

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 ORIGINAL

\_\_\_\_\_  
Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

**RECEIVED**

NOV 29 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BILLY RAY SMITH,

APPELLANT

APPELLATE CASE NO 2015-002543

\_\_\_\_\_  
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) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, after giving the standard charge that voluntary intoxication is not a defense, the trial judge erred in giving an additional charge that commented on the facts of the case that voluntary intoxication “does not impair a defendant’s ability to act with malice aforethought?”

## STATEMENT OF THE CASE

On September 29, 2015, appellant was indicted for attempted murder, unlawful sale or delivery of pistol to and possession by certain persons, possession of a firearm during the commission of a violent crime, and obstruction of justice. R. 380-86. On November 16, 2015, appellant was tried before the Honorable R. Scott Sprouse and a jury. R. 1. Kristin W. Reeves and Chelsey Moore represented the State. R. 1. Hervery B. Young represented appellant. R. 1. The jury convicted appellant on all counts. R. 366, l. 10 – 367, l. 19. Judge Sprouse sentenced appellant to twenty years' imprisonment for attempted murder and concurrent five year terms on the other charges. R. 378, ll. 1 – 17. This appeal follows.

## ARGUMENT

After giving the standard charge that voluntary intoxication is not a defense, the trial judge erred in giving an additional charge that commented on the facts of the case that voluntary intoxication “does not impair a defendant’s ability to act with malice aforethought.”

Everyone involved in this case agreed that appellant was highly intoxicated on the night his wife was shot. Appellant’s son testified that appellant began drinking early that afternoon. R. 108, ll. 14 – 20. One of the first police officers on the scene described appellant as “intoxicated” and speaking “with very slurred speech.” R. 122, ll. 4 – 9. Another officer who interviewed appellant said he was intoxicated and “had a strong odor of alcohol about his person.” R. 155, ll. 1 – 16. The police found three prescription bottles in appellant’s pocket, two of which were Oxycodone and Oxycontin. R. 155, ll. 3 – 16. Appellant drank at least a pint of liquor, beer, and could not remember how many pills he had taken. R. 155, ll. 3 – 16.

When asked if appellant had been drinking, another police officer replied, “That was obvious.” R. 203, ll. 7 – 10. Appellant smelled of alcohol and had “somewhat slurred speech.” R. 203, ll. 7 – 10.

Appellant’s wife, Sandra Smith (“Wife”) said she drank often and had been drinking on the day of the shooting. R. 275, ll. 2 – 7. Wife did not remember how much she had to drink that day. R. 281, ll. 21 – 25. She said appellant often drank. R. 275, ll. 6 – 7. Appellant came and went from the house during the day, but “when he would come home, he was drinking.” R. 283, ll. 15 – 23. Wife was not sure how much appellant drank. R. 283, ll. 15 – 23.

Wife testified that she and appellant had “been arguing about something.” R. 273, l. 24 – 274, l. 14. She could not remember the subject of the argument. R. 273, l. 24 – 274, l. 14. Wife said the room got quiet and “then he come from across the room. Before I knew it, he was right

up on me and he shot me.” R. 273, l. 24 – 274, l. 14. Wife suffered a gunshot wound to the head. R. 263, ll. 2 – 3.

Wife denied seeing appellant with a gun. R. 274, ll. 15 – 16. She claimed she would not have handled a gun and would not have tossed a gun back and forth with her husband. R. 274, ll. 19 – 23. She denied ever pointing a gun at appellant or at herself. R. 274, l. 24 – 275, l. 1.

Appellant’s son, Billy Paul Smith (“Son”), testified that appellant showed up at his house that night “hysterical” about Wife being shot. R. 109, ll. 17 – 19. Son took the gun from appellant. R. 109, ll. 20 – 21. Son and appellant drove back to appellant’s house. R. 109, l. 25 – 110, l. 4. Son called 911. R. 110, ll. 11 – 14. When they got to the house, Son found his mother holding a green robe to her head. R. 93, ll. 9 – 13.

Appellant gave several statements to the police. R. 19, l. 8 – 71, l. 3. In the final statement appellant gave to the police, appellant described shooting a .22 pistol with Son earlier in the day. R. 218, l. 13 – 222, l. 6. Son told appellant something was wrong with the gun. R. 218, l. 13 – 222, l. 6. Appellant wanted the .22 pistol. R. 218, l. 13 – 222, l. 6. He wanted to give it to his wife for her protection. R. 218, l. 13 – 222, l. 6.

When appellant got home, Wife saw the gun. R. 218, l. 13 – 222, l. 6. After a night of drinking and taking pills, appellant and Wife began playing with the gun. R. 218, l. 13 – 222, l. 6. Wife picked up the gun, pointed it at appellant and said she would shoot him, then pointed it at herself and said she would shoot herself. R. 218, l. 13 – 222, l. 6. Appellant and Wife then threw the gun back and forth twice, but on the second toss, when appellant caught it, “the gun went off.” R. 218, l. 13 – 222, l. 6. Appellant panicked and went to Son’s house for help. R. 218, l. 13 – 222, l. 6.

Appellant's defense was accident. R. 341, l. 20 – 345, l. 6. Defense counsel repeatedly emphasized to the jury in his closing argument that "Accidents happen." R. 341, l. 20 – 345, l. 6. The trial judge charged the defense of accident to the jury. R. 361, ll. 20 – 24.

