

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

 ORIGINAL

THE STATE,

v.

JAMES LAMONT ARTHUR,

RESPONDENT

RECEIVED

OCT 29 2018

SC Court of Appeals

APPELLANT

APPELLATE CASE NO 2017-002595

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a member of the Horry County Clerk of Court's Office to testify about Appellant's conviction for burglary third degree to establish that he was prohibited from possessing a gun pursuant to S.C. Code §§16-23-10; 16-23-30 when the witness was not listed on the witness list provided to Appellant's counsel and the trial judge?

STATEMENT OF THE CASE

In June of 2016, the Horry County Grand Jury indicted Appellant, James Lamont Arthur, for trafficking cocaine base less than 28 grams, possession of schedule I-V drug, Adderall, unlawful possession of a pistol and unlawful carrying of a pistol, indictments #2016-GS-26-2574, 2575, 2576, 2577. On November 6, 2017, Appellant was tried in his absence before the Honorable Steven H. John. Kenneth B. Massey represented Appellant at trial. Mary-Ellen Walter and C. Leigh Andrew prosecuted the case. The jury returned verdicts of guilty on the four charges. Judge John found that the trafficking conviction was a third offense. (R. p. 121, line 10 – p. 122, lines 1-5). Judge John issued sealed sentences for the charges.

On December 18, 2017, Appellant appeared before Judge John for sentencing. Kenneth B. Massey represented Appellant at sentencing. Mary-Ellen Walter represented the State. Judge John opened the sealed sentences and sentenced Appellant to twenty-five (25) years for trafficking, six months concurrent for possession of Adderall, five years concurrent for unlawful possession of a pistol and one year concurrent for unlawful carrying of a pistol. A timely notice of intent to appeal was filed on December 19, 2017. At the same time the notice of intent to appeal was filed on December 19, 2017, counsel for Appellant filed a motion to reconsider sentence. On January 12, 2018, the State filed a response. On January 26, 2017, Judge John denied the motion to reconsider. This appeal follows.

STANDARD OF REVIEW

The admission or exclusion of evidence is subject to an abuse of discretion standard of review. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion....”). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007).

In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court’s assessment of witness credibility. Cf. State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) (equating the “any evidence” standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court’s ruling is supported by any evidence”).

ARGUMENT

The trial judge erred in allowing a member of the Horry County Clerk of Court's Office to testify about Appellant's conviction for burglary third degree to establish that he was prohibited from possessing a gun pursuant to S.C. Code §§16-23-10; 16-23-30 when the witness was not listed on the witness list provided to Appellant's counsel and the trial judge.

At trial the State called Natalie Stevens, a member of the Horry County Clerk of Court's Office as a witness. (R. p. 64, lines 2 – 24). Appellant objected and a bench conference was held off the record. (R. p. 64, line 25 – p. 65, lines 1-4). Ms. Stevens went on to testify about a sentencing sheet that reflected that Appellant had a prior conviction for burglary third degree. (R. p. 65, line 6 – p. 66, lines 1-4). When the State moved to admit the sentencing sheet in evidence, the trial judge stated, "And based on the objection of the defense, I'm gonna allow into evidence over the objection of the defense and we'll place it on the record at a later opportunity." (R. p. 66, lines 6-9).

Later, the judge allowed counsel for Appellant to place the objection on the record. (R. p. 86, lines 13-16). Counsel argued, "Your Honor, I was given a list of witnesses and I understand why she had to testify this morning and not being on that witness list because my client is TIA, but she's not here listed on the that witness list and she was talking about a prior conviction, and I think that should've been listed." (R. p. 86, lines 17-21). The trial judge overruled the objection stating, "In this particular matter, the witness that testified was merely representative of the elected clerk of court, in her capacity as a records keeper and allowed the Court to receive the certified true copy of the record. I do not find that her – that she was not listed on the proposed witness list, I do not find that to be - - that the defendant has shown any prejudice to him

regarding the allowance of the testimony regarding the records keeper. So, I overrule your objection.” (R. p. 87, lines 8-16). The trial judge erred.

