STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE STEWART CURRY,

APPELLANT

Appellate Case No. 2012-213370

FINAL BRIEF OF APPELLANT

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II. In violation of Appellant's state and federal constitutional right to due process of law, the trial judge erred in failing to charge the jury regarding guilty but mentally ill where Appellant presented evidence that he was unable to conform his conduct to the requirements of the law at the time of the commission of the offense.

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STATEMENT OF THE CASE

Appellant was indicted for throwing bodily fluids on a corrections officer (2011-GS-32-3528) in violation of section 24-13-0470 of the South Carolina Code by a Lexington County grand jury on November 7, 2011. R. 239 (indictment). The prosecution, represented by Rhonda Patterson and Shannon Davis, called the case to trial before the Honorable Howard P. King and a jury on November 5, 2012. R. 1. The jury found Appellant guilty as charged. R. 217, lines 3-8. On November 6, 2012, Judge King sentenced Appellant to imprisonment for eight and a half years with a recommendation for mental health treatment within the Department of Corrections. R. 223, lines 7-12; R. 223, lines 18-21; R. 242 (sentence sheet).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

While Appellant was detained at the Lexington County Detention Center, he was charged with throwing bodily fluids on a corrections officer. Prior to his trial, Appellant was evaluated numerous times regarding his mental condition.

Hearing pursuant to State v. Blair[1]

Judge King presided over a hearing to determine whether Appellant was competent to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

Testimony of Dr. Marla Domino

The prosecution presented the testimony of Dr. Marla Domino, a psychologist with the South Carolina Department of Mental Health. Pursuant to a court order for a competency evaluation, Dr. Domino interviewed Appellant on November 2, 2010. R. 6, lines 18 – 22; R. 7, line 1. Appellant had significant mental health history and Dr. Domino gathered records concerning his prior psychiatric care. R. 7, lines 13 – 21. Dr. Domino's interview with Appellant lasted approximately one hour and thirty minutes. R. 8, lines 7 – 9. Additionally, Dr. Domino attempted to speak with Appellant on the date of the hearing, but Appellant refused to speak with her. R. 8, lines 10 – 14. Based upon her interview of November 2, 2010, Dr. Domino opined that Appellant "did not lack the capacity to understand the proceedings against him or to assist in his own defense as a result of the lack of mental capacity." R. 8, lines 19 – 24; R. 10, lines 13 – 17.

Although Appellant seemed to understand the charges against him, he was unsure of the penalties and required education in various areas of competency. R. 8, line 25 – R. 9, line 5. When discussing the roles of court personnel, Appellant gave multiple incorrect

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

answers, including his belief that the role of the prosecutor was to advocate on his behalf, that the judge was on his side, and that his attorney was "rotten to the core" and wanted "to fry him." R. 9, lines 6 – 10; R. 20, lines 4- 14. It was the opinion of Dr. Domino that Appellant was feigning an inability to learn the information regarding the responsibilities of courtroom personnel. R. 9, lines 13 – 15; R. 20, line 18 – R. 21, line 1. Appellant appreciated the seriousness of the charges against him and understood the difference between pleas of guilty and not guilty. R. 9, lines 16 – 21. Although Appellant seemed to be able to assist in his own defense, according to Dr. Domino, he gave numerous incorrect responses regarding the role of his attorney. R. 9, line 25 – R. 10, line 9.

When Dr. Domino interviewed Appellant, he had tremors in his hand and lacked proper personal hygiene. R. 18, line 25 – R. 19, line 6. Appellant gave incorrect answers during the examination, such as Eisenhower was the current United States President and that the colors of the United States flag were brown and green. However, she concluded that Appellant intentionally gave incorrect information. R. 19, lines 7 – 15. She also explained that he acted silly by laughing or smiling all of a sudden, for no reason whatsoever. R. 19, lines 16 – 21.

