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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LADORREAN COLLINGTON,

APPELLANT

Appellate Case No. 2011-194088

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in admitting evidence of alleged prior bad acts by Appellant, including a twice broken window, a verbal confrontation between Appellant and the victim's girlfriend, a threatening note, a threatening text message, and a physical altercation between Appellant and the victim, where none of the exceptions for introduction of such evidence applied and the prosecution did not prove the prior bad acts by clear and convincing evidence?

II. Did the trial judge err in admitting evidence of threats allegedly made to the victim through Anthony Graham, a witness for the prosecution, where none of the exceptions for introduction of such evidence applied and the prosecution failed to prove the conduct by clear and convincing evidence?

III. Did the trial judge err in denying Appellant's motion to sever her trial from that of her co-defendant where the joint trial prevented the jury from making a reliable judgment in light of the different crimes charged, which necessitated the introduction of different evidence?

STATEMENT OF THE CASE

In 2008, the Horry County Grand Jury indicted Appellant as a principal in the murder and home invasion of Allen Smith. R. 2 lines 21-22. In 2010, the Horry County Grand Jury indicted Appellant for accessory before the fact of murder, accessory before the fact of kidnapping, accessory before the fact of burglary in the first degree, and accessory before the fact of armed robbery. R. 2 lines 10-24. During a pretrial hearing on May 13, 2011, the prosecutor informed the judge and Appellant that the prosecutor intended to go forward on the 2010 indictments. R. 2 lines 23-24. Nevertheless, on June 6, 2011, the prosecutor called only the indictments for accessory before the fact of burglary in the first degree and accessory before the fact of armed robbery. R. 19 lines 23-25; R. 620. Appellant was tried jointly with Quentin Gause, who was charged with murder, armed robbery, and burglary in the first degree. R. 20 lines 1-3. Heather Tolar von Hermann and Martin D. Spratlin prosecuted the case. R. 1. H. Gregory McCollum represented Appellant, and Ronald Hazzard represented Gause. R. 1. The Honorable Steven H. John presided over the case. R. 1.

Ultimately, the jury convicted Appellant as charged. R. 597 lines 1-9. Judge John sentenced Appellant to twenty-two years on each charge to run concurrently. R. 600 lines 7-17.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

During a pretrial hearing held on May 13, 2011, Appellant moved to exclude evidence of prior threats or difficulties between Appellant and the alleged victim. R. 5 lines 8-11. Appellant also moved to exclude evidence of any threats allegedly made to the victim through Anthony Graham. R. 5 lines 12-15. However, the prosecution was not prepared to argue the motions during the pretrial hearing. R. 7 lines 6-13. During a subsequent pretrial hearing on June 2, 2011, Appellant again moved to exclude evidence of prior difficulties between Appellant and the victim, R. 603 lines 1-3,[1] and to exclude evidence of threats allegedly made through Graham, R. 605 lines 8-10. The state summarized the evidence it proposed to submit as follows: "There are a number of threats made by [Appellant] directly to the victim, to the victim through a third party, an Anthony Gra[ham], and by a note that was left at the victim's residence." R. 604 lines 11-15. In addition, the prosecution alleged Appellant broke out a window at the victim's residence. R. 604 lines 16-18.

The prosecutor argued the incidents were admissible because they "happened within a very short time, a couple of days, prior to the time the victim was killed." R. 604 at lines 19-20. The prosecutor cited Rules 404(b), 401, and 403 of the South Carolina Rules of Evidence to support her position. In the alternative, the prosecutor argued the incidents were admissible "pursuant to a res gestae theory." R. 604 line 23. Appellant argued the prosecution wanted to introduce evidence of the character of the accused and could not

[1] The pretrial hearing held on May 13, 2011 was transcribed at the same time the trial transcript was transcribed; therefore, the May 13, 2011 pretrial hearing is paginated consecutively with the trial. However, the pretrial hearing held on June 2, 2011 was transcribed at a later date and is paginated separately. In her initial brief, Appellant denotes the transcripts of the pretrial hearing held on May 13, 2011 and the trial transcript as Tr. and the transcript of the pretrial hearing held on June 2, 2011 as Tr. II.

introduce such evidence unless Appellant first presented evidence of good character. R. 608 lines 14-19. Turning to the prosecutor's res gestae argument, Appellant explained that res gestae requires the acts to be interwoven with the alleged crime in such a way as to make separating the two nonsensical. R. 608 line 24 – R. 609 line 2.

