

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**ORIGINAL**

Appeal from Greenville County  
J. Mark Hayes, II, Circuit Court Judge

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**RECEIVED**  
MAR 20 2017  
SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

DONALD LAMON YOUNG,

APPELLANT.

APPELLATE CASE NO. 2014-002655

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MOTION FOR A NEW TRIAL

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order setting aside Appellant's convictions and ordering a new trial. As will be set out more fully in this motion, the court reporter produced only a portion of Appellant's trial. On remand for reconstruction of the record, the parties attempted to reconstruct the missing portions to permit meaningful appellate review, including calling witnesses to testify regarding their recollections of the trial and the introduction of exhibits to assist in reconstructing the missing portions. At the conclusion of the hearing, the presiding judge determined the record was unable to be reconstructed to allow the appellate courts to conduct meaningful appellate review. In light

of this ruling, and in agreement with this ruling, Appellant moves this Court to set aside his convictions and remand for a new trial.

### **Procedural History**

During its August 2014 term, a Greenville County grand jury indicted Appellant for attempted murder, burglary in the first degree, criminal sexual conduct in the first degree, and two counts of kidnapping. Austin Watts of the Thirteenth Circuit Solicitor's Office called the case for trial on December 3, 2014, before the Honorable J. Mark Hayes, II. Frank Eppes represented Appellant. On December 5, 2014, the jury acquitted Appellant of attempted murder, burglary in the first degree, and one count of kidnapping. The jury found Appellant guilty of criminal sexual conduct and one count of kidnapping. Judge Hayes sentenced Appellant to concurrent terms of twenty-five years' imprisonment. On December 11, 2014, Appellant filed and served a notice of appeal.

On March 11, 2015, the Office of Appellate Defense ordered the trial transcript from the court reporter, Caroline Hiskell. Subsequently, Hiskell provided a partial transcript. On the last page of the transcript, she typed, "Due to a theft as reported to court administration, the remainder of this transcript cannot be produced." On July 11, 2016, Ms. Hiskell wrote a letter attesting to the theft and her inability to produce the remainder of the transcript.

On October 18, 2016, undersigned counsel filed a motion for new trial, or in the alternative, an order to reconstruct the record of the Appellant's trial. On December 8, 2016, this Court remanded the matter to Judge Hayes for reconstruction of the record. On February 10, 2017, Judge Hayes presided over a hearing in Greenville, South Carolina, in compliance with this Court's order to permit an opportunity to the parties to reconstruct the missing portions of the record of Appellant's trial. Elizabeth Gary represented the state, and undersigned counsel

represented Appellant. On February 23, 2017, Judge Hayes signed an order finding the record could not be reconstructed sufficiently to permit meaningful appellate review. The order was filed on March 9, 2017, in the Greenville County Clerk of Court's Office.<sup>1</sup> The order accompanies this motion for new trial. See Exhibit #1.

### **Discussion**

“South Carolina jurisprudence recognizes the trial court’s authority to set the record for appeal.” State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). When the transcript is unavailable or incomplete, the trial court has the authority to reconstruct the record for appellate purposes. Id.; see also Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004)(recognizing a court’s power to remand for a reconstruction hearing); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002)(holding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed). Whenever a party challenges “a reconstructed record on appeal,” the party must “demonstrate prejudice flowing from an inadequate record.” Ladson, 373 S.C. at 325, 644 S.E.2d at 273. “A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review.” Id. at 325, 644 S.E.2d at 274 (internal quotations omitted). In short, for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due process. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Adams v. H.R. Allen, Inc.,

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<sup>1</sup> When the signed order was sent to the Greenville County Clerk of Court’s Office for filing by undersigned counsel, a copy was sent to the state. Upon receipt of a copy of the clocked order, undersigned counsel provided a copy to the state by email on March 13, 2017, and by mail on March 14, 2017.

397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992).

Appellant agrees with Judge Hayes' analysis and respectfully requests this Court grant a new trial. As explained in the order, numerous appellate issues arose during Appellant's trial, but those issues will evade meaningful appellate review with the current record. While not encapsulating all of the issues that were presented, Appellant offers a few examples in support of his motion.

Perhaps the most significant issue that all parties agreed was presented and preserved concerned the Allen charge, but an appellate court would be unable to review the issue because the nature of the objection is unknown and the substance of the instruction given is unknown.<sup>2</sup> Another significant issue centered on a jury instruction concerning consent. There was disagreement among the parties regarding whether such an instruction was requested or given. Due to this disagreement, an appellate court could not review any issue on appeal regarding the propriety of giving such an instruction in these circumstances or on the propriety of such an instruction had one been given.

Furthermore, although all parties agreed the complaining witnesses, Ballard and Arthur, testified at Appellant's trial, their testimony was not transcribed and there was no evidence presented during the reconstruction hearing concerning the substance of their testimony.

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<sup>2</sup> The substance of the charge is necessary for appellate review. See Workman v. State, 412 S.C. 128, 132-133, 771 S.E.2d 636, 639 (2015)(finding the Allen charge given unconstitutionally coercive and trial counsel ineffective for failing to object); Dawson v. State, 352 S.C. 15, 20-21, 572 S.E.2d 445, 447-448 (2002)(holding trial counsel ineffective for failing to object to a coercive Allen charge); Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001)(explaining "[w]hether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'")(quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)).