On cross-examination, Dr. Domino admitted that Appellant had been in "special school" from an early age. R. 12, lines 3 – 7. She also admitted that he had a learning disability and was considered emotionally handicapped. R. 12, lines 8 – 11. Appellant suffered a severe head injury when he was eleven- or twelve-years old. R. 12, lines 19 – 21. Additionally, Appellant had received disability payments since 1995 based upon his diagnosis of paranoid schizophrenia. R. 12, lines 12 – 14. Although Appellant's mother had been his payee on these checks, he had another individual named as the payee

because of his paranoid distrust of his mother. R. 12, lines 15 – 18. Prior to his incarceration, Appellant had slept under a bed, complained of seeing a bald man, and believed his family members had been cloned. R. 13, lines 2 – 5; R. 13, lines 6 – 10; R. 16, line 21 – R. 17, line 4.

Appellant was admitted to the Gilliam psychiatric hospital multiple times between 1992 and 1999, where he was diagnosed as suffering from post-traumatic stress disorder, an anxiety and mania disorder, antisocial personality disorder, paranoid schizophrenia, and a delusional disorder. Not surprisingly, he was prescribed antipsychotic medications. R. 13, line 19 – R. 14, line 1; R. 22, lines 2 – 8; R. 14, line 25 – R. 15, line 4. Additionally, Appellant had received treatment at the Aiken Barnwell Mental Health Center between 1993 and 2010, where he had been diagnosed with schizophrenia, paranoid type and a delusional disorder. R. 15, lines 15 – R. 16, line 2; R. 224(Court's Exhibit #1).

Appellant had been evaluated by the Department of Mental Health in 1997, 2000, 2001, 2006, 2007, three times in 2008, and twice in 2010. R. 16, lines 3 – 8; R. 224 (Court's Exhibit #1). In 2007, Dr. Pamela Crawford found Appellant incompetent and not likely to restore. R. 16, lines 14 – 16. Appellant was admitted to Just Care in March 2010, on an emergency inpatient commitment due to his erratic behavior. R. 17, lines 13 – 23. Dr. Domino admitted that historically Appellant was noncompliant with his medications, including at the time of her interview and at the time of his trial. R. 18, lines 3 – 5; R. 20, lines 1 – 3. Dr. Domino admitted that Appellant's non-compliance with medication would have an impact on competency. R. 23, lines 6 – 9. Also, Dr.

Domino admitted that Appellant was not cooperative with her and that his lack of cooperation limited her ability to diagnose Appellant. R. 17, lines 5 – 8.

Testimony of Appellant

Appellant testified during the Blair hearing as well. Appellant stated that he understood he was in court "[t]o stand trial;" however, he indicated he was unsure of that response by posing it as a question. R. 31, lines 24 – 25. He further testified that it was the job of the jury to find him guilty or innocent. R. 32, lines 9 – 3. However, he indicated confusion regarding the subject matter that would be presented to the jury. Appellant wanted to testify regarding his having been hit on the head with a sledgehammer while he was at the jail and of his constitutional rights having been violated due to the delay in his trial. R. 32, lines 3 – 11; R. 32, line 25 – R. 33, line 2. He further indicated that he was charged with throwing bodily fluids. R. 32, lines 16 – 17. However, he indicated he was not worried about the seriousness of the charge because he was innocent. R. 32, lines 20 – 23. Appellant indicated unwillingness to help his attorney present his case explaining that he wanted to speak to the jury about the head injury. R. 33, lines 17 – 20.

Court's Exhibits

Dr. Domino's report indicated that on May 21, 2008 she determined Appellant was competent to stand trial because he was uncooperative and therefore, she had insufficient data to overcome the presumption of competence. Despite this finding by Dr. Domino, Appellant was found incompetent to stand trial by the court on June 16, 2008. R. 232 (Court's Exhibit #2). After Appellant underwent a period of competency restoration, Dr. Domino reexamined him on August 19, 2008. Again, Dr. Domino opined

that Appellant was competent because he had been uncooperative and there was insufficient evidence to overcome the presumption of competence. Nevertheless, the court held Appellant was incompetent to stand trial and unlikely to be restored. R. 235(Court's Exhibit #3). A month later, on May 5, 2009, Dr. Domino evaluated Appellant again. Because he was uncooperative, she opined that there was insufficient evidence to overcome the presumption of competence. However, when Appellant cooperated with her interview in November 2010, Dr. Domino found Appellant competent to stand trial. R. 224 (Court's Exhibit #1).

