

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stillwell, Circuit Court Judge

Case No. 2011-GS-23-05149-05151

State of South Carolina Respondent

vs.

William A. Butts Appellant.

FINAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Citgo gas station on Woodruff Road in Greenville was robbed three times in 2009 – first on October 18, again on October 30, and finally on November 5. All three robberies involved a black man in a mask. A motion for severance was made, and the Court without hearing any evidence or making any findings as to whether the charges (1) arose out of a single chain of circumstances, (2) were proved by the same evidence, (3) were of the same general nature, **and** (4) whether any real right of the defendant has been jeopardized, See, State v. Harris, 351 S.C. 643, 572 S.E. 2d 267 (2002), denied the motion out of hand. In fact, the three charges neither arose out of a single chain of circumstances, nor were proven by the same evidence, and the rights of the defendant have been jeopardized; therefore, the convictions of the defendant should be reversed and this matter remanded for further proceedings.

STATEMENT OF ISSUE ON APPEAL

Should three separate armed robberies, each involving a perpetrator in a mask, be joined for one trial against one defendant?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted William Anthony Butts during its

July, 2011 term for three counts each of Armed Robbery and Possession of A Weapon During the Commission of a Violent Crime (2011-GS-05149 - 05151). R. pp. 367-371.¹ A trial was held on October 17-19, 2011, and, on October 19, 2011, a jury found William Anthony Butts guilty of the charges. The Honorable Robin B. Stilwell sentenced Mr. Butts to twenty years each on the charges of armed robbery and five years each on the charges of possession of a weapon during the commission of a violent crime, all to run concurrently. R. pp. 362-364. A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. See Notice of Appeal and Amended Notice of Appeal, R. pp. 372-373.

STANDARD OF REVIEW

When offenses are charged in separate indictments, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E. 2d 838 (1981). Further, 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

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For ease of understanding, the charges will be discussed as robberies or "three robberies" and shall be meant to include the separate weapons charge because there is no dispute that a weapon was shown to have been used in each robbery.

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. 368 S.C. at 613, 629 S.E.2d at 395.

FACTS

On each of October 18, October 30, and November 5, 2009, the Citgo gas station and store located on Woodruff Road in Greenville, South Carolina was robbed by what appeared to be a black man in a mask. During the course of their investigation, the officers on the case found a video from the Citgo security camera dated November 3, 2009 which contained images of the Appellant, William Anthony Butts, buying a cigar at the same Citgo. R. p. 264, lines 3-6. Thereafter, the investigators went to Mauldin High School where they obtained identification of Mr. Butts as the purchaser of the cigar. R. pp. 264-267. Ultimately, Mr. Butts was arrested and charged with the commission of all three robberies.

The evidence concerning the perpetrator of each of the three robberies is distinct, and each robbery is on an audio and video recording. The state's case utilizes the November 3 video, a similarity of the gun used in all three robberies, and the testimony of Mr. Butts estranged ex-girlfriend and her

mother to buttress the actual evidence concerning the three robberies in order to obtain the conviction of Mr. Butts on all three robberies.

a. Distinct Evidence from the Robberies

In the robbery which took place on October 18, 2012, a black man wearing a mask with the eyes cut out of it, a white hoodie, black jeans and black shoes robbed the Citgo on Woodruff Road. R. p. 115, lines 9 - 21 , R. p.116, line 23 - p. 117, line 23, and R. p. 126, lines 20 -22. Further, the robber had a gun that looked similar to a gun that was linked to Mr. Butts. R. p. 118, lines 15- 20, and a mask with a tenuous link to Mr. Butts. See, R. p. 116, line 23 - p. 117, line 23 and R. p. 231, line 19 - 232, line 17. In this robbery, there is evidence that Mr. Butts was in the vicinity of the robbery. Specifically, his former girlfriend testified that she took him to a store very near the Citgo on Woodruff Road and waited for him in a parking lot. She also verifies that Mr. Butts had a gun in his possession on this night. But, this same witness also testifies that Mr. Butts had neither a hoodie nor gloves, nor a mask when he exited and returned to her vehicle. She also states that he was wearing sweat pants. R. pp. 188-194.