Therefore, Appellant's motion for a directed verdict, which all parties agree was lodged and denied, could not be reviewed on appeal as no record exists of the evidence presented to determine whether any direct evidence or substantial circumstantial evidence sufficient reasonably tending to prove the guilt of the accused existed to support the denial.<sup>3</sup>

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007). Appellant was not at fault for the absence of the vast majority of his transcript; rather, the transcript is not available due to a theft of the court reporter's equipment. See State v. Serrette, 375 S.C. 650, 653, 654 S.E.2d 554, 555 (Ct. App. 2007)(holding a defendant whose transcript is not available due to his own actions, including being a fugitive

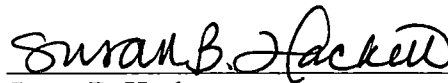
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<sup>3</sup> See State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)(holding a defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)(same); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001)(same); State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)(holding that to deny a motion for a directed verdict there must be direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)(same); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)(same); State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011)(providing that when the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000)(same); State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004)(holding that a verdict of acquittal must be directed in the defendant's favor when the evidence produced "merely raises a suspicion the accused is guilty"); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)(same); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999)(same).

from justice, is not entitled to reconstruction of the record or meaningful appellate review). In light of the court reporter's inability to produce a transcript of Appellant's trial and Judge Hayes' decision that the record cannot be reconstructed to permit meaningful appellate review, Appellant requests this Court order a new trial in his case.

WHEREFORE, the undersigned counsel requests this Court set aside his convictions and remand for a new trial.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

Attorney for Appellant

This 20th day of March, 2017.

# EXHIBIT #1



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE



COPY

Division of Appellate Defense  
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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

February 28, 2017

The Honorable Paul B. Wickensimer  
Clerk of Court, Greenville County  
305 East North Street  
Greenville, S.C. 29601-2121

2017 MAR -9 PM 4: 28  
FILED-CLERK OF COURT  
PAUL B. WICKENSIMER  
GREENVILLE CO. SC

Re: State v. Donald Lamon Young, 2014-GS-23-412; -415  
Appellate Case No. 2014-002655

Dear Mr. Wickensimer:

Please find enclosed an order in the above-referenced case signed by the Honorable J. Mark Hayes, II. Please file the original order. I am enclosing a copy of the order as well. Please return a clocked copy of the order to me so that I may file it in the Court of Appeals. I am providing a self-addressed stamped envelope for this purpose.

By copy of this letter, I am serving a copy of the signed order on the State of South Carolina.

If you require additional information, please contact me.

Sincerely,

Susan B. Hackett  
Appellate Defender

Enclosure

cc: Hon. J. Mark Hayes, II (w/o enclosure)  
Elizabeth Gary, Esquire (w/ enclosure)  
Donald Lamon Young (w/o enclosure)

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MAR 13 2017

APPELLATE DEFENSE

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

THE COURT OF GENERAL SESSIONS  
INDICTMENT NO. 2014-GS-23-412, -415  
APPELLATE CASE NO. 2014-002655

STATE OF SOUTH CAROLINA )

v. )

DONALD LAMON YOUNG, )

Defendant. )

**ORDER**

FILED: CLERK OF COURT  
PAUL B. WICKENSIMMER  
GREENVILLE CO. SC  
2017 MAR -9 PM 4: 28

Pursuant to the Order of the Court of Appeals remanding this case to the Circuit Court to reconstruct the record, a hearing was held on February 10, 2017, in Greenville County, South Carolina. Elizabeth Gary, Esquire, of the Thirteenth Circuit Solicitor's Office, was present on behalf of the State of South Carolina. Susan Barber Hackett, Esquire, of the Office of Appellate Defense, was present on behalf of Donald Lamon Young, the defendant. The defendant was present for the hearing as well.

**PROCEDURAL HISTORY**

A Greenville County grand jury indicted Young for attempted murder, burglary in the first degree, criminal sexual conduct in the first degree, and two counts of kidnapping. The State, represented by Austin Watts, Esquire, called the case to trial on December 3, 2014. Frank Eppes, Esquire represented Young. The trial continued through December 5, 2014, when the jury returned its verdicts. The jury acquitted Young of attempted murder, burglary in the first degree, and one count of kidnapping; all three of these charges concerned conduct allegedly directed toward Seth Arthur. However, the jury found Young guilty of criminal sexual conduct and one count of kidnapping; these two charges concerned conduct allegedly directed toward Tammy Ballard. The defendant was sentenced to concurrent terms of twenty-five years' imprisonment.

