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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2015-000184

The State, ... Respondent,

v.

Derek Vander Collier, ... Appellant.

FINAL BRIEF OF APPELLANT DEREK VANDER COLLIER

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II. Whether the trial court erred by finding that Appellant's statements were given freely and voluntarily?

III. Whether the trial court erred by allowing Justin Kirkman's in-court identification when the pretrial identification was unduly suggestive?

STATEMENT OF THE CASE

Appellant was indicted for possession of a weapon during the commission of a violent crime and burglary, 2nd degree, violent arising out of the theft of a television from a Myrtle Beach motel. (*See* Indictments). The State brought Appellant to trial before the Honorable Steven H. John on December 9, 2014. Despite representing to the Court in a pre-trial status conference that a *Neil v. Biggers* hearing would be unnecessary, the Solicitor asked the State's second witness, Justin Kirkman, for an in-court identification. (R. pp. 77, 78, 81). Appellant made a motion for a mistrial, which was granted by the trial court. (R. pp. 80–83).

The State called the case to trial the following day, December 10, 2014, after conducting a *Neil v. Biggers* hearing. (R. p. 138). Appellant was convicted of burglary, 2nd degree, violent and acquitted of possession of a weapon during the commission of a violent crime. (R. p. 337). The trial court sentenced Appellant to thirteen years' incarceration, with credit for time served. (R. pp. 340, 352).

STATEMENT OF FACTS

On November 20 and 21, 2013, the Jamaican Motor Inn ("the Jamaican")—a building located at the Caribbean Resort in Myrtle Beach—was closed so that the doors to the

rooms could be painted. (R. pp. 158, line 25; 159, lines 1–5; 163, lines 1–7). Justin Kirkman and another subcontractor were hired to paint the doors of these rooms. (R. p. 172, lines 12–13). Kirkman and his coworker finished the job late on the evening of November 20, 2013. (R. p. 173, line 2). As the doors were still wet, Kirkman remained at the Jamaican in order to check all the doors and close them as they dried. (R. p. 173, lines 2–5). Kirkman checked the doors approximately every thirty minutes. (R. p. 173, line 11). Shortly after midnight, Kirkman heard a door shut and went down to the third floor to investigate. (R. pp. 173, lines 24–25; 174, lines 1–5). Kirkman observed a light on in Room 309 and walked over and saw "a black gentleman with his hands on the TV, with gloves on, trying to remove the TV." (R. p. 175, lines 1–3). Kirkman asked what the man was doing there, and the man then turned, pulled out a semiautomatic handgun, put up the hood on his shirt, and fled the room. (R. p. 175, lines 3–13).

Kirkman "slowly follow[ed]" the man down the stairs and observed the man enter a gold or silver four-door sedan. (R. pp. 177, line 25; 178, lines 1–7). Kirkman observed the man drive by in the vehicle and saw a television in the backseat of the car. (R. p. 178, lines 17–23). Kirkman called the police, and met with officers approximately a week later to help prepare a sketch of the suspect. (R. p. 181, lines 1–25). Approximately three weeks later, police had Kirkman come in to view a photographic lineup. (R. p. 182, lines 17–25). Kirkman was not able to positively identify Appellant, who was one of the persons pictured in the lineup.[1] (R. p. 183, lines 17–23).

[1] Over one year later at trial, however, Kirkman identified Appellant as the man he observed in Room 309 of the Jamaican. (R. p. 184, lines, 17–21).

After the burglary, law enforcement began searching for gold Saturns in local parking lots and other areas.[2] (R. pp. 220, lines 22–25; 221, line 1). Detective Todd MacPherson located a gold Saturn nearby, but that proved to be a dead end. (R. pp. 221, lines 2–25; 222, lines 1–18; 227, lines 9–12). Late on January 29, 2014 or early on January 30, 2014, Detective Brian Truex observed Appellant walking down 6th Ave. South and Ocean Boulevard and stopped him related to outstanding warrants.[3] (R. p. 229, lines 17–25). Detective Truex placed Appellant under arrest and conducted an interview at the Myrtle Beach Police Department jail. (R. p. 231, lines 1–7). The interview took place five to ten minutes after the arrest. (R. p. 231, lines 7–10). Appellant had recently smoked crack cocaine at the time. (R. p. 232, lines 4–7). Appellant's counsel objected as to the voluntariness of the statement. (R. pp. 234, lines 17–19; 235, lines 16–17). The trial court allowed the State to introduce this statement over Appellant's objection. (R. pp. 235, line 25; 236, line 1). During the interview, Appellant made incriminating statements about the burglary. (R. p. 237, lines 1–25). Appellant also stated that his mother owed a debt to drug dealers, which caused him to commit burglaries in order to repay the debt. (R. p. 239, lines 14–23).