During the charge conference, the State initially asked for a charge of inferred malice based on the use of a deadly weapon, but retreated from this position after a closer reading of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). R. 301, l. 15 – 305, l. 24. The State then requested a charge on voluntary intoxication. R. 306, l. 15 – 307, l. 4. Appellant objected to the final sentence of the State's requested charge: "Voluntary intoxication does not impair the defendant's ability to act with malice aforethought." R. 307, ll. 6 – 12.

The trial judge noted that the bench book did not contain this sentence. R. 307, ll. 13 – 23. The State cited State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983) as authority for its request. R. 307, l. 24 – 308, l. 5. Appellant argued that including this sentence went beyond the standard voluntary intoxication charge. R. 308, ll. 12 – 24. Appellant also argued that the State's request amounted to an improper comment on the facts and could lead the jury to believe that voluntary intoxication could, in and of itself, be sufficient to find malice. R. 308, l. 21 – 309, l. 2. After reviewing Davis, Judge Sprouse overruled appellant's objection and indicated he would give the State's requested instruction. R. 309, ll. 3 – 13. The court ultimately charged the jury, "Voluntary intoxication does not impair a defendant's ability to act with malice aforethought." R. 361, ll. 10 – 19.

Adding this sentence to the standard charge on voluntary intoxication was error, an improper comment on the facts, and confused the jury. The correct charge is that "Voluntary intoxication or drug use does not absolve a defendant of criminal responsibility." State v. Bellue,

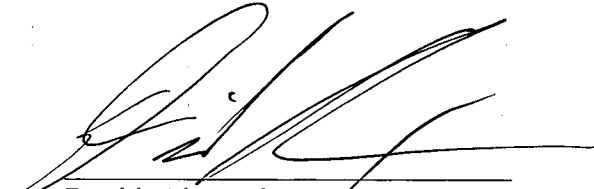
260 S.C. 39, 43, 194 S.E.2d 193, 195 (1973). This principle applies to both general and specific intent crimes. State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).

The State's requested charge amounted to an improper comment on the facts of the case. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. In the recent case of State v. Stukes, the Supreme Court found that a charge to the jury which was an accurate statement of law still violated this constitutional principal. State v. Stukes, 416 S.C. 493, 499-500, 787 S.E.2d 480, 482-83 (2016). In Stukes, the charge at issue was that the statutory rule of evidence that the testimony of the victim in a sex case need not be corroborated. Id. Stukes held that giving this charge to the jury, even though it was a correct statement of the law, confused juries and allowed them to believe that they must accept a victim's testimony as true. Id.

Similarly, here, the charge the State drew from Davis is not the proper subject of a jury charge. In Davis, the Court ruled that the trial judge erred in giving a voluntary manslaughter charge over the defendant's objection because the trial judge believed that the jury could find that the defendant's intoxication "could have eliminated the element of malice from the killing." Davis at 545, 298 S.E.2d at 779. The Court simply ruled that, as a matter of law, this reasoning was not correct. Id. Giving this charge from Davis left the jury with the impression that they could infer malice simply on the basis that appellant was intoxicated. Giving this hopelessly confusing charge was error. State v. Manning, 305 S.C. 413, 416-17, 409 S.E.2d 372, 374-75 (1991). This Court should reverse appellant's convictions and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of November, 2016.

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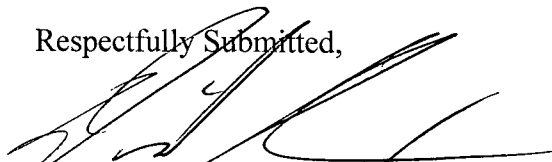
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Billy Ray Smith states:

1. He is an 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 the Honorable R. Scott Sprouse, which was held on November 16-18, 2015 (Trial Hearing), 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 Billy Ray Smith.

Respectfully Submitted,



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 28th day of November, 2016.

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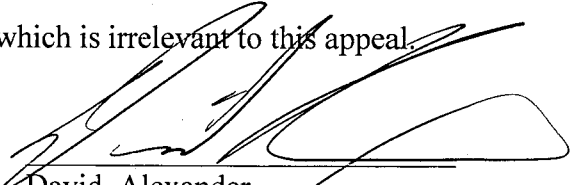
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) Trial transcript dated November 16-18, 2015
- (2) Indictments
- (3) State's Ex. 1-3

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

November 28, 2016



David Alexander  
Appellate Defender

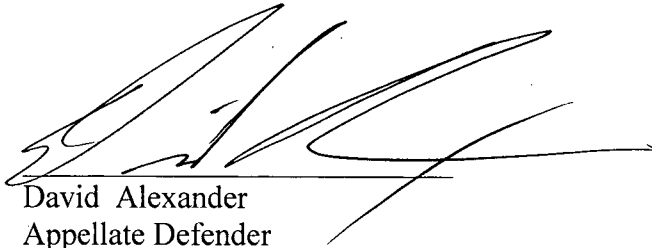
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ATTORNEY FOR APPELLANT

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 28, 2016.



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Appellate Defender

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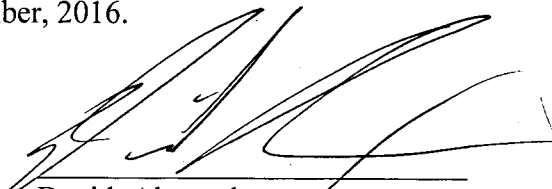
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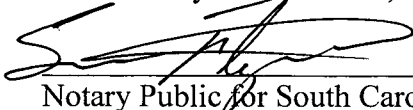
CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Billy Ray Smith, #274409, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of November, 2016.



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 28th day of November, 2016.



(L.S)

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

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