

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON HUNTER KENNY RIVERS,

APPELLANT

APPELLATE CASE NO. 2016-000402

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The trial court erred in refusing to charge self-defense where
appellant and another witness testified that one of the alleged
victims pulled out a gun as appellant and his co-defendant were
leaving the scene3

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases

State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) 13

State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989)..... 13

State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)..... 12

State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936) 13

State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013) 13

State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012)..... 12

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to charge self-defense where appellant and another witness testified that one of the alleged victims pulled out a gun as appellant and his co-defendant were leaving the scene?

STATEMENT OF THE CASE

On November 25, 2014, a Lancaster County Grand Jury indicted appellant for three counts of attempted murder and failure to stop for a blue light. R. 573-578. On February 16, 2016, appellant was tried before the Honorable Thomas A. Russo and a jury. R. 1. Andrew Cook represented the State. R. 1. Mark Grier represented appellant. R. 1. Appellant pled guilty before trial to failure to stop for a blue light. R. 19, ll. 8 – 16. The jury convicted appellant on the remaining charges. R. 549, l. 23 – 550, l. 14. Judge Russo sentenced appellant to concurrent terms of twenty-five years' imprisonment. R. 571, ll. 6 – 14. This appeal of appellant's attempted murder convictions follows.

ARGUMENT

The trial court erred in refusing to charge self-defense where appellant and another witness testified that one of the alleged victims pulled out a gun as appellant and his co-defendant were leaving the scene.

Factual Background

The police arrived on the scene at approximately 10:00 PM and found a man with a gunshot wound in the yard. R. 78, ll. 6 – 10. R. 79, ll. 2 – 5. The man had been shot through the penis and into the leg. R. 79, ll. 6 – 16. This man was Christopher Jones (“Jones”). R. 92, ll. 3 – 8. When EMS rolled Jones over, the officer saw a starter pistol on the ground underneath him. R. 82, ll. 1 – 14. The starter pistol “looked like a revolver, but the cylinder on it was a little bit smaller than a normal revolver.” R. 83, ll. 2 – 6. The officer compared the starter pistol to a .22 caliber pistol. R. 89, ll. 2 – 5. Another officer admitted the starter pistol could look and sound like a real gun. R. 372, ll. 16 – 20. The police performed no testing on the starter pistol. R. 343, ll. 4 – 7. They did not try to recover fingerprints or DNA from the starter pistol. R. 350, ll. 8 – 17. No one at the scene claimed ownership of the starter pistol. R. 95, ll. 12 – 16. The police found two .25 caliber shell casings near the road. R. 84, ll. 3 – 19. R. 341, ll. 14 – 18.

When the police apprehended appellant, they found black cotton gloves in one of his pockets. R. 103, ll. 1 – 9. The police did not find any weapons. R. 107, ll. 24 – 25. Appellant wrecked his motorcycle during a police pursuit and appellant told the police he ran because he did not have a license, insurance, and had some marijuana. R. 108, ll. 3 – 6. Appellant pled guilty before trial to failure to stop for a blue light. R. 19, ll. 8 – 16.

The shooting occurred at a duplex. R. 122, l. 24 – 123, l. 5. The State presented no evidence that the police ever searched the duplex. R. 128, ll. 1 – 8. The police did not perform

gunshot residue tests on any of the people at the scene of the shooting. R. 146, ll. 11 – 23. R. 345, ll. 13 – 17. The witnesses on scene were interviewed at the police station between 11:00 PM and approximately 5:30 AM. R. 129, l. 1 – 130, l. 1. The statements were videotaped, but were not preserved for the trial because of “a glitch in the system” as described by the police. R. 141, ll. 7 – 19.

Angela Laney’s Testimony

On the day of the shooting, Angela Laney (“Angela”) went to Kacy Noe’s (“Kacy”) duplex apartment, with her husband, Terry Laney (“Terry”), and her daughter. R. 151, ll. 5 – 8. Kacy, Ronnie Blackwell (“Ronnie”), Charlotte Parker, and Jones were at the duplex. R. 151, ll. 14 – 18. The reason for their visit was Angela’s husband, Terry, was going to engage in a drug transaction for pills with Ronnie. R. 152, ll. 10 – 17.

