the State. Tr. 1. Brandon Steen and Justin Jones represented appellant. Tr. 1. The jury convicted appellant on all three counts. Tr. 646, ll. 2 – 24. Judge Gibbons sentenced appellant to concurrent terms of five years' imprisonment on the weapons charges and life imprisonment for murder. Tr. 653, l. 14 – 654, l. 3. This appeal follows.

ARGUMENT

The trial judge erred in allowing a witness to testify that appellant confronted him with a pistol fifteen minutes before a shooting that was completely unrelated to the confrontation.

The State never presented a motive for appellant to shoot the decedent Terrence Antonio "Tonio" Jones. In his closing argument, the solicitor said, "And I can't begin to explain to you why Quanell McIlwain shot Tonio Jones." Tr. 605, ll. 23 – 24. The jury recognized as much and sent out its first question: "Was there a relationship between SK [appellant's alleged nickname] and Antonio Jones ever established? Tr. 644, ll. 2 – 3. The State's only eyewitness to the shooting of Jones claimed appellant just opened fire on Jones, with no words or any other altercation. Tr. 433, l. 19 – 434, l. 3. The State's witnesses were related to each other, disposed of the gun, disposed of clothes, contradicted each other, but gave evidence that appellant was the shooter. In this case with no motive, the State was allowed to present evidence of an unrelated prior bad act that occurred fifteen minutes before Jones' death that tended to portray appellant as a violent person.

Factual Background

This shooting occurred at 4:00 AM at the Pardue Street apartments in Lancaster. Tr. 59, ll. 4 – 13. One of the police officers who first arrived on the scene recognized the decedent, Jones. Tr. 60, ll. 2 – 15. According to a witness, Jones had left an apartment "to go get some cigarettes." Tr. 66, ll. 17 – 18.

In another apartment, Dora Montgomery ("Montgomery") lived with her sister, Justine Gladden ("Gladden"). Tr. 192, ll. 19 – 22. They were having "a little kick back" at their apartment attended by approximately ten people the night of the shooting. Tr.

196, l. 24 – 198, l. 6. Everyone was "gettin drunk." Tr. 263, ll. 2 – 3. She did not know everyone at the "kick back." Tr. 198, ll. 1 – 2.

Montgomery saw Tanisha Nelson and Edrickis "Qua" Stevens ("Stevens") arguing shortly before the shooting. Tr. 204, l. 12 – 206, l. 6. Tanisha Nelson was running from Stevens and he was chasing her. Tr. 204, l. 12 – 206, l. 6. Montgomery got Tanisha Nelson's baby and brought the baby to her house. Tr. 204, l. 12 – 206, l. 6. Tanisha Nelson then got her baby and went back to her house. Tr. 206, ll. 10 – 22. Montgomery heard the shots "a couple of seconds" after Tanisha Nelson left with the baby. Tr. 206, l. 21 – 207, l. 3.

According to Gladden, an attendant at the party, Timothy Nelson, was also called "Qua" and "Que Black." Tr. 221, ll. 5 - 14. Montgomery said Que Black was sitting on the floor of her apartment playing on his phone when she heard the gunshots. Tr. 201, ll. 6 – 12. After the shooting (and before the police arrived), she saw Que Black with a silver handgun in his hand. Tr. 209, l. 2 – 210, l. 11. She told him "to get out." Tr. 209, l. 2 – 210, l. 11. Montgomery's sister then told her they needed to throw away a black shirt and a black hat they found in a closet. Tr. 211, ll. 2 – 22. She did not remember what appellant was wearing that night. Tr. 214, ll. 18 – 21.

Montgomery's sister, Gladden remembered events differently. Gladden testified that the party started at Keith Benson's apartment and some of those people moved over to her apartment. Tr. 224, l. 10 – 226, l. 22. Gladden testified that Montgomery never got Tanisha Nelson's baby. Tr. 232, l. 19 – 233, l. 15. Tr. 245, ll. 20 – 24. Keith Benson also testified that Tanisha Nelson never came in the apartment. Tr. 273, ll. 21 – 24.

Tanisha Nelson showed up wanting to use the phone. Tr. 247, ll. 8 – 15. She used Montgomery's cell phone. Tr. 247, ll. 8 – 15.

After she heard the gunshots, Gladden saw a man wearing a white shirt jump over the fence at the back of the apartments. Tr. 238, ll. 10 – 19. Timothy Nelson was also "right in front of the fence." Tr. 238, ll. 18 – 19. The man in the white shirt tossed a silver and black handgun to Timothy Nelson. Tr. 239, l. 2 – 240, l. 21. Timothy Nelson brought the gun into Gladden's house and she told him he had to leave. Tr. 240, l. 2 – 241.

