

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge

RECEIVED

FEB 22 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW BRENT SCOTT,

APPELLANT

Appellate Case No. 2012-212554

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

\_\_\_\_\_  
DAVID ALEXANDER  
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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**TABLE OF AUTHORITIES**

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in permitting an in-court identification of appellant and a photographic lineup to be admitted into evidence when the witness's identification had been corrupted by her being told, prior to viewing a photographic lineup, that the police suspected appellant was the perpetrator?

## STATEMENT OF THE CASE

On November 24, 2010, appellant was indicted in Spartanburg County for armed robbery, first degree assault and battery, kidnapping, and a weapons offense. On April 24 – 26, 2012, appellant was tried before the Honorable Roger L. Couch and a jury. R. 1. Appellant was represented by Beverly Jones. R. 1. Zach Ellis represented the State. R. 1. The jury convicted appellant on all counts. R. 511, ll. 6 – 21. Judge Couch sentenced appellant to thirty years' imprisonment on the kidnapping and armed robbery charges and ten years' imprisonment on the assault and battery charge, to run concurrently. R. 520, l. 21 – 521, l. 4. Judge Couch sentenced appellant to five years' imprisonment on the weapons charge to run consecutive to the other sentences. R. 521, ll. 2 – 3. On May 2, 2012, appellant filed and served his notice of appeal. This appeal follows.

## ARGUMENT

The trial court erred in permitting an in-court identification of appellant and a photographic lineup to be admitted into evidence when the witness's identification had been corrupted by her being told, prior to viewing a photographic lineup, that the police suspected appellant was the perpetrator.

### **Relevant Facts**

Appellant was accused of robbing The Money Tree in downtown Chesnee. Prior to trial, the court held a Neil v. Biggers hearing regarding the suggestiveness of the lineup procedure. R. 36, ll. 5 – 21. The State called Bridgette Jackson (“Jackson”) as its first witness at the hearing. R. 37, ll. 14 – 19. Jackson testified that she was working at the Money Tree on September 28, 2010. R. 38, ll. 9 – 17. She noticed a man wearing all-black riding a bicycle come up to the front of the store. R. 39, l. 11 – 40, l. 10. She lost track of the man inside of the store. R. 42, ll. 13 – 15.

Jackson then noticed an interior door opening. R. 42, l. 22 – 43, l. 5. She saw the man trying to come through the door with a knife in his hand. R. 43, ll. 6 – 15. The man was wearing a hat and sunglasses. R. 40, ll. 1 – 3. After an altercation with Jackson, the man took money from the store's safe. R. 48, l. 19 – 49, l. 2. Jackson escaped and ran to the nearby city hall building. R. 49, ll. 4 – 20.

Appellant was a former employee of The Money Tree. R. 70, ll. 7 – 23. Jackson had previously spoken with appellant on the phone. R. 70, ll. 7 – 23. Approximately two weeks before the robbery, another employee told Jackson that “Mr. Scott is telling people he's gonna rob the store.” R. 72, ll. 2 – 14. Prior to being given a photographic lineup, this employee reminded Jackson about their discussion concerning appellant. R.

72, l. 24 – 73, l. 4. The employee came into City Hall and said, “I can’t believe he did this.” R. 71, ll. 20 – 24. Jackson stated, “So, I was, I was taking that she knew who had done it.” R. 71, l. 23. Jackson was then shown a photographic lineup and picked out appellant. R. 55, ll. 16 – 24. Jackson then made an in-court identification of appellant. R. 58, l. 23 – 59, l. 7.

Appellant argued that the identification should be disallowed. R. 89, l. 23 – 90, l. 3. Appellant argued that “the suggestion by a co-worker prior to the lineup of, suggestion as to who the suspect is by a co-worker could have impacted Ms. Jackson’s identification.” R. 89, l. 24 – 90, l. 1. The trial judge found that the identification was reliable and untainted by “someone who was unnamed and not identified by name at the time of her identification.” R. 91, l. 10 – 92, l. 4. The photographic lineup was admitted into evidence. R. 170, ll. 16 – 20. Jackson was also allowed to make an in-court identification of appellant as the robber. R. 176, ll. 11 – 25.