On December 11, 2014, the defendant, through counsel, filed and served a notice of appeal. After communicating with trial counsel, the Office of Appellate Defense (ADO) ordered the trial transcript from Caroline Hiskell, Circuit Court Reporter, on March 11, 2015. Ms. Hiskell provided ADO with a partial transcript. On the last page of the transcript, she typed, "Due to a theft as reported to court administration, the remainder of this transcript cannot be produced." On July 11, 2016, Ms. Hiskell wrote to ADO attesting to the theft and her inability to produce the transcript. Specifically, the portions provided by Ms. Hiskell were as follows: (1) jury *voir dire*; (2) jury selection; (3) the testimony, arguments, and rulings on two pre-trial hearings pursuant to Jackson v. Denno, 378 U.S. 368 (1964); (4) the testimony, arguments, and rulings on the admissibility of an alleged voice identification; (5) a preliminary objection to the introduction of a cell phone and bullet casing; (6) the court's introductory remarks to the jury; (7) the Assistant Solicitor's opening statement; (8) defense counsel's opening statement; (9) the complete testimony of two witnesses; and (10) the beginning of the testimony of a third witness.

On October 18, 2016, Young's appellate counsel filed a motion for new trial, or in the alternative, an order to reconstruct the record of the defendant's trial. On October 28, 2016, J. Benjamin Aplin, Esquire, of the Office of the Attorney General, wrote a letter to the Court of Appeals in response to the defendant's motion. In the letter, Mr. Aplin indicated the State could not consent to a new trial "[a]t this time," but "acknowledge[d] reconstruction may be a challenge" in light of the amount of the transcript that was missing and the affidavit of trial counsel submitted with the motion for new trial explaining that several issues arose over the course of the trial and trial counsel's belief that meaningful appellate review of those issues, as well as others, could not be had without a verbatim transcript of the defendant's trial. Mr. Aplin requested the matter be remanded to the trial court to attempt to reconstruct the missing portions

of the record. On December 8, 2016, the Court of Appeals remanded the matter to the undersigned “for reconstruction of the record.”

**RECONSTRUCTION HEARING**

After two conference calls regarding the matter, the parties convened on February 10, 2017, for a hearing in Greenville, South Carolina. During the hearing, this Court had before it the exhibits that were introduced during the defendant’s original trial. The exhibits were incorporated into the record of the reconstruction hearing. This Court also had before it the partial transcript. In total, it was ninety-eight (98) pages, which covered only a portion of the first day of Young’s three-day trial. Additionally, this Court had the motion for new trial and its accompanying exhibits filed by Young, the State’s response to the motion for new trial, and the Order remanding the case for reconstruction of the record.

***Partial transcript***

In addition to the issues regarding Young’s statements to police and the voice identification, the partial transcript also revealed several matters that would be relevant for a direct appeal. For example, the partial transcript indicated that during the testimony of Cheri Lyda the defense raised an objection and the jury was excused for consideration of the objection. Tr. 96, l. 24 – Tr. 97, l. 6. However, the partial transcript did not indicate the basis of the objection or the ruling. Additionally, the partial transcript revealed there was an issue regarding the admissibility of certain evidence because defense counsel did not receive a forensic report. Tr. 66, ll. 8-19. Again, the partial transcript did not reveal how the objection was resolved.

The State’s opening statement, which appeared in the partial transcript, revealed what the State believed the evidence would show. The State claimed Tammy Ballard and Seth Arthur were asleep in bed when Young entered the room armed with a gun. Tr. 78, ll. 7-10. Next, the

State claimed, Young forced Ballard and Arthur from their beds. Tr. 78, l. 11. According to the State, Young told Arthur “to do push-ups beside the bed” and took Ballard “in a different room where he sexually assaulted her.” Tr. 78, ll. 12-14. Finally, the State claimed Arthur “caused a commotion” prompting Young to re-enter the room where Arthur was and shoot him in the leg. Tr. 78, ll. 14-15.

*Joelle Lanfear*

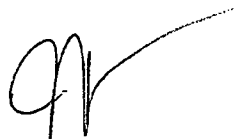
At the reconstruction hearing, the first witness called by the State was Joelle Lanfear. Lanfear had worked in the Greenville County Clerk of Court’s Office for ten years before starting her employment with the Thirteenth Circuit Solicitor’s Office in January 2017. Lanfear testified that she was an Administrative Assistant who was assigned to serve as the Clerk of Court’s representative in the courtroom during Young’s trial. Over objection,<sup>1</sup> the State introduced into evidence a document created by Lanfear contemporaneous with the trial. See State’s Exhibit #1. Lanfear testified that during a criminal trial, part of her job duties included typing out notes regarding the trial. Principally, her notes included the times of occurrences and the names of witnesses with no indication regarding the substance of the testimony of the witnesses.

Lanfear prepared a list of the jurors who were selected and noted that a Jackson v. Denno, supra, hearing and a Neil v. Biggers<sup>2</sup> hearing occurred. Lanfear’s notes indicated the existence of an issue pertaining to the admissibility of certain evidence where defense counsel did not

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<sup>1</sup> This Court permitted the notes to be admitted during the reconstruction hearing as an exception to the rule against hearsay, finding the notes were a business record. Young’s counsel argued the notes were not a business record because Joelle Lanfear’s typewritten notes were maintained in a computer file in the Clerk’s Office and were not part of the individual case file. Finding the State elicited the necessary foundation for the business record exception, this Court ruled the notes were admissible.