Judge's Ruling

Judge King found Appellant was competent to stand trial. The judge concluded that based upon the evidence presented, his observations of Appellant, and Appellant's testimony that Appellant understood the charges and the role of the jury. He further concluded that Appellant was malingering in his answers to some questions regarding the functions of the court in order to convince everyone that he was unaware of what the proceeding was about. R. 39, line 19 – R. 41, line 18.

Trial

Following Judge King's finding that Appellant was competent to stand trial, the parties proceeded to present evidence concerning the charge against Appellant, throwing bodily fluids, and Appellant's defenses.

Testimony of Frederick Hopkins

Frederick Hopkins, an officer at the Lexington County Detention Center, testified that on August 18, 2010, Appellant was an inmate at the detention center. R. 44, lines 12 – 16. Hopkins was working the first floor, which is where the detention center housed

inmates with special needs and mental health issues, such as Appellant. R. 44, line 21 – R. 45, line 1; R. 46, line 20; R. 55, lines 4 – 5. The officers reserved the clean-up of Appellant's cell until last because of the strong smell emanating from his cell even through the closed door. R. 46, line 9 – R. 46, line 15. When Hopkins opened the door, Appellant lobbed fecal matter hitting Hopkins in the abdomen and dribbling down onto his right leg. R. 46, line 25 – R. 47, line 4. Hopkins immediately sealed the door and called for assistance. R. 48, lines 20 – 24.

Hopkins was well aware of Appellant's mental illness. In fact, Hopkins was aware that Appellant was refusing to take medications around the time of the incident. R. 57, lines 2 – 6. Appellant stayed alone in his cell and took his recreation alone. R. 58, lines 19 – 20; R. 59, lines 1 – 5. After the alleged incident, Hopkins discovered that Appellant was hoarding feces under the sink in his cell. R. 61, lines 6 – 7. Hopkins and Appellant had no cross words before or after the incident, and the incident occurred out of the blue. R. 67, lines 15 – 23.

Testimony of James Clawson

James Clawson, another officer with the detention center, testified that after the alleged incident, he and others cleaned feces from Appellant's cell. The officers removed the linens and the mattresses, and cleaned the walls and the toilet to remove feces. R. 73, lines 8 – 18; R. 81, lines 17 – 24; R. 86, lines 19 – 22. Appellant had feces on his face and clothing. R. 81, lines 1 – 12. Although Clawson had almost daily contact with Appellant, he explained that Appellant experienced very little human interaction. R. 82, lines 19 – 25. Appellant usually said very few words and spent most of his time of alone. R. 83, lines 1 – 8.

Testimony of Appellant

Appellant did not graduate from high school. In fact, Appellant did not even make it into middle school. R. 98, lines 11 – 21. Appellant received disability benefits for mental illness – paranoid schizophrenia. R. 199, lines 19 – 22. Appellant claimed that Ella Walker was not his real mother and that his real mother lived in New York. R. 100, lines 2 – 10. Much of Appellant's testimony was irrelevant to the matter before the court because Appellant wanted to discuss the infringement of his constitutional rights and his being hit on the head with a sledgehammer by correctional officers. Appellant testified that he did not remember throwing feces on Hopkins. R. 109, lines 23 – 25. However, Appellant did recall putting feces on the walls at the detention center more than once. R. 112, line 20 – R. 113, line 2.

Testimony of Casandra Means

Casandra Means, a counselor with the Department of Mental Health, worked as a counselor at the detention center. R. 118, lines 1 – 10. Appellant was housed with other individuals requiring mental health observation. R. 123, lines 2 – 18. Although Appellant initially interacted with her, his level of interaction decreased over time. Appellant was isolated, did not talk, and did not engage. Although he would make eye contact at times, he would not answer questions. R. 123, lines 19 – 25. Appellant always had a flat affect, meaning he showed no expression or emotion. R. 124, lines 10 – 13. Appellant's willingness to engage in conversations fluctuated. R. 124, lines 14 – 18. However, even at his best, Appellant was not a conversationalist. R. 125, lines 4 – 6. Appellant would not communicate with Means or anyone else for long periods of time. R. 125, line 7 – 9. She found him to be consistent in his conduct and mannerisms. R.