In the robbery that took place on October 30, 2012 there is no evidence placing Mr. Butts at or near the scene. The victim was a different store clerk

from the other two robberies. R. p. 130-134. The robber was 5'8" - 6' tall. The robber wore a hoodie and a black mask and carried a gun that "looked like" a gun which was linked to Mr. Butts. R. p. 132-133. As it relates to the identification in this robbery, the record shows that Mr. Butts is 6'1" tall. R. p. 206, lines 17 - 18.

In the robbery that took place on November 5, 2011, the store clerk that had been the victim in the October 18 robbery was once again the victim. In this robbery, the robber wore a different mask, R. p. 123, lines 13 - 20 and a different outfit, specifically the witness testified that the robber wore a "black shirt over his hoodie". R. p. 123, lines 4 - 6. This witness also noted that this robber was "more aggressive and he seemed nervous". R. p. 122, lines 25 - p. 123, line 1. Once again the gun "looked like" a gun that was linked to Mr. Butts. R. p. 124, line 2. Further, the robber wore a pair of pants that were similar to a pair of pants that Mr. Butts was seen wearing in the video of November 3, 2012 when he entered the Citgo as a legitimate customer, although a law enforcement officer acknowledged that he could not state whether they were in fact the same jeans. R. p. 281, lines 12 - 17.

b. Evidence Linking the Robberies Together and Purporting to Link the Robberies to Mr. Butts.

As presented by the prosecution, the three robberies became a seamless web of brigandage unarguably perpetrated by the same person, Mr. Butts. The presentation began with the testimony of the district supervisor of Citgo, R. p. 91, lines 11-13 , identifying four tapes and having them entered into evidence –

- a. the tape from the robbery of October 18, 2009;
- b. the tape from the robbery of October 30, 2009;
- c. the tape from November 3, 2009 showing the defendant, Mr. Butts, making a purchase at the store; and,
- d. the tape from the robbery of November 5, 2009. R. p. 94-98.

Thereafter, the first victim, a store manager, testified as to his memory of the two robberies in which he was the victim. R. pp. 112 - 129. While this victim stated very clearly that **he could not say what the robber looked like**, R. p. 115, lines 9 - 11, the state began building links between the three robberies:

- a. this victim was asked to identify a gun linked to Mr. Butts, see R. pp. 201 - 205 and pp. 290 - 293, as similar to the gun used in the robbery. R. p. 118, lines 15- 20;
- b. this victim was asked to identify a mask that was found two years after the robbery in a van owned by Mr. Butts former girlfriend, R. p. 231, line 19 - p. 232, line 17, as similar to the mask used in the October 18 robbery. R. p. 116, line 23 - p. 117, line 23;

c. this victim gave a very tentative statement that “[i]t seemed to be the same person. I mean, at the – at the time, you know, I was confused, you know, and it’s the second time around, you know. R. p. 125, lines 2 - 4.

Despite his tentative identification, it was clear that this victim had come to believe it was the same robber in both the October 18 and November 5 robberies –

- “he actually had a different mask for this robbery” R. p. 123, lines 8-9;
- “this time he put a black shirt over his hoodie, I guess, so he could move better or that you wouldn’t see him so much in the night.” R. p. 123, lines 4 -5.
- “He wore gloves every time. . . . For both of my robberies, yes.” R. p. 127, lines 11 - 13.

However, on cross examination, this victim conceded that the robber, based upon his familiarity with the store during the first robbery, appeared to be a former employee. R. p. 125, lines 11 - 25.