While in South Carolina the State is not required to provide a witness list to a criminal defendant,¹ the South Carolina Supreme Court has found that requiring a capital murder defendant to provide a witness list to the Court for purposes of jury selection was proper². In State v. Powers, 331 S.C. 37, 44, 501 S.E.2d 116, 119 (1998), the South Carolina Supreme Court wrote:

Although we have not previously addressed this issue, other courts have mandated a defendant divulge his witness list prior to *voir dire* of the jury. See State ex rel Hill v. Reed, 199 W.Va. 89, 483 S.E.2d 89 (1996) (lower court acted within its discretion in ordering state and petitioner to provide the court with a list of witnesses on the first day of trial prior to *voir dire* of jury); People v. Cangiano, 131 Misc.2d 930, 502 N.Y.S.2d 349 (1986) (disclosure of prospective witnesses is required to determine whether any prospective juror is related to or knows any one of them and may be challenged for cause,³ and disclosure immediately prior to jury selection cannot prejudice defense absent extraordinary circumstances); State v. Ussery, 106 N.C.App. 371, 416 S.E.2d 610 (1992) (no abuse of discretion in requirement that defendant divulge potential witnesses for *voir dire* purposes); People v. Perry, 210 Ill.App.3d 773, 155 Ill.Dec. 287, 569 N.E.2d 287 (1991); Com. v. Larsen, 452 Pa.Super. 508, 682 A.2d 783 (1996). See also Mau v. North American Asbestos Corporation, 156 Ill.App.3d 926, 109 Ill.Dec. 273, 509 N.E.2d 1112 (1987) (list of witnesses is not “work product” and statute limiting disclosure of witnesses applied only to pretrial discovery). We find the trial court acted within its discretion in requiring disclosure of Powers' witness list during jury selection.

It follows that the State is also required to provide a witness list to the judge prior to jury selection. By requiring both the State and the Defense to provide witness lists prior to jury selection the judge can determine if prospective jurors know the witnesses and the attorneys can intelligently exercise their use of peremptory strikes accordingly.


¹ State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005).

² State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

During jury selection in the present case the trial judge asked, "The possible or potential witnesses in this case are Marvin Cal Cox - - all these or of the Horry County Police Department - - Marvin Cal Cox; James Hafner, Donna Bell, Courtney Johnson, James Lamont Arthur. Any member of the jury panel that's related by blood or marriage, close personal friends, acquaintances, knows any of these possible or potential witnesses, if you would please stand?" (R. p. 7, line 22 – p. 8, lines 1-4). No jurors responded. (R. p. 8, line 5). Ms. Natalie Stevens, the member of the Horry County Clerk of Court, was not included in the list of potential witnesses. The trial judge abused his discretion in allowing her testimony when her name was not included on the witness list and the potential jurors were not questioned about any potential relationship they might have to Ms. Stevens. As a result, Appellant was not able to intelligently exercise peremptory strikes while selecting the jury.

CONCLUSION

Based on the above argument this Court should reverse the convictions and sentences and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of October, 2018.

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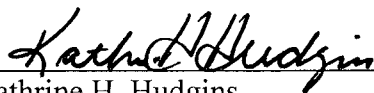
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Lamont Arthur 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 November 6-7, 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 James Lamont Arthur.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of October, 2018.

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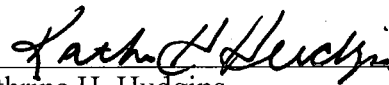
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript November 6-7, 2017;
- (3) Court's Exhibit #1 - Bail Proceeding Form II with bench warrant and order- 6 pages;
- (4) Court's Exhibit #2 - Subpoena;
- (5) Sentencing Transcript December 18, 2017;
- (6) Motion to Reconsider Sentence;
- (7) State's Response to Motion to Reconsider Sentence;
- (8) Order Denying Motion to Reconsider Sentence.

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

October 29, 2018


Kathrine H. Hudgins
Appellate Defender

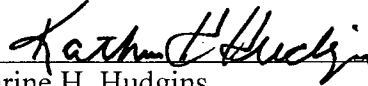
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ATTORNEY FOR APPELLANT

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."

October 29, 2018.



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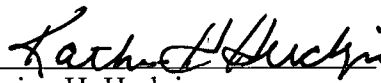
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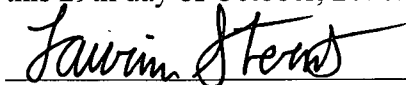
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on James Lamont Arthur, #301001, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of October, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2018.

 (L.S)

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