

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Richland County

Honorable R. Knox McMahon, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

NATHAN DANIEL MARTINEZ

APPELLANT

APPELLATE CASE NO 2016-002494

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

RECEIVED  
APR 18 2018  
SC Court of Appeals

LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS .....3

ARGUMENT

The trial court erred in admitting a prior incident pursuant to State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923) where Appellant Martinez allegedly committed the same crimes of criminal sexual conduct first degree and kidnapping two days before the trial incident where he was on trial for several offenses that included criminal sexual conduct first degree and kidnapping which was prejudicial to Appellant because the probative value was outweighed by the prejudicial effect.....9

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL.....12

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS .....3

ARGUMENT

The trial court erred in admitting a prior incident pursuant to State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923) where Appellant Martinez allegedly committed the same crimes of criminal sexual conduct first degree and kidnapping two days before the trial incident where he was on trial for several offenses that included criminal sexual conduct first degree and kidnapping which was prejudicial to Appellant because the probative value was outweighed by the prejudicial effect.....9

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL.....12

**TABLE OF AUTHORITIES**

**Cases**

State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) ..... 10

State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000)..... 10

State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999)..... 10

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)..... 1, 6, 9

**Rules**

Rule 404 (b), SCRE ..... 7, 9, 10

Rules 403, SCRE ..... 10

**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in admitting a prior incident pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) where Appellant Martinez allegedly committed the same crimes of criminal sexual conduct first degree and kidnapping two days before the trial incident where he was on trial for several offenses that included criminal sexual conduct first degree and kidnapping which was prejudicial to Appellant because the probative value was outweighed by the prejudicial effect?

## STATEMENT OF THE CASE

On December 6, 2014, the Richland County Grand Jury indicted Nathan Martinez on the charges of burglary first degree, armed robbery, three counts of kidnapping, criminal sexual conduct (CSC) first degree, and possession of a weapon during the commission of a violent crime. R. 61, ll. 14 – R. 62, ll. 1; R. 1783 - 1805. On November 28-December 8, 2016, Appellant Martinez proceeded to trial before the Honorable R. Knox McMahon and a jury. Appellant Martinez represented himself with Jason Kata as standby counsel. The state was represented by K. Luck Campbell, Meghan Walker, and Jessica Godwin. R. 1.

The jury found Martinez guilty on all counts as indicted. R. 1767, ll. 24 – R. 1768, ll. 25. The judge sentenced Martinez to life without parole on the burglary first degree; thirty years each on the armed robbery, three counts of kidnapping, CSC first degree; and five years on the possession of a gun during violent crime. R. 1780, ll. 1 – R. 1781, ll. 3.

Martinez filed a notice of appeal. This appeal follows.

## STATEMENT OF FACTS

In March 2014, Briona Hurshman, her husband, and their two daughters ages seven and fourteen were living in a three-story townhouse in Forest Acres. On the morning of March 27, 2014, Ms. Hurshman was in her bedroom getting dressed for her job at a salon in Camden, and her two daughters were getting dressed for school. Her husband had already left for work. R. 448, ll. 4 – R. 450, ll. 11.

She sent her young daughter to check on her older sister. The young daughter returned immediately to the bedroom followed by an unknown man who had a gun pointed at Ms. Hurshman and a hammer in the other hand. She had never seen the man before and he did not have permission to be in her home. The man kept yelling at her to “shut up.” R. 450, ll. 12 – R. 451, ll. 6; R. 456, ll. 4 – 15.

The man made her lay down on her bedroom floor, and he tied her hands and feet with extension cords. The man retrieved the older daughter and put the two girls in the bathroom and shut the door. R. 452, ll. 2 – 9; R. 457, ll. 8 – 25; R. 451, ll. 14 – 24. The man held Ms. Hurshman’s phone and had her call her work to say she would not be in. He then proceeded to assault Ms. Hurshman sexually but was unable to penetrate her with his penis. He then penetrated her vaginally with his fingers to the point that she suffered some injuries. R. 458, ll. 1 – R. 464, ll. 24.