Next, the state presented the second victim, who was robbed on October 30, 2012. R. pp. 130-138. The testimony of this witness consisted of statements that the robber wore a hoodie and a mask, was between 5’8" and 6' tall, and that the gun and mask in this robbery once again appeared “similar” to the gun and mask linked to Mr. Butts. R. pp. 132-133. The prosecution further added a link in its chain of proof to the November 3 video in which Mr.

Butts came into the store and purchased a cigar, R. pp. 264-267, when the second victim testified that

a. “it’s just that – I don’t know if it was the things he was saying or the way he moved. I felt like I had waited on this guy before. I just, you know, just a gut feeling”; and,

b. that the robber took a wrap or a blunt cigar.

R. p. 133, line 23 - p. 134, line 9.

After the victims had testified, the state called Mr. Butts estranged ex-girlfriend and her mother to tie the tapes and all three robberies to Mr. Butts. The ex-girlfriend’s testimony does link Mr. Butts to the location of the Citgo at the time of the October 18 robbery, and she does state that he had a gun in his possession, See R. pp. 188-194; however, her testimony also states that she does not remember if he was carrying anything when he left her car, he was not wearing a hoodie, and he possessed neither mask nor gloves, R. p. 196, lines 1 - 15 and R. p. 207, lines 15 - 17 . This witness did provide the testimony linking the gun that was similar to the gun in the robberies to Mr. Butts. R. pp. 201-205. She also testified that it was similar to the gun she had seen on the night of the first robbery. R. p. 204, lines 22 - 25.

The ex-girlfriend, after acknowledging that she had never in her life seen the defendant with a mask, also testified that at some time in the past, she found in her bedroom and disposed of a stocking cap with holes cut out of it. R. p. 194, line 12 - p. 195, line 21. This witness was never asked about the toboggan entered into evidence as Exhibit 14.

As part of her testimony, the state also presented evidence from the ex-girlfriend purporting to identify Mr. Butts from all three of the videos of the robberies as well as the video of November 3, 2009 in which Mr. Butts went into the same Citgo to buy a cigar. The phrasing of the questions, as well as the answers seemed to vary without objection from defense counsel, but the gist of the answers was that in each of the videos, the voice, phrases utilized and the mannerisms of the robber were similar to those of Mr. Butts. See generally R. p. 195, line 22 - p. 201, line 20.

The questioning was done seamlessly, and the tapes were played in chronological order, so after testifying that the first two robbers moved, acted, and spoke similar to Mr. Butts, the actual November 3 video of Mr. Butts as a Citgo customer was shown wherein the ex-girlfriend identified Mr. Butts, his voice, and his clothes with specificity. R. p. 198, line 3 - p. 199, line 23. Thereafter, in showing the November 5 robbery video, the state went so far as

to ask – “And you recognize the clothes that individual was wearing in that – Mr. Butts was wearing in that video?” R. p. 200, lines 6 -7. After an objection by the defense was overruled, the state seemingly agrees to refer to the robber as “the Defendant” from this point forward. R. p. 200, lines 14 - 15.

Next the state called the estranged ex-girlfriend’s mother. This witness testified as to the toboggan identified in the record as Exhibit 14 which she found in her van almost two years after the robberies. R. p. 231, line 19 - p. 233, line 8 and p. 234, lines 5 - 11. Next, the state showed this witness the November 3 video of Mr. Butts buying a cigar at the Citgo and asked her to identify him, his clothes and the cigar he was buying. R. p. 245, lines 11 - 25. Thereafter, in quick succession, this witness identifies the clothes, mannerisms and voice of the robber in each of the three videos as Mr. Butts. R. p. 246, line 5 - p. 249, line 1. Once again, the witness in testifying as to all three separate incidents seems to vacillate between an actual identification and statements that it appears to be the defendant, his voice, and his clothes. Compare R. p. 246, line 5 - p. 249, line 1 with R. p. 250, line 10 - p. 254, line 4.