<sup>2</sup> Neil v. Biggers, 409 U.S. 188 (1972).



receive a forensic report. However, Lanfear's notes failed to indicate how the issue was resolved. Lanfear's notes did not show that an objection was raised during Ms. Lyda's testimony. Additionally, Lanfear's notes stated that a matter of law was raised during the testimony of James Perry concerning a "typed" statement. The notes did not reflect how this matter of law was resolved or the basis for the matter of law.

According to the notes, there was a challenge to the defense calling "11<sup>th</sup> hour witnesses." The notes, however, did not indicate the nature of the objection. According to the notes, defense counsel proffered the testimony. Thereafter, three witnesses, including Young, were listed as testifying. It is unclear from the notes, and this issue was not explored during the hearing, whether the testimony of all three were in the nature of a proffer. It would appear that the testimony of Young was not in the form of a proffer because all parties agree that Young testified in his defense. There was no indication in the notes regarding the ruling following the proffer, or whether any limitations were placed on the witnesses' testimony. The day after the proffer, Lanfear's notes indicated two of the three witnesses whose testimony appeared to have been proffered the prior day testified before the jury. The notes further indicated that two additional witnesses whose names did not appear on the notes as having testified pursuant to a proffer testified in front of the jury.

Lanfear's notes also indicated the jury had multiple questions, which were corroborated by the Court's Exhibits from the original trial, and that an Allen<sup>3</sup> charge was given.

Lanfear testified that she also kept handwritten notes during Young's trial. While her primary responsibility was to maintain the typewritten notes, she often would write notes on the random jury strike sheet as she did in this case. See Defendant's Exhibit #1. The random jury

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<sup>3</sup> Allen v. United States, 164 U.S. 492 (1896).

strike sheet, including Ms. Lanfear's handwritten notes, was maintained in the individual case file in the Clerk's Office. A comparison of the handwritten notes and the typed notes indicates only minor differences in the times listed. Cf. State's Exhibit #1 with Defendant's Exhibit #1.

For example, the typed notes indicated Tammy Ballard's testimony began at 4:07 p.m., but the handwritten notes indicate the testimony began at 4:06 p.m. However, one stark and important difference between the two is that the handwritten document listed Christopher White as the first witness to testify in the defense case. White was not listed on Lanfear's typed notes.

*Austin Watts, Esquire*

Next, the State called Austin Watts, Esquire, to testify at the reconstruction hearing. Mr. Watts explained that he was the Assistant Solicitor who prosecuted the defendant during his original trial. He tried the case without the assistance of co-counsel. At the time of the hearing, Mr. Watts was no longer employed by the Thirteenth Circuit Solicitor's Office. He was working as an associate at Covington, Patrick, Hagins, Stern & Lewis, PA. According to Watts, this trial was one of the last ones he tried prior to his departure from the Solicitor's Office; therefore, he had a better independent recollection of it than others.

Watts remembered that Tirissa Johnson testified regarding multiple 911 calls that were received relative to the charged offenses. This testimony was supported by the partial transcript wherein Johnson's testimony is transcribed. Watts further recalled that Chris McCalmont testified about being one of the first officers on the scene and his observations in that role. Again, this testimony is supported by the partial transcript wherein McCalmont's testimony is transcribed.

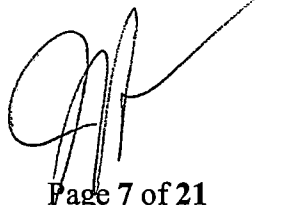
Watts also recalled that Cheri Lyda was one of the first responding officers. Concerning Lyda's testimony, Watts was questioned regarding the objection posed by defense counsel

during her testimony and the excusal of the jury from the courtroom to discuss the objection. Watts recalled the objection was to hearsay regarding what Ballard said to Lyda when Lyda arrived on the scene. He was unable to recall how the objection was resolved except that the State "reined in" the testimony.

According to Watts, the next two witnesses were Tammy Ballard and Seth Arthur. Watts remembered that he had elicited testimony from Arthur regarding the voice identification that was the subject of the pre-trial hearing. He provided no other information regarding the substance of the testimony from the State's two key witnesses about the criminal allegations.

Watts remembered calling Pennie Sullivan to testify. She was a sexual assault nurse examiner (SANE) nurse at the time, and testified to the authenticity of the rape kit. She also testified regarding tearing of the vaginal cavity. According to Watts, he called two witnesses who were chain of custody witnesses: Daniel Bevill and Kara Bennick.

Watts was certain the lead investigator, Robert "Bob" Perry, testified as well. According to Watts, the investigator testified regarding statements made by Young during a telephone conversation, which were the subject of the pre-trial hearing. He also testified regarding evidence found at the scene, which included two pieces of evidence to which defense counsel had posed an objection prior to trial due to the defense not receiving a forensic report. Watts did not have an independent recollection of the specifics of the objection or how the objection was resolved, but he did recall that the evidence was admitted. Watts did recall that Perry testified regarding where the defendant "lived and didn't live" and about finding some shoes at a location where the defendant had lived previously. The shoes or a photograph of the shoes were introduced as an exhibit through Perry.



Page 7 of 21

Next, Watts remembered that James "Jim" Perry also testified on behalf of the State. Watts recalled he testified regarding the results of a forensic analysis conducted on a cell phone. The state also called Brian Totherow, a forensic technician, to testify. His testimony centered on evidence found at the scene, including casings. Again, the casings were the subject of a pre-trial objection by defense counsel. While Watts did not recall the specifics of the objection or how the objection was resolved, he did recall that the casings were introduced into evidence.

According to Watts, the last two witnesses called by the state were Tim Nafziger and Dr. Jagannadha Kandala. Watts stated both testified regarding forensic testing, specifically DNA analysis, conducted by the local police department.

When presented with his potential witness list, which was maintained in the Clerk of Court's file, Watts testified that although he listed eighteen (18) witnesses, all of them did not testify on behalf of the State. Specifically, he did not call Steve Picone, Chris White, Renee Buford, Adam Davis, and John Derby to testify during the State's case-in-chief. However, he acknowledged that all of these individuals had some involvement in the investigation of the charges against Young.

Watts remembered that he had not received a witness list from the defense and objected to the defense calling witnesses, other than Young. His primary concern was that a juror may know a witness. He recalled the judge conducted *voir dire* on the names of the witnesses submitted by the defense and determined no juror knew the witnesses. Thereafter, the defense called its witnesses. Watts recalled Young's mother and sister were called to testify as to Young's good character. He also recalled someone from the jail testifying on Young's behalf. He was uncertain of the substance of this witness's testimony. Finally, Watts testified he believed one additional witness testified on Young's behalf, but he could not recall the person's

identity or the substance of the testimony. In general, Watts characterized the defense witnesses as providing good character evidence.

Watts recalled only one of the State's witnesses, Arthur, having any issues concerning a prior conviction. His recollection was that the State brought out the prior conviction during direct examination. He could recall no other issues implicating Rule 609, SCRE, or Rule 404(b), SCRE, pertaining to the State's witnesses. When questioned about any issues regarding prior convictions or bad conduct of the defense witnesses, Watts testified that his office was unable to make any of these determinations because the witnesses' names were revealed so late in the trial. He maintained this position even for the witness whom he alleged was in the jail with Young while Young was awaiting trial.

Watts acknowledged that defense counsel moved for a directed verdict of acquittal, but did not testify regarding the basis of the motion. He did recall the motion was denied and the charges went to the jury.

According to Watts, the State made no specific requests to charge. He did not recall if the defense made any specific requests for jury instructions. He also did not recall the specifics of the jury instructions actually given. In other words, Watts could not remember the substance of the jury instructions. On this point, he did not remember if there had been a request for a specific circumstantial evidence charge. He also did not remember if there had been a request for a good character charge or if such a charge had been given. Finally, he did not recall if the jury had been instructed on the defense of consent or on any lesser-included offenses.

However, Watts vividly remembered that the jury was deadlocked and that an Allen charge was given. He also recalled that defense counsel objected to the giving of such a charge and to the language of the charge actually given. Nevertheless, Watts was unable to recall the

substance of the Allen charge given. Further, Watts recalled the jury posed a question asking for an instruction on criminal sexual conduct and the judge indicating he planned to re-charge the jury concerning criminal sexual conduct. According to Watts, defense counsel requested the judge also charge reasonable doubt again.

*Frank Eppes, Esquire*

The State chose not to call Frank Eppes, Esquire, who represented the defendant at trial, during the reconstruction hearing. Instead, the State chose to rely upon Eppes' affidavit, which was an exhibit to the defendant's motion for new trial and was marked as a Court's Exhibit during the reconstruction hearing. In the affidavit, Eppes recalled objecting to the judge re-charging the jury on criminal sexual conduct only, and requesting the inclusion of an instruction "that consent was an absolute defense." See Eppes Affidavit. On this point, Eppes' recollection was that when he made this request, he was informed that consent had not been part of the original charge to the jury. See Eppes Affidavit. Eppes noted that as consent was the defense to the charges, particularly the criminal sexual conduct charge, his failure to request a jury instruction on consent, if he had so failed, would be a ground for post-conviction relief. See Eppes Affidavit. Eppes was unable to say with any certainty what transpired before the trial court regarding a jury instruction on consent. See Eppes Affidavit.

Eppes also recalled the Allen charge and that he objected to this charge "strenuously." See Eppes Affidavit. However, Eppes explained he was "not sure what charge was used" in delivering the Allen charge. See Eppes Affidavit.

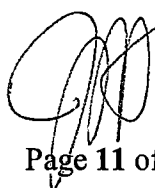
Eppes also asked for a specific instruction regarding circumstantial evidence. See Eppes Affidavit. According to his affidavit, Eppes requested the charge required in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). See Eppes Affidavit. Eppes' recollection was that the charge

was denied and that he preserved the request on the record. See Eppes Affidavit. According to the documents maintained by the Clerk of Court, defense counsel did request a specific jury instruction regarding circumstantial evidence. See Court's Exhibit #3 (Defendant's Request to Charge No. 1).