125, lines 10 – 16. Means recalled that at the time of the alleged incident, Appellant was presenting symptoms consistent with mania. Mania involved a high energy state and irrational thinking. R. 132, line 15 – R. 133, line 8.

Testimony of Merrie Cherry

Merrie Cherry, the psychiatrist at the detention center, had contact with Appellant fairly regularly because he had significant mental illness. R. 137, lines 1 – 9; R. 140, lines 3 – 4; R. 140, lines 12 – 16. She explained that Appellant had never been one to volunteer information. He would answer questions asked, but he would not elaborate or provide details. Recently, he refused to answer questions altogether. During his depressed state he isolated more. Although he may answer her questions, he would be "cocooned" in his sheets and blanket. She described him as having a very flat affect. During periods of mania, Appellant showed increased agitation, increased psychomotor activity, increased impulsivity, and hypersexuality. She also explained that during his mania, he would laugh loudly and inappropriately. R. 141, lines 1 – 24. Dr. Cherry diagnosed Appellant with bipolar affective disorder. R. 142, lines 3 – 5. She explained his disorder was defined by episodes of severe mania, including psychotic symptoms. R. 142, line 8 – 15. Dr. Cherry acknowledged that previously Appellant had been diagnosed with schizophrenia, indicating he had had delusions, false beliefs, and paranoia. R. 143, lines 5 – 24.

Testimony of Ella Walker

Ella Walker, Appellant's mother testified. Although Appellant had testified that she was not his birth mother, Walker testified that she had in fact given birth to him on November 1, 1959. R. 152, lines 5 – 12. Appellant dropped out of school at the age of

twelve. R. 153, lines 1 – 3. Appellant received disability payments as he was unable to hold a job due to his mental illness. R. 153, lines 6 – 10. Although Walker had been the payee on his check, Appellant developed a distrust of her and the payee was changed. R. 153, lines 11 – 18. Walker allowed Appellant to live in the home next door to hers. Appellant tore out the walls because he saw a "bald headed Mexican," who was trying to harm him. R. 154, lines 1 – 16. Appellant would not eat food that she prepared for him because he feared she was trying to poison him. R. 154, line 21 – R. 155, line 3.

When Appellant returned from the jail, he had a scar and insisted the scar showed that he had been cloned. He wore sheets and aluminum foil around his waist as protection. R. 155, lines 4 – 11. Appellant repeatedly complained of hearing voices throughout his life. R. 155, lines 15 – 19. Appellant additionally had visual hallucinations, usually involving the "bald headed Mexican." R. 155, lines 20 – 24. Appellant's visual and auditory hallucinations worsened over time. R. 156, lines 3 – 5.

Testimony of Dominique Curry

Dominique Curry, Appellant's daughter testified. R. 158, lines 11 – 14. Appellant often claimed he saw "small, little midgets, white people, ball headed Mexicans running around." R. 158, line 20 – R. 159, line 2. Appellant believed that his family members had been replaced by clones. R. 159, lines 3 – 8. Appellant accused his mother of attempting to poison him, and he refused to eat food prepared by others. R. 159, lines 12 – 19. Appellant tore down the walls in the house because he thought people were inside the walls trying to get to him or kill him. R. 159, line 23 – R. 160, line 5. Appellant believed the correctional officers had placed a tracking device in his chest. As a result, he always wore aluminum foil around his chest to keep the tracking device from

working. R. 160, lines 6 – 14. Appellant believed the tracking device was to aid others in killing him. R. 160, lines 15 – 18. Curry recalled Appellant sitting in the living room and then suddenly jumping up by the air because he believed people were attacking him. R. 160, line 19 – R. 161, line 1.