For the state, the critical link between all three robberies was the testimony of the estranged ex-girlfriend and her mother. This testimony was gathered during an interview that took place in August 2011, just a couple of

months before the trial. For the defense, the theme of the case also related directly to this interview in August 2011 and involved allegations of coerced testimony from the ex-girlfriend and her mother with a threat of jail and the loss of a child to the custody of the State of South Carolina. See generally Biggers motions re witnesses, R. pp. 156-176 and R. pp. 237-244; and, cross examination of ex-girlfriend and her mother. R. pp. 210 - 214 and R. pp. 254-260.

Finally, the investigating officers were put on the stand and described how they came to focus on Mr. Butts as the perpetrator of all three robberies. See generally, R. pp. 262-305. On direct examination, neither of the officers directly linked the gun which had been found and entered into evidence to any of the three robberies, however, during cross-examination, the defense opened the door to arguably inadmissible evidence when he elicited testimony from one officer that said officer believed that the firearm was the same in all three videos and that it was the gun entered into evidence as Exhibit 12. R. pp. 301-302. This was the last witness to testify.

The jury after deliberating for less than three hours, and likely eating lunch, returned a verdict of guilty on all counts. R. p. 358, line 4 - p. 359, line 20.

ARGUMENT

Prior to trial, the defense made what can only be described as a half-hearted motion to sever the three indictments, and the state argued that, based upon the factual links found between the three robberies, as well as the need for judicial economy, the cases should be tried together. The Court held that there appeared to be no significant prejudice to the defendant and that the cases appeared “significantly related to one another that is appropriate to try them together.” See R. pp. 41-44 (Quoted language from R. p. 44, lines 7-8).

The motion of the defense actually raises an issue that the courts have phrased two different ways but which is analyzed under one test:

1. Whether the separate robberies and weapons possession charges, each pair being charged in a separate indictment, should have been severed for trial; or,
2. Whether the separate robberies and weapons possession charges, each pair being charged in a separate indictment, were all three properly joined together for trial.

Simply stated, charges, whether indicted separately or apart, can be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and where (4) no real right of the defendant has been prejudiced. State v. Harris, 351 S.C. 643, 572 S.E. 2d 267; see also, State v. Simmons, 352 S.C. at 351, 573 S.E.2d

at 861 (Ct. App. 2002); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct.App.1985); and State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

While the Courts will allow evidence of a “crime spree” as appropriately admitted in the penalty phase of a capital trial, see. e.g. State v. Woomer, 276 S.C. 258, 265 - 266, 277 S.E. 2d 696, 700 (1981)(overruled on other grounds in State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315(1991)), the analysis goes well beyond allegations that the crimes involve the same charges and evidence, or even the same location or general area. For example, in State v. Middleton the South Carolina Supreme Court found that consolidation for trial of two counts of murder and criminal sexual conduct, and one count of attempted armed robbery, aggravated assault, and aggravated assault and battery was improper, where the defendant allegedly escaped from a prison work detail, raped and murdered one victim the next day, raped and murdered the second victim two days after his escape, and attempted to rob a store three days after his escape, all within the space of 72 hours and a few square miles. 288 S.C. at 23 - 24, 339 S.E. 2d at 693. The Supreme Court firmly rejected the state’s argument which was based upon the similarity of the murders, the fact that the crimes occurred within a few miles of each other, and the contention that the same knife was used in the crimes. 288 S.C. at 23, 339 S.E. 2d at 693.

The principal regarding the joinder or severance of charges has also been stated as follows:

Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996). (Citations omitted).

State v. Rice, 368 S.C. 610, 614, 629 S.E. 2d 393, 395 (Ct. App. 2006).

Appellant cannot dispute that all three charges involve armed robberies that took place in the Citgo on Woodruff Road in Greenville, South Carolina. However, the trial court erred in basing its analysis solely on an argument that the robberies were “connected transactions closely related in time, place and character” and a cursory analysis purporting to find no significant prejudice to the defendant. See R. pp. 41-44. As old judges often note, all facts put in by the prosecution are designed to prejudice the defendant. However, an analysis of the facts presented at trial indicates that joinder of the three robberies in one trial fails to meet at least three of the four requirements for joinder and placed Mr. Butts in a situation that was unfairly prejudicial.

a. The three robberies did not arise out of the same set of circumstances.