The next morning when Gladden was cleaning up, she found a black shirt and a black hat in her kitchen closet. Tr. 241, l. 25 – 242, l. 9. She had earlier seen appellant wearing the black hat and black shirt. Tr. 242, ll. 10 – 18. Gladden also recalled seeing Keith Benson wearing a black shirt. Tr. 246, ll. 17 – 20. Montgomery took the clothes and disposed of them. Tr. 242, l. 21 – 244, l. 22.

Keith Benson testified Timothy Nelson was in the kitchen with him when he heard the gunshots. Tr. 263, l. 20 – 264, l. 13. Keith Benson said appellant left the Pardue apartments thirty minutes before the shooting. Tr. 264, ll. 13 – 23. Keith Benson was impeached with a prior statement that he had seen appellant with a "big ass gun," earlier that day, but explained that all of the males at the party were handling the gun. Tr. 272, l. 5 – 273, l. 6. Tr. 276, l. 18 – 277, l. 17. He explained that Pardue Street was a rough neighborhood and people "don't sit around late at night like that it's too much going on over there as it is." Tr. 276, l.18 – 277, l. 7. In addition to appellant, Timothy Nelson held the gun, Keith Benson held the gun, and the gun was being passed around by "the dudes cause we all hung together." Tr. 277, ll. 4 – 17.

Keith Benson said he saw appellant with a .9 millimeter gun in his car earlier in the evening. Tr. 268, l. 2 – 269, l. 4. In the statement used to impeach Keith Benson, he claimed the gun he saw being passed around was a "silver chrome brown handle .357 revolver" and was a "big ass gun." Tr. 273, ll. 2 – 6. This description conflicted with Dora Montgomery's description of the handgun she saw in Timothy Nelson's possession after the shooting as "little," but matched the colors. Tr. 210, ll. 2 – 11.

When Keith Benson gave his statement to police describing appellant with the gun and what appellant was wearing, he thought he was going to be charged in relation to the shooting. Tr. 271, ll. 2 – 18. He said that at the time of the statement, referring to appellant, "Everyone knew that's who they was supposed to be looking at that point in time---." Tr. 279, ll. 4 – 9. In this statement, Keith Benson said appellant was wearing a black shirt, jean shorts, and a black hat. Tr. 275, ll. 24 – 25.

Timothy Nelson gave a statement to police a week after the shooting because he was afraid the police would accuse him of being the murderer. Tr. 326, ll. 1 – 16. In this statement, he said appellant (known to him as "SK") was in the apartment at the time of the shooting. Tr. 324, l. 13 – 325, l. 7. At trial, he disavowed this portion of his statement and said appellant was not in the apartment when he heard the shots. Tr. 325, ll. 11 – 18. In the statement he said another person named "Hook" was in the apartment at the time of the shooting. Tr. 325, ll. 2 – 5. Timothy Nelson did not know Hook's "government name." Tr. 324, ll. 6 – 9. Timothy Nelson admitted that he was called "Qua, Que-Black or Quack." Tr. 323, ll. 16 – 17. Keith Benson's daughter was Timothy Nelson's "God baby." Tr. 323, ll. 20 – 21.

After hearing the shots, Timothy Nelson claimed he first ran to the front yard of the apartment, then through the apartment to the backyard. Tr. 311. ll. 3 – 14. He saw appellant climbing a fence. Tr. 311, l. 15 – 312, l. 11. He yelled to appellant, "throw me the junk" meaning the gun. Tr. 312, ll. 12 – 17. Confusingly, Timothy Nelson said when he yelled for appellant to throw him the gun, he did not even know whether appellant had a gun. Tr. 312, ll. 18 – 19. Appellant threw him the gun and he caught it in his shirt. Tr. 313, ll. 2 – 3. Timothy Nelson then took the gun inside the apartment and emptied all six spent shells into a baby diaper and threw it in the trash. Tr. 315, l. 12 – 317, l. 9. It was a silver .357 with a wooden grip. Tr. 315, ll. 8 – 11. He then took the gun to his mother's house, but when his mother found it and told him to get rid of it, he threw the gun in a river. Tr. 326, ll. 1 – 13. Timothy Nelson led the police to the gun a week later. Tr. 317, l. 17 – 318, l. 24.