Detective Carol Allen then testified at trial that she conducted two interviews with Appellant—one on January 30, 2014 and one on January 31, 2014. (R. p. 245, lines 14–15). The State only introduced the latter interview, during which Appellant expressed fear of several local criminals, including David Henry. (R. p. 255, lines 1–3). However, in-

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[2] Catrisha Brandenburg—allegedly a friend of Appellant's—later testified that she had a gold Saturn, though she acknowledged that other people had access to it and had driven it before. (R. p. 277, lines 13–23).

[3] It is unclear when or how law enforcement obtained a warrant for Appellant in this case.

formation that Appellant gave law enforcement during this interview led to the arrest of Henry on numerous charges. (R. p. 255, lines 19–24). During Appellant's interviews, he never admitted to having a gun. (*See, e.g.*, R. p. 252, lines 13–14).

ARGUMENTS

I. The trial court committed reversible error when it improperly limited Appellant's closing argument and prohibited Appellant from responding to the State's bolstering of Justin Kirkman's credibility.

A. Factual and Procedural History

Kirkman admitted during his testimony that he had previously been convicted of burglary and non-aggravated robbery in Colorado and was currently on probation for those charges. (R. p. 171, lines 5–22). Appellant's counsel obviously referred to these charges in attacking Kirkman's credibility in the trial. Additionally, during Kirkman's cross-examination, Appellant's counsel questioned him about inconsistencies in his statements to police. Initially, Kirkman told police that the suspect left in a silver car.[4] (R. p. 193, lines 1–10). However, later Kirkman changed his story and said the vehicle was "silver or gold." (R. p. 193, lines 1–10). The State asked the trial court to allow it to introduce a prior consistent statement of Kirkman, contending that Appelant's counsel implied recent fabrication. (R. p. 197, lines 14–24). Appellant's counsel countered that such evidence would only operate as "bolstering testimony by the State". (R. p. 198, lines 3–4).

The trial court held that Appellant's questioning did not imply recent fabrication or improper influence or motive and did not allow the State to introduce the prior consistent statement. (R. p. 201, lines 1–18). However, the trial court did rule that "if it's the attention (sic) of the Defense to make [the] argument to the Jury that this witness is lying to

[4] Officer Jake Roy later testified that Kirkman initially told him that he observed "a four-door silver car." (R. p. 207, line 23).

save himself from going back to jail, then I am going to allow the statement, because that is an argument by the Defense of improper influence or motive." (R. p. 201, lines 14–18). On redirect, the State's first question to Kirkman was: "[I]f you were convicted of perjury or lying to the police, that would get you a probation revocation, too, wouldn't it?" (R. p. 203, lines 19–22).

During Appellant's closing argument, the State objected to Appellant making reference to Kirkman's motivation for committing the crime. (R. p. 310, lines 9–10). Specifically, the State contended that Appellant contravened the Court's earlier ruling that Appellant not argue that Kirkman recently fabricated his testimony or had an improper influence or motive, and the State asked the trial court to reopen the case so that it could introduce Kirkman's prior consistent statement. (R. pp. 310, lines 23–25; 311, lines 1–5). Appellant argued in response that:

> The State in their closing argument went to great length about Justin Kirkman's believability and reliability. They went to great length about saying that he gave a statement and what he said was true. I certainly don't think that I would now be precluded from attacking a witness' credibility and reliability.

(R. p. 311, lines 15–20).

The trial court ruled that Appellant was making an argument about recent fabrication or improper motive but declined to reopen the case. (R. pp. 312, lines 1–16; 317, lines 3–4). However, the trial court directed Appellant's counsel that he "not imply the improper motive argument in such that, regarding Mr. Kirkman, that he is fabricating something to save himself from prosecution or going to jail or revocation of his probation." (R. p. 317, lines 14–18).

B. Analysis

During the State's closing argument, the solicitor extensively referenced Kirkman's prior criminal history and argued to the jury that Kirkman would not lie because he risked perjury charges or violating his probation. Specifically, the solicitor stated:

> What further motivation does Justin have to tell the truth? Well, at least for a little while longer, he's doing well, he might get off probation early but as of right now he's still on probation. If he were to be convicted of lying to the police or lying to the Court, he could go to jail, he could go to prison. He has a lot of incentive to tell the truth. . . . Justin has *no motivation to lie.*

(R. pp. 297, lines 13–19; 298, lines 7–8).

