

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 ORIGINAL

\_\_\_\_\_  
Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

DAVID JAMES WELCH,

APPELLANT

APPELLATE CASE NO 2017-001019  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

RECEIVED  
JAN 30 2018  
SC Court of Appeals

KATHRINE H. HUDGINS  
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ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT .....3

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL .....9

**TABLE OF AUTHORITIES**

**Cases**

State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977)..... 6

State v. Goodwin, 250 S.C. 403, 158 S.E.2d 195 (1967) ..... 5

State v. Lake, 257 S.C. 407, 186 S.E.2d 256 (1972) ..... 5

State v. Robinson, 274 S. C. 198, 262 S.E.2d 729 (1980)..... 6

State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981)..... 5

State v. Tate, 298 S.C. 104, 341 S.E.2d 380 (1986)..... 6

State v. Washington, 315 S.C. 108, 110 S.E.2d 448 (1992)..... 5

State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)..... 5

**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in refusing to grant a mistrial when a detective testified that he knew the Appellant as the individual identified on Facebook as David Royal, implying that the detective knew Appellant because of prior criminal activity?

### **STATEMENT OF THE CASE**

In March of 2015, the Horry County Grand Jury indicted Appellant Welch for criminal sexual conduct, first degree, kidnapping, armed robbery and possession of a weapon during the commission of a violent crime, indictments #2015-GS-26-969, 970, 971, 972. On April 17, 2017, Appellant proceeded to jury trial before the Honorable Steven H. John. Ralph J. Wilson, Jr. represented Appellant at trial. Joshua D. Holford and Cara J. Walker prosecuted the case. The jury found Appellant not guilty of armed robbery and possession of a weapon during the commission of a violent crime but guilty of criminal sexual conduct first degree and kidnapping. Judge John sentenced appellant to two concurrent twenty-four (24) year sentences. A timely notice of intent to appeal was served on April 21, 2017. This appeal follows.

## ARGUMENT

**The trial judge erred in refusing to grant a mistrial when a detective testified that he knew the Appellant as the individual identified on Facebook as David Royal, implying that the detective knew Appellant because of prior criminal activity.**

On January 8, 2015, Jerrica Nelson called her mother from the Belk department store and reported that her “stuff had been stolen” and she did not know what to do. (R. p. 99, lines 5-8). After speaking with her mother she called the police and reported that someone had followed her out of the restroom at Burger King and stolen her purse and cell phone. (R. p. 99, lines 10-13; p. 110, lines 3-8). After interviewing Nelson the police became concerned that Nelson’s story did not make sense and warned her that she could be charged with filing a false police report. (R. p. 134, lines 1-17). At this point Nelson’s story changed.

Appellant and Jerrica Nelson had never personally met but became friends on Facebook on January 6, 2015, and began messaging one another. (R. p. 79, lines 15-24; pp. 116-127). Two days later, on January 8, 2015, Nelson agreed to meet Appellant at the Burger King near the mall. (R. p. 87, lines 20-23). Nelson testified that once at the Burger King parking lot Appellant got in her car and tried to kiss her. (R. p. 90, line 3 – p. 91, lines 1-7). Nelson testified that when she refused Appellant’s advances, he asked her to drive him home. (R. p. 91, lines 8-12). Nelson agreed to drive Appellant home. (R. p. 91, lines 10-11).

Nelson claimed that she drove Appellant to an apartment complex where he pulled a gun and started having sex with her. (R. p. 96, lines 8-25). According to Nelson, when she told him that she was not on birth control, he stopped, put on a condom and continued to have sex with her. (R. p. 96, line 25 – p. 97, lines 1-2). Afterwards, Nelson claimed that Appellant took her

purse and ran away. (R. p. 97, lines 2-8). The jury found Appellant not guilty of armed robbery and possession of a weapon during the commission of a violent crime.

During the pre-trial Jackson v. Denno hearing the attorney for Appellant requested redaction of a portion of Appellant's recorded statement where a detective indicated that he is familiar with Appellant's name, implying that Appellant has been in trouble with the police before. (R. p. 48, lines 3-9). That portion of the interview was redacted. During the testimony of another detective, however, the prosecutor asked, "So, you knew that the person identified on Facebook as David Royal is in fact the Defendant in the courtroom, David Welch?" (R. p. 197, lines 20-22). The officer answered, "Correct." (R. p. 197, line 23). Counsel for Appellant asked to approach the bench and a bench conference was held outside the presence of the jury. (R. p. 197, line 24 – p. 198, lines 1-3). The judge then sent the jury to the jury room and heard motion from counsel. (R. p. 198, lines 4-10).

Counsel for Appellant argued:

Judge, my concern here is this, that we obviously want to keep out any inference to the jury that this Defendant had any sort of prior bad act or conduct which would obviously be something this officer would know him from he's testifying on the stand, which was elicited by the Solicitor about testimony saying that he knows him as David Welch, and that's how they identified him. And based on what I understand from the actual tapes as well as listening to the interviews is that how they identified him was a conversation. Again, this was the issue that I filed a motion about, Judge.