Angela’s daughter and Kacy’s daughter were jumping up and down on a couch. R. 154, ll. 21 – 24. Shane Bolen (“Shane”), Kacy’s brother, lived next door in the duplex. R. 153, ll. 6 – 10. R. 193, l. 24 – 194, l. 1. Shane was high on drugs.¹ R. 154, l. 21 – 155, l. 5. Shane quickly entered the house and, addressing Angela’s nine-year-old daughter directly, told the little girl, “Every time your little fat ass comes over here you end up knocking my shit off my fucking wall and you just broke my goddamn mirror.” R. 155, ll. 6 – 21. Angela forcefully replied that Shane could not speak to her child in such a profane fashion without consequences. R. 155, ll. 12 – 21. Terry “pinned Shane between the screen door and the side of Kacy’s apartment.” R. 155, ll. 12 – 21. Kacy then told Angela and Terry to “get the fuck out of my yard.” R. 155, ll. 12 – 21.

Angela and Terry left and “Terry was still pissed.” R. 155, l. 22. They went to Terry’s cousin’s house. R. 155, ll. 22 – 24. Terry’s cousin is appellant’s mother. R. 156, ll. 5 – 10.

¹ Shane died before trial of a cocaine and heroin overdose. R. 157, ll. 7 – 14.

Appellant was also at the house. R. 157, l. 25 – 158, l. 17. Terry asked his cousin to watch his daughter “while we went back over there because [Terry] was going to beat the hell out of Shane.” R. 155, l. 22 – 156, l. 1. As Angela described it, “Terry was going to go back over there and give Shane a proper ass whooping. . . .” R. 157, ll. 15 – 20.

Angela and Terry drove back to the duplex. R. 158, ll. 21 – 24. Appellant drove to the duplex on his motorcycle, but parked at a nearby bowling alley. R. 158, ll. 21 – 25. Shane and Terry resumed their disagreement, but appellant “stood back and just watched.” R. 159, ll. 1 – 11. The neighbor from across the street threatened to call the police and Angela, Terry, and appellant left. R. 159, ll. 3 – 18. Appellant “never tried to cause conflict. He stood at the back.” R. 161, ll. 21 – 24.

Angela and Terry went home. R. 161, l. 25 – 164, l. 16. Angela’s brother, Brian Steele (“Steele”) came over to the house with appellant on a motorcycle. R. 164, ll. 10 – 22. Appellant and Steele were drinking. R. 165, ll. 7 – 25. Angela claims she saw appellant with two small guns when he changed jackets. R. 166, ll. 6 – 14.

Kacy sent Angela a text message which she read out loud in front of appellant. R. 178, ll. 3 – 22. According to Angela, Kacy’s text said, “Why did you bring that skinny ass crack head, Brandon Rivers, to my house?” R. 178, ll. 16 – 17. Angela claimed appellant then said, “Fuck that shit, I’m going back over there.” R. 178, ll. 23 – 25. This text message was not recovered or preserved by the police. R. 143, l. 22 – 144, l. 11. Appellant and Steele left on a motorcycle. R. 179, ll. 1 – 5. Later that night, Angela picked up her “hysterical” brother from the side of the highway. R. 179, l. 21 – 180, l. 15.

On cross-examination, Angela initially denied telling investigators that the gun used in the shooting would be found in a toilet outside of appellant’s house. R. 184, ll. 9 – 15. She

initially denied learning from Steele where the gun had been placed. R. 184, ll. 9 – 12. After being pressed by defense counsel, Angela then admitted that she “probably” did tell investigators about the gun being in the toilet and that she had likely learned this information from Steele. R. 184, ll. 16 – 185, l. 3. Angela also remembered looking through the toilet. R. 185, ll. 3 – 6. The police never found the gun used in the shooting. R. 142, ll. 5 – 8.

