

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

---

Appellant Case No. 2014-002126

---

The State,

Respondent,

v.

Arthur William Macon,

Appellant

---

**INITIAL BRIEF OF APPELLANT**

---

Glenn Walters, Sr.  
R. Bentz Kirby  
P O Box 1346  
Orangeburg, SC 29116  
(803) 531-8844  
(Fax) (803) 531-3628

Attorneys for Appellant

**RECEIVED**

MAR 31 2016

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of Case	1
Facts	1
Standard of Review	3
Arguments	
I. THE TRIAL COURT ERRED BY ALLOWING JASON COLON'S FATHER TO TESTIFY THAT JASON COLON WAS SCHIZOPHRENIC, HAD A LOBOTOMY, WAS PASSIVE, AND HAD THE MIND OF A THIRTEEN (13) YEAR OLD TO PROVE THE CHARACTER OF JASON COLON AND TO BOLSTER COLON'S TESTIMONY AGAINST THE DEFENDANT	4
II. THE TRIAL COURT ERRED BY ALLOWING RICKY WOODBERRY TO GIVE TESTIMONY REGARDING THE MEDICAL CONDITION OF JASON COLON WHICH WAS BOTH HEARSAY AND WHICH HE LACKED THE SPECIAL KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING TO SO TESTIFY	11
Conclusion	15

## TABLE OF AUTHORITIES

### Cases

<i>In re Care and Treatment of Harvey</i> , 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003)	9, 14
<i>Sellers v. State</i> , 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005)	6
<i>State v. Brown</i> , 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015)	9, 14
<i>State v. Douglas</i> , 380 S.C. 499, 671 S.E.2d 606(S.C., 2009)	5
<i>State v. Fripp</i> , 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012)	12
<i>State v. Grubbs</i> , 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003)	7, 12
<i>State v. Holder</i> , 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009)	9
<i>State v. Johnson</i> , 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987)	10
<i>State v. Johnson</i> , 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989)	10
<i>State v. Lyles</i> , 379 S.C. 328, 665 S.E.2d 201(S.C. App., 2008)	3
<i>State v. Mitchell</i> , 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012)	12
<i>State v. Nelson</i> , 331 S.C. 1, 501 S.E.2d 716 (S.C., 1998)	9
<i>State v. Page</i> , 406 S.C. 272, 750 S.E.2d 623 (S.C. App., 2013)	3
<i>State v. Sims</i> , 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010)	5, 7
<i>State v. Williams</i> , 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996)	6,7,8, 11

### Statutes

SC Code §16-11-0330 (A)	1
-------------------------	---

### Other Authorities

S.C.R.E. 401	2, 4, 5, 14
--------------	----------------

S.C.R.E. 403	10
S.C.R.E. 404	2, 8
S.C.R.E. 405	3
S.C.R.E. 601	5,6
S.C.R.E. 701	8, 11
S.C.R.E. 702	7, 11
S.C.R.E. 801	6,7
S.C.R.E. 802	7

Legal Books

<i>McCormick on Evidence</i> , § 12 (3rd Ed.1984)	8
---	---

Medical Treatise

<i>DSM -5 American Psychiatric Association</i> (2013)	13
---	----

Dictionary

<i>Merriam-Webster Dictionary</i> , <a href="http://www.merriam-webster.com/dictionary/lobotomy">http://www.merriam-webster.com/dictionary/lobotomy</a>	12
--	----

<i>Merriam-Webster Dictionary</i> , <a href="http://www.merriam-webster.com/dictionary/schizophrenia">http://www.merriam-webster.com/dictionary/schizophrenia</a>	13
--	----

## STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against the Appellant?
2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

## STATEMENT OF CASE

On July 16, 2014, the Appellant, Arthur William Macon, was indicted for Armed Robbery under SC Code §16-11-0330 (A)<sup>1</sup>. The case had the Docket No. 2013-GS-40-000579. [Indictment] The robbery was alleged to have occurred on August 30, 2012, at a location of the TD Bank. [Indictment] The allegation in the indictment was that the Appellant planned the robbery and conspired with Jason Colon to rob the bank. An arrest warrant was issued on September 20, 2012. [Arrest Warrant] The case was tried in the General Sessions Court of Richland County on September 29 through October 3, 2014, before the Honorable Deandrea G. Benjamin. The jury returned a verdict of Guilty and on October 3, 2014, the Appellant was sentenced to twenty-three (23) years of imprisonment with the South Carolina Department of Corrections. [Sentence Sheet] This appeal followed.