The three robberies at issue occurred over an eighteen day period in the fall of 2009. During that time, the Citgo employees, along with hundreds, if not thousands, of customers came and went. Days passed without incident. There is no evidence as to what the Defendant, the victims, or anyone else was doing during the days between the robberies which would connect the robberies at all. The alleged “same set of circumstances” is nothing more than the opinion of Mr. Butts ex-girlfriend and her mother that each of the three robbers looked like Mr. Butts, and the opinion of one of the investigators that the same gun was used in the robberies.

The court’s holding as to severance appears to be comparable to the analysis done regarding the admissibility of prior bad acts into evidence. South Carolina Rules of Evid., Rule 404(b) states that “[e]vidence of other crimes, wrongs, or acts is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent”. Such bad acts, however, if they do not involve a prior **conviction**, must be shown by clear and convincing evidence and not be unduly prejudicial to the defendant. See, e.g. State v. Fletcher, 379 S.C. 17, 23 - 24, 664 S.E. 2d 480, 483 (2008). The Court in Fletcher explained that certain prior bad act testimony is

inadmissible because it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial. 379 S.C. at 26, 664 S.E. 2d at 484. It is unfair to use these three robberies together, to obtain a conviction that could not be obtained by trying them separately. There can be no evidence of a plan or commonality for these separate and distinct occurrences.

In State v. Middleton, 288 S.C. at 23 - 24, 339 S.E. 2d at 693, the Supreme Court was faced with similar issues when the Defendant had been tried for two murders by stabbing and related charges all occurring within a few miles of one another. Even though the same knife was used in the murders, and all the crimes occurred within 72 hours or so, the Court found that the consolidation of all the charges for one trial was improper, indicating that the two murders, even with the same weapon, were separate sets of circumstances and were required to be tried separately. Despite the allegations that a common weapon was used, as in Middleton, the charges against Mr. Butts for the three armed robberies are separate and should have been tried separately.

Likewise, in State v. Tate, 286 S.C. 462, 334 S.E. 2d 289 (Ct. App. 1985), the South Carolina Court of Appeals found that two forgery charges involving similar conduct by the defendant with two different liquor store

cashiers, although admittedly in two different liquor stores, were not “in substance a single ... course of conduct” or “connected transactions.” 286 S.C. at 464, 334 S.E. 2d at 290. The Court of Appeals rightly saw that offenses separated temporally do not form the same course of conduct.

b. The three robberies were not proven by the same evidence

Each of the three robberies were proven by distinct testimony from the victims and separate and distinct videos. The common evidence was all circumstantial and was cobbled together by the state to make the three cases seem stronger than they were. The November 3 video of Mr. Butts buying a cigar was used to link all three videos and all three crimes. It is important to note that neither of the victims was shown the November 3 video as part of the state’s case, and neither testified that it was Mr. Butts that robbed them. Yet the jury was shown all four videos, which included three separate videos of three separate robberies, repeatedly as if they were conclusively part of the same single event.

The evidence concerning the October 18 and November 5 robberies contains several differences. The victim of those two robberies testified that the robbers wore different masks. In the first robbery, the robber wore a hoodie, while, in the second robbery, the robber had a t-shirt over a hoodie.

See R. p. 123, lines 2- 9. The first robber was practiced and deliberate and instructed the victim as to where their money was located. R. pp. 114-115. In fact, the victim conceded that the first robber might well have worked at the Citgo. R. p. 125, lines 11 - 25. The second robber was “more aggressive and seemed nervous.” R. p. 122, line 25 - p. 123. The victim said the October 18 robber wore jeans and a hoodie. R. p. 126, line 20 - p. 127, line 5. Yet the only witness placing Mr. Butts near the scene says that he was wearing sweat pants and a t-shirt on October 18. R. p. 189, lines 14 - 16.

