STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No: 2012-212564

THE STATE,

Respondent,

v.

JEROD SWINTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's argument that the trial court erred in failing to conduct an in camera hearing concerning the victim's identification of Appellant as the perpetrator is not preserved, but even if preserved, the trial court correctly denied Appellant's request for the hearing because Victim had known Appellant for years and had already identified Appellant by name prior to being shown the photograph merely as confirmation. Furthermore, any error was harmless because Victim's in-court identification had an independent origin and was not the tainted product of the circumstances surrounding the prior, out-of-court identification.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for attempted murder. (R.pp 139-140.) On May 16, 2012, Appellant proceeded to trial before a jury. Martha Kent Runey, Esquire, represented Appellant, and Assistant Solicitor Rutledge Durant represented the State. The jury found Appellant guilty, and the Honorable Kristi Lea Harrington sentenced him to twenty years' imprisonment. (R. p. 133, 138.)

Appellant filed a timely Notice of Appeal. This appeal follows.

STATEMENT OF FACTS

On August 5, 2010, Simon Simmons (Victim) and his wife Veronica walked to their son's school to pick him up. (R. p.19, lines 17-24.) They ran into Appellant while they were walking. (R. p.20, lines 9-13.) Victim had known Appellant for about fifteen years, having gone to school with him. (R. p.20, lines 14-20.) Appellant came back with Victim to Victim's house, where they ate pizza and drank beer, "catching up on old times." (R. p.21, lines 20-25.) Later in the day, Appellant returned to Victim's house around mid-afternoon asking for $100 that Victim owed him. (R. p.22, line 23-R. p.23, line 13.) Victim did not have the money, and Appellant returned again around 6:00 or 7:00 p.m. (R. p.23, lines 14-25.) Victim still did not have the money he owed Appellant, so Appellant returned again at approximately midnight. (R. p.24, lines 3-23.) When Appellant knocked on the door, Victim went outside to talk to him. (R. p.25, lines 3-5.) They decided to walk to the store to get cigarettes. (R. p.25, lines 6-13.) Before they left, Appellant walked into the house to use the bathroom, at which time Veronica saw him and noticed he was wearing dark clothes that were different from what he was wearing the other times he came by. (R. p.25, lines 13-15; R. p.52, lines 1-8.)

As Victim and Appellant walked to the store, Appellant pulled a gun on Victim and shot him twice before running from the scene. (R. p.25, line 18-25; R. p.29, lines 4-18.) Victim was able to get back to his apartment and call for his wife, who called 911. (R. p.31, lines 4-10.) He told his wife Appellant had shot him, and he also told police when they arrived. (R. p.32, line 11-19.) Police were unable to locate Appellant that night but arrested him twenty days later and charged him with attempted murder. (R. p.101, lines 7-12; R.pp.139-140.)

At trial, Appellant requested an in camera hearing regarding a photograph of Appellant police showed to Victim at the hospital. (R. p.11, line 24-R. p.12, line 24.) Appellant specifically stated:

> The only thing that I wasn't clear about is the hearing outside the presence of the jury regarding the photo . . . at the hospital. . . . Well, Your Honor, I just want - - I feel like that the State has to establish how it was presented to the victim at the hospital, and from my understanding from the case that Mr. Durant submitted to the Court - - I just read it briefly when he showed it to me - - is that his plan was to put the victim up to testify to that identification, **although it's different from Biggers.** I would request a hearing on that outside the presence of the jury.

(R. p.11, line 24-R. p.12, line 3; R. p.12, lines 16-24.) (emphasis added.) The trial court pointed out that Victim and Appellant had known each other for an extended period of time and that Victim's identification was based on his personal knowledge rather than on the photograph. (R. p.13, lines 3-15.) Determining Appellant's viewing of the photograph was merely a confirmation of the identification he had already given, the trial court advised Appellant to object at the time the photograph would be introduced. (R. p.13, lines 7-20.) At that point, defense counsel told the trial court, "Okay. And that objection, if I could state that on the record before we even get started is, I have not been provided that picture through discovery." (R. p.13, lines 20-22.) However, the State informed the trial court it had given defense counsel the photograph in discovery. (R. p.14, lines 9-12.) Appellant asked the trial court to suppress the identification based on the State's failure to provide the photograph. (R. p.16, lines 3-5.) The trial court again determined it would address that issue when the photograph was presented during trial. (R. p.16, lines 6-7.)