Testimony of Dr. Marla Domino

In reply, the prosecution called Dr. Domino. Specifically, Dr. Domino testified that in her opinion, Appellant did not lack the capacity to distinguish right from wrong at the time of the alleged crime. Dr. Domino reached this conclusion based upon her opinion that Appellant was not experiencing symptoms of mental illness at the time of the alleged act. R. 186, line 14 – R. 187, line 1. Additionally, Dr. Domino testified that in her opinion, Appellant was able to conform his conduct to the requirements of the law. R. 187, lines 2 – 5. This decision, as well, was based upon her opinion that Appellant was not experiencing symptoms of mental illness at the time of the alleged period. R. 187, lines 6 – 20; R. 224 (Court's Exhibit #1).

Charge Conference – Request for GBMI & NGRI

At the conclusion of the presentation of evidence, Appellant moved for the jury to consider the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI). The judge refused to instruct the jury as to these two verdicts because he found no evidence in the record that Appellant lacked the ability to distinguish right from wrong. The judge surmised that the test in South Carolina is whether the moving party put forward evidence regarding the defendant's inability to distinguish right from wrong. The judge found no testimony in the record regarding Appellant's inability to distinguish right from wrong. He concluded that the only testimony in the record concerning the

issues was from the prosecution that Appellant possessed the ability to distinguish right from wrong. The judge agreed that Appellant displayed "eccentric behavior," but determined there was no testimony that Appellant lacked the ability to distinguish right from wrong. R. 196, line 5 – R. 201, line 20.

Renewal of requests to charge

At the conclusion of the jury instructions, Appellant renewed his request for the charge on the mental health defenses of NGRI and GBMI. R. 215, lines 16 – 19. The judge again denied the request. R. 215, line 20 – R. 216, line 1.

Motion for new trial

After the jury returned its guilty verdict, Appellant moved for a new trial based on the judge's refusal to charge the jury as to NGRI and GBMI. Appellant argued that the judge was requiring that he present testimony, either expert or lay, that at the minute of the alleged incident, Appellant did not know the difference between right and wrong, or that he was insane. Appellant argued that he presented testimony from Dr. Cherry and Dr. Means regarding his mental health around the time of the crime and had provided testimony regarding Appellant's mental health in general. R. 218, line 7. R. 219, line 18. The judge disagreed, stating that the law required Appellant to present evidence, not just of manifestations of mental illness, but specific evidence of his inability to distinguish right from wrong at the time of the crime. R. 219, line 19 – R. 220, line 13.

ARGUMENT

I. In violation of Appellant's state and federal constitutional right to due process of law, the trial judge erred in finding Appellant competent to stand trial where Appellant presented evidence that he lacked an understanding of the proceedings against him and the ability to assist in his defense as a result of mental illness.

An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. Medina v. California, 505 U.S. 437, (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. Pate, 383 U.S. at 378.

South Carolina law provides that whenever a judge "has reason to believe that a person on trial before him, charged with the commission of a criminal act ... is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or assistant in his own defense as a result of lack of mental capacity," the judge shall order an examination of the individual by the Department of Mental Health. S.C. Code Ann. § 44-23-410.

The test for determining competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." State v. Weik, 356 S.C. 76, 81, 687 S.E.2d 683, 685 (2002) (citing Dusky v. United States, 362 U.S. 402 (1960)); State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is

before the court for trial, not the time of the alleged offense. Monahan v. State, 365 S.C. 130, 616 S.E.2d 422 (2005).

The Supreme Court found plea counsel provided ineffective assistance by failing to request a competency hearing to determine the defendant's fitness to stand trial where the defendant presented evidence at his post-conviction relief (PCR) hearing that he was learning disabled, suffered a major head injury from a near-fatal car accident a year before the crimes, and as a result of the accident had severe frontal lobe brain damage. The defendant's expert at the PCR hearing testified that the defendant was incompetent and could not assist in his defense. The Court concluded the defendant "clearly established by a preponderance of the evidence" that he was incompetent at the time he entered his guilty plea. Matthews v. State, 358 S.C. 456, 459-460, 596 S.E.2d 49, 50-51 (2004).