At Appellant's request, the court reserved ruling upon the motion until the testimony was presented. R. 605 line 11 – R. 606 line 7. Although the trial judge refused to rule until the presentation of evidence, he explained "that in general prior difficulties, prior threats, prior actions, are certainly - - is certainly evidence that could be relevant and admissible in the trial of a person charged with a crime such as [Appellant] is charged." R. 607 lines 15-24.

Testimony of Anthony Graham

The prosecutor called Anthony Graham as a witness. Graham was staying with the victim during the week of his death. R. 31 lines 10-11. According to Graham, the victim was romantically involved with Appellant and another woman. R. 37 lines 9-23. Graham testified that on the Tuesday before the victim's death, the victim and Appellant argued about the love triangle. R. 39 lines 3-6; R. 39 lines 17-23. The verbal argument escalated into a physical confrontation. R. 40 lines 1-7. Shortly after this argument, Graham saw Appellant near the victim's house in her vehicle. R. 42 lines 10-20. Graham and the victim ran. R. 43 lines 2-5. Graham heard a window bust, and then saw Appellant's vehicle driving away. R. 44 line 25 – R. 45 line 2. The police arrived shortly thereafter. R. 45 lines 23-24. Graham testified that the officer joked with the victim that this was the second time Appellant had busted his window. R. 46 lines 1-12.

In addition, the prosecutor elicited from Graham the content of a text message allegedly sent from Appellant to the victim several days before the victim's death. Graham testified that he saw the message, which said "something about you and your mama could get it." R. 52 line 16 – R. 53 line 7. During the testimony of Graham, Appellant asked for the record to reflect the earlier objection in pretrial motions and asked for the objection to be ongoing. R. 68 line 23 – R. 69 line 1. The trial judge ruled as follows: "You raised other issues and I've ruled on them. I can't tell you how you need to operate to protect the interest of your client." R. 69 lines 2-4.

Graham also testified that he received a voicemail message from Appellant several days prior to the victim's death. R. 67 line 14 – R. 68 line 9. When the prosecution moved to admit a recording of the voicemail message, Appellant objected based upon the prior motion to exclude evidence of threats made to the victim through Graham. R. 68 lines 10-14. Judge John overruled the objection. R. 68 lines 15-16. The prosecutor then played the voicemail message for the jury. R. 69 lines 7-8.

Request for Curative Instruction and Mistrial

Shortly thereafter, Appellant requested a curative instruction and a mistrial concerning the introduction of evidence of prior difficulties between Appellant and the victim. R. 131 line 23 – R. 132 line 4. Appellant argued that the initial understanding of the court and the parties was Appellant would stand trial for accessory before the fact of murder in addition to the accessory charges for armed robbery and burglary. R. 130 line – R. 131 line 6. The prosecutor countered that although the indictment for accessory before the fact of murder was not before the jury, the facts and circumstances presented remained the same. R. 132 lines 7-12. Additionally, the prosecutor argued the threats formed "a part of the res

gestae" and were admissible under Rule 404(b) of the South Carolina Rules of Evidence. R. 132 lines 12-13. The prosecutor argued the prior bad acts showed "a pattern of behavior, escalating behavior, where she [became] angrier and angrier and ultimately elict[ed] these other people to go in and commit what ultimately turns out to be a murder." R. 132 lines 14-17. According to the prosecutor the evidence was admissible to prove "that pattern of behavior, that motive of her sending those other individuals in there, so it goes to her motive, it goes to her intent, it goes to her planning, and it's part of the res gestae." R. 132 lines 18-22. The prosecutor opposed Appellant's request for a curative instruction and a mistrial. R. 132 lines 23-25.

The trial judge ruled Appellant waived her objections to Graham's testimony by failing to object during the testimony. According to the judge:

> We had the entirety of the testimony of one of the victims in this matter, and that was Mr. Anthony Graham. At no time during his testimony did you raise the issue before the Court. All of his testimony as to prior difficulties is in evidence. It's in evidence without objection. It's in evidence without [[Appellant] raising an issue to it. The Court's first position is you've waived it. It's over. The evidence is in the record. It is too late to object to the problem, if there was one, now.