Victim testified regarding the events of August 5, 2010, when he walked to his son's school with his wife. (R. p.19, lines 17-24.) He explained how he ran into Appellant, who he had known for fifteen years. (R. p.20, lines 9-23.) He further testified Appellant was a friend, they shared the same birthday, and they had hung out together. (R. p.21, lines 1-12.) After testifying about Appellant's numerous visits to the apartment that day, he gave a detailed account of what happened when he was shot. (R. p.21, line 22-R. p.26, line 1.) Victim testified that the last time Appellant came to the apartment, he was wearing dark clothing instead of the white t-shirt and pants he had been wearing earlier in the day. (R. p.37, lines 12-16.) Victim described how he and Appellant began walking away from the apartment into an alley and that he heard Appellant say, "What's up?" and saw him pointing a gun at him. (R. p.25, lines 21-23; R. p.28, lines 18-24.) He testified that Appellant asked for the money Victim owed him and told him to empty his pockets. (R. p.29, lines 9-10.) Victim threw his phone at Appellant and tried to run but then heard a gunshot and fell. At that point, Appellant walked over to Victim, shot him twice, and ran. (R. p.29, lines 14-18.) Victim testified that he told his wife Appellant had shot him, calling him by his nickname, Rod Black. (R. p.32, lines 12-23.) He also testified that when the police arrived, he told them Appellant had shot him. (R. p.34, lines 14-18.)

Victim's wife, Veronica Simmons, testified next. (R. p.44, lines 5-25.) She testified that she and Victim ran into Appellant on August 5, 2010, that she knew Appellant as Rob Black, and that she had known him for approximately three or four years. (R. p.46, line 7-R. p.47, line 24.) She recounted Appellant's numerous visits to the apartment that day, noting that the last time he came by was around twelve at night and he was wearing dark colors instead of the lighter colors he had been wearing on his

earlier visits. (R. p.49, line 15-R. p.52, line 17.) She recalled hearing Victim screaming her name about ten to fifteen minutes after he and Appellant left to go to the store. (R. p.53, lines 5-15.) Veronica testified that when she saw Victim coming toward the apartment, she asked him what was wrong and he told her he had been shot. (R. p.53, lines 17-21.) She testified that when she asked Victim who shot him, he told her it was Rob Black. (R. p.53, lines 21-22.)

The State called Sergeant Eric Jourdan of the City of North Charleston Police Department. (R. p.63, lines 7-8.) He testified that when he responded to the scene, he asked Victim if he knew who shot him and Victim told him, "Jerod Swinton." (R. p.66, lines 12-15; R. p.67, line 25-R. p.68, line 4.) The State also called Detective Christopher Ware, who testified he asked Victim who shot him and Victim told him, "Jerod Swinton." (R. p.82, lines 5-6; R. p.88, lines 7-8.) Detective Ware testified that Victim told him he was shot over some money and he believed he was shot with a .38. (R. p.88, lines 8-12.)

The State called Detective Alan Kramitz, who testified that he obtained a photograph of Appellant and took it to the hospital to show it to Victim. (R. p.96, line 20-R. p.97, line 4.) Appellant objected based on his earlier objection to the photograph. (R. p.97, lines 5-8.) The trial court held an off-the-record bench conference, after which it noted Appellant's ongoing objection to the line of questioning. (R. p.97, lines 10-14.) Although the trial court did not state that it overruled Appellant's objection, the record shows the State was permitted to ask Detective Kramitz about showing the photograph to Victim and he testified he showed the photograph to get extra confirmation that Appellant was the perpetrator based on his knowledge that Appellant had been a friend of Victim for a long period of time and knew him very well. (R. p.98, lines 16-25.) After

questioning Detective Kramitz regarding Victim's reaction to the photograph, the State moved to admit the photograph, Exhibit 16. (R. p.99, line 1-R. p.100, line 14.) The trial court decided to take the admission of the photograph up outside the presence of the jury. (R. p.100, lines 15-16.) When asked the basis of his objection to the admission of the photograph, Appellant argued:

> Your Honor, I understand the decision of the Court in regards to the Biggers. This is somebody that the victim knew. I think that makes a difference. **My argument as to this picture being admitted is that we were not provided it in discovery.** I say that we were not provided it; **I was given a booking photo of [Appellant].** I believe that the picture was shown to him without the booking information, **but it is the booking photo**. And I was just given notice of that today when we started the trial. And I ask **for that reason** that it be excluded.

(R. p.110, lines 14-23.) (emphasis added.) The State made the following statement in relation to providing the photograph to Appellant:

> I'd just like to point out that that photograph was provided to the Defense, listed on our numbering system as number 27; and, also, in Detective Kramitz's report, which was also turned over to the Defense. **There was only one booking photo turned over to the Defense and it was this one.** And it says that on 8/6/2010 at approximately one forty-seven hours, this detective provides the victim a photograph obtained via the Charleston County Inmate Photo Bank. Upon viewing the photograph, victim Simmons immediately states, ["T]hat's him. That's Jerod. He's the one that shot me.["] So the information about what kind of photo was all presented.