Tanisha Nelson was related to Timothy Nelson. Tr. 419, ll. 14 – 17. Tanisha Nelson claimed she saw appellant shoot the decedent. Tr. 433, l. 7 – 434, l. 10. She had an argument with her boyfriend, Stevens. Tr. 424, ll. 20 – 21. Stevens chased her out of her apartment and she ran to Justine Gladden's apartment. Tr. 425, l. 13 – 426, l. 19. Montgomery went to Tanisha Nelson's apartment and got her baby. Tr. 427, ll. 13 – 16. Stevens left in Tanisha's car. Tr. 427, ll. 20 – 25. At Justine Gladden's apartment, she saw Timothy Nelson, appellant, and another cousin, Chavis. Tr. 428, ll. 7 – 21.

Tanisha took her baby and began making her way home. Tr. 429, ll. 1 – 14. Appellant brought Tanisha a flip phone and told her Stevens wanted to speak with her. Tr. 430, ll. 9 – 16. She took the phone and appellant walked away. Tr. 432, ll. 1 – 3. She was talking to Stevens when she saw fire erupt from the barrel of a gun held by

appellant. Tr. 432, l. 18 – 434, l. 10. She had seen a person she did not recognize walk past her. Tr. 433, ll. 7 – 25. She did not hear anyone talk or get into a fight before she saw the shooting. Tr. 433, l. 19 – 434, l. 3. Tanisha saw the man fall then she ran into her house. Tr. 434, l. 19 – 435, l. 16. Later she gave police the phone. Tr. 435, ll. 3 – 5. She claimed the shooting happened about ten minutes after Stevens left in her car. Tr. 436, ll. 16 – 18.

THC was present in the decedent's system. Tr. 341, ll. 11 – 15. He died from two gunshot wounds: one through the chest and another through the lower abdomen. Tr. 346, l. 24 – 351, l. 12. The bullet from the chest wound was recovered at the autopsy. Tr. 348, ll. 3 – 4. The bullet matched the gun Timothey Nelson threw in the river. Tr. 576, ll. 11 – 18.

The Rule 404 Hearing and Edrickis "Qua" Stevens' Testimony

Before trial, appellant moved to exclude testimony by Stevens as a prior bad act under Rule 404(b). Tr. 35, l. 17 – 39, l. 2. The State intended to offer Stevens' testimony that before the shooting and during his chase of Tanisha Nelson, he was confronted by appellant with a gun. Tr. 36, l. 4 – 38, l. 1. Appellant moved under Rule 404(b), Rule 403, State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996) to exclude evidence of this confrontation. Tr. 38, ll. 4 – 12. Judge Gibbons said that he would require the State to proffer Stevens' testimony and would rule at that time. Tr. 38, ll. 15 – 20.

During the trial, the court excused the jury and had the State proffer Stevens' testimony. Tr. 353, l. 1 – 354, l. 15. Stevens testified that he and Tanisha Nelson had an argument. Tr. 356, ll. 11 – 15. She ran and Stevens chased her. Tr. 356, ll. 11 – 17.

Stevens stopped chasing Tanisha Nelson when he was confronted by appellant. Tr. 356, l. 18 – 357, l. 24. According to Stevens, appellant told him that he could not watch him "jump on my baby's momma cause—you know—he's saying when he was coming up he seen his momma get jumped on and he say he ain't liked that kind of stuff." Tr. 356, l. 18 – 357, l. 24. Stevens "was like well who's gonna stop me?" Tr. 356, l. 18 – 357, l. 24. Appellant said "I stop you now," pulled out a chrome .357 pistol, and held it by his side. Tr. 356, l. 18 – 357, l. 24. Appellant did not point the pistol at Stevens. Tr. 356, l. 18 – 357, l. 24. Stevens then got in Tanisha Nelson's car and left. Tr. 357, l. 25 – 358, l. 1.

Appellant argued this testimony should not be admitted because it had no connection to the murder. Tr. 361, l. 12 – 362, l. 7. Appellant argued that the State was attempting to create a motive where none existed "when these incidents had nothing combined. Different victims, different incidents, different motives. . . ." Tr. 356, l. 18 – 357, l. 24. The State argued it was offering the evidence to show that appellant was armed with a gun. Tr. 363, ll. 1 – 7. The following colloquy occurred between defense counsel and the court:

> MR. STEEN: But see on the cases that have to do with res gestae, Your Honor, its always the same victim over time. The same victim over time with the same crime. The bad act and the current charge are the same thing. The victim in both situations are the same thing.
>
> THE COURT: Wouldn't you agree though that your client or the defendant allegedly if the jury were to believe his testimony you know showing this weapon which identification matches the other identification of the weapon, **wouldn't that show the propensity toward committing this act?**
>
> **MR. STEEN: Yes, Your Honor, which was—which is what 404—**

> **THE COURT: Which is why it come in.** I understand that. The question is though of course I'm the gate keeper, I have to do the balancing test.