According to Ms. Hurshman, the man appeared to become frustrated and stopped. As he left, he took items from her jewelry box, and took her debit card from the night stand after he got her PIN number from her. He took the girls downstairs, and he left. Ms. Hurshman freed herself and checked on her daughters who were not harmed. She then called her husband and 911. R. 464, ll. 20 – R. 468, ll. 16.

Ms. Hurshman went to the hospital and was examined by a sexual assault nurse who found injuries and abrasions to Ms. Hurshman's external body. The nurse also found a laceration to her genitalia. R. 470, ll. 1 – 15; R. 744, ll. 1 – R. 745, ll. 25; R. 746, ll. 21 – 25; R. 753, ll. 1 – R. 754, ll. 22; R. 769, ll. 21 – 25.

Ms. Hurshman then met with a sketch artist who developed a sketch that was sent to the media. She explained that the man wore glasses and had big block lettering across his neck but she could not tell what the letters said. In addition, she believed from his diction that he was Hispanic. R. 470, ll. 16 – 23; R. 462, ll. 24 – R. 463, ll. 9. Later, Ms. Hurshman was not able to identify the man from a photo lineup. R. 474, ll. 2 – 24.

She later discovered that the man had taken two rings from her jewelry box which included her husband's wedding ring. R. 471, ll. 10 – R. 472, ll. 12.

Ms. E. Tucker lived in Columbia in 2014. When she saw on the news the sketch of the man who allegedly assaulted Ms. Hurshman, Ms. Tucker called the police. She explained to them that on March 25, 2014, that same man had assaulted her. R. 908, ll. 15 – R. 909, ll. 5. According to her, she was staying at her father's house but he was asleep downstairs. She woke up to a man holding a knife to her neck. The man took her in her father's car to an isolated place near Hopkins. There he had sexual intercourse with her and then made her perform oral sex on him. He then started to return her to her father's house but he got out of the car near Lower Richland School and she drove home. She was too scared to call police until she saw the sketch and realized that he had hurt someone else. R. 899, ll. 8 – R. 908, ll. 25.

She told the police of the tattoo on the man's neck and eyebrow. She identified the man from a photo lineup. Later she realized that he was the brother of one of her father's friends, and

that he had been to her father's house in the past. R. 904, ll. 5 – 25; R. 909, ll.25 – 25; R. 908, ll. 1 – 14.

Investigator Russell Shumard with the Forest Acres Police Department met with the Hurshman family at their home the night of the incident. R. 1073, ll. 1 -R. 1074, ll. 23. One of his investigators, Charles Morrison, did research on March 28, 2014 and learned that the man had conducted a transaction at a local pawnshop managed by Kendall Decker where he sold two rings that matched the description of Ms. Hurshman's rings that were stolen. Mr. Decker had identified the man in a photo lineup. R. 684, ll. 1 – R. 688, ll. 24. Investigator Shumard obtained warrants for Nathan Martinez on March 30, 2014. He then contacted the Fugitive Task Force for assistance in apprehending Martinez. R. 1082, ll. 1 – R. 1083, ll. 19.

Warren Cavanaugh with the Fugitive Task Force stated that the Task Force through investigation had obtained the number of a telephone that Martinez might be using. A GPS device locator was obtained to locate the phone and Martinez. R. 1280, ll. 1 – R. 1282, ll. 24.

Lieutenant Mark Berube with SLED obtained a GPS locator directly from the phone company on March 31, 2014 due to "exigent circumstances" of the case. He said this could be done up to 48 hours prior to obtaining a court order for the GPS locator. He obtained the court order for the GPS locator the next day, April 1, 2014. R. 1294, ll. 20 – R. 1296, ll. 3.

Martinez was located sitting in a minivan with his mother at his brother's house in the early morning hours of April 2, 2014. He was arrested and taken to the Forest Acres Police Department. R. 1280, ll. 1 – R. 1282, ll. 21; R. 1084, ll. 1 – 1084, ll. 25. After allegedly waiving his rights, Martinez gave a statement to the Forest Acres Police. R. 828, ll. 1 – 832, ll. 24. Investigator Charles Morrison took the statement from Martinez. R. 833, ll. 1 – R. 835, ll. 24.