(R. p.111, lines 19-25; R. p.112, lines 1-5.) At that point, the trial court marked the photograph the State gave Appellant pursuant to Rule 5 as Court's Exhibit 1 and asked Appellant if he preferred the full booking photograph to go to the jury. (R. p.112, lines 15-16.) Appellant stated, "I would prefer just one picture." (R. p.112, line 17.) The State offered to clip one, and Appellant agreed to the full-face photograph. (R. p.112,

lines 17-24.) The State prepared the photograph according to Appellant's request and the trial court admitted it into evidence as Exhibit 16-A over Appellant's objection. (R. p.113, line 22-R. p.114, line 8.) However, the trial court did not admit Exhibit 16, the entire booking photograph Detective Kramitz showed Victim in the hospital, which was the exhibit Appellant had objected to. (R. p.114, lines 2-4.)

Ultimately, the jury found Appellant guilty, and the trial court sentenced him to twenty years' imprisonment. (R. p.133, 138.)

ARGUMENT

Appellant's argument that the trial court erred in failing to conduct an in camera hearing concerning the victim's identification of Appellant as the perpetrator is not preserved, but even if preserved, the trial court correctly denied Appellant's request for the hearing because Victim had known Appellant for years and had already identified Appellant by name prior to being shown the photograph merely as confirmation. Furthermore, any error was harmless because Victim's in-court identification had an independent origin and was not the tainted product of the circumstances surrounding the prior, out-of-court identification.

Appellant argues the trial court violated Appellant's state and federal constitutional rights to due process of law when it failed to conduct an in camera hearing concerning the victim's identification of Appellant as the perpetrator where police showed the victim a single photograph for identification purposes. However, at trial, Appellant's objection to the admission of the booking photograph shown to Victim at the hospital was based only on the fact Appellant claimed not to have received the correct photograph during discovery. Thus, this particular issue is not preserved for appellate review. However, even if preserved, any error was harmless because Victim had substantial prior knowledge of Appellant, which meant that his in-court identification had an independent origin and was reliable. Therefore, the identification procedure was merely confirmatory. Moreover, Victim's identification of Appellant was cumulative to other properly admitted evidence, which included Victim's wife's identification of Appellant. Accordingly, Appellant's conviction and sentence should be affirmed.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is

sufficiently reliable is a mixed question of law and fact. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." State v. Liverman, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

Preservation

As an initial matter, Appellant's issue on appeal is not preserved for review. Appellant argues in his brief that the trial court failed to conduct an in camera hearing concerning the victim's identification of Appellant as the perpetrator where police showed the victim a single photograph for identification purposes. However, Appellant did not object on this specific basis at trial. On the contrary, Appellant told the trial court:

> Your Honor, I understand the decision of the Court in regards to the Biggers. This is somebody that the victim knew. I think that makes a difference. **My argument as to this picture being admitted is that we were not provided it in discovery.** I say that we were not provided it; **I was given a booking photo of [Appellant].** I believe that the picture was shown to him without the booking information, but it is the booking photo. And I was just given notice of that today when we started the trial. And I ask **for that reason** that it be excluded.

(R. p.110, lines 14-23.) (emphasis added.) It is clear from the above exchange that Appellant was only objecting on the basis of not having been provided the exact photograph, the booking photograph without the booking information, in discovery. Even earlier in the trial when Appellant requested an in camera hearing and was told by

the trial court to object at the time of the photograph, defense counsel told the trial court, "Okay. **And that objection**, if I could state that on the record before we even get started **is, I have not been provided that picture through discovery**." (R. p.13, lines 20-22.) (emphasis added.) Additionally, defense counsel stated, "And, Your Honor, I would just ask the Court to suppress that identification at the hospital based on failure to give that over to me." (R. p.16, lines 3-5.) The argument that the trial court violated Appellant's constitutional rights in failing to conduct a hearing was never raised to or ruled upon by the trial court. An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). "A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Therefore, this issue is not preserved.

Merits

In Neil v. Biggers, the United States Supreme Court set forth a two-part test for courts to use in determining whether due process requires suppression of an eyewitness identification. 409 U.S. 188, 198 (1972). First, the court must determine whether the identification resulted from unnecessary and unduly suggestive police procedures. Id. If so, the court must then determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. If the court determines the identification resulted from unnecessary and unduly suggestive police procedures, the court will look at the totality of the circumstances to determine whether the identification was nevertheless reliable. Liverman, 398 S.C. 138, 727 S.E.2d at 426. When looking at the totality of the circumstances, courts consider the following factors:

> (1) [T]he witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id.