R. 133 lines 12-20. In addition, the judge ruled the evidence was admissible under Rules 401, 403, and 404 of the Rules of Evidence and pursuant to the doctrine of res gestae. R. 133 lines 21-25.

When Appellant moved to limit the introduction of additional evidence of this nature, the trial judge refused based upon the same reasoning. R. 134 line 21 – R. 135 line12.

Testimony of Frankie Davis

Frankie Davis, the victim's live-in girlfriend, testified on behalf of the prosecution as well. Davis testified that Appellant had broken her living room window out twice. R. 150 lines 7-13. Additionally, Davis testified that she had a "run-in" with Appellant on the Friday before the victim's death. R. 150 lines 14-19. Appellant objected, but the judge overruled the objection. R. 150 lines 20-23. Davis testified that she saw Appellant at a store and confronted her about the broken windows. R. 151 lines 5-10. According to Davis, Appellant was "irate." R. 151 line 13. When the prosecutor asked Davis what Appellant said, Davis testified that she called her names and acting crazy. R. 151 line 25 – R. 152 line 16. This evidence was allowed over Appellant's objection. R. 152 lines 4-5.

Testimony of Tiffany James

The prosecutor also introduced evidence of Appellant and the victim allegedly having a physical altercation and Appellant allegedly breaking the victim's window through witness Tiffany James. James testified she "believe[d]" the victim and Appellant argued about the victim living with another woman while Appellant was pregnant with the victim's child. R. 423 lines 10-23. James responded that she thought the verbal argument escalated to a physical confrontation even though she was not in the room at the time. R. 423 line 24 – R. 424 line 2. James testified that after the argument, she and Appellant drove to Appellant's house where Appellant "bust out his window." R. 425 lines 3-7. Appellant objected to this testimony. R. 425 lines 16-18. However, the trial judge overruled the objection. R. 425 line 19.

Testimony of Officer Daniel Cradic

Towards the end of its case-in-chief, the prosecution informed the judge of its intent to call Officer Daniel Cradic to the stand. Officer Cradic responded to the victim's home on April 8, 2008 concerning a broken window. The prosecution explained its intent to elicit from the witness that the window was broken, a note was left at the scene, the note had been destroyed by the police department pursuant to its internal procedures, and the contents of the note based upon the officer's incident report. R. 522 lines 12 – 24. Appellant objected based upon the fact that the note had been destroyed and that the report indicates the officer's knowledge of the note came from the victim. R. 523 lines 7-13; R. 524 lines 3-8. The trial judge ruled the officer could testify as to the contents of the note as long as he testified he read the note, then the officer could testify. R. 523 line 14 – R. 524 line 2; R. 524 lines 9-16.

On direct examination, Officer Cradic testified there was a note found at the scene and he read the note. He copied the contents down on the note in his report. R. 529 lines 1-10. When Officer Cradic testified he could not remember the contents and would have to use his report, Appellant objected. R. 530 lines 19-22. Officer Cradic then read the contents of the note: "bitch, I will be back, nigger, fuck you. F.Y. bitch ass, AIDS-infected bitch. Yeah, we all got it. D-baby." R. 531 lines 4-6.

ARGUMENT

I. The trial judge erred in admitting evidence of alleged prior bad acts by Appellant, including a twice broken window, a verbal confrontation between Appellant and the victim's girlfriend, a threatening note, a threatening text message, and a physical altercation between Appellant and the victim, where the prosecution did not prove the prior bad acts by clear and convincing evidence and none of the exceptions for introduction of such evidence applied.

Relevant for this issue, the prosecutor introduced the following prior bad acts allegedly committed by Appellant: the breaking of the victim's window twice, a threatening note, a threatening text message, a confrontation with the victim's live-in girlfriend, and a verbal and physical altercation with the victim.