The defendant called Eppes to the stand during the hearing on February 10, 2017. Eppes indicated that while he mentioned specific appellate issues in his affidavit, he relies upon appellate counsel to review the transcript and determine the issues for appeal. Additionally, he noted that the issues mentioned in his affidavit were simply the names of issues without any certainty regarding the rulings and the substance of what transpired as a result of the objections/motions. Eppes, who had experience as a trial lawyer and an appellate lawyer, explained that determining the meritorious issues on appeal required scrutinizing the transcript of the proceedings for preserved issues warranting relief. He also testified that he was certain he had made objections and motions beyond those appearing in his affidavit. For example, he was certain he had objected to hearsay, but was unable to recall the witness when such an objection was posed or the ruling.

#### *Argument by Counsel*

At the conclusion of the hearing, the State moved this Court to hold that the record had been reconstructed sufficient to permit meaningful appellate review. In support of its argument, the State provided this Court with the following cases: State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. Ap. 2007) and State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). Specifically, the State argued that there was no disagreement regarding the exhibits that were admitted into evidence and that generally, the parties agreed on the witnesses who testified.



Additionally, the State argued the reconstruction hearing had revealed several issues for appellate review, primarily, the Allen charge.

Young's counsel argued against finding the record was reconstructed sufficiently to permit meaningful appellate review. According to Young's counsel, the hearing had revealed numerous issues that did not permit meaningful appellate review. For example, the parties agreed that an Allen charge had been given and multiple objections posed, but the parties could not agree upon the substance of the charge given. As a result, counsel argued, the issue was not reviewable on appeal. Young's counsel also noted that no witness testified to the substance of the testimony of the alleged victims in the case, rendering a motion for directed verdict, which everyone agreed occurred, unreviewable on appeal. Finally, Young's counsel argued the evidence presented during the hearing was ambiguous regarding whether at least one witness even testified.

#### LEGAL ANALYSIS AND DISCUSSION

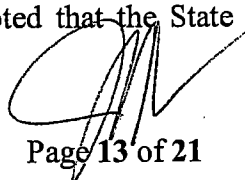
The trial court has the authority to set the record for appeal. Ladson, 373 S.C. at 324, 644 S.E.2d at 273. "[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." Id. (internal citations omitted). When the transcript is unavailable or incomplete, the trial court has the authority to reconstruct the record for appellate purposes. Id.; see also Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004)(recognizing a court's power to remand for a reconstruction hearing); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002)(holding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed).

In order for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due

process. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992). The Court of Appeals held “the party challenging a reconstructed record on appeal [must] demonstrate prejudice flowing from an inadequate record.” Ladson, 373 S.C. at 325, 644 S.E.2d at 273. “A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review.” Id. at 325, 644 S.E.2d at 274 (internal quotations omitted).

This Court finds Ladson, supra, particularly helpful in resolving whether the record in the instant matter has been reconstructed sufficient to permit meaningful appellate review. Ladson was convicted of first-degree burglary at the conclusion of a three-day trial. Ladson, 373 S.C. at 321, 644 S.E.2d at 271. While Ladson’s case was pending appeal, he learned the court reporter could not produce the transcript. Id. Ladson moved for a new trial. Id. The state moved for reconstruction. The Court of Appeals remanded the case for reconstruction. Id.

Ladson’s reconstruction hearing occurred more than a year after the trial. Id. The Court of Appeals explained “the passage of time clearly dimmed the recall of the participants.” Id. at 325, 644 S.E.2d at 274. Reviewing the transcript of the reconstruction hearing, the Court of Appeals noted “[i]t was clear from the outset of this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle.” Id. at 321-322, 644 S.E.2d at 271-272. During the hearing, the State summarized the testimony of the majority of the witnesses and provided affidavits from two witnesses. Id. at 322, 644 S.E.2d at 272. The Court of Appeals determined the “information provided by the State was conclusory.” Id. Additionally, the Court of Appeals noted that the State “had completely forgotten about one



witness, whose identity was determined only by reference to Ladson's trial counsel's notes." Id. The parties even disputed whether Ladson testified in his own defense. Id. Finally, the Court of Appeals noted that the trial court and the State expressed confidence "that Ladson made timely objections at trial and moved for a directed verdict 'based upon the evidence.'" Id. at 323, 644 S.E.2d at 272.

On appeal, the Court of Appeals applauded the diligent effort by all parties to reconstruct the record, but explained "the reconstructed record [was] largely conclusory, with testimony, objections, and the like recalled only in summary fashion." Id. The Court explained, "It is simply unrealistic and unreasonable to think that a trial judge and counsel can – under these circumstances – reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules." Id. at 326, 644 S.E.2d at 274. The Court further explained "[t]he continuing dispute as to whether Ladson even testified (much less the content of his purported testimony) is but one example of the trial court and counsel groping in the dark as to what actually happened at trial." Id. After the reconstruction hearing, the Court was "left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multi-day and fact-intensive trial that resulted in a non-parolable twenty-five year person term." Id. at 327, 644 S.E.2d at 274. The record before the Court contained only "a few gratuitous references to generic motions and objections" without any information concerning "the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence." Id. The Court refused to speculate. Id. In concluding the record was insufficient for meaningful appellate review, the Court of Appeals also noted the record "would effectively foreclose any collateral challenge

through post-conviction relief or otherwise.” Id. at 327, 644 S.E.2d at 275. Thus, the Court concluded, Ladson had demonstrated “clear prejudice.” Id.