In Liverman, our Supreme Court ruled that regardless of an eyewitness' prior knowledge of a defendant, "preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action." Liverman, 398 S.C. at 140, 727 S.E.2d at 427. In reaching its conclusion, our Supreme Court overruled its own precedent, which held that a Neil v. Biggers hearing was not necessary if the eyewitness had prior knowledge of the defendant.[1] The Supreme Court in Liverman relied upon Perry v. New Hampshire, 132 S. Ct. 716 (2012), which, according to our Supreme Court, "reemphasized the necessity of pretrial judicial review when an identification is infected by improper police influence[.]" Liverman, 398 S.C. at 140-41, 727 S.E.2d at 427.

Although our Supreme Court in Liverman refused to hold that the hearing in that case fully comported with due process, the Court ultimately held that any error in not conducting the full Neil v. Biggers hearing was harmless. Id. at 141, 727 S.E.2d at 427. Notably, our Supreme Court in Liverman pointed out that "[n]o definite rule governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. In its harmless error analysis, the Court stated the following:

> Although McLeod cannot survive Perry as a standalone basis for circumventing a Neil v. Biggers hearing, **the fact an identification witness knows the**

[1] State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973).

> **accused remains a significant factor in determining reliability**. The suggestive nature of a show-up is mitigated by the witness' prior knowledge of the accused. **We concur with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory.**

Liverman, 398 S.C. at 141-142, 727 S.E.2d at 427-428 (emphasis added).

Furthermore, in People v. Rodriguez, a case our Supreme Court relied upon in Liverman, the Court of Appeals of New York explained the "confirmatory exception" to the hearing requirement for suggestive pretrial identification procedures. People v. Rodriguez, 593 N.E.2d 268, 272 (N.Y. 1992). The Rodriguez court noted the following:

> "When a crime has been committed by *a family member, former friend or long-time acquaintance* of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person. . . . But in cases where the prior relationship is fleeting or distant it would be unrealistic to ignore the possibility that police suggestion may improperly influence the witness in making an identification."
>
> A court's invocation of the "confirmatory identification" exception is thus tantamount to a conclusion that, as a matter of law, **the witness is so familiar with the defendant that there is "little or no risk" that police suggestion could lead to a misidentification.** This is so because, as a consequence of applying the exception, the defendant will be denied a . . . hearing to explore suggestiveness. In effect, it is a ruling that however suggestive or unfair the identification procedure might be, there is virtually no possibility that the witness could misidentify the defendant.
>
> The exception may be confidently applied where the protagonists are family members, friends or acquaintances or have lived together for a time. At the other extreme, it clearly does not apply where the familiarity emanates from a brief encounter.

Id. at 271-72 (internal citations omitted) (second emphasis added). Liverman also cited State v. Taylor, 594 N.W.2d 158 (Minn. 1999), for its "holding that the show-up

procedure was not suggestive but merely confirmatory where witness previously singled out assailant by nickname and had seen him around her apartment building at least ten times before the show-up took place." Id. at 142, 727 S.E.2d at 427-28.

Here, the photograph police showed to Victim after he had already named Appellant as the shooter merely served to confirm the identity. Prior to admitting the booking photograph, which the trial court modified in response to Appellant's request, the trial court heard testimony from Victim regarding his extensive prior knowledge of Appellant. Victim testified he knew Appellant for approximately fifteen years. (R. p.20, lines 14-17.) He testified he and Appellant had gone to school together and that Appellant used to come to his house "a while back," but that he had not seen him in a while. (R. p.20, lines 17-19.) By the time Victim saw the photograph Detective Kramitz showed him at the hospital, he had already identified Appellant based on this long friendship. Thus, Victim's identification based on the booking photograph was merely confirmatory and fit squarely into the "confirmatory exception."

Appellant argues in his brief that he was entitled to a pretrial hearing regarding the admissibility of Victim's identification in light of the suggestive procedures used by the police. Specifically, he argues the record lacks information concerning Victim's ability to observe the shooter and lacks evidence of the lighting conditions at the scene. However, Victim testified that he was with Appellant when they left his apartment to go to the store for cigarettes and walked into the alley together, at which time Appellant pulled out a gun and shot him twice. There was no reason to require testimony of Victim's ability to see when he was walking with Appellant when the shooting occurred.

