

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Marion County

NOV 13 2015

Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KEMONIE LASHAWN JONES,

APPELLANT

APPELLATE CASE NO. 2015-000522

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in refusing the defendant's request to charge mere presence when the defendant's testimony indicated he was innocent and only near the place where a crime occurred?

STATEMENT OF THE CASE

On August 1, 2013, a Marion County grand jury indicted appellant for possession of marijuana with intent to distribute and murder. R. 605. On February 23, 2015, appellant was tried before the Honorable Donald B. Hocker and a jury. R. 1. Fitzlee McEachin represented the State. R. 1. Henry Anderson, Jr. and Scott Floyd represented appellant. R. 1. The jury convicted appellant on both charges. R. 585, ll. 2 – 16. Judge Hocker sentenced appellant to concurrent terms of five years' imprisonment for the marijuana charge and forty-five years' imprisonment for murder. R. 602, l. 21 – 603, l. 2. This appeal follows.

ARGUMENT

The trial judge erred in refusing the defendant's request to charge mere presence when the defendant's testimony indicated he was innocent and only near the place where a crime occurred.

Appellant testified in his own defense. He never even saw the shooting victim, Stanley Witek ("Witek"), and was in the wrong place at the wrong time. R. 532, ll. 17 – 23. Appellant was walking to a friend's house at approximately 9:00 AM. R. 515, ll. 4 – 16. He knocked on his friend's door, but his friend was not home. R. 515, l. 9 – 517, l. 6. Along the way he passed at least four stores. R. 517, ll. 14 – 17.

Appellant received a phone call from a man named BJ who wanted to buy marijuana. R. 519, l. 20 – 520, l. 17. Appellant walked past several other stores and made his way to Jones Avenue. R. 520, ll. 5 – 10. Appellant thought he saw a police officer observe him trying to make the sale. R. 521, ll. 3 – 8. Appellant ran. R. 521, ll. 9 – 10. Appellant testified, "I was scared. I was being chased by the police." R. 539, ll. 18 – 20. He was also on probation. R. 522, ll. 21 – 24. The police caught appellant and arrested him. R. 521, ll. 16 – 19.

Cyrus Sloan ("Sloan") was Witek's neighbor. R. 126, l. 25 – 127, l. 4. He was inside reading the paper when he heard gunshots. R. 129, ll. 15 – 25. He looked out of his door and saw a person running in the direction of Jones Avenue. R. 130, ll. 7 – 24. Sloan called 911. R. 131, ll. 9 – 15. He told the police that the man he saw running had a red ski mask. R. 131, ll. 9 – 15. Sloan walked across the street and found Witek, who had been shot. R. 134, l. 21 – 136, l. 21. Witek had been shot three times. R. 475, ll. 16 – 477, l. 1.

Officer Jack McCaskill (“McCaskill”) with the Marion Police Department responded to the dispatch call. R. 417, l. 11 -- 418, l. 17. He drove toward Jones Avenue. R. 418, ll. 20 – 24. He was looking for “a male subject wearing a black jacket and a red ski mask.” R. 419, ll. 3 – 5. On Jones Avenue, Officer McCaskill saw a man “wearing a black and gray jacket and he had in his hand what appeared to be a red ‘boggan – a red toboggan.” R. 419, ll. 6 – 11. Once Officer McCaskill turned his car around, the man began to run. R. 420, ll. 7 – 11. Officer McCaskill and other police officers chased the man. R. 420, l. 19 – 425, l. 16. They took the man they chased – appellant – into custody. R. 12 – 16. The police found marijuana on appellant. R. 427, ll. 14 – 22.

The police did not find a gun on appellant. In fact, they never found the gun that was used to kill Witek. Tr. 109, ll. 7 – 8. The police found a red hat behind a house on Jones Avenue. R. 409, l. 20 – 410, l. 14. The State’s best evidence was gunshot residue found on appellant’s clothing and hands and the testimony of a jailhouse snitch. R. 336, ll. 15 – 22. R. 338, ll. 8 – 9. R. 338, l. 10 – 339, l. 19. The snitch, Don Oliver (“Oliver”), claimed appellant admitted killing Witek. R. 448, l. 6 – 449, l. 5. R. 453, ll. 10 – 13. Oliver told the police about appellant’s supposed confession while he was awaiting sentencing on a strong-arm robbery charge. R. 463, ll. 3 – 18. Appellant denied admitting to any crimes to Oliver. R. 528, l. 3 – 529, l. 10.

Appellant requested a charge on mere presence. R. 541, l. 25 – 542, l. 6. Judge Hoeker denied the request for a mere presence charge. R. 541, l. 25 – 542, l. 6. The trial judge ruled that the mere presence charge was not applicable to someone who was only in the “general vicinity.” R. 541, l. 25 – 542, l. 6. The court reasoned that the charge

applied only when the defendant was “at the actual crime scene.” R. 541, 1. 25 – 542, 1. 6.