Although the October 18 and November 5 robberies involve the same victim, the October 30 robbery does not. In that robbery the victim testified that he was robbed by a black man between 5'8" and 6' in a hoodie and a mask. R. p. 132, lines 11 - 15. Mr. Butts is 6'1" tall. R. p. 206, lines 17 - 18. That evidence in that case is separate and distinct, and there is in fact no link to Mr. Butts except the commonality of the “similar gun” and the “similar mask” and a young black man wearing what is arguably the uniform of all young men today, pants and a hoodie.

These three robberies are separate and distinct incidents, and the evidence as to each of them is separate and distinct as well. The proof as to

each robbery is, in fact, supported by different testimony from different witnesses, and joinder is inappropriate. State v. Tate.

c. The rights of the Mr. Butts were prejudiced by the trial of the three robberies together.

As the South Carolina Supreme Court has long recognized,

‘Circumstances might arise which would render a uniting of several counts unjust to the defendant.’
City of Greenville v. Chapman, 210 S.C. 157, 162, 41 S.E.2d 865, 867 (1947). Even where joinder is permissible, the trial court must be mindful of protecting the defendant's right to a fair trial because “[b]y the multiplication of distinct charges, the prisoner may be confounded in his defense, or prejudiced in his challenges, or the attention of the jury may be distracted.” Id. (internal citations omitted).

State v. Cutro, 365 S.C. 366, 380, 618 S.E. 2d 890, 897 (2005)(Placones, J. dissenting).

The overwhelming nature of the circumstantial evidence against Mr. Butts made it impossible for a fair trial. By joining the three robberies for trial, the state was able to link three separate crimes, each of which would be difficult to prove beyond a reasonable doubt, and create a case that overwhelmed any possibility of defense. The joinder of the three cases created an implication that all three robberies had to be done by the same robber.

Thus, the defense had to establish reasonable doubt on four fronts, once in the robbery of October 18, once in the robbery of October 30, once in the robbery of November 5, and again in the alleged links between the robberies – this burden proved to be insurmountable and unfair.

The testimony of the victim in the October 18 and November 5 robberies, when taken together, creates an unfair illusion of commonality. This victim stated that he could not say what the robber on October 18 looked like since he was wearing a mask. R. p. 115, lines 9 - 13. Yet in his testimony discussing the second robbery, he testifies as if the robber is the same person although when asked if it is the same person, he can only say that it was his impression. See R. p. 124, line 24 - p. 125, line 4. In fact, the robber on November 5 wore a different mask, and a t-shirt over a hoodie, yet the victim assumes it is the same person. R. p. 123, lines 2 - 9. By lumping the two robberies together, a witness whose identification is, at best, shaky, has been buttressed with the unopposed assumption that one person did all three robberies. This critical assumption is at the heart of the prejudice to Mr. Butts.

Even the defense adopts the states' position that one person did all three robberies – “Q. Okay. He was wearing gloves this time, right? Gloves every time? Okay.” R. p. 127, lines 10 - 12. This assumption that one person

committed all three robberies, particularly once adopted by the defense, permeates every part of the case. The nature of circumstantial evidence is such that each small fact is joined together in an attempt to create an unbroken chain of coincidence which leads to only one conclusion. In this case, by joining three disparate robberies, each from a different day, each with different evidence allegedly pointing to Mr. Butts, the state has created a statistically unassailable case out of three potentially defensible robberies.