## FACTS

The TD Bank branch at 8550 Farrow Road, Richland County was robbed by Jason Colon. [T pp 193-194]. He went in to cash a check but did in fact rob the bank. [T pp 305, 312]. Mr. Colon

---

<sup>1</sup> There were other charges for kidnapping related to the incident, but a Not Guilty verdict was returned on all of those charges.

testified that his plan when he went in to the bank was to cash his unemployment check but that he decided to rob the bank while he was standing in the lobby of the bank.. [T pp 313-314] His testimony was that Appellant “told” him to rob the bank, but he also testified the pellet gun was given to him months prior to the date of the robbery and that he decided to rob the bank after he was inside the bank. [T pp 305-317] According to the testimony of the Investigator Kerry Johnson, Mr. Macon admitted that Mr Colon had been in the truck with Appellant and that he dropped Colon off at bus stop on Farrow Road. The Appellant denied any knowledge of the robbery or the actions of Mr. Colon. [T pp 326-329] Mr. Colon stated that the Appellant had dropped him off at the Sonic on Farrow Road. [T p 316].

At the beginning of the trial, it was revealed to the Court that Jason Colon was a Co-Defendant in the case and that he had been offered a plead the charge of entering a bank with intent to steal and if he accepted the plea the other charges against him would be dropped. [T p 37] The Appellant’s lawyer objected to the parents of Jason Colon testifying to the general character, demeanor, personality and issues related to Mr Colon’s disability and the Court and parties determined they would reserve ruling on these issues until the witnesses were called. At that time there would be a proffer of the testimony. [T pp 68-69] The proffer and Motions regarding the testimony were in fact held prior to Ricky Woodberry’s testimony. [T pp 285-299]

The testimony sought to be admitted about Mr. Colon regarded his injury to the head and that as a result, Mr. Colon was schizophrenic and very passive. Mr. Woodberry was to testify that Mr. Colon had the mind of a thirteen (13) year old. [T pp 287-290] The Attorney for the Appellant correctly objected to this testimony in full because it was hearsay, character evidence barred by S.C.R.E., Rule 404 (3) and was not relevant. S.C.R.E. Rule 401. The State admitted that it wanted

to introduce the testimony in order to bolster Jason Colon's testimony against the Appellant. [T pp 293-295] Additionally, the Appellant's attorney objected that the testimony was improper because the witness was not a doctor and the testimony should not be allowed.. [T p 295] The Court ruled pursuant to S.C.R.E, Rule 405 (b) it was admissible to prove the character of Mr. Colon with regard to him having the mind of a thirteen (13) year old and that he was passive.

However, during Mr. Woodberry's testimony, the Court allowed the witness to testify that Colon was shot in the frontal lobe and the result was that Colon received a lobotomy and became schizophrenic. The testimony also included the fact that Mr. Colon and the Appellant had been "hanging out before the robbery." [T pp 299-303]

#### STANDARD OF REVIEW

The standard of review has been set forth in *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201(S.C. App., 2008) (citations omitted). "In criminal cases, the appellate court sits to review errors of law only. ... [The] court is bound by the trial court's factual findings unless they are clearly erroneous. ... The appellate court does not reevaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. ... A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of a legal error which results in prejudice to the defendant. ... An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. ... To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Id.* at 204. *Accord*, *State v. Page*, 406 S.C. 272, 750 S.E.2d 623 (S.C. App., 2013). In this case, the evidence objected to was hearsay, improper character evidence and was not relevant. [T p 292-299] The parent of Jason Colon was not competent to testify

regarding Jason Colon's medical condition and the only reason the evidence was introduced was to bolster the State's argument that Appellant was the mastermind who planned the crime and manipulated Colon into actually robbing the bank. S.C.R.E. Rule 401.