As a threshold matter, Appellant recognizes the general rule that a motion in limine is not a final determination, and, therefore, a contemporaneous objection must be made when the evidence is introduced. State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009)(citing State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). However, there are exceptions to the rule. One such exception is when the ruling on the motion in limine is made immediately prior to the introduction of the challenged evidence. Id. Our Supreme Court held this exception applied even when the challenged evidence was not introduced immediately after the motion in limine, but where the trial judge commented to the jury about the challenged evidence and the state mentioned the challenged evidence in an opening statement. Id. at 157, 679 S.E.2d at 175. Thus, the Court reasoned the ruling on the admission of evidence was a final ruling and preserved for appellate review. Id. Here, the prosecutor mentioned the prior bad acts during its opening statement. R. 26 lines 10-12

(detailing the alleged verbal and physical altercation between the victim and Appellant); R. 26 lines 12-18 (describing Appellant allegedly breaking the victim's window and leaving a threatening note). Thus, the trial court's general ruling that evidence of prior difficulties would be admissible became a final ruling based upon the prosecutor's incorporation of this evidence in its opening statement.

Another exception to the general rule is the doctrine of futility. Our Court does not require a party to engage in futile actions to preserve an error for review. Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)(citing State v. Bryant, 316 S.C. 216, 222, 447 S.E.2d 852, 855 (1994) and State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 162 (1978)). Based upon the trial judge's general ruling on the admissibility of evidence and the prosecutor informing the jury of the evidence during its opening, it would have been futile for Appellant to continue to object to the evidence.

Evidence of other bad acts is not admissible to prove a person's guilt; however, such evidence may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In addition, evidence of prior bad acts not subject to a conviction must be proven by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). As explained by the Supreme Court, the process of analyzing bad act evidence starts with Rule 401, SCRE. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). Thus, the first step is determining whether the evidence is relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The prior bad act evidence submitted by

the prosecution fails this basic test as it does not make it more or less probable that Appellant orchestrated the armed robbery and burglary of the victim. The only purpose served by the evidence was to convince the jury Appellant was a bad person.

If the evidence is relevant, the next step is determining whether the evidence fits within one of the exceptions of Rule 404(b). Wallace, 384 S.C. at 433, 683 S.E.2d at 277. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). In addition, if the defendant were not convicted of the prior bad act, evidence of the conduct must be clear and convincing. Id. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

One of the exceptions relied upon by the prosecutor was common scheme or plan. As explained by the Court, to determine whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity. Id. at 433 at 277-278 (citing State v. Parker, 315 S.C. 230, 433 S.E.2d 831(1993)). If the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Id. at 433 at 278.

None of the prior bad acts introduced by the prosecutor were similar to the charged crime. Under the state's theory, Appellant encouraged and assisted others in committing a home invasion robbery, which resulted in the victim's death. None of the prior bad acts

involved Appellant acting through intermediaries. None of the prior bad acts involved robbing the victim. None of the prior bad acts involved causing harm to the victim. None of the prior bad acts involved Appellant orchestrating a great plan. In fact, the alleged prior bad acts involved Appellant acting alone to express her displeasure with the victim for continuing to live with another woman while Appellant carried his child. Therefore, the prior bad act evidence was not admissible pursuant to the common plan or scheme exception.

The next exception relied upon by the prosecution was motive and intent. In order for prior bad act evidence to be admissible to show motive and intent, the record must support a relationship between the crime and the prior bad act. State v. Smith, 309 S.C. 442, 446, 424 S.E.2d 496, 498 (1992)(holding evidence of prior drug use was not admissible pursuant to the motive exception as the record contained no evidence to support any relationship between the crime of murder and the drug use); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 494-495 (1990)(holding the defendant's use of crack cocaine the night before he committed an armed robbery did not show motive where there was no logical relevance between use of the crack cocaine the night before the robbery and the robbery the next day); State v. Coleman, 301 S.C. 57, 60, 389 S.E.2d 659, 660-661 (1990)(finding the introduction of evidence that the defendant was a social user of cocaine was not admissible to show motive because there was no evidence to show the defendant was using cocaine at the time of the murder or that the defendant and the victim were involved in a drug transaction at the time of the murder). The prosecution presented evidence that the motive for the home invasion was money and drugs. According to a key prosecution witness, Donell James, the robbers expected to find $40,000 and half a brick of cocaine. R. 217 lines

8-15. Donell testified that Appellant's cut of the robbery's proceeds would be having her car note paid. R. 219 lines 11-17. Therefore, the prior bad acts did not supply the motive – obtaining money – that the prosecution claimed existed.