When Appellant's counsel attempted to rebut these statements during Appellant's closing argument, the State objected and the trial court instructed Appellant's counsel that such argument was improper given his earlier ruling on the prior consistent statement. (R. pp. 310, lines 9–25; 312, lines 1–16). This ruling was error, for Appellant's argument to the jury was an invited response to the State's bolstering of Kirkman's credibility by strongly intimating to the jury that Kirkman would never lie because he could go to jail for perjury. The law cannot countenance inconsistent standards applied to prosecutors and defense counsel.

The State was allowed to argue that Kirkman "has no motivation to lie." (R. p. 298, lines 7–8). Surely they cannot conversely be allowed to protest vigorously when defense counsel argued in reply that, in fact, Kirkman had a strong motivation to lie. Indeed, the appellate courts of this State have permitted argument as to a witness's motive to lie during closing arguments, particularly when it is necessary in lieu of comments made by the opposing party. *See Ellenburg v. State*, 267 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (finding that a solicitor's argument that a witness would not lie or change his story be-

cause he was facing a polygraph "was in fair response to [defense] counsel's argument regarding the polygraph. Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant.").

Kirkman was the State's key witness and the only eyewitness to the crime. More importantly, Kirkman had a conviction for burglary and robbery. Depriving Appellant of the right to argue Kirkman's motivation to lie after the State repeatedly bolstered his credibility strikes at the very heart of Due Process. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("Solicitors are bound to rules of fairness in their closing arguments." (quoting *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)); *see also State v. Frost*, 161 P.3d 361, 366 (Wash. 2007) ("Improper limitation of closing argument may also infringe upon a defendant's Fourteenth Amendment due process rights."). "In an adversarial system[,] due process requires at least a reasonably level playing field at trial." *Giron v. State*, 19 S.W.3d 572, 575 (Tex. App. 2000) (quoting *DeFreece v. State*, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993)). This Court should reverse and remand for a new trial so that Appellant has the opportunity to have his guilt determined in a proceeding where the same rules apply to the State and the Defense.

II. The trial court committed reversible error by finding that Appellant's statements were given freely and voluntarily.

A. Factual and Procedural History

Prior to trial, Appellant's counsel moved to exclude Appellant's statements, arguing that Appellant's statements were not given freely and voluntarily. (R. p. 12). The State called Brian Carl Truex, formerly a violent crimes detective with the Myrtle Beach Police Department, to testify about Appellant's first statement. (R. p. 14, lines 14–25). Detective

Truex interviewed Appellant at the Myrtle Beach Police Department jail immediately after Appellant's arrest on the evening of January 30, 2014. (R. p. 15, lines 17–25).

Detective Truex testified that Appellant, who only had a tenth grade education, "stated that he had smoked crack about forty-five minutes prior to the interview." (R. pp. 16, lines 24–25; 26, lines 11–13). Although Detective Truex offered to conduct the interview at a later time, he ultimately did not delay the interview to ensure that the effects of the drugs had worn off. (R. p. 19, lines 1–19). During cross-examination, Detective Truex acknowledged that he had no first-hand knowledge of the effects of crack cocaine and "wouldn't know what that feels like." (R. p. 21, lines 12–15). Moreover, Detective Truex admitted that intoxication on crack cocaine "can impair your decisions." (R. p. 22, lines 15–17).

Following Detective Truex's testimony, Appellant's counsel moved to suppress Appellant's first statement based on *Jackson v. Denno* and its progeny. (R. p. 32, lines 7–12). Appellant's counsel contended that Appellant did not knowingly and intelligently waive his constitutional rights because he was intoxicated on crack cocaine, which impaired his ability to understand the seriousness of his charges and his constitutional rights at issue. (R. p. 33, lines 7–25). Additionally, counsel argued that Appellant only has a tenth grade education and was coerced by implied promises of leniency made by the interrogating officer. (R. pp. 34, lines 11–21; 35, lines 2–20). The trial court denied Appellant's motion, finding that Appellant's first statement was given voluntarily. (R. p. 37, lines 4–25; 38, lines 1–25; 39, lines 1–8).