#### ARGUMENTS

I. THE TRIAL COURT ERRED BY ALLOWING JASON COLON'S FATHER TO TESTIFY THAT JASON COLON WAS SCHIZOPHRENIC, HAD A LOBOTOMY, WAS PASSIVE, AND HAD THE MIND OF A THIRTEEN (13) YEAR OLD TO PROVE THE CHARACTER OF JASON COLON AND TO BOLSTER COLON'S TESTIMONY AGAINST THE DEFENDANT

The only evidence which directly connects the Appellant to this robbery is the testimony of Jason Colon. [T pp 305-317].<sup>2</sup> He stated that Arthur Macon told him to go there and that Macon had given him a fake gun to demand the money. [T p 305]. He also testified that the Appellant had talked to him about doing this a few months before the robbery. [T p 311]. However, on cross examination Colon testified that he went into the bank to cash a check and that he decided to rob the bank after he was inside the bank. [T pp 313-314] He also testified that Mr. Macon dropped him off at the Sonic, not the bank. [T p 316]. Thus the evidence that Macon was involved in this robbery is minimal at best and Jason Colon confessed to the armed robbery of the bank. [T p 312].

In order to bolster the testimony of Colon, the State presented Colon's father to testify regarding the fact that Macon had manipulated Colon into the robbery and that Colon was not capable of planning and executing the robbery. The Appellant's lawyer objected to this testimony and a proffer was made to the court. [T pp 285-291] In summary, the proffered testimony was that while living in Brooklyn, Jason Colon had been caught in a shoot out and his brain was damaged,

---

<sup>2</sup> While there is some evidence that the Appellant was in the area, the evidence is clear that he dropped Jason Colon off in the area. However, this is no evidence he was involved in the robbery other than Colon's testimony.

specifically his frontal lobe. Woodberry testified that as a result of the lobotomy, Colon became Schizophrenic<sup>3</sup>, very passive with the mind of a 13-year-old and he was easily led by others. [T pp 288-289] On cross examination Woodberry admitted he had no personal knowledge of any of the events or whether Colon and the Appellant had ever worked together. All of Woodberry's testimony was hearsay and he "only [knew] what he ad been told." [T pp 291] The State's attorney expressly stated that Woodberry was offered by the State to testify regarding Mr Colon's medical condition, his mental capacity and his relationship to [Macon]." [T p 292].

At that point in the trial Appellant's attorney objected on the grounds that the testimony was hearsay, improper evidence of character of a witness and was not relevant. [T p 293] S.C.R.E. Rule 401. The State argued it was not character evidence and it was only evidence of Colon's medical condition. [T pp 293-294] In fact, whether you consider the proffered testimony character evidence or evidence of a medical condition, allowing the proffered and allowed testimony is both an error of law and an abuse of discretion which was more prejudicial than probative. The Court should not have allowed this testimony into evidence. *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

In order to testify a witness must be competent. S.C.R.E. Rule 601. A witness in disqualified only if the witness can not express himself concerning the matter to be understood or is incapable of understanding the duty of a witness to tell the truth. *Id.* In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009), a witness was allowed to testify about the need for a victim to have a medical exam based upon her personal observations. However, she was not allowed to give her opinion about her interview. Opinion by a lay witness is only admissible if the opinion does not

---

<sup>3</sup> Clearly the witness was not competent to make this diagnosis and there was no medical evidence to support this declaration. Further, it is completely wrong and irrelevant as the behavior discussed about Mr. Colon was not consistent with schizophrenia.

require any special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). A witness is presumed to be competent, even if mentally ill (schizophrenic) and the illness would only affect the credibility of the witness. *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005).

Jason Colon entered into a plea bargain and testified in the case. Thus, it can not be argued that he was not a competent witness pursuant to Rule 601 and the only rational assumption is that he was qualified under Rule 601 to be a witness. Accordingly, there was no need for Woodberry's testimony as he had no personal knowledge of the factual evidence in question. Therefore any statements he gave were hearsay and improper opinion evidence. His testimony on the medical issues was clearly was hearsay as the statement, if it happened at all, was made by a doctor who was not present to give an opinion or a diagnosis. S.C.R.E. 801. A review of Woodberry's testimony shows that all of it was hearsay and was inadmissible.