The state also claimed the evidence of alleged prior bad acts by Appellant was admissible as part of the res gestae of the crimes charged. Evidence is admissible as part of the res gestae of the charged offenses when it provides part of the context of the crime or is necessary to the full presentation of the case or is "intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context." State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996)(quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)(internal citations omitted)). A prior bad act is admissible under the theory of res gestae when it is "so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other." Id. The prior bad acts introduced by the prosecution were not part of the alleged crimes - accessory before the fact of armed robbery and accessory before the fact of burglary in the first degree.

The prosecution presented no evidence showing the alleged prior bad acts were logically connected to the charged crime. In fact, the state could not articulate the logical connection between the alleged prior bad acts and one of the five exceptions because none existed. See State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). The evidence of the alleged prior bad acts – a twice broken window, a threatening note, a threatening text message, a verbal altercation with the victim's girlfriend, and a physical confrontation between Appellant and the victim – did not assist the jury in understanding a material issue

in the case related to one of the five exceptions. See State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 495 (Ct. App. 2011).

Additionally, there was no clear and convincing evidence that Appellant engaged in the prior bad acts, and the trial court failed to engage in an analysis to determine whether the prosecution proved the bad acts by such evidence. Turning first to the alleged threat made by Appellant to the victim via text message and the alleged verbal and physical confrontation between Appellant and the victim, the only evidence presented by the prosecution was that of Graham. Although the trial court made no finding at all in this regard, the record is clear that Graham's testimony was not credible. Turning next to the confrontation between Appellant and Davis, the only evidence presented was that of Davis. Davis' testimony was not credible in this regard. Finally, turning to the twice broken window and threatening note, the prosecution presented no eyewitness testimony regarding the perpetrator except that of Tiffany James. The other witnesses, Graham, Davis, and the police officer, could only testify that they suspected Appellant. Obviously, this did not rise to the level of clear and convincing. James lacked all credibility based upon the criminal charges she was facing. Thus, the trial court should not have permitted the evidence of prior bad acts as the prosecutor did not prove the acts by clear and convincing evidence.

Finally, even if the evidence fit within one of the enumerated exceptions and was proven by clear and convincing evidence, the trial court erred in admitting it as its probative value was substantially outweighed by the danger of unfair prejudice." See Rule 403, SCRE.

II. The trial judge erred in admitting evidence of threats allegedly made to the victim through Anthony Graham, a witness for the prosecution where none of the exceptions for introduction of such evidence applied and the prosecution failed to prove the conduct by clear and convincing evidence.

Relevant to this issue the prosecutor introduced testimony of Graham regarding a voicemail message he received from Appellant and an audio recording of the voicemail message.

The trial judge erred in admitting this evidence because none of the exceptions for the introduction of the evidence applied and the prosecution failed to prove the conduct by clear and convincing evidence. The prosecution relied upon the same arguments concerning this evidence as it did the evidence discussed in issue one. Nevertheless, those arguments fail as this evidence as well.

As explained, evidence of other bad acts is not admissible to prove a person's guilt, but may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, supra. In addition, evidence of prior bad acts not subject to a conviction must be proven by clear and convincing evidence. Wilson, supra. The bad act must logically relate to the crime with which the defendant has been charged. Gaines, supra.

Turning to the prosecutor's argument that this evidence was admissible because it established Appellant's common scheme or plan, the prosecutor failed to show how the voicemail was logically related to one of the enumerated exceptions or how the voicemail showed similarities between the charged offenses. The voicemail did not show Appellant enlisting the assistance of others to harm the victim or cause him distress. The voicemail did

not evidence any plan by Appellant to rob or harm the victim. The evidence was inadmissible under this exception.

Motive and intent, the next exception relied upon the prosecution, is not applicable to the voicemail introduced into evidence. The voicemail did not show an intent on the part of Appellant to recruit others to rob the victim or burglarize his home. All the voicemail showed was that someone was unhappy with the victim.

The state also claimed the evidence of the voicemail was admissible as part of the res gestae of the crimes charged. The voicemail was not part of the context of the crime or necessary to the full presentation of the case. In fact, the voicemail had nothing to do with the robbery, burglary and eventual murder of the victim. There was no connection between the voicemail and the charges of accessory before the fact of burglary and armed robbery; therefore, the voicemail certainly was not "intimately connected" with the crime charged.