Following the trial court's ruling on Appellant's first statement, the State played Appellant's second and third statements to the trial court. (R. pp. 41, lines 14–25; 46, lines

21–22; 47, lines 8–9). Detective Carol Allen, who conducted both interviews, testified at the hearing. (R. pp. 42–54). Detective Allen acknowledged that "[Appellant's] understanding was that he was implicating himself in order to either help [Drug Enforcement Unit] or help [her] office in the prosecution of other people." (R. p. 51, lines 16–19). Additionally, Detective Allen told Appellant that she would "put in a good word for [him]." (R. p. 53, lines 6–8). However, Detective Allen did not attend Appellant's bond hearing to testify on his behalf. (R. p. 53, lines 10–13).

Appellant then testified at the *Jackson v. Denno* hearing. (R. p. 51). Appellant testified that he had smoked crack "four to five minutes before [the police] arrested [him]." (R. p. 56, lines 3–4). Appellant also testified that Detective Truex found a crack pipe on him when he was arrested. (R. p. 56, lines 10–12). Further, Appellant testified that Detective Truex told him he would "end [his] days as a free man" if he didn't cooperate with law enforcement. (R. p. 57, lines 15–16).

Appellant's counsel then argued that the third statement should be excluded[5] from trial because Appellant's will was overborne when law enforcement made promises of leniency in exchange for Appellant's cooperation. (R. p. 63, lines 3–25). Moreover, Appellant's counsel argued that had Appellant not his first statement under the influence of drugs, he would not have given a subsequent statement, rendering the third statement involuntary. (R. pp. 63, lines 22–25; 64, lines 1–4). The trial court found that Appellant's third statement was voluntarily given. (R. pp. 65, lines 6–25; 66, lines 1–25; 67, lines 1–21).

[5] The State acknowledged that it did not intend to introduce Appellant's second statement at trial, so arguments were limited to Appellant's third statement. (*See* R. p. 41, lines 2–4).

B. Analysis

"Under *Jackson v. Denno*, a defendant is entitled to a 'reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence.'" *State v. Miller*, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007) (quoting *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976)). "'A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession.'" *State v. Parker*, 381 S.C. 68, 75, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007)). "The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made." *Miller*, 375 S.C. at 382, 652 S.E.2d at 450 (citations omitted). The State must prove by a preponderance of the evidence that the defendant's statement was voluntary. *Id.*

In this case, the uncontroverted evidence shows that Appellant smoked crack cocaine approximately forty-five minutes prior to his first interview. Crack cocaine is "a highly addictive and powerful stimulant derived from powdered cocaine." *Arrington v. Astrue*, 2011 WL 3844172, at *5 n.7 (W.D.N.Y. Aug. 8, 2011). It logically follows that Appellant was still intoxicated during the interview. Although crack cocaine is well known to have a short duration, it is equally well known as being highly addictive, causing users to repeatedly seek hit after hit of the drug. Thus, even if the primary effects of the drugs had worn off, Appellant was likely in a position where he would do almost anything to get out of jail. It is clear from Appellant's interview that he desired to be as cooperative as possible in order to help himself out, but it is equally apparent from the context of the interview that Appellant's decisions were very likely affected by his intoxication.

It is within the ambit of common knowledge that drugs often cause people to do things that they would not otherwise do. While Detective Truex offered to conduct the interview at a later time, the far more prudent course would have been to simply delay the interview to ensure that Appellant was not under the influence of drugs. The circumstances of the crime in this case do not indicate any type of exigency or other extraordinary situation that would require interviewing Appellant immediately after arrest. While this may have proved to be an inconvenience for officers, constitutional dictates trump pragmatic concerns. In fact, Detective Truex admitted that intoxication on crack cocaine "can impair your decisions." (R. p. 22, lines 15–17). In light of this, this Court should find, under the totality of circumstances, that Appellant's first statement was involuntary due to his intoxication and his third statement was involuntary as a result.

III. The trial court erred by allowing Justin Kirkman's in-court identification when the pretrial identification was unduly suggestive.

A. Factual and Procedural History

After declaring a mistrial in Appellant's first trial, the trial court conducted a *Neil v. Biggers* hearing. (R. pp. 91–133). The State first called Detective Todd Macpherson, who was the investigator that prepared a photographic lineup a little over a month after the burglary occurred. (R. pp. 92–93). Six photographs were displayed in the lineup, with all being full black and white headshots. (R. pp. 93, lines 11–19; 94, line 12). Appellant's photograph was located in the number 2 spot on the lineup. (R. p. 94, line 1). Appellant was the only person who had a hooded sweatshirt on in the lineup. (R. p. 97, lines 17–19). After preparing the lineup, Detective Macpherson gave the lineup to Detective Lester Cook. (R. p. 94, line 22).