Martinez explained that he did enter the Hurshman house because he was looking for something to steal because the voices in his head told him to do that. He saw the lady tied up and the two girls in the bathroom. He took the debit card and gold rings. He had the lady's cell phone and was planning to take it but stopped when she asked him not to take it. He left and did pawn the rings. He did not remember having a gun. He told the police that he wanted to resolve these issues of the chips implanted inside of him by the Utah police. R. 836, ll. 17 – R. 841, ll. 25.

Investigator Colin Bailey with the City of Columbia police was present during Martinez's statement. Investigator Bailey then conducted a separate interview with Martinez concerning the Tucker case. R. 828, ll. 1 – 18. According to Investigator Bailey, Martinez admitted to the Tucker incident. He admitted to having sex with her but said that it was consensual as she was willing to do it. R. 1122, ll. 1 – R. 1124, ll. 22.

Martinez, who represented himself at trial, made several pretrial motions. R. 409, ll. 14 – 17. The judge ruled following a Jackson v. Denno hearing that Martinez's statement concerning the Hurshman case was admissible. R. 408, ll. 1 – 11. The judge also ruled following a Neil v. Biggers hearing that the out of court and in court identifications by Ms. Hurshman of Martinez were admissible. R. 396, ll. 12 – 23.

In another pretrial motion, the state moved to admit the testimony of Ms. Tucker pursuant to State v. Lyle, *supra*. The state argued that the cases were very similar and met the common scheme or plan exception. R. 410, ll. 24 – R. 415, ll. 12. Martinez argued against the Tucker case being admitted because there was no clear and convincing evidence. Martinez argued that there was no connection between the two cases for the common scheme or plan to apply. He pointed out that the "commission of two or more crimes so related to each other that the proof of

one tends to establish the other for common scheme or plan to apply. R. 415, ll. 12 – R. 417, ll. 24. Martinez argued that the admission of the Tucker case had “the prejudicial effect to undue fairness and undue prejudice” to him. R. 418, ll. 1 – 8.

The judge found that the cases were “clearly intertwined to the extent that the identification and common scheme or plan could not be extracted one from the other.” He ruled that the evidence did meet the standard of clear and convincing under 404(b). And he ruled that the probative value was not outweighed by the danger of unfair prejudice. R. 420, ll. 1 – 8.

Ms. Tucker did testify during the trial. R. 899, ll. 14 – R. 933, ll. 22. The statement of Martinez to Investigator Bailey concerning the Tucker incident was published to the jury. R. 1122, ll. 13 – R. 1124, ll. 22.

No fingerprints were collected. R. 873, ll. 11 – 19. And the only DNA evidence was Martinez’s DNA on Ms. Hurshman’s cell phone. R. 976, ll. 1-3.

Martinez’s defense was that the Ogden, Utah police had implanted a microchip behind one of his ears and were trying to control him. He heard voices that told him to hurt himself or to kill other people. He was not responsible for his actions. R. 1362, ll. 7 – R. 1363, ll. 16.

In March 2015, Martinez underwent a mental evaluation for competency to stand trial and criminal responsibility. Martinez was seeking treatment to determine what was behind his ears. His attorney at the time testified that the evaluation indicated that Martinez was competent to stand trial, and that he could be held criminally responsible for the charged offenses. R. 1542, ll. 12 – R. 1544, ll. 23.

Dr. Rozanna Tross testified that she received a court order to perform an evaluation on Martinez. She did conduct the evaluation and issued a report on September 1, 2015. R. 1347, ll. 15 – R. 1352, ll. 5. Her findings provided that he was not suffering from any mental illness. It

was her opinion that his diagnosis was antisocial personality. R. 1381, ll. 9 – 11; R. 1389, ll. 11 – 19. She found that he could conform his behavior and that he was competent. R. 1390, ll. 14 – R. 1391, ll. 17.

Dr. Jose Chavez testified that he was treating Martinez at the Alvin Glenn Detention Center. His diagnosis was that Martinez had a delusional disorder which was a mental illness characterized as psychosis. He said that Martinez had a fixed delusion that the government had installed some microchips in his brain. R. 1260, ll. 1 – R. 1262, ll. 24.

Martinez testified in his own defense. R. 1550, ll. 1 – R. 1607, ll. 22.