Tr. 363, l. 17 – 364, l. 6 (emphasis added) (error in original). The court then ruled the evidence was clear and convincing, logically relevant, and the probative value outweighed its prejudicial impact. Tr. 364, ll. 7 – 17. The trial judge also ruled that the State was not offering Stevens' testimony as a prior bad act, but as "just part of the whole situation that was happening that night considering the fact that it only happened fifteen minutes or so or right before the actual act of violence occurred." Tr. 364, ll. 18 – 25.

During his testimony before the jury, Stevens claimed to know appellant by the name "SK." Tr. 387, ll. 24 – 25. Tanisha Nelson was his "baby momma." Tr. 387, ll. 9 – 10. On the night of the shooting, Stevens and Tanisha had an argument at Tanisha's apartment in the Pardue complex. Tr. 390, ll. 2 – 9. She ran and Stevens gave chase. Tr. 391, ll. 3 – 12. Appellant stopped Stevens and asked why he was chasing Tanisha. Tr. 391, l. 9 – 392, l. 25. Appellant told Stevens he "couldn't sit out there and let me do my baby momma like that." Tr. 392, ll. 19 – 25. Stevens asked who was going to stop him. Tr. 392, ll. 19 – 25. Appellant pulled out a chrome .357 pistol and said he would stop Stevens. Tr. 392, l. 19 – 393, l. 10. Stevens replied, "man go ahead with that," turned around and left. Tr. 392, ll. 19 – 25. Stevens left in Tanisha's car. Tr. 393, ll. 15 – 16.

Inexplicably, Stevens then claimed he called appellant—the man he said just pulled a gun on him—to ask him to put Tanisha on the phone. Tr. 394, l. 6 – 396, l. 23. Stevens claimed on cross-examination that he did not take being threatened by appellant with a gun too seriously. Tr. 398, ll. 17 – 20. Appellant answered the phone and gave it to Tanisha. Tr. 395, ll. 2 – 23. Stevens originally said he talked to Tanisha for 20-30

minutes on appellant's phone. Tr. 401, ll. 2 – 4. Stevens claimed to be on the phone with Tanisha when the shooting happened. Tr. 402, ll. 3 – 5. Defense counsel confronted Stevens with the records from the phone he called. Tr. 398, l. 21 – 402, l. 5. Stevens called the phone seven times between 3:41 AM and 3:53 AM and the longest call was 213 seconds. Tr. 400, l. 7 – 402, l. 1. Even though Stevens claimed that Tanisha was on the phone with him when she witnessed the shooting, he never testified that he heard her make any excited utterance or say anything at all about the shooting while they were on the phone.

Discussion

The trial court erred in admitting Stevens' testimony about the confrontation with the gun. The State's explanation that Stevens' testimony showed appellant with a gun at the time of the shooting was a smokescreen to portray appellant as a violent person in a case where it had no motive. Stevens' testimony was inadmissible under Rules 404 and 403.

The confrontation with Stevens was offered to show appellant had a violent character. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." Rule 404(a), SCRE. The trial judge erred in agreeing with the State that Stevens' testimony was offered to show appellant was armed prior to the shooting. While Stevens' testimony did have this collateral effect, other witnesses offered the same testimony. Tanisha Nelson claimed she witnessed appellant shoot Jones. Timothy Nelson testified appellant threw him the gun after the shooting and he threw it in the river. Keith Benson testified he saw appellant with the gun. Therefore, the evidentiary value of Stevens'

testimony linking appellant to the gun was small while the tendency of the evidence to prove appellant had a violent character was large. The trial judge's initial reason for admitting the evidence was because it showed appellant had a "propensity" for committing the crime. Tr. 363, l. 17 – 364, l. 6. Propensity evidence is not admissible. Lyle, 118 S.E. at 808-11; People v. Molineux, 6 Bedell 264, 61 N.E. 286 (N.Y. 1901). See also State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977) (citing Lyle and holding it was error to admit evidence that appellant poisoned her first husband with arsenic when she was on trial for poisoning her current husband with arsenic).