Angela admitted that her brother Steele knew that Shane had “cussed out” her daughter, was angry, and “wanted to go back and whoop Shane’s ass.” R. 187, ll. 2 – 8. But Angela denied that Steele would have ever used a gun because, “Real men fight with their fists. Low down lame people fight with guns.” R. 187, ll. 13 – 18. She then admitted that her brother stole her television on the day of the shooting because he was “a crackhead.” R. 187, ll. 21 – 188, l. 8.

Ronnie Blackwell's Testimony

Ronnie was at the store and did not witness the first argument. R. 193, ll. 9 – 18. Angela and Terry were gone when Ronnie returned from the store. R. 194, ll. 11 – 13. Ronnie testified that Angela, Terry, and appellant returned at approximately 8:30 PM. R. 194, ll. 16 – 19. The argument resumed, but appellant “didn’t have too much to say,” and “was nice.” R. 195, ll. 1 – 13. Ronnie told appellant not to get involved and that if they did not leave he would call the police. R. 195, ll. 1 – 13. Ronnie said that appellant listened to him and left. R. 195, ll. 1 – 13. Ronnie claimed that Shane and Terry “kissed and made up” before everyone left. R. 197, ll. 20 – 24.

Ronnie stated that appellant returned later that night with Steele. R. 198, ll. 4 – 14. Appellant never got off his motorcycle. R. 198, ll. 21 – 25. The adults came outside except for Shane, who stayed inside the doorway of the duplex. R. 200, ll. 1 – 11. Steele got off of the motorcycle. R. 202, ll. 8 – 11. Ronnie said that Steele “wanted to fight everybody in the world.”

R. 202, ll. 8 – 11. Ronnie told Steele that he would call the police, but this only enraged Steele. R. 202, ll. 12 – 25. Steele got back on the motorcycle and told appellant to, “kill the niggers, shoot the niggers.” R. 203, ll. 4 – 17. However, the investigator who interviewed Ronnie the night of the shooting testified unequivocally that Ronnie never told the police about this racial epithet. R. 390, l. 3 – 391, l. 3. The investigator said that Ronnie “never said that.” R. 391, ll. 2 – 3.

Ronnie claimed that appellant then pulled out a gun and began firing. R. 203, l. 18 – 204, l. 13. Ronnie blamed Steele and testified that appellant “got caught up in the moment.” R. 204, ll. 6 – 13. Ronnie claimed that no one in his party had a gun. R. 204, l. 18 – 205, l. 9. Ronnie denied ever seeing the starter pistol the police found underneath Jones. R. 206, l. 20 – 207, l. 11.

Kacy Noe's Testimony

Kacy and Ronnie still lived together at the time of trial, but their testimony about the incident substantially differed. R. 235, l. 24 – 236, l. 2. Kacy testified that Steele never said anything when he returned to the scene with appellant. R. 236, ll. 13 – 24. According to Kacy, Steele did not even appear angry. R. 237, ll. 19 – 22. Steele had a “blank look on his face.” R. 238, ll. 2 – 4.

In her original statement the night of the shooting, Kacy wrote: “**The passenger**, who was walking up the driveway, turned around and **got back on the back of the bike. As he did**, so I told him that the law should be here shortly and it was best to go. **As he turned around, he then shot 4 times and drove off.**” R. 234, l. 9 – 235, l. 9 (emphasis added). Kacy denied that the “he” referred to Steele because she did not know who actually fired the shots. R. 235, ll. 10 – 17. Kacy testified that appellant never got off of the motorcycle. R. 225, ll. 2 – 3. Kacy claimed that the shooting happened after Steele got on the motorcycle, drove away, and then returned,

firing three or four times. R. 228, ll. 5 – 14. Kacy denied ever seeing anyone with a gun, including the gun found under Jones. R. 228, ll. 20 – 22. R. 230, ll. 24 – 25. Kacy denied that Tonya Snipes was at her house that night. R. 231, ll. 1 – 8.

Chris Jones' Testimony

Jones' testimony was also drastically different from Kacy and Ronnie's accounts of the evening. Jones had "no idea" what anybody could have said that would have caused the shooting. R. 282, l. 24 – 283, l. 4. No one was mad, angry, or yelling. R. 282, ll. 19 – 25.