Without question, the State made a good faith and diligent effort to reconstruct the record. Additionally, the State made an excellent presentation at the hearing. Nevertheless, after reviewing the case law submitted by the State and carefully considering the evidence, testimony, and arguments presented during the hearing, this Court finds the record cannot be reconstructed adequately to permit meaningful appellate review based on the following reasons. This conclusion is further supported because nothing has been presented, nor alleged, that Young in any way contributed to the loss of the transcript. See State v. Serrette, 375 S.C. 650, 653, 654 S.E.2d 554, 555 (Ct. App. 2007)(holding a defendant whose transcript is not available due to his own actions, including being a fugitive from justice, is not entitled to reconstruction of the record or meaningful appellate review).

#### *Jury Instructions*

The testimony elicited at the reconstruction hearing revealed a disagreement among the parties regarding whether a jury instruction on the defense of consent was given. In light of this disagreement, an appellate court cannot review any issue that could be raised regarding the propriety of giving such an instruction in these circumstances or on the propriety of such an instruction had one been given.

Related to this point, there is a disagreement among the parties regarding what defense counsel requested be instructed in response to the jury’s question for clarification on the offense of criminal sexual conduct. Watts recalled defense counsel requested reasonable doubt be charged, and defense counsel recalled he requested consent be charged. Thus, an appellate court cannot review any issue that could be raised regarding the judge’s response to the jury’s question

and whether the response should have included supplemental instructions per defense counsel's request, whatever that request may have been. Furthermore, because only summaries of some of the witnesses' testimony were presented, an appellate court could not determine whether any evidence in the record would have supported defense counsel's request. The standard for giving such a charge requires only that any evidence in the record support the charge, the lack of specific testimony creates a great risk of prejudice to Young.

All parties agree, and the exhibits on file with the Clerk of Court support, that the jury was deadlocked. See Court's Exhibit #7. At 4:50 p.m., the jury advised they were "deadlocked at this point. 8 not guilty, 4 guilty. Can't see any movement at this point." See Court's Exhibit #7. All parties agree that an Allen charge was given in response. All parties agree that defense counsel objected to not only the giving of an Allen charge, but to the substance of the charge itself. However, no one recalled what instructions the jury received. Without the substance of the charge, any issue related to the charge is unreviewable on appeal. See Workman v. State, 412 S.C. 128, 132-133, 771 S.E.2d 636, 639 (2015)(finding the Allen charge given unconstitutionally coercive and trial counsel ineffective for failing to object); Dawson v. State, 352 S.C. 15, 20-21, 572 S.E.2d 445, 447-448 (2002)(holding trial counsel ineffective for failing to object to a coercive Allen charge); Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001)(explaining "[w]hether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'")(quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)). The jury's acquittal on some charges and being deadlocked on others satisfies this Court that the case was close, and therefore, any error in the appellate record could be sufficient for reversal because no harmless error would likely be found.



Although Watts did not recall any specific request for a circumstantial evidence charge, the exhibits support Eppes' affidavit that he made a specific request concerning circumstantial evidence. Eppes recalled that he requested a charge pursuant to Logan, supra, and that the request was denied. However, according to the exhibit, the defense requested a charge using language from State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989). A handwritten note on the exhibit states: "Also see State v. Logan, 405 S.C. 83[, 747 S.E.2d 444] (2013)." The author of the handwritten note is not revealed on the exhibit and was not deduced during the hearing. Nevertheless, the handwritten note corroborates Eppes' affidavit at least to the extent that the parties discussed Logan, supra. Therefore, there appears to be a disagreement in the record regarding whether defense counsel requested the circumstantial evidence charge made mandatory upon request by the Supreme Court in 2013. Furthermore, the record is not clear whether the jury was instructed pursuant to Logan, supra. While the Supreme Court has made the charge mandatory upon request, in the event a harmless error analysis would be used on appeal, such an analysis could not occur due to the lack of a transcript of the factual evidence presented.

Finally, all parties agreed that Young presented evidence of good character and, therefore, the evidence supported a jury instruction on good character. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)(holding the law to be charged to the jury is determined by the evidence presented at trial); State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993)(same). However, the record was unclear as to whether defense counsel requested a jury instruction on good character and whether such an instruction was given to the jury. Therefore, any appellate issue regarding the propriety of giving such an instruction and the substance of the instruction if one were given is not reviewable on appeal. See State v. Lee-Grigg, 387 S.C. 310,

692 S.E.2d 895 (2010)(holding that if evidence of good character is presented and the defendant makes a request for the instruction, then a defendant is entitled to an instruction that evidence of good character may in and of itself create doubt as to guilt); see also Brown v. Smalls, 325 S.C. 547, 554-555, 481 S.E.2d 444, 448 (Ct. App. 1997)(citing Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994))(providing that when a requested instruction is supported by the evidence and correctly states the applicable law, the judge is duty-bound to give it); see also State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (1996)(holding that "[w]here a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error"); State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)(holding that a "trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence").