In a case cited in Lyle, Boyd v. United States, 142 U.S. 450 (1892), the United States Supreme Court ruled that some connection between prior similar acts and the charged crime must exist. Boyd was a unanimous decision authored by the first Justice Harlan, who would become the lone dissenter in the infamous case of Plessy v. Ferguson, 163 U.S. 537, 552 (1896). In Boyd, the defendants were charged with a murder arising from the attempted robbery of a ferry. Boyd, 142 U.S. at 451-52. At trial, the government introduced evidence of four other robberies by the defendants. Id. at 454. Identity was an issue in the trial. Id. at 454-55. The defendants were found with the goods from one of the robberies (referred to as the Rigsby's store robbery), and the government used this evidence to establish identity because several witnesses saw this robbery. Id. at 456. Whether the victims had the right to arrest the defendants for another robbery (referred to as the Taylor robbery) was also a factual question. Id. at 456-57.

Justice Harlan wrote that had the Rigsby store robbery and the Taylor robbery been the only prior bad acts admitted, it was likely "that the judgment would not be

disturbed." Id. at 457-58. Evidence of the other robberies "was inadmissible for the identification of the defendants, or for any other purpose whatever. . . ." Id. at 458. Writing in compelling fashion concerning the admissibility of these prior crimes, Justice Harlan wrote for the unanimous Court:

> Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, **and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law** for the trial of human beings charged with crime involving the punishment of death. Upon careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. **However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.**

Id. at 458 (emphasis added). The defendants' convictions were reversed.

In State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013), the Court asked the threshold relevance question of what the evidence was offered to prove. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). The issue was whether the co-defendant committed the rape and murder of Cope's daughter by himself. Id. at 335, 748 S.E.2d at 203 (majority); Id. at 354, 748 S.E.2d 213-14 (Kittredge, J., dissenting). Cope is a difficult case in which the defendant sought to offer evidence that his co-defendant committed other assaults after breaking into other women's homes. Only after asking the threshold question of whether the evidence was relevant did the Court proceed to discuss whether the crimes were sufficiently similar. Id. at 337-38, 748 S.E.2d at 204-05. The majority concluded they were not. Id. Like the conclusion in Cope, there was no similarity between the confrontation with Stevens and what Tanisha Nelson said happened when appellant allegedly shot Jones.

Appellant aptly cited State v. Smith to the trial judge to support exclusion of Stevens' testimony. In Smith, the defendant was tried for homicide by child abuse in the beating death of a one-year old girl. Smith at 108, 470 S.E.2d at 365. The defendant was also tried for ABHAN for beating the girl's older brother. Id. The defendant gave a statement admitting he beat the older brother, but only circumstantial evidence linked the defendant to the girl's death. Id. The Court held admission of the evidence of the brother's beating was erroneous under Lyle. Id. at 109-10, 470 S.E.2d at 365-66. The beatings were not similar, the evidence against the defendant for the girl's death was slight, and the prejudicial effect outweighed the probative value. Id.

Just as in Smith, here the confrontation with Stevens bore no similarity to the charged crime. The State showed no connection between the shooting of Jones and the confrontation with Stevens. To the extent that Stevens' testimony showed appellant had a gun, this testimony was of limited probative value compared to the prejudicial effect of showing appellant was a violent person. The State admitted it had no motive for the shooting. Without a motive, it was necessary to demonstrate that appellant was a bad person. Stevens' testimony allowed the State to portray appellant as a violent individual which made up for the shortcomings of its case. The State's alleged eyewitness was related to Timothy Nelson who, for no explicable reason, disposed of the murder weapon and only led police to it when suspicion fell on him. This Court should reverse appellant's convictions and remand for a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of August, 2015.

STATE OF SOUTH CAROLINA

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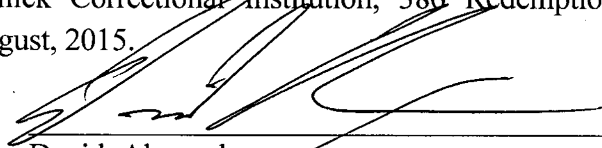
QUANELL MARQUAN MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2014-002539

CERTIFICATE OF SERVICE

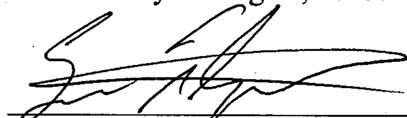
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and on Quanell Marquan McIlwain, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899 this 10th day of August, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of August, 2015.



______________________________(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .