

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge
Appellate Case Tracking No. 2014-001717

THE STATE,

RESPONDENT,

-v-

CHAD STEPHEN HAYES

APPELLANT,

FINAL BRIEF OF APPELLANT

JAMES K. FALK
Falk Law Firm, LLC.
PO Box 1058
Charleston, SC 29402
(843) 606- 6007

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether it was prejudicial error for the trial court to qualify Laura Caldwell as an expert in the field of child abuse assessment, where she did not have a bachelor's degree in psychology, or sociology, had not published any peer review articles on child abuse assessment, and had not taken any post-graduate, or continuing education courses in the field.

II.

Whether it was prejudicial error for the trial court to allow the same individual to testify as both a forensic interviewer and as an expert in child abuse assessment.

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury on four counts of Committing a Lewd Act on a Minor; one count of Contributing to the Delinquency of a Minor; one count of First Degree Criminal Sexual Conduct with a Minor under 11 years old; one count of Criminal Sexual Conduct with a Minor under 16 years old; and 2 counts of Criminal Sexual Conduct with a Minor under 14 years old. Three of these indictments were *nolle prossed*, namely one count of Lewd Acts upon a Minor; one count of CSC with a Minor under age 16; and one count of CSC with a Minor under age 14. His case was called to trial on July 28, 2014 before the Honorable Thomas A. Russo.

Robert T. Williams represented the appellant. Suzanne Mayes and Rhonda Patterson of the 11st Circuit Solicitor's Office represented the State. (R. 1).

On August 1, 2014 the jury returned guilty verdicts on all counts. Judge Russo sentenced defendant to 3 years on the Contributing to the Delinquency of a Minor charge; and 15 years each on the three Lewd Acts charges and the one CSC with a minor under 14 charge. These 5 sentences were to run concurrent. Judge Russo sentenced appellant to 25 years on the CSC with a Minor under 11 charge with that sentence to run consecutive to the other 5 sentences for a total of 40 years.

This appeal followed.

STATEMENT OF THE COMMON FACTS

Christy Earnest has four daughters, three of whom testified as victims in this action. Throughout this brief they will be described as daughter 1, daughter 2, daughter 3, and daughter 4. In 2008 Christy Earnest met Appellant Chad Hayes and within weeks after meeting, Christy Earnest and her four daughters moved into Appellant's home in the Leesville area of Lexington County. (R. 137 ll. 4-6; R. 207 ll. 14- 18). The four girls all attended Batesburg-Leesville Elementary School. (R. 198 ll. 11 – 20). On September 1, 2011 daughter 2 and daughter 3 withdrew from Batesburg-Leesville school system and relocated to Campbell, Missouri. Daughter 1 withdrew from the school on September 2, 2011. (R. 154 l. 3 – 13). Daughter 3 re-enrolled in the Batesburg Leesville School on January 21, 2011. Daughter 1 re-enrolled into the Batesburg Leesville Middle school on January 18, 2012. (R. 156 ll. 7-10). Upon their return to Lexington County daughter 1 and daughter 3 lived with their maternal aunt and guardian Ashley Rodriguez. (R. 157 ll. 3-7). Daughter 2 remained in Campbell, Missouri and lived with another maternal aunt, Peggy Walker. (R.343 ll. 14 – 20).

After her return to South Carolina in September 2011, Daughter 3 told Ashley Rodriguez that she and her sisters were sexually assaulted by Appellant and that Appellant took naked photographs of her and her sisters. (R. 192 ll. 7 – 13). Ashley Rodriguez then reported daughter 3's allegations to Michelle Brackett, who was the Batesburg Leesville School guidance counselor. (R. 192 ll. 14- 23). On or about December 9, 2011 Michelle Brackett in turn reported daughter 3's allegations to the Lexington County Sheriff's Office. (R. 158 ll. 9-13). Michelle Brackett's report of sexual abuse included allegations of abuse by defendant upon daughter 1, daughter 2, and

daughter 3. (R. 159 II. 4 – 15). Upon receiving Michelle Brackett's, report Detective Stephen Collins of the Lexington County Sheriff's Department had the Dickerson Center conduct forensic interviews with daughter 1 and daughter 3. (R. 464 I. 1 – R. 465 I. 7). Because daughter 2 was still residing with her aunt in Missouri a provider in that state conducted her forensic interview. (R. 465 II. 8 – 19).

On or about March 30, 2013, Detective Collins interviewed the Appellant at the Lexington County Sheriff's office. After receiving Miranda warnings, Appellant gave a statement to Detective Collins and admitted to touching each of the three but denied that the contact was sexual. (R. 480 I. 6 – R. 482 I. 24). After giving his statement, Appellant was then placed under arrest and charged with criminal sexual conduct. (R. 488 II. 22-23).

ARGUMENT

I.

Laura Caldwell did not have sufficient knowledge, skill, experience, training or education in the field of child abuse assessment to testify as an expert, and the admission of her testimony was prejudicial and harmful error.

Relevant Facts

Daughter 1, daughter 2 and daughter 3 testified against Appellant at trial. All three girls were daughters of Christy Earnest. The accusations against Appellant arose from the time when Christy Earnest and her three daughters were living at Appellant's home in the Leesville area of Lexington County.

In addition to daughter 3's in-court testimony, the State introduced and published a forensic interview that Laurie Caldwell conducted with daughter 3. Ms. Caldwell conducted the interview at the Dickerson Center for Children on January 12, 2012 at a time when daughter 3 was ten years old. (R. 426 ll. 1-10.). The video of the forensic interview was published to the jury. The content of the video was not transcribed by the Court reporter. (R. 426 ll. 21-25.).

Prior to the publication of the forensic interview, the Court conducted an in-camera hearing to determine if the video interview possessed particularized guarantees of trustworthiness as required under S.C. Code Ann. § 17-23-175(F). In the hearing both the State and defense counsel questioned Ms. Caldwell. (R. 418 l. 9 – p. 423 l. 3). Ms. Caldwell's *curriculum vitae* was marked as Court's Exhibit 7. (R. 419 l. 3). During this in-camera hearing, the state advised the Court that in addition to having her testify regarding the manner in which she conducted daughter 3's interview, the State advised

the Court that it intended to call Ms. Caldwell to testify in the area of child abuse assessment and the delayed reporting of sexual abuse. (R. 423 ll. 7- 16). In response Defense counsel objected by stating: *I'm sure the Solicitor knows about State versus Cromer (sic) talks about what forensic examiners can testify to and how they're not supposed to give their opinion in reference to the validity or truthfulness of the person they're interviewing.* (R. 424 ll. 10-14). The Court then stated: *Well, I don't mean to interrupt you, but this may -- I don't know, this may be appropriate to take up at the point that you want to proffer that testimony regarding that. Right now I just want to really deal with the admissibility of the video.* (R. 424 ll. 17-21).

The Court then found that based upon the method Ms. Caldwell used to conduct the forensic interview, the interview appeared to have the proper and appropriate indicia of reliability. (R. 423 ll. 17- 23). Defense counsel raised no objection to the publication of the January 12, 2012 interview. The Court then called the jury back in and Ms. Caldwell provided in-court testimony regarding the manner in which she conducted daughter 3's January 12, 2014 forensic interview. (R. 425 l. 24 – R. 426 l. 8).

The State then sought to have Ms. Caldwell admitted to testify as an expert in the field of child abuse assessment. (R. 431 ll. 10- 12). Defense counsel was given the opportunity to *voir dire* Ms. Caldwell regarding her qualifications. On cross examination Caldwell revealed that she had master's degree was in social work; an associate's degree in criminal justice; and a bachelor of arts in interdisciplinary studies. (R. 431 l. 18- R. 434 l. 23). After conducting his *voir dire* of Ms. Caldwell, defense counsel advised the court that he would not stipulate that Ms. Caldwell was an expert in child abuse. (R. 434 l. 24). The Court then qualified Ms. Caldwell as an expert in the field of child abuse assessment.

(R. 435 ll. 1-4).

Discussion

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion. State v Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (S.C. 2015) citing State v Myers, 301 S.C. 251, 391 S.E. 2d 551 (1990). A trial court's decision to admit expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Chavis, 412 S.C. at 106, citing State v Price, 368 S.C. 494, 629 S.E.2d 363 (2006). An abuse of discretion occurs when the circuit court's conclusions are either erroneous as a matter of law, or are based upon unsupported factual conclusions. State v. Chavis, 412 S.C. at 106, citing State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006).

The two-prong test set forth in State v White, 382 S.C. 265, 676 S.E.2d 684 (2009) applies to the admissibility of expert testimony from child abuse assessment experts. State v Chavis, 412 S.C. at 106. Under the test in White, the trial court must first make a threshold determination that the expert is sufficiently qualified; and that the expert's testimony will be reliable. State v White, 382 S.C. at 273. In qualifying Ms. Caldwell as an expert in the field of child abuse assessment, the Court relied upon Ms. Caldwell's experience and training. (TT p. 511 l. 2).

Ms. Caldwell testified that it was more common for a child abuse victim to delay their reporting of abuse than it was for child abuse victims to immediately report any abuse. (R. 436 ll. 7- 9). Ms. Caldwell testified further as to why child abuse victims

may delay reporting of their assaults. Ms. Caldwell then testified that between January 1, 2014 and February 25, 2014, she interviewed 35 children at the Dickerson Center and of those 35 interviews, 29 interviews had delayed reporting of abuse by the victim. (R. 436 ll. 10 – 20). Ms. Caldwell went further to testify why child abuse victims would delay reporting of their assaults.

The facts in this case are similar to those presented in State v. Chavis, id. In Chavis the South Carolina Supreme Court was presented with the issue whether a forensic interviewer, Debbie Elliot, was qualified to testify as an expert in child abuse assessment. In Chavis the state sought to introduce testimony from a report made by a forensic interviewer through the in-court testimony of Ms. Elliot. The forensic interviewer, Ms. Gist, was not available for trial. Defense counsel asserted a hearsay objection to Elliot's testimony regarding Grist's report. The State was able to survive the hearsay objection by qualifying Elliot as an expert in child abuse assessment and then argue pursuant to Rule 703 of the South Carolina Rules of Evidence that an expert was permitted to testify to evidence that would be otherwise inadmissible. Id. at 107.

In holding that Elliot was not sufficiently qualified as an expert in child abuse assessment the Chavis Court stated:

There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. However, evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies. (internal citation omitted).

Id.

In the case at bar Appellant would agree that Laura Caldwell is qualified to perform forensic interviews of child sexual abuse victims. Moreover Appellant would agree that Ms. Caldwell is qualified to testify regarding the appropriate technique for conducting a forensic interview on a child sexual assault victim.

Rule 702 SCRE provides the criteria for determining if a witness is qualified as an expert. Laura Caldwell did not have the educational credentials to qualify her as a child abuse assessment expert. Laura Caldwell does not have a degree in psychology instead she has an associate's degree in criminal justice; a bachelor of arts degree in interdisciplinary studies with a focus on sociology and social work; and, a master's degree in social work. (R. 432 II. 2 – 17). Laura Caldwell had not taken any specialized course or undergone any continuing education specifically related to the field of child abuse assessment. (R. 432 I. 25 – R. 433 I. 21). There is nothing on her C.V. to indicate that she has ever published a report or article on the subject of child abuse assessment in a peer-reviewed journal. Ms. Caldwell does not have sufficient knowledge, skill, experience, training or education in the field of child abuse assessment and delayed reporting to qualify as an expert in this field. Therefore her expert opinions do not meet the threshold qualification requirement of Rule 702 SCRE, and the admission of her opinions supported by the imprimatur of the designation as an expert in the field was prejudicial.

II.

The trial court committed prejudicial error by permitting Laura Caldwell to testify in the dual role as both the forensic interviewer and as a child abuse assessment.

Relevant Facts

Caldwell began her testimony by generally bolstering the reliability of a child's testimony when it is generated through a forensic interview. She began testifying with the following definition of a forensic interview:

A forensic interview is basically a real fancy term for an interview that's designed for children. We question children different than we question adults. Because children can be quite suggestible, we approach children in open-ended questions so that we can solicit their narrative and not ours. We leave it to the what, when, where, who, how, so that we can have them tell us instead of us suggesting a direction to go in.

(R. 415 II. 3 – 10). After further colloquy with the State Ms. Caldwell testified that the goal of a forensic interview was to obtain testimony uncontaminated by adults:

We're seeking uncontaminated information. We do not want any influence from an outside party, whether it be a caretaker, a parent, a law enforcement officer, Department of Social Services.

(R. 416 II. 2 – 5).

Once admitted as an expert in child abuse assessment, Caldwell opined why children delay their reporting or disclosure of sexual abuse. Caldwell testified that children delay reporting because: they fear additional violence; they fear being separated from

their parent and or siblings; and, or they seek the attention and gifts provided them by the alleged abuser.

The effect of Caldwell's testimony served to bolster the individual testimony from all three girls. Caldwell testified that one reason why children delay reporting of child abuse is the fear of physical violence. (R. 436 I. 25 – R. 437 I. 2). This bolstered the testimony of the three daughters. Daughter 1 testified that she feared that Appellant would frequently hit and spank her with both a belt and wooden drum sticks. (R. 215 II. 15 – 19; R. 219 II. 7 – 13; and R. 230 II. 16- 19). Daughter 2 testified several times that Appellant would "whoop" them. (R. 346 I. 17; R. 350 I. 10; R. 351 I. 7 - 17). In her forensic interview daughter 3 stated that she would not say anything about the alleged abuse because she was scared the Defendant would get mad and he would push her and hit her with a belt. (Trial Exhibit 76).

Ms. Caldwell testified that children who witness domestic abuse are more likely to delay reporting sexual abuse. (R. 436 I. 25 – R. 437 I. 2). This statement again bolstered the daughters' testimony. Daughter 1 testified that she witnessed physical fights between Appellant and her mother. (R. 219 I. 25 – R. 220 I. 4). Daughter 2 testified that she witnessed Appellant slap and push her mother, making her fall. (R. 351 II. 20 – 25). In her forensic interview Daughter 3 testified that the defendant would hit, push and kick her mother and that she was scared of defendant. (Trial Exhibit 76). She also testified that defendant pushed their mother to the ground causing an injury to the mother's tailbone. (R. 337 I. 25 – p. 338 I. 5).

In addition to exposure to physical abuse and domestic violence, Ms. Caldwell testified that exposure to animal abuse was a factor that contributed to a child's delayed

reporting. (R. 437 I. 2). This bolstered Daughter 3's statements in her forensic interview that when the defendant would get mad he would hit their dogs for no reason. (Trial Exhibit 76).

Caldwell testified that the child's dependency on grownups, and their fear of dislocation is a further reason why abuse victim's delayed reporting. (R. 437 II. 1-4). She further testified that in one-income households, they fear losing their home if the breadwinner goes to jail. (R. 437 II. 22-24). Children feel trapped when the non-offending parent is not supportive of the child. (R. 439 II. 20-24). All of Caldwell's testimony bolstered the testimony of the three daughters.

Daughter 1 testified that the reason she did not tell her teachers or other adults about the alleged abuse she was her fear of what would happen. She did not want someone to come in and separate her from her sisters. She was afraid if someone else knew, that they would call DSS and "DSS would take us away." (R. 216 I. 7 – R. 217 I. 16). Daughter 1 testified that her mother was present when defendant was taking topless pictures of the three daughters. (R. 210 II. 14-17; R. 287 I. 24 – R. 289 I. 1). Daughter 1 testified that her mother knew that defendant was shaving their pubic regions. (R. 241 I. 20 – R. 242 I. 1). In her statement Daughter 3 said that her mother was in the house when the defendant was taking nude pictures of her. Daughter 3 also indicated that her mother saw the defendant touch her inappropriately; and that her mother would not say anything about it because the defendant would get mad and hit her mother. (Trial Exhibit 76).

Caldwell also testified that predators would try and befriend and earn the trust of their victims by buying them gifts and taking them on special trips. Daughter 1 testified

that defendant bought them all their clothes, toys, and shoes. Daughter 1 was then shown State's Exhibits 30, 31 and 32, which she identified as her and her sisters' bedrooms in Appellant's house. She then identified the toys, shoes, clothes, karaoke machine, and video games belonging to her and her sisters. (R. 229 I. 23 – R. 233 I. 5). Daughter 1 testified further and that the defendant paid to take the girls to Carowinds. (R. 281 II. 10-17). She then testified that defendant told them that since they would be wearing their bikinis at Carowinds that he had to shave them before they could go. (R. 242 II. 14- 25).

Finally at the end of her interview, and once Ms. Caldwell left the room, daughter 3 turned and faced the ceiling-mounted camera and stated: *it was really sad what he did to us; sometimes he made us cry; I am happy we don't live with him no more.* (Trial Exhibit 76). This statement differed from the other testimony from daughter 3 because no one was in the room and she addressed it directly to the viewer of the recording. After Exhibit 76 was published to the jury the following colloquy took place between the State and Laura Caldwell:

Q: And at a point where you stepped out, Megan spoke out loud while she was alone in the room.

A: Yes, she did. She started speaking directly to the camera.

Q: Can you tell us during your experience there at the Dickerson Center, whether that's happened before with other kids in other cases?

A: That has happened before.

Q: And through your training and experience, can you tell us whether or not children express themselves in different ways?

A: Yes, they do.

(R. 429 I. 22 – R. 430 I. 8). Without Caldwell's bolstering testimony that daughter 3's behavior was not unusual, a jury is likely to have drawn a negative inference from this precocious 10 year old breaking the fourth wall with these remarks.

Discussion

Before testifying as a child abuse assessment expert, Laura Caldwell testified as daughter 3's forensic interviewer. The sole purpose of Caldwell's testimony should have been to lay the ground work for the introduction of daughter 3's taped interview. Forensic interviewers are not to testify to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. State v. Anderson, 413 S.C. 212, 220, 776 S.E.2d 76, 80 (2015). Laura Caldwell's testimony about forensic interviews in general went beyond this limited purpose of laying the groundwork for daughter 3's interview. Laura Caldwell's general statements about forensic interviews served to vouch and bolster daughter 3's testimony because it assured the jury that daughter 3's testimony would not be corrupted by leading questions or undue influence from a parent, guardian or case worker.

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court noted that: *It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the child's allegations.* Id. at 358. Whether by direct or indirect means, a witness may not comment on the credibility of another witness. State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), reh'g denied (May 21, 2012) (citing Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447

(1998); State v. Sapps, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-146 (1988)). This rule applies equally to a forensic interviewer bolstering the testimony of the child interviewee. McKerley, 397 S.C. at 464 (citing Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)). "The assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464(citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Since she had already performed the forensic interview of Daughter 3, Ms. Caldwell was fully informed that daughter 3 would testify that she was afraid of the defendant and afraid of being separated from her home, mother, and sisters. Therefore Caldwell was able to tailor her expert opinion regarding the root causes of delayed reporting in order to bolster daughter 3's testimony as to why she waited to report the abuse. The propriety of the State's dual use of one witness as both forensic examiner and child assessment expert was before the South Carolina Supreme Court in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). In Anderson the court held it was reversible error for the Court to qualify the same individual as both forensic interview expert and as a child abuse assessment expert. Id. at 413 S.C. at 219, and 776 S.E.2d at 79. In addressing the witnesses' dual role the Anderson court stated:

The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

Id. at 413 S.C. at 218, 776 S.E. 2d. at 79. The court in Anderson distinguished its opinion from the decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct.

App. 2015). Unlike the child abuse assessment experts in both *Anderson* and in the case at bar, the expert in Brown never interviewed the victim before testifying in court. Id. 413 S.C. at 219.

Prejudice

There was no forensic evidence to corroborate the daughters' allegations against defendant. In his closing defense counsel acknowledged that there was photographic evidence that corroborated some of the allegations, but there was doubt as to when and by whom the pictures taken. (R. 665 l. 25 – R. 666 l. 25). Therefore the case against defendant rested upon the credibility of the daughters' testimony. In his closing the Solicitor stated:

In this case, it's really about truth. There is no higher truth than what comes from right there. You heard the testimony of [daughter 1, daughter 2, and daughter 3], testimony where truth brought them the worse circumstances, truth, telling the truth tore them away from their family, torn them away from each other, left them motherless.

(R. 641 ll. 8 – 14). The Solicitor relied upon the testimony Ms. Caldwell's testimony to explain the daughters' delay in reporting:

Remember the testimony of Laurie Caldwell, a SLED agent with years of experience in child sexual abuse and child exploitation investigations? One of the most common tactics that sex offenders use is they try and gain some kind of bribery with the child. And we know that he was controlling, we know that he was at times abusive. We know the children were afraid of him.

(R. 645 ll. 15- 21). The Solicitor concluded his closing argument by again stressing the veracity of the daughters' testimony:

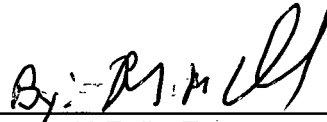
The most significant aspect of this case is that it speaks the truth. Every facet of this case, every circumstance speaks the truth, because those children have no motive whatsoever to come in this courtroom and say this about him if it weren't true. For a 14-year-old to get on an airplane for the first time by herself and come down here and take that stand in front of a roomful of strangers, there's no motive except to tell the truth.

(R. 655 ll. 18 – 25). Because of the reliance the State made on the veracity of the daughters' testimony, any testimony that impermissibly corroborated that testimony must be prejudicial to the defendant. The court permitted prejudicial error in allowing Ms. Caldwell to testify in a dual capacity. Ms. Caldwell was permitted to both elicit testimony from daughter 3 in the form of a forensic interview and as an expert witness explain to the jury why the testimony was consistent with other child abuse victims.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully Submitted,



James K Falk, Esq.
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com

Robert Dudek, Esq.
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 15th day of July, 2016.

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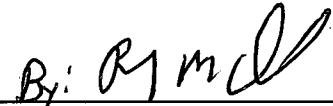
-v-

CHAD STEPHEN HAYES

APPELLANT,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule
211(b), SCAR.

By: 
James Falk
PO Box 1058
Charleston, SC 29402
(843) 606-6007

Robert Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Ranee Saunders, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and this 15th day of July, 2016.

By: 

James K Falk
Robert Dudek

Attorneys for Appellant

SUBSCRIBED AND SWORN TO
Before me this 15th day of March, 2016



Notary Public for South Carolina
My Commission Expires: October 30, 2022