In Jones' version, Steele and appellant got off the motorcycle and knocked on the door. R. 281, ll. 3 – 11. Appellant went back to the bike, followed by Steele who told appellant to shoot them. R. 281, ll. 16 – 19. Steele was not on the motorcycle when the shots were fired. R. 283, ll. 17 – 20. The motorcycle was not running. R. 283, ll. 21 – 22. Instead of the three or four shots heard by Kacy, Jones estimated he heard 10 – 14 shots. R. 279, ll. 21 – 24.

Jones denied owning a starter pistol. R. 277, ll. 1 – 20. He stated that he did not even know what a starter pistol was. R. 277, ll. 21 – 22. When asked if he had any explanation of why the starter pistol was found beside him, Jones replied, "I have no idea." R. 277, ll. 23 – 24. Jones denied ever firing a gun at anyone or that anyone at the duplex fired at appellant and Steele. R. 284, ll. 12 – 19.

Brian Steele's Testimony

Steele testified for the State. R. 285, l. 13. At the time of his testimony, Steele's three charges of attempted murder were still pending. R. 285, l. 25 – 286, l. 9. Steele denied having been promised anything by the State. R. 286, ll. 10 – 12. On cross-examination, Steele admitted that he was released **on a personal recognizance bond with the consent of the solicitor.** R.

312, ll. 2 – 16. Steele remained adamant that he expected no concessions in exchange for his testimony. R. 312, ll. 21 – 25.

According to Steele, he left his sister's house that evening to "go over there and confront Shane Bolen." R. 292, ll. 9 – 13. Steele wanted to confront Shane because he "supposedly hit my niece with the door and cussing her out and stuff and all that." R. 292, ll. 14 – 17. Steele admitted he wanted to go to fight Shane and appellant was going to give him a ride. R. 293, ll. 2 – 5. He did not see appellant with a gun. R. 293, ll. 6 – 13.

When they arrived at the house, the people at the duplex were standing in the yard beside a tree. R. 294, ll. 8 – 12. Steele got off the bike. R. 294, ll. 23 – 24. Appellant got off the bike "and stood there." R. 306, ll. 23 – 25. Steele walked up to Ronnie and Jones. R. 305, ll. 3 – 5. Steele knocked on the door, but never saw Shane. R. 296, ll. 5 – 13. Steele denied having words with anyone. R. 296, ll. 5 – 20. Steele said, "I don't fuss at nobody." R. 307, ll. 10 – 11.

According to Steele, appellant and Kacy were the ones arguing. R. 307, ll. 12 – 19. Steele realized that he was not going to be able to fight Shane so he walked back and got on the motorcycle. R. 296, ll. 21 – 25. Appellant started to pull away and the motorcycle choked and stopped. R. 297, ll. 11 – 16. Appellant restarted the bike. R. 297, ll. 13 – 16. Appellant was supposedly still yelling and screaming at the people in the yard when he reached into his coat pocket and started shooting. R. 297, l. 17 – 298, l. 7. Appellant fired "four or five" shots. R. 298, ll. 10 – 11.

Steele testified, "I was pushing Brandon's arm down hollering and telling him to stop, stop." R. 298, ll. 5 – 7. Appellant supposedly replied, "I'm a real motherfucker." R. 298, ll. 16 – 18. Steele denied having a gun or having ever "even shot a gun." R. 301, ll. 1 – 7. Steele denied seeing anyone at the duplex except appellant with a gun. R. 301, ll. 8 – 10.

Steele got off the motorcycle before law enforcement began chasing appellant. R. 300, ll. 23 – 25. Contradicting his sister’s testimony about picking him up, he ran a “quarter of a mile” to his sister’s house. R. 309, ll. 17 – 24. Steele denied ever telling appellant to shoot anybody. R. 313, ll. 8 – 9. Steele had prior convictions for shoplifting and breach of trust. R. 313, ll. 1 – 7.

Tonya Snipes’ Testimony

Tonya Snipes (“Snipes”) testified for the defense. R. 391, l. 8. She was at the house the day of the shooting to obtain pills and to party. R. 392, l. 22 – 393, l. 2. Snipes described the duplex as “a drug house.” R. 407, ll. 10 – 13. Kacy denied that Snipes was there that day, but admitted that Snipes “used to come to the house often.” R. 231, ll. 6 – 8.