Additionally, no clear and convincing evidence established that Appellant was the voice on the recorded message, and the trial court failed to engage in an analysis to determine whether the prosecution proved the bad act by such evidence. Graham did not testify as to his certainty that Appellant's voice was on the recording. In fact, Graham had only recently met Appellant and spoken with her on the phone only once. His ability to determine whether Appellant's voice appeared on the recording was nil. The prosecution did not introduce any expert testimony regarding the voice either. Therefore, the trial court should not have permitted the introduction of the voicemail as the prosecutor did not prove Appellant was the one who made the recording by clear and convincing evidence.

Finally, even if the evidence fit within one of the enumerated exceptions and was proven by clear and convincing evidence, the trial court erred in admitting it as its probative value was substantially outweighed by the danger of unfair prejudice. See Rule 403, SCRE.

III. <u>The trial judge erred in denying Appellant's motion to sever her trial from that of her co-defendant where the joint trial prevented the jury from making a reliable judgment in light of the different crimes charged, which necessitated the introduction of different evidence.</u>

During a pretrial hearing on May 13, 2011, Appellant filed a motion to sever the trial of the defendants. R. 4 line 23 – R. 5 line 4. Appellant conceded the case was the same in terms of the same victim, but argued the evidence against Appellant and Gause was different due to the nature of the charges. R. 15 lines 16-23. Appellant noted that she had been charged as an accessory to the crimes, whereas Gause had been charged with actually entering the residence, participating in the robbery, kidnapping, and shooting. R. 15 lines 6-15. The prosecutor argued the defendants should be tried together because the same witnesses and evidence would be presented against each of them. R. 16 lines 16-22.

After examining the indictments, Judge John concluded there were common areas of evidence and fact against the defendants. R. 17 line 24- R. 18 line 3. Judge John explained that Appellant's concerns could be cured with a proper limiting instruction and through the potential resolution of issues raised at trial. R. 18 lines 3-7. Thus, the judge denied the motion. R. 18 lines 17-19.

In a pretrial hearing held on June 2, 2011, Gause moved to sever the trials. R. 610 lines 22-23. Appellant joined in the motion. R. 611 lines 3-4. The prosecution countered that the "testimony of the individuals with the exception of two would be from the exact same witnesses." R. 611 lines 7-9. Judge John found there was no risk that a joint trial would compromise a specific right of Appellant or Gause or prevent a jury from making a

reliable judgment about guilt. R. 611 lines 18-23. Thus, the judge denied the motion. R. 612 line 11.

At the close of the state's case, Appellant renewed all motions previously made. R. 536 lines 16-21; R. 538 lines 20-24. The judge denied the request. R. 538 line 25 – R. 539 line 7. After Appellant rested, Appellant renewed all motions previously made. R. 553 lines 7-15. The judge denied the request again. R. 553 lines 16-23.

"A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. At 613, 629 S.E.2d at 395. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005). "A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009).

The trial judge erred in failing to sever Appellant's trial from Gause because the joint trial prevented the jury from making a reliable judgment about Appellant's guilt. The evidence presented by the prosecution's witnesses was that Appellant and two others entered the victim's home and shot him. R. 233 lines 14-22; R. 236 line 6 – R. 236 line 15; R. 238 lines 2-13; R. 365 lines 21-25; R. 367 line 25 – R. 368 line 2; R. 368, lines 11-16; R. 369 lines 6-18; R. 370 lines 3-23. The prosecution claimed Appellant encouraged the others

to rob the victim. R. 216 lines 14-24; R. 217 lines 3-7; R. 345 lines 3-7. Therefore, the evidence against Appellant differed substantially from the evidence offered against Gause. As a result, the differing evidence combined with the required different jury charges, including the hand of one is the hand of all as to Gause only, prevented the jury from making a reliable verdict as to Appellant's guilt.

CONCLUSION

Appellant respectfully requests this Court to reverse her convictions and sentences and remand her case to the circuit court for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

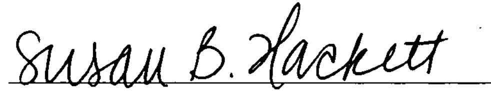
ATTORNEY FOR APPELLANT

This 18th day of December, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 18th, 2012



Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

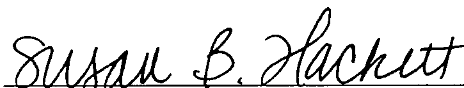
V.

LADORREAN COLLINGTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of December, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of December, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.