The trial judge erred in not charging mere presence. A trial judge should give a requested charge if there is any evidence to support that charge. State v. Burriss, 334 S.C. 265, 262, 513 S.E.2d 104, 108 (1999). When the evidence presents a rational inference that justifies a specific charge, a trial court should instruct the jury on that charge. See State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006) (*citing* State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App.1999)).

A mere presence instruction explains that the prosecution has to prove every element of the crime and that mere presence at the crime scene is not enough to sustain a conviction. See State v. Mattison, 380 S.C. 326, 669 S.E.2d 635 (Ct. App. 2008) Further, the trial judge is required to charge the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct.App. 2005). The court had a duty to tailor its instruction to the facts of this case. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

The failure to charge mere presence where it is called for by the evidence is reversible error. See State v. Kimbrell, 394 S.C. 51, 362 S.E.2d 630 (1987). There was ample evidence to support the mere presence instruction. Appellant testified he was on Jones Avenue and walking through the neighborhood where Witek was shot. The police testified about where appellant was apprehended, which was close to the crime scene. The trial judge drew an arbitrary geographical distinction that is not founded in the law.

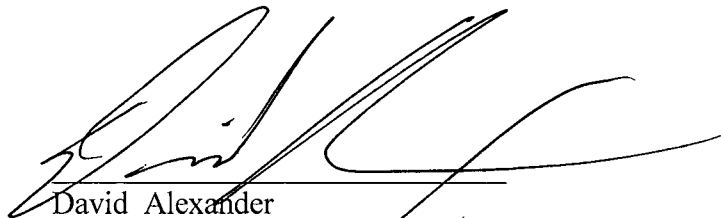
Appellant’s defense was that he was in the wrong place at the wrong time. Appellant only ran because he was on probation and thought the police saw him try to sell

marijuana. An instruction on mere presence was vital to the jury's understanding of appellant's defense. This Court should reverse and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's murder conviction and grant him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

Donald B. Hocker, Circuit Court Judge

THE STATE,

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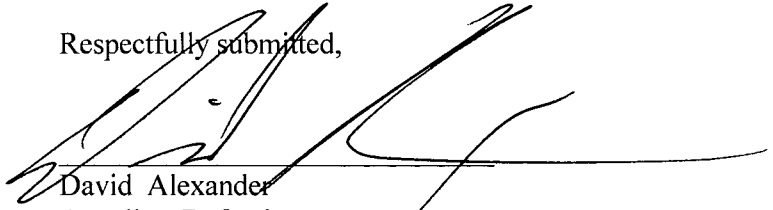
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kemonie Lashawn Jones states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Kemonie Lashawn Jones.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2015.

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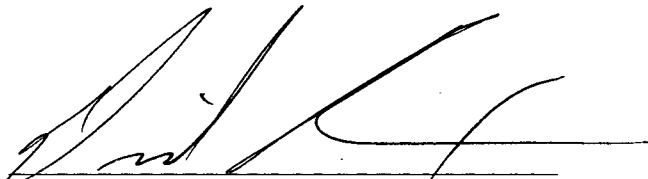
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript

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

November 13th, 2015



David Alexander
Appellate Defender

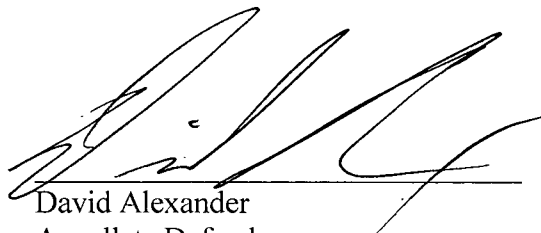
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

November 13, 2015



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
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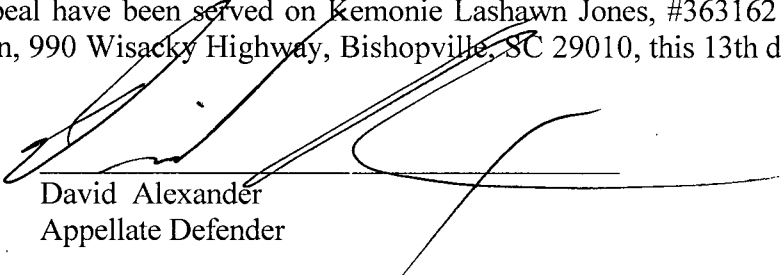
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APPELLATE CASE NO. 2015-000522

CERTIFICATE OF SERVICE

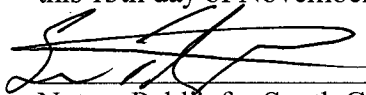
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Kemonie Lashawn Jones, #363162 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of November, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.