Direct examination by Mr. Cathcart on behalf of the State:

- Q. And where did the bullet exactly hit him?  
A. In his temple in his head, frontal lobe.  
Q. Okay. And when -- did the bullet stay in there?  
A. No, it went in and came out the other side.  
Q. Through the Temple lobe?  
A. Yes.  
Q. Frontal lobe?  
A. Yes.  
Q. So he basically got a lobotomy from the bullet?  
A. Yes.  
Q. Did the doctors indicate -- well, did that change him in any way?  
A. Yes, it did.  
Q. Okay. Did it make camp in what way? How -- did he become what?  
A. He was diagnosed with schizophrenia. He started talking to his self. He became passive.  
Q. Did the doctors indicate his mind would be that of what?  
A. A 13 year old.  
Q. Okay. And he is how old now?  
A. He is 28.

- Q And has he improved in the past couple of years?  
A No. No. While he is on medication he has gotten a little better.  
Q Okay. But he still has the mind of 13 year old?  
A Yes, he does.

[T pp 301-302]. There is nothing within his testimony which is not hearsay and it all is submitted to prove of the truth of the matter, that Jason Colon was mentally ill, was easily led and had the mind of a thirteen (13) year old.

The straightforward definition of hearsay is set forth in *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE."

Id at 694 SE2nd at 13. Almost every word of the testimony of Ricky Woodberry falls into this definition. He testified about a shooting he never witnessed and stated he was told medical facts by a medical doctor who was not in court. Additionally, if the doctor had been in court he would have had to testify as an expert witness. S.C.R.E. 702. Clearly no expert witness was called to testify to the underlying hearsay in Woodberry's testimony. An expert witness is allowed to assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003). However, a lay witness may not testify about a matter which requires special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). While a witness may testify regarding impressions drawn from an observed fact, the testimony by Woodberry was not related to any fact he observed.

In *Williams* the Supreme Court addressed this issue and stated:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. Rule 602, S.C.R.E. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, S.C.R.E.

*Id.* at 54. It was not asserted by the State that Colon was not competent to testify or that any of his supposed deficiencies would have prevented him from testifying. Therefore, as he was competent to testify, and his testimony is the only testimony directly linking Macon to the bank robbery, the jury should have been allowed to evaluate his testimony without bolstering from Woodberry. In this instance, the testimony was given to show that Colon was lead by Macon into committing the crime. The testimony clearly was related to the character of Colon, and indirectly the character of Macon and was inadmissible pursuant to Rule 404.

The courts have differentiated between a fact and an opinion by pointing out that there is a difference in the degree of concreteness. *Supra, Williams* at 469 S.E.2d 54. The court stated that:

The terms "fact" and "opinion" denote merely a difference of degree of concreteness[321 S.C. 464] of description. *McCormick on Evidence*, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts.

In this instance it is clear that the testimony allowed was not a fact based upon personal observation but was an opinion drawn from hearsay evidence. It is clear that character evidence is what the testimony was to provide.

The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness. Generally speaking,

character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity.' " (Citations and internal quotation omitted). ... Such evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted.

*State v. Nelson*, 331 S.C. 1, 6-7 501 S.E.2d 716 (S.C., 1998). *Accord*, *State v. Holder*, 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009). The character traits involved Colon's personality, including his propensity to act as instructed by others, together with his physical injuries and supposed mental illness. The jury should have been allowed to assess the credibility of Colon's testimony without the improper bolstering by Woodberry offering his opinions about Colon's character. *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 250 (S.C. App., 2015). Thus, Woodberry's testimony was clearly improper bolstering of Colon's character by saying that Colon was not capable of making his own decisions.

This case is similar to the case of *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003), where the trial court did not allow an actual expert witness to use hearsay as the basis of the opinion proffered to the trial court. The hearsay was in the form of a log which was "replete with subjective opinions and judgments and therefore is inadmissible hearsay." *Id.* at 62.

Additionally, the testimony of Woodberry was a back door attack on the credibility and character of the Appellant. The logical implication of this testimony was that Colon was incapable of deciding to rob the bank on his own and therefore only the Appellant could have coaxed Colon into acting. In general, it is improper to attack the character of the Appellant by showing he is a "bad person". While the State did not introduce any direct evidence regarding the Appellant, the clear

implication is that he was the “mastermind”. As such, in addition to the other arguments set forth above, this evidence as more prejudicial than probative. *See, State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989) and S.C.R.E. 403. The bolstering of testimony and the attack on Appellant’s character as well as testimony regarding Colon’s character is clearly shown by the State’s examination of Woodberry.