(R. p. 198, lines 11-20). Counsel noted that the portion of the interview where the detective indicated that he knew Appellant had been redacted. (R. p. 198, line 21 – p. 199, lines 1-5). Counsel further stated, "And how else would he know him unless he had some run-ins with him, which is the inference that the jury would jump to." (R. p. 199, lines 5-7). Counsel additionally noted, "Just for the record, he [the detective] testified earlier that he does narcotics and that he does CSC. He said that himself. Okay? And so the jury has already heard that." (R. p. 200,

lines 7-9). Earlier the detective testified, "I've been a part of various narcotics related investigations. I've been a part of investigations related to prostitution and then also as a patrol officer leading up to my position, I've been involved in various investigations up to and including CSC's shoplifting, things like that." (R. p. 195, lines 8-12).

The judge stated, "For all the jury knows is he was a, you know, YMCA basketball coach and that's how he knows that individual to be David Welch." (R. p. 200, lines 13-15). The judge then ruled, "If your request is for a mistrial, I deny your request for a mistrial based on the fact that I do not believe there is anything that has been said to the jury that would rise to the level of a mistrial. In fact, I do not think anything has been said improper to the jury in any shape, manner or form." (R. p. 200, lines 21-25). The judge offered to give a curative instruction which counsel declined. (R. p. 201, line 1 – p. 202, lines 1-2). The trial judge erred in refusing to grant a mistrial.

In State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992), the South Carolina Supreme Court wrote:

The granting of a mistrial is a matter within the sound discretion of the trial judge, and his decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Lake, 257 S.C. 407, 186 S.E.2d 256 (1972). We find that the witness' answer in each instance was responsive to counsel's queries. Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Goodwin, 250 S.C. 403, 158 S.E.2d 195 (1967). We affirm the ruling of the trial court on this issue.

In the present case the State asked the detective if he knew that David Royal was the Appellant, David Welch, after the same information had been redacted pretrial. Unlike in Washington, the answer in the present case was not elicited by Appellant's counsel.

In State v. Tate, 298, S.C. 104, 341 S.E.2d 380 (1986), the South Carolina Supreme Court held the admission into evidence of a six-man photographic array containing a mug shot of the defendant was reversible error. In Tate the Court noted that the photographs in question were typical police photographs taken when a person was arrested. The Court noted that it had held that the introduction of a mug shot was reversible error unless it is shown that: (1) the State had a demonstrable need to introduce the photograph; and, (2) the photographs themselves if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner as to draw attention to the source or implication of the photograph. State v. Robinson, 274 S. C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977). The Court held in Tate that the first two prerequisites were not met in that case. The same is true in this case.

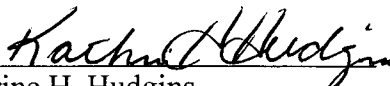
The State did not need the detective's testimony to establish that the David Royal on Facebook was Appellant, David Welch. Nelson and Appellant communicated with one another through Facebook and the telephone. The State called witnesses from both Verizon and Spectrum and these witnesses testified about the phone calls between Nelson and Appellant. The telephone number used by Appellant was the land line registered to Appellant's mother and the address corresponded to the address where police eventually arrested Appellant. (R. pp. 70-75; 177-181; 204-208). Additionally, Nelson identified Appellant in court. (R. p. 78, line 4 – p. 79, lines 1-10).

In the same way the mug shot from the Tate case inferred to the jury that appellant had a prior criminal record, the detective's testimony that he knew that the David Royal from Facebook was the Appellant, David Welch, implied that the detective knew Appellant because of prior criminal activity. The testimony improperly placed Appellant's character into evidence. The error was not harmless. The State's case was based solely on the testimony of Nelson. There was no

forensic evidence of a sexual assault or kidnapping and Nelson admitted that initially she told her mother and the police only that she had been robbed. The sexual assault and kidnapping accusations were not made by Nelson until after the police threatened to charge her with a crime for filing a false police report.

**CONCLUSION**

Based on the above argument, this Court should reverse the conviction and sentence and remand for a new trial.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

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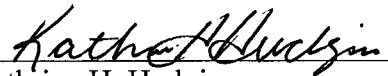
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Counsel for David James Welch states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Steven H. John, which was held on April 18 - 20, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for David James Welch.

Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 30th day of January, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
Honorable Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

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DAVID JAMES WELCH,

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

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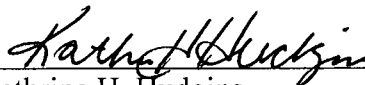
Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript pages 1-395;
- (3) State's Exhibit #1 – Miranda Rights form;
- (4) State's Exhibit #28 – CD of Redacted Interview with Appellant – to be transported;
- (5) Defense Exhibit #4 – DVD of interview with Jerrica Nelson – to be transported;
- (6) Defense Exhibit #13 – CD of interview with Jerrica Nelson, part 2 – to be transported.

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

January 30, 2018

  
Kathrine H. Hudgins  
Appellate Defender

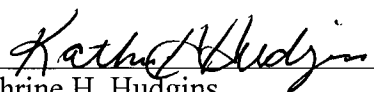
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ATTORNEY FOR APPELLANT

**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."

January 30, 2018.

  
Kathrine H. Hudgins  
Appellate Defender

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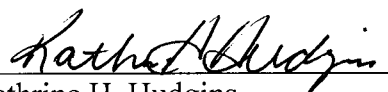
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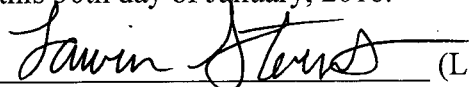
APPELLANT

\_\_\_\_\_  
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. Ben 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 David James Welch, 372246, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 30th day of January, 2018.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 30th day of January, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.