Victim testified that on the day of the incident, Appellant came to Veronica's apartment numerous times. Veronica also testified regarding these visits. Notably,

without objection, both Victim and Veronica made in-court identifications of Appellant and testified regarding their out-of-court identifications of Appellant. (R. p.21, lines 13-19; R. p.32, lines 11-23; R. p.48, lines 8-17; R. p.54, lines 8-9.) Victim identified Appellant as the perpetrator immediately following the crime. As soon as he made it back from the alley to his apartment, he told his wife the person who had shot him was Rod Black, Appellant's nickname. (R. p.32, lines 12-25.) When the police arrived, Victim told the police Appellant shot him. (R. p.34, lines 14-18.) Additionally, Victim's wife testified that Victim told her Rob Black shot him. (R. p.54, lines 6-9.) While Appellant argues in his brief about inconsistencies in the identification of the shooter because of the names Jerod Swinton, Rod Black, and Rob Black, these inconsistencies are easy to explain. Victim testified Appellant's nickname was Rod Black and that he had known him by that nickname as long as he had known him. (R. p.32, lines 16-25.) Victim's wife testified she knew Appellant only as Rob Black and stated, "Well, I thought that's what they was [sic] calling him, Rob Black." (R. p.60, lines 23-14.) Furthermore, Victim told police Jerod Swinton was the person who shot him. It is clear Jerod Swinton, Rod Black, and Rob Black were all names of Appellant. Although Victim and his wife gave the police officers two similar yet different nicknames for Appellant, Rod and Rob, this mistake did not negate the reliability of the identifications. Despite Veronica's confusion regarding Appellant's nickname, Victim was able to give the police officers Appellant's actual name, which ultimately led to Victim confirming Appellant's identity by looking at a photograph the police provided.

Many of the safeguards noted by the United States Supreme Court in Perry and our Supreme Court in Liverman were at work in Appellant's trial. See Perry, 132 S. Ct. at 728-29; Liverman, 398 S.C. at 143, 727 S.E.2d at 428 ("These protections include the

defendant's Sixth Amendment right to confront the eyewitness. Another is defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments.").

The reliability of Victim's identification was fully vetted at trial. During cross-examination of Victim, Appellant's trial counsel discussed the weaknesses of Victim's identification, including the fact that Victim identified the photograph of Appellant while ill in the hospital. (R. p.39, lines 8-12.) He also elicited the fact that Victim was not interested in participating in the prosecution of the case and never gave a detailed statement to police. (R. p.39, lines 16-23.) In cross-examining Veronica, Appellant's trial counsel focused on discrepancies between her statement and her testimony. (R. p.58, line 3-R. p.60, line 10.) He also pointed out that Veronica only knew Appellant as Rob Black, not Jerod Swinton. (R. p.60, line 23-R. p.61, line 4.) Additionally, during closing arguments, Appellant's trial counsel discussed the weaknesses of Victim's and Veronica's identifications, casting doubt on their credibility. (SROA. p.1-6.) In light of these protections afforded to Appellant during trial, any error in the trial judge's denial of a Neil v. Biggers hearing was harmless.

Additionally, both Victim and Veronica testified they had run into Appellant earlier in the day and that he had visited the apartment four times that day. Both testified he came back around midnight and that Victim left with Appellant to walk to the store for cigarettes. Victim testified Appellant stopped in an alley and shot him twice, and Veronica testified approximately ten to fifteen minutes after the two men left to go to the store, she heard Victim calling for her and discovered him shot. In light of this evidence, any error was harmless.

In summary, any suggestiveness of the identification process was mitigated by Victim's extensive prior knowledge of Appellant. Because Victim had extensive prior knowledge of Appellant, his identification was merely confirmatory and there was little to no risk that the police's conduct in this case could have led to a misidentification. Furthermore, Victim's identification was merely cumulative to other properly admitted testimony, and Appellant received many safeguards at trial. Accordingly, even if the trial judge erred in not conducting a Neil v. Biggers hearing, any error was harmless. Thus, this Court should affirm Appellant's conviction and sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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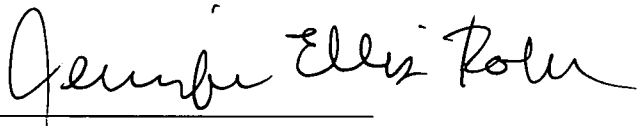
BY: 
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September 27, 2013

STATE OF SOUTH CAROLINA

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Honorable Kristi Lea Harrington, Circuit Court Judge

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v.

JEROD SWINTON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served. This 27th day of September, 2013.

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