Direct Examination of Woodberry by the State’s attorney Mr. Cathcart:

- Q Do you know Arthur Macon?  
A Yes, I do.  
Q Okay. How do you know him?  
A He is a cousin of Jason’s mother.  
Q Okay. And y’all moved down here 11 years ago?  
A Yes, we did.  
Q How long before this incident -- well, did they hang out before this incident occurred?  
A They only started hanging out like two months before the incident.  
Q So y’all had been here like 11 years before hand. And so two months before this occurred, they started hanging out together?  
A Yes.  
Q Okay. About how much?  
A Mabel twice a week, three times a week he would come by.  
Q And would he ever take Jason off to?  
A Yes, he would.

[T pp 303-304] There is no mistaking the fact that the purpose of Woodberry’s testimony was to show that the Appellant manipulated Jason Colon. The purpose of the testimony was to prove the truth of the matter asserted.

The testimony of Ricky Woodberry was hearsay, improper character evidence and was not relevant to the issues before the court. It was used to bolster the testimony of Colon. The jury received improper hearsay evidence and did not make a direct decision regarding the testimony of

Colon. The opinion that he was mentally ill and had the mind of a thirteen (13) year old was not probative of any relevant fact and was in fact extremely prejudicial to the Appellant as Colon's testimony is the only testimony linking him to the bank robbery. The evidence should not have been allowed at trial and is both an abuse of discretion by the trial court and an error of law. As such, this conviction should be reversed.

II. THE TRIAL COURT ERRED BY ALLOWING RICKY WOODBERRY TO GIVE TESTIMONY REGARDING THE MEDICAL CONDITION OF JASON COLON WHICH WAS BOTH HEARSAY AND WHICH HE LACKED THE SPECIAL KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING TO SO TESTIFY

Although it is clear that Woodberry's testimony was improper character evidence, the justification provided by the State was that it was evidence of Colon's medical condition. [T pp 293-298] Despite the objection of the attorney for the Appellant Woodberry was allowed to testify to medical issues which required expert testimony. Woodberry was allowed to testify on matters which required particular medical knowledge and which he did not have the proper special knowledge, skill, experience or training to give competent testimony. The medical testimony was that Jason Colon was shot in the head in the temporal lobe, Colon received a lobotomy from this gun shot, and that Colon was schizophrenic and passive. [T pp 301-302] Under S.C.R.E. Rules 701 and 702, this testimony was improper and could only be provided by a qualified expert who could testify regarding the brain damage and resulting mental disability and mental illness. First, he had no first hand knowledge of the facts. [T pp 301-304] *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996).

It was clear legal error for the trial court to allow this testimony. A witness can not testify about matters regarding a medical condition unless the witness is an expert who possesses the necessary scientific, technical, or other specialized knowledge that will assist the trier of fact. *State*

*v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003). Further, a witness giving opinion testimony may not do so from inadmissible hearsay. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). Clearly this was inadmissible hearsay as the basis of the testimony of Woodberry was based on what he was supposedly told by an unknown doctor. [T p 302] There was no proper foundation introduced to allow this testimony.

Additionally, the nature of the testimony is clearly such that an expert must be called to testify on the issue. Woodberry testified that a doctor told him that Colon received a “lobotomy” from a bullet wound. However, there was no proper foundation laid for this testimony. A lobotomy is a medical term and it relates directly to a medical procedure. A review of the dictionary definition shows that medical testimony is required to give this opinion. The definition of a lobotomy is “surgical severance of nerve fibers connecting the frontal lobes to the thalamus performed especially formerly for the relief of some mental disorders.” *Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/lobotomy>. It is clear to any thinking person that Woodberry lacked the medical knowledge to testify on this medical condition and his testimony was inadmissible hearsay. This testimony was medical in nature and not based upon matters which are based upon his perception. *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012); *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012). There was no way that Woodberry had any knowledge on the issue of Colon’s brain damage. Woodberry was not competent to testify that Colon had received a lobotomy. Additionally, a lobotomy is preformed by a surgeon for the purpose of the relief of certain disorders. There is no credible evidence that the nerve fibers of the frontal lobes to the thalamus where surgically severed, or that the bullet wound had that effect. Finally, the testimony is unreliable because Woodberry testified that a doctor told him it the wound gave Colon

schizophrenia. A lobotomy is performed to relieve certain existing mental disorders, it does not cause schizophrenia. Therefore, it is clear that this testimony was not only improper, but was highly prejudicial.