#### *Witnesses*

All parties agreed the alleged victims, Ballard and Arthur, testified at Young's trial. Specifically, Watts testified that Ballard and Arthur were called as witnesses during the State's case-in-chief. No contradictory evidence on this point was offered. However, there was no evidence presented during the reconstruction hearing concerning the substance of the testimony offered by Ballard and Arthur. Therefore, Young's motion for a directed verdict, which all parties agree was entertained and denied, cannot be reviewed on appeal as no record exists of the evidence presented to determine whether any direct evidence or substantial circumstantial evidence sufficient reasonably tending to prove the guilt of the accused existed to support the denial. See State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)(holding a defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)(same); State v. McHoney, 344 S.C. 85, 97

544 S.E.2d 30, 36 (2001)(same); State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)(holding that to deny a motion for a directed verdict there must be direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)(same); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)(same); State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011)(providing that when the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000)(same); State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004)(holding that a verdict of acquittal must be directed in the defendant's favor when the evidence produced "merely raises a suspicion the accused is guilty"); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)(same); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999)(same).

Lanfear's handwritten notes indicated the defense called Chris White to testify. The typed notes show no such reference. Thus, there is a disagreement in the record regarding whether Chris White testified. Certainly, Chris White was involved in the investigation and prosecution of the charges as his name was listed on the State's potential witness list and Watts acknowledged his involvement during his testimony at the reconstruction hearing. This disagreement regarding whether White testified exemplifies how the record has not been reconstructed. See Ladson, 373 S.C. at 326, 644 S.E.2d at 274 (stating that the dispute as to whether a witness testified was an example of the record not being reconstructed sufficiently to permit meaningful appellate review).

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Although Watts indicated he recalled no issues regarding prior bad acts or prior convictions concerning the defense witnesses because the prosecution received notice of those witnesses so late, it must be noted that at least one witness was in jail at the time of his testimony, according to Watts, and therefore, presumably, could have been impeached based on that conduct. Further, it must be noted that although Watts received late notice of the defense witnesses, all parties agreed the defense witnesses did not testify before the jury until the day after notice was given, which would permit the prosecution to run criminal histories on the witnesses in anticipation of their testimony the following day. Any issues regarding impeachment of the defense witnesses are not reviewable in light of the record and the inability of the parties to construct this aspect of the trial despite good faith and diligent efforts.

#### ***General Objections***

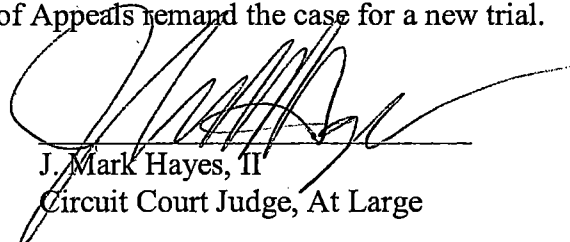
It is clear from the record that the defense posed multiple objections, but the bases of those objections and the rulings on those objections are not available and have not been reconstructed to permit meaningful appellate review. The partial transcript revealed an objection to certain evidence – a cell phone and a bullet casing – but neither the partial transcript nor the evidence presented at the reconstruction hearing revealed how the objection was resolved except to the extent the items were admitted into evidence. An appellate issue appeared to exist regarding the admissibility of the evidence, but it is unreviewable without a record of the arguments and ruling.

The partial transcript revealed an objection during the testimony of Lyda, one of the State's first witnesses. This objection did not appear in Lanfear's notes. During the reconstruction hearing, the only evidence presented on this point was that the objection was to hearsay and that the State reined in the testimony. This left open the possibility that an appellate

issue still existed, which is not reviewable without a record of the testimony, the arguments, and the ruling.

CONCLUSION

Therefore, this Court concludes the record cannot be reconstructed to permit meaningful appellate review and recommends that the Court of Appeals remand the case for a new trial.



J. Mark Hayes, II  
Circuit Court Judge, At Large

February 23, 2017

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Greenville County  
J. Mark Hayes, II, Circuit Court Judge

**RECEIVED**

MAR 20 2017  
SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

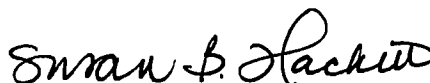
V.

DONALD LAMON YOUNG,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for a new trial in the above referenced case has been served upon opposing counsel, J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Donald Lamon Young #339194, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of March, 2017.



Susan B. Hackett  
Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me  
this 20th day of March, 2017.



(L.S.)

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



# SCCID

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RECEIVED

MAR 20 2017

SC Court of Appeals

March 20, 2017

The Honorable Jenny A. Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, S.C. 29211

Re: State v. Donald Lamon Young, Appellate Case No. 2014-002655

Dear Ms. Kitchings,

Please find enclosed the original and six copies of appellant's motion for a new trial in the above-captioned case.

Thank you for your assistance in this matter.

Sincerely,

Susan B. Hackett  
Appellate Defender

SBH/smf

Enclosure

cc: Honorable J. Mark Hayes, II  
J. Benjamin Aplin, Esquire  
Donald Lamon Young #339194