The lineup was shown to Justin Kirkman. (R. p. 99; lines 7–9). Kirkman testified that he was approximately thirty to thirty-five feet from the suspect at the crime scene and only had fifteen to twenty seconds to observe the suspect. (R. p. 101, lines 10–18). Moreover, Kirkman testified that the suspect was wearing a hooded sweatshirt. (R. p: 102, lines 13–24). After looking at the lineup, Kirkman tentatively selected the number 2 photograph, telling the Detective that he couldn't be one-hundred percent sure of his selection. (R. p. 105, lines 10–17). In fact, Kirkman was only able to eliminate four photographs from the lineup and narrowed down his selection to photographs number 2 and 3. (R. p. 106, lines 1–9). Thus, Kirkman did not circle or affirmatively identify any photograph in the lineup, and Detective Cook later testified "there was no clear-cut identification." (R. pp. 121, lines 8–25; 122, lines 1–10; 124, lines 18–19). In fact, Kirkman admitted that he may have only tentatively selected photograph number 2 because it was the only photograph in which a suspect had on a hooded sweatshirt. (R. p. 115, lines 8–15 ("I was worried that I was associating and since the gentleman in the photo had a hoodie on, that I was just associating those two together.")). Despite being unsure of his identification when viewing the lineup, Kirkman testified at trial that he was positive that Appellant was the person that he viewed fleeing the Jamaican Motel with a television. (R. pp. 110, lines 23–25; 111, line 1).

Following the testimony at the *Neil v. Biggers* hearing, Appellant made a motion for the photographic lineup to be excluded and a motion to suppress any in-court identification. (R. p. 125, lines 8–18). The trial court found that Kirkman's tentative identification of Appellant constituted a pretrial identification for purposes of *Neil v. Biggers*. (R. p. 129, lines 1–22). The trial court ruled that it would allow the in-court identification, after

which Appellant withdrew his motion to suppress the photographic lineup so that it was available for cross-examination. (R. p. 132, lines 1–10).

B. Analysis

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000) (citing *Stovall v. Denno*, 388 U.S. 293 (1967)). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *Id.* (citations omitted). Courts undertake a two-prong analysis to resolve this question. First, the court must determine whether the identification process was unduly suggestive. *Moore*, 343 S.C. at 287, 540 S.E.2d at 447. Second, the court must determine whether the out-of-court identification was so reliable that there is no substantial likelihood of misidentification. *Id.*

Here, by Kirkman's own admission, the photographic lineup was unduly suggestive. Kirkman testified that he "was worried that [he] was associating and since the gentleman in the photo had a hoodie on, that I was just associating those two together." (R. p. 115, lines 8–15). *See id.* at 287, 540 S.E.2d at 448 (noting that similar clothing is an indicator of suggestiveness). Often, courts are left to speculate whether a lineup is suggestive based on the characteristics in the photographs, but here we have an admission by the person viewing the lineup that the similarity in clothing *did* affect his decision. That is sufficient to satisfy the first requirement.

Second, there are no indicators that the out-of-court identification was so reliable that there is no substantial likelihood of misidentification. In fact, Kirkman's identification

was anything but reliable. He was not able to state with one-hundred percent certainty that Appellant was the suspect. Moreover, Kirkman was located thirty to thirty-five feet from the suspect at the crime scene, only had fifteen to twenty seconds to observe the suspect, and the lineup occurred a month after the crime. (R. p. 101, lines 10–18). Thus, this Court should determine that there are no indicators of reliability that would trump the suggestive nature of the lineup. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972) (listing factors to be considered by the court, including "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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.").

Moreover, and compounding the problem in this case, Kirkman was present in court for the *Jackson v. Denno* hearing and heard Appellant's inculpatory statements. (R. p. 132, lines 12–21). Although Appellant's counsel did not ask Kirkman to be excused during that hearing, there was no reason to do so at that time as the State had affirmatively indicated that Kirkman would *not* be making an in-court identification (which led to the mistrial in the first trial). Accordingly, Kirkman's in-court identification should be excluded in this case.

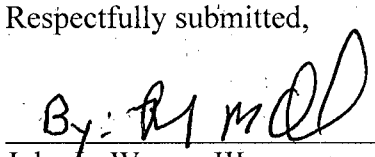
CONCLUSION

For the reasons stated above, this Court should reverse the conviction and sentence of Appellant Derek Vander Collier.

(Signature Page Follows)

Respectfully submitted,

April 27, 2016

By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability the Final Brief 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."

Respectfully submitted,

April 27, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.