

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

OCT 18 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MICHAEL TOMPAI,

APPELLANT

APPELLATE CASE NO. 2013-001319  
\_\_\_\_\_

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

ROBERT M. PACHAK  
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 ISSUE ON APPEAL**

Whether the trial court erred in allowing Detective Cox to testify how he put together the photo line-up in this case because it placed appellant's character into issue by suggesting there was a mug shot of him?

## STATEMENT OF THE CASE

Appellant was convicted of armed robbery after a jury trial held before the Honorable Larry B. Hyman, Jr., on June 10 – 11, 2013, in Horry County. A seventeen (17) year sentence was imposed. W. Thomas Floyd, Esquire, was trial counsel. Scott Hucks, Esquire, was the assistant solicitor.

This appeal follows:

## ARGUMENT

The trial court erred in allowing Detective Cox to testify how he put together the photo line-up in this case because it placed appellant's character in issue by suggesting there was a mug shot of him.

Richard Corrado testified that he was a gas station attendant at Kangaroo Store 3063 at the end of Forestbrook and Dick Pond Road in Horry County. On September 9, 2012, he was preparing to start the cooler. He noticed a man entering the forested side of the building, which was kind of odd, so he paid attention to him. He headed directly toward the restroom. About a minute later, he walked out of the building. He re-entered moments later with a gun. He demanded that money be placed in a bag and he took a couple cartons of cigarettes. (R. 71, line 5 – R. 72, line 3). Mr. Corrado said he called the police and gave them a description of the robber. (R. 73, lines 16 – 19). He identified a photo line-up he looked at in which he picked out number six who was the appellant. (R. 74, lines 2 – 22).

Detective Cox said he was assigned to this case. He called J. Reuben Long Detention Center to their Photo I.D. Section. He testified that they can get photos at the jail or at SLED. Since the case was two weeks old, he decided to use the jail to get a photo line-up with appellant's photo. (R. 92, line 13 – R. 93, line 13).

This testimony should not have been allowed because it let the jury know that appellant had a prior record since the jail had a mug shot of him. This placed appellant's character into issue. In *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989), the Court wrote:

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. *State v. McElveen*, 280, S.C. 325, 313 S.E.2d 298 (1984); *State v. Swords*, 279 S.C. 554, 309 S.E.2d

750 (1983); \*189*State v. Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In *State v. Ross*, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). The mug shot also suggested prior bad acts. In *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

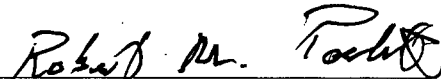
[3] It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. See, e.g., *State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. See, *United States v. Johnson*, 610 F.2d 194 (4<sup>th</sup> Cir.1979); *State v. Byers*, 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. See, *State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence \*325 which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. See, e.g., *State v. Lyle, supra*; *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins*, 285 S.C. 361, 329 S.E.2d 759 (1985).

293 S.C. at 324-325, 360 S.E.2d at 319.

CONCLUSION

Because appellant's mug shot was introduced into evidence, his conviction should be reversed.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of October, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL TOMPAI,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Michael Tompai 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 Larry B. Hyman, Jr., which was held on June 11, 2013, 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 Michael Tompai.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of October, 2013.

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

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (June 10 – 11, 2013)

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

October 18th, 2013



Robert M. Pachak  
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."

October 18, 2013

*Robert M. Pachak*

Robert M. Pachak  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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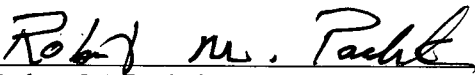
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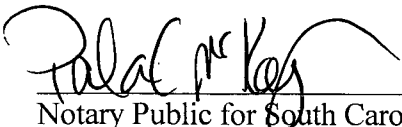
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Michael Tompai, #355763 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 18th day of October, 2013.

  
\_\_\_\_\_  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 18th day of October, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.