Woodberry was also not competent to testify that the bullet wound gave Colon schizophrenia and caused him to be passive. There is no evidence Colon has schizophrenia, and even if he did, there is no evidence that Colon was incapacitated to the point he was incapable of making a decision.<sup>4</sup>

Schizophrenia is a medical term which describes a particular mental illness. A literal definition of schizophrenia is found in the dictionary and is not in accord with the general public perception. Technically, schizophrenia is “a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as delusions), perception (as hallucinations), and behavior....”. Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/schizophrenia..>

To know if a person suffers from the disease of schizophrenia the diagnosis must be made in accord with the *DSM -5 American Psychiatric Association* (2013). The criteria for a diagnosis of schizophrenia must be made by a competent medical doctor skilled as a psychiatrist and must comport with the stated definition:

Schizophrenia Diagnostic Criteria 295.90

- A. Two (or more) of the following, each present for a significant portion of time
- 

<sup>4</sup> If Colon was schizophrenic he was not competent to testify, or at least, expert testimony was necessary to show that his testimony was reliable. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009).

during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):

1. Delusions.
2. Hallucinations.
3. Disorganized speech (e.g., frequent derailment or incoherence).
4. Grossly disorganized or catatonic behavior.
4. Negative symptoms (i.e., diminished emotional expression or avolition).

*Id.* The definition requires a diagnosis that two of the five conditions set forth are present. Additionally, there must be evidence that at least of the first three conditions is also present. Those three are delusions, hallucinations or disorganized speech. There is no evidence even one of these three conditions are present, much less a required additional condition. As stated above, the statement by Woodberry was inadmissible hearsay and clearly was irrelevant and should never have been admitted.

The prejudicial impact of this testimony is evident. By allowing this testimony, the testimony of Colon was bolstered as the jury was lead to believe he had received a lobotomy, was schizophrenic and passive. As the attorney for the Appellant argued at trial the sole purpose of this improper testimony was to bolster the testimony of Colon. *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015). The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003).

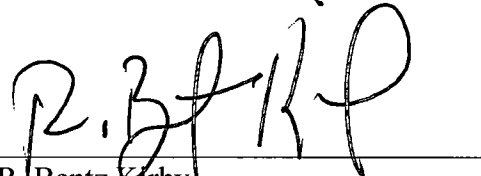
In order for evidence to be admitted, it must be reliable and it must be relevant. S.C.R.E. Rule 401. There is no evidence or testimony here which is reliable. Rather there is only inadmissible hearsay statement by Woodberry. And, the definition of both a lobotomy and schizophrenia in the most basic meaning indicate the evidence was not reliable. There is no evidence

which comports with the plain meaning, nor the clinical meaning of the medical conditions which are the subject of this testimony. It was error for the trial court to allow this testimony and the case law on relevance is clear on this issue. *State v. Page*, supra and *State v. Lyles* supra.

### CONCLUSION

A cursory examination of the testimony of Woodberry indicates it is neither relevant or reliable. It was introduced to bolster the testimony of Jason Colon and to allow the State to argue that the Appellant had planned the bank robbery. Colon was competent to testify and testified he decided the rob the bank after he went in to cash his check. Woodberry is not competent to provide any opinion or hearsay evidence regarding the mental condition of Colon as that is the province of medical experts. There is no relevant issue that Colon received a lobotomy or is schizophrenic. Allowing the jury to hear this improper hearsay evidence was both an error of law and an abuse of discretion. Therefore, the judgment and verdict below should be reversed.

Respectfully submitted, this the <sup>28<sup>th</sup></sup> day of March, 2016 at Orangeburg, South Carolina.



R. Bentz Kirby  
Glenn Walters  
Post Office Box 1346  
Orangeburg, South Carolina 29116  
(803) 531-8844  
Attorney for Appellants