Snipes heard a commotion outside. R. 395, ll. 16 – 24. Steele and appellant arrived on the motorcycle. R. 395, ll. 16 – 24. Everyone was “calling names, arguing back and forth.” R. 396, ll. 20 – 21. Snipes saw Jones pull out a gun. R. 395, ll. 16 – 24. Steele, not appellant, shot. R. 395, ll. 16 – 24. Steele and appellant were already back on the motorcycle at the time Steele fired. R. 395, l. 16 – 396, l. 2. Snipes left before the police arrived because she was on probation. R. 398, ll. 12 – 14. Snipes only saw two guns that night – the ones held by Jones and Steele. R. 410, ll. 17 – 20.

Appellant’s Testimony

Appellant testified that he never had a gun that day. R. 418, ll. 13 – 21. Steele asked appellant for a ride so that he could “whip Shane’s ass.” R. 418, ll. 1 – 8. Appellant believed there would be just another argument, but agreed that if there was going to be a physical altercation he probably would have helped Steele. R. 457, l. 11 – 458, l. 6. R. 447, ll. 2 – 3.

When they arrived, Steele got off the motorcycle and “started raising hell.” R. 420, ll. 7 – 19. The group at the duplex threatened to call the police. R. 420, ll. 7 – 19. Appellant wanted to leave. R. 420, ll. 22 – 23. Appellant described what happened next:

So I go to get back on my bike, as I go to get back on my bike, I crank my bike up, I pull right to the bowling alley, I turn around. As I turned around, [Steele] is standing there. He gets on the bike, as he gets on the bike I turn and look at [Jones]. **When I look at [Jones], I see him pull out a gun.** I tell [Steele], I say, Watch out. **As I go to pull out, [Steele] pulls out a gun and starts shooting four times, maybe six at the most.**

R. 421, ll. 1 – 10 (emphasis added). Appellant said Jones “was hollering with the gun pointed.” R. 427, ll. 8 – 19. Steele was already on the motorcycle when appellant saw Jones with the gun. R. 450, ll. 2 – 6. Steele started shooting as appellant started to leave. R. 459, ll. 7 – 17. When they left, appellant did not know if anyone had been shot. R. 428, ll. 16 – 19.

Appellant denied that Steele ever told him to shoot anybody. R. 425, ll. 16 – 17. Appellant denied telling Steele that he was a “real motherfucker.” R. 426, ll. 3 – 5. Appellant did not deny having the pair of gloves that tested positive for gunshot residue, but stated that his father had given him the gloves and his father was an avid hunter. R. 453, ll. 6 – 16. No gunshot residue test was performed on appellant’s hands. R. 147, ll. 8 – 22. A SLED agent testified the gloves contained gunshot residue, but that in the case of an inanimate object, SLED could not give a time frame as to when the particles got on the gloves. R. 259, ll. 9 – 25. Appellant explained that he ran from the police because he had no license, no insurance, and was drunk. R. 428, ll. 7 – 15. He was also supposed to be on house arrest. R. 428, ll. 7 – 15.

Argument and Ruling on a Self-Defense Instruction

After the close of the evidence, the trial court held a charge conference off the record where appellant learned the court intended to charge accomplice liability. R. 463, l. 22 – 25.

Appellant requested a self-defense charge. R. 463, l. 17 – 466, l. 13. Appellant argued that the evidence showed that the motorcycle was moving and appellant was leaving when Steele fired, meaning that they had begun to withdraw from the altercation when Jones presented a firearm. R. 465, l. 1 – 466, l. 13. At this point, Steele would have been afraid for his life and would have been justified in shooting in self-defense. R. 465, l. 1 – 466, l. 13.

The trial judge denied the charge because their “whole purpose in going over there was to fight.” R. 466, ll. 17 – 24. The court also reasoned that because Steele testified that he never saw a gun, then Steele could not have acted in self-defense and appellant was not entitled to the charge. R. 467, ll. 2 – 11.

