

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

John C. Hayes, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

EDWARD MARTIN CLARKSON,

APPELLANT

---

ANDERS BRIEF OF APPELLANT

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KATHRINE H. HUDGINS  
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

**RECEIVED**

FEB 11 2013

**SC Court of Appeals**

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in allowing the State to re-open and present evidence that defendant was over the age of fourteen after the State had rested and defendant had moved for a directed verdict of acquittal based on the fact that the State failed to prove that defendant was over the age of fourteen, an element of committing a lewd act on a minor?

## STATEMENT OF THE CASE

In July of 2011, the York County Grand Jury indicted Clarkson for committing a lewd act on a minor, indictment #2011-GS-46-2127. On January 11, 2012, Clarkson proceeded to jury trial before the Honorable John C. Hayes, III. The jury found Clarkson guilty as charged. Judge Hayes sentenced Clarkson to fifteen years. A timely notice of intent to appeal was filed on January 18, 2012. This appeal follows.

## ARGUMENT

The trial judge erred in allowing the State to re-open and present evidence that defendant was over the age of fourteen after the State had rested and defendant had moved for a directed verdict of acquittal based on the fact that the State failed to prove that defendant was over the age of fourteen, an element of committing a lewd act on a minor.

At the close of the State's case counsel for Clarkson moved for a directed verdict of acquittal. (R. p. 129, lines 13-15). The judge denied the motion. (R. p. 129, lines 16-22). After a lunch recess, counsel for Clarkson renewed the directed verdict motion arguing that the State failed to prove that Clarkson was over the age of fourteen, an element of lewd act. (R. p. 133, lines 16-21). The State moved to re-open their case in order to prove that Clarkson was over the age of fourteen. (R. p. 133, lines 23-24). The judge allowed the State to re-open their case and present evidence that Clarkson was over the age of fourteen. (R. p. 133, line 25 – p. 134, lines 1-25). The judge erred.

Former S.C. Code §16-15-140, (repealed by 2012 Act No. 255, §14, effective June 18, 2012), provided, "It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of the child." In order to prove the crime of lewd act on a minor, the State must prove that the actor was over the age of fourteen. In the case in chief, the State failed to prove that the defendant was over the age of fourteen. The judge should have directed a verdict of acquittal. Instead, the judge allowed the State to re-open the case and present evidence that the defendant was over the age of fourteen.

In State v. Wren, 470 S.E.2d 111, 112 (Ct. App. 1996) the South Carolina Court of Appeals wrote:

For the edification of the Bench and Bar, we encapsulate the rule enunciated in State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (); State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978) and State v. Harrison, 236 S.C. 246, 113 S.E.2d 783 (1960).

A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge. His ruling will not be reversed absent an abuse of discretion. A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule.

See State v. Humphery, supra; State v. Hammond, supra; State v. Harrison, supra.

In Wren the State was allowed to re-open the case and introduce the drugs that were the subject of the prosecution. The State, however, had already presented testimony about the drugs and simply neglected to introduce the drugs. The Court of Appeals found that the judge did not abuse his discretion in allowing the State to re-open the case and introduce the drugs in evidence. In State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981), the South Carolina Supreme Court found that the trial court did not abuse its discretion in allowing the State to reopen and prove value – an essential element of grand larceny. The owner of the goods, however, had already testified as to their value. In State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978) the South Carolina Supreme Court found there was no prejudicial abuse of discretion in allowing the State to re-open the case and present testimony from an officer in view of the fact that the additional testimony was merely corroborative of previous testimony. In all three cases discussed above, the evidence or testimony admitted when the state was allowed to re-open and present additional evidence or testimony, was merely cumulative to other

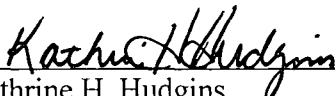
open and present additional evidence or testimony, was merely cumulative to other evidence or testimony already admitted at trial. But see State v. Green, 350 S.C. 580, 567 S.E.2d 505 (Ct.App. 2002) (in trial for distribution of cocaine within a half mile of a school, the trial court permitted the State to re-open its case and present testimony that Beaufort Academy is a school offering education from kindergarten through twelfth grade).

The trial judge abused his discretion in allowing the State to re-open the case and present evidence that defendant was over the age of fourteen. The additional testimony was not merely cumulative to other testimony or evidence presented at trial. The judge should have granted to motion for a directed verdict of acquittal when the State failed to prove that defendant was over the age of fourteen.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for the entry of judgment for acquittal.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

John C. Hayes, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

EDWARD MARTIN CLARKSON,

APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Edward Martin Clarkson 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 John C. Hayes, III, which was held on January 12, 2012, 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 Edward Martin Clarkson.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2013.

STATE OF SOUTH CAROLINA

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John C. Hayes, III, Circuit Court Judge

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

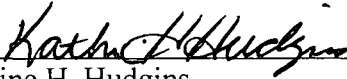
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment and sentencing sheet;
- (2) Trial transcript.

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

February 7th, 2013

  
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Kathrine H. Hudgins  
Appellate Defender

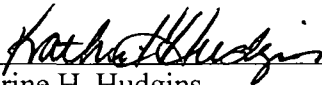
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

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 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."

February 7, 2013

  
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Kathrine H. Hudgins  
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

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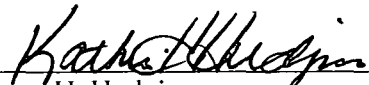
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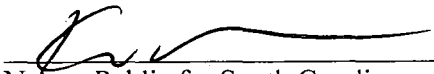
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney 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 Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Edward Martin Clarkson, #237856 at Kershaw Correctional Institution, this 7th day of February, 2013.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of February, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 13, 2013.