### **Discussion**

Identification procedures that are impermissibly suggestive render an identification inadmissible. Neil v. Biggers, 409 U.S. 188, 197 (1972). “[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” Id. at 199-200. “A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive

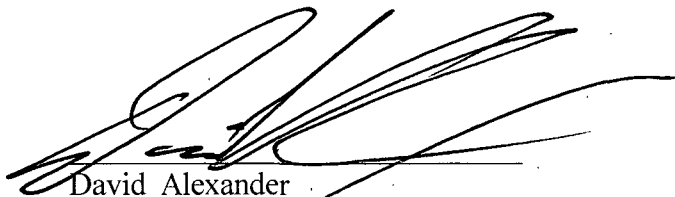
and conducive to irreparable mistaken identification.” State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

In this case, the trial court erred by permitting evidence of the photographic lineup to be admitted at trial. The trial court also erred by allowing Jackson to make an in-court identification of appellant. Jackson knew from a conversation prior to the robbery that her co-worker had heard appellant was going to rob The Money Tree. When she heard her co-worker state, “I can’t believe he did this,” immediately prior to being presented a photographic lineup, Jackson knew she was referring to appellant. R. 71, l. 20 – 72, l. 10. This rendered any identification by Jackson inadmissible. The totality of the circumstances demonstrates that Jackson’s identification during the lineup and at court should not have been permitted.

CONCLUSION

For the above-stated reasons, appellant's convictions should be reversed and he should be granted a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDREW BRENT SCOTT,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Andrew Brent Scott states:

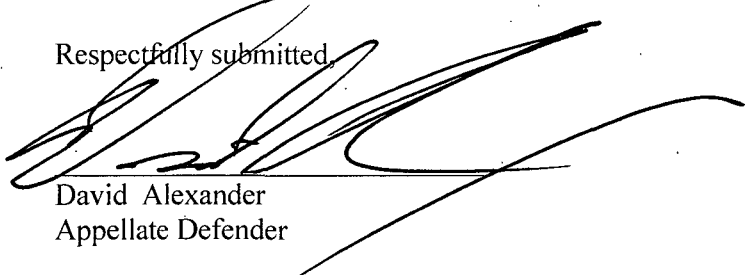
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Roger L. Couch, which was held on April 26, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, he asks the Court to relieve him as counsel for Andrew Brent Scott.

Respectfully submitted,



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

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

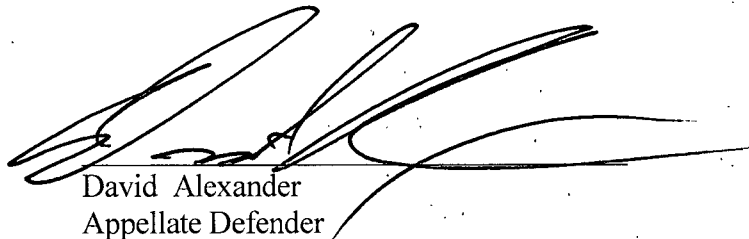
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial Transcript;
- (3) Trial exhibit 38;
- (4) Trial exhibit 37 (to be transported).

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

February 22nd, 2013



David Alexander  
Appellate Defender

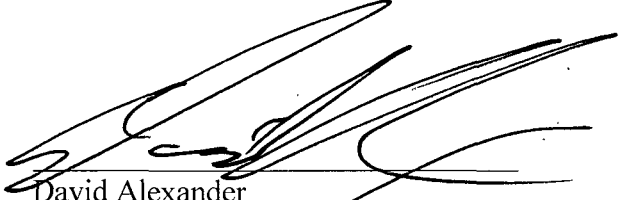
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PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

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 22, 2013



David Alexander  
Appellate Defender

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Columbia, South Carolina 29211-1589

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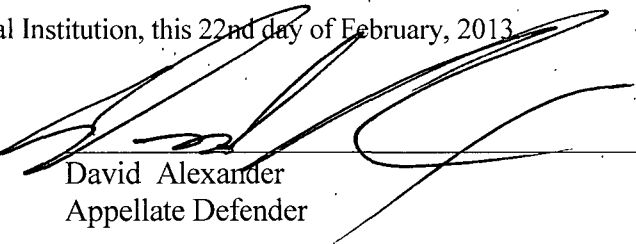
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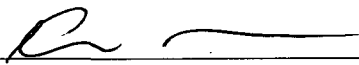
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 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 and Record on Appeal have been served on Andrew Brent Scott, #192735 at Lieber Correctional Institution, this 22<sup>nd</sup> day of February, 2013.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 22<sup>nd</sup> day of February, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.