Discussion

The court erred in not charging self-defense because appellant’s testimony established that they had no intention of engaging in anything other than a fistfight and they were leaving the scene when Jones pulled out a gun. Snipes also testified that Jones drew a gun. The trial judge mistakenly weighed the evidence and erred in ruling that contradictory testimony meant that appellant could not receive a self-defense charge.

When “there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error.” State v. Light, 378 S.C. 641, 649-50, 664 S.E.2d 465, 469 (2008). The court did not use the “any evidence” standard. The court also failed to view the facts and inferences in the light most favorable to appellant. See State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (“When reviewing the circuit court’s refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant.”). Nor is a court permitted to weigh the

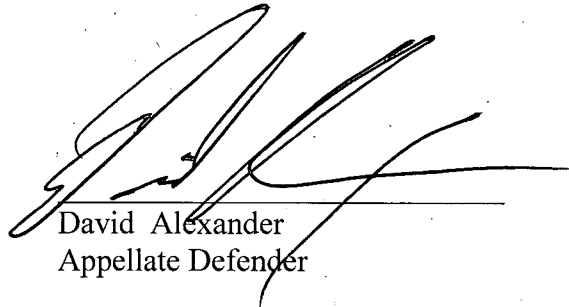
credibility of the witnesses. See State v. Rogers, 405 S.C. 554, 569 n.5, 748 S.E.2d 265, 273 n.5 (Ct. App. 2013) (stating that at the directed verdict stage—which uses the same “any evidence” standard as a jury charge—the court may not weigh the credibility of witnesses).

While appellant may have borne some fault in bringing on the initial difficulty, he had no reason to believe the confrontation would involve deadly force. He saw no guns and did not know that Steele had a gun. Regardless, appellant’s testimony established that he and Steele were withdrawing from the altercation. Steele went to fight Shane and, according to Ronnie, Shane never came outside. R. 202, ll. 8 – 11. Appellant and Steele were on the motorcycle when appellant saw Jones pull out a gun and told Steele. “One’s right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act.” State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 321 (1999). It was a question for the jury to determine whether appellant and Steele had withdrawn and whether they had a right to self-defense. In fact, the jury asked whether if “the method of harm changed from a verbal confrontation, which was planned, to a shooting, which may not have been planned, does the hand—the hand in hand law still apply.” R. 533, l. 23 – 534, l. 1.

Steele would have had the right to act on appearances. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). A defendant does not have to wait on an assailant to “get the drop on him” before firing. State v. Rash, 182 S.C. 42, 50, 188 S.E.2d 435, 438 (1936). Under these facts, appellant was entitled to a jury determination on self-defense. The trial court erred by weighing the evidence and by determining that the contradiction between the self-interested Steele and appellant foreclosed a self-defense charge. This Court should reverse.

CONCLUSION

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



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2017.

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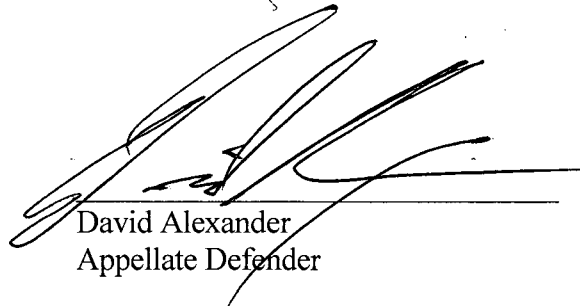
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SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 18, 2017



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STATE OF SOUTH CAROLINA

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THE STATE,

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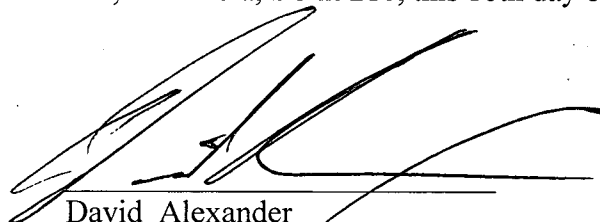
V.

BRANDON HUNTER KENNY RIVERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Brief of Appellant have been served on Brandon Hunter Kenny Rivers, #367157, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of April, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of April, 2017.

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