Perhaps the best example of the prejudice caused to Mr. Butts by trying these cases together is found in the testimony of the last witness, Investigator David Weiner. As mentioned above, the victims testified that the guns used in each of the three robberies appeared to be “similar” to a gun linked to Mr. Butts. Likewise, the videos appear to show that the guns are similar. This evidence, across three different robberies on three different dates was a critical link in the chain of evidence used by the state to prove “beyond a reasonable doubt” that Mr. Butts was guilty of all three robberies. On cross-examination, the defense, obviously concerned about this issue, tried to point out that the gun in question could not be definitively linked to the three robberies. This effort led to the following exchange:

Q. But the gun was found – as far as it being connected to this robbery, you have no idea if this is the gun connected to this robbery though, do you, these robberies?

A. I'm pretty confident it is, sir, based on the video and looking at the gun. It has some distinguishing characteristics.

Q. The gun has distinguishing characteristics?

A. Yes sir.

* * * *

A. It's got a gray stripe down the side. It's made by a company called Hi-Point.

Q. Okay

A. Hi-Point makes – they make a lot of guns, .45, .49, .380, but they only make one that I'm aware of with this stripe, which is the .380. And in all three robberies that gun can be clearly seen. You can see the gray stripe. And, of course, that's what we have in the box [Exhibit 12].

R. p. 301, lines 9 - 24. Having opened the door, the defense went all the way through by asking Investigator Weiner, who had not been qualified to testify as an expert, to testify that he could say with a reasonable degree of certainty that Exhibit 12 was the same gun used in the robberies. R. p. 302, lines 10 - 19. This testimony was damning and underscores the prejudice to defendant.

This case was built on circumstantial evidence, which by its nature is a series of circumstances designed to lead the fact finder to an ultimate conclusion. Exhibit 12 looks like the gun in each robbery. There was, in fact,

no admissible evidence for which a foundation was properly laid which proved that the gun presented into evidence was, in fact, the gun used in all three robberies, or even in one of the robberies. Nor was there any admissible evidence which showed that the same person committed all three robberies. Yet, Mr. Butts was faced with an insurmountable mountain of coincidence which, as it was presented to a jury, unfairly prejudiced his defense.

In State v. Tate, the Court of Appeals made note of this problem:

joinder would be prejudicial because it is likely the jury would infer criminal disposition based on evidence of one [crime] and on that basis alone find [defendant] guilty of another [crime].

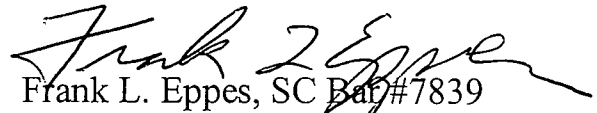
286 S.C. at 464, 334 S.E. 2d at 290.

In sum, none of the three robbery cases tried alone would have been a particularly strong case; however, when tried together, particularly when the defense has conceded the point that one person committed all three robberies, the accumulation of evidence unfairly shifts the burden of proof by requiring the defense to separately prove that Mr. Butts was not involved in or linked to each of the three robberies in order to create reasonable doubt that he was not the perpetrator of all of them.

CONCLUSION

For the reasons stated herein, the decision of the court below should be reversed, and this matter should be remanded for further proceedings.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stillwell, Circuit Court Judge

Case No. 2011-GS-23-05149-05151

State of South Carolina, Respondent

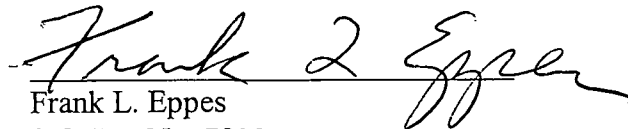
vs.

William A. Butts, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(a), SCACR and is identical to the brief previously served except as allowed pursuant to Rule 211 (b), SCACR.

March 6, 2013



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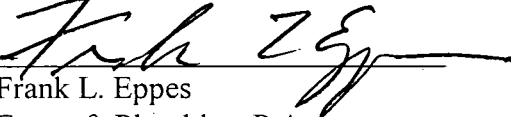
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Respondent with the Appellant's Final Brief and the Record on Appeal by mailing a copy of the same by United States Mail with first class postage prepaid to the following address.

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March 7, 2013

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SC Court of Appeals