The jury found Martinez guilty of all charges as indicted. R. 1768

## ARGUMENT

The trial court erred in admitting a prior incident pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) where Appellant Martinez allegedly committed the same crimes of criminal sexual conduct first degree and kidnapping two days before the trial incident where he was on trial for several offenses that included criminal sexual conduct first degree and kidnapping which was prejudicial to Appellant because the probative value was outweighed by the prejudicial effect.

Appellant Martinez was prejudiced by the trial court's admission of the incident of CSC first degree and kidnapping that involved Ms. Tucker which occurred two days before the trial incident involving Ms. Hurshman. The two incidents were similar enough for the jury to convict Martinez on propensity. That is if he committed one, then he must have committed the other.

Rule 404 (b), SCRE, provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

In State v. Lyle, id., the Supreme Court held that in a prosecution for uttering a forged check, evidence of extraneous offense which were inadmissible as bearing on the identity of the accused or for the purpose of showing a criminal intent, held inadmissible for the purpose of showing a plan or system pursuant to which the offense charged had been committed as a part of a continuous transaction.

Lyle was charged with cashing several fraudulent checks at several banks. Identification was the main issue. The Court held that as to identity, there was no obvious connection between the Georgia crimes and the offense charged in the Aiken case for which Lyle was on trial. The Court also held that as to common scheme or plan, the other offenses were not an essential

ingredient of the crime charged, and that it was immaterial whether such crimes were committed as part of a common scheme or plan. There must be a logical connection between the crime charged and the other criminal acts for evidence of the prior bad acts to be admissible under the Lyle exception. State v. Ford, 334 S.C. 444, 451, 513 S.E.2d 385 (Ct. App. 1999).

In State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000), the Supreme Court, citing Rules 403, SCRE and rule 404(b), SCRE, held that evidence of other crimes or bad acts is admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent, but the evidence must relate to the crime charged, and even if the evidence meets those criteria, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

The Supreme Court in State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000), held that when prior bad acts are similar to the one for which the defendant is being tried, the danger of unfair prejudice is enhanced.

The admission of the prior incident of CSC first degree and kidnapping with Ms. Tucker was far more prejudicial to Martinez than it was probative. The state did not need that incident to convict Martinez as they already had three eyewitnesses who identified Martinez as the person who assaulted Ms. Hurshman. Ms. Hurshman and her two daughters although only the oldest daughter testified at trial. The state had Martinez's DNA from Ms. Hurshman's cell phone. The state sought to have the Tucker incident introduced to inflame the jury's passion against Martinez for the crime which was prejudicial to Martinez. The prejudicial effect was more powerful than the value of the probative impact.

CONCLUSION

Based on the above, Appellant Martinez's convictions and sentences should be vacated,  
and his case remanded for a new trial.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
APR 18 2018  
SC Court of Appeals

Appeal from Richland County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHAN D. MARTINEZ,

APPELLANT

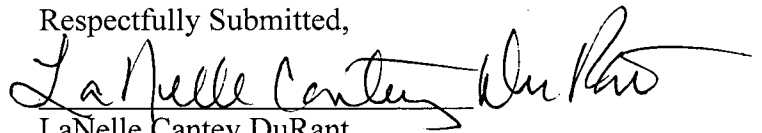
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nathan D. Martinez 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 R. Knox McMahon, which was held on Nov 28 - Dec 8, 2016, 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 Nathan D. Martinez.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

Appeal from Richland County  
Honorable R. Knox McMahon, Circuit Court Judge

APR 18 2018  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHAN D. MARTINEZ,

APPELLANT

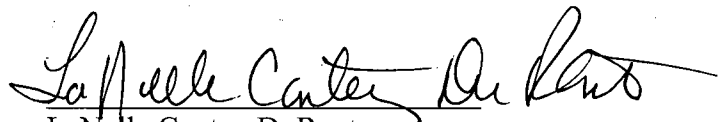
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Entire trial transcript November 28 – December 8, 2016
- (3) Sentencing Sheets

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

April 18, 2018

  
LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**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."

April 18, 2018.



LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**RECEIVED**  
APR 18 2018  
SC Court of Appeals