The judge erred in finding Appellant competent to stand trial where even the state's expert testified that Appellant answered questions regarding the judicial process incorrectly and had a history of severe mental illness dating back decades. His mental illness was documented from the early 1990s and included his receipt of disability payments based upon his diagnosis of schizophrenia. Dr. Marla Domino, the state's expert, admitted Appellant had significant mental health history, including multiple evaluations by the Department of Mental Health, commitments to Just Care and the Gilliam Psychiatric Unit, and outpatient treatment at community mental health centers. She further admitted that Appellant required education in various areas of competency. Appellant believed the prosecutor was his advocate, that the judge was on his side, and that his attorney was "rotten to the core" and wanted "to fry him." When Dr. Domino interviewed Appellant,

he had tremors in his hand and lacked proper personal hygiene. Additionally, Appellant gave incorrect answers during the examination, such as Eisenhower was the current President and that the colors of the flag were brown and green. She also explained that he acted silly by laughing or smiling all of a sudden, for no reason whatsoever. Despite Appellant's lengthy history of mental illness and clear evidence that he experienced manifestations of mental illness when not incarcerated, Domino opined that Appellant was feigning an inability to learn the information regarding the responsibilities of courtroom personnel. She also concluded that Appellant intentionally gave incorrect information.

Appellant's testimony indicated that he understood he was going to trial and that the jury would find him guilty or innocent, but he manifested a clear lack of understanding concerning the purpose of the trial. Appellant repeatedly explained that he believed the purpose of the hearing was to produce evidence concerning his having been hit in the head with a sledgehammer while incarcerated at the detention center and the infringement of his constitutional rights due to the delayed trial. His answers to questions posed and his spontaneous outbursts demonstrated his inability to comprehend the purpose of the trial itself.

The trial judge erred in finding Appellant competent to stand trial based upon the evidence presented. The records showed Appellant suffered from severe mental illness and the state was unable to dispute the clear historical record of Appellant's altered state of mind as the result of mental illness. The testimony of Dr. Domino and Appellant demonstrated his lack of understanding of the proceedings against him and his inability to assist in his defense.

II. In violation of Appellant's state and federal constitutional right to due process of law, the trial judge erred in failing to charge the jury regarding guilty but mentally ill where Appellant presented evidence that he was unable to conform his conduct to the requirements of the law at the time of the commission of the offense.

South Carolina law provides for the verdict of guilty but mentally ill (GBMI). S.C. Code Ann. § 17-24-30. A defendant is GBMI if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong, but because of mental disease or defect, he lacked sufficient capacity to conform is conduct to the requirement of the law. S.C. Code Ann. § 17-24-20(A); State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993). The burden of proof is on the defendant to prove by a preponderance of the evidence that at the time of the crime he was mentally ill. S.C. Code Ann. § 17-24-20(B). If a defendant is found to be GBMI, the judge must sentence the defendant as provided by law for a defendant found guilty; however, if the sentence includes incarceration, then the defendant must be taken to a facility designated for treatment and retained there until he may be safely moved to the general population. S.C. Code Ann. § 17-24-70 (A). Expert testimony is not necessary to prove insanity or sanity; lay testimony may be sufficient. Id.; State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). In fact, a jury may disregard expert testimony on the issue of a defendant's sanity. Id. "The law to be charged is determined from the facts presented at trial." Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986)).

"The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally

ill inmates receive treatment for their benefit as well as society's while incarcerated." State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997)(citing State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)). The GBMI statute provides a guide for a jury when considering whether a defendant is not guilty, NGRI, GBMI, or guilty. Id. at 127, 484 S.E.2d at 872.

In State v. Hartfield, 300 S.C. 469, 471-472, 388 S.E.2d 802, 803 (1990), the South Carolina Supreme Court reversed a defendant's drug convictions where the trial judge refused to allow the jury to consider NGRI or GBMI because the defendant's mental condition was the result of organic brain syndrome caused by chronic substance abuse. The Court reasoned that although the voluntary intoxication or use of drugs does not constitute a defense to a crime, insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant's ability to know right from wrong. Id. at 473, 388 S.E.2d at 804. In proceedings to determine whether the defendant was competent to stand trial, the defendant presented an expert who testified he was incompetent based upon his delusional thought system. The defendant suffered from paranoid psychosis. The expert testified that three weeks prior to the alleged incident, the defendant was "'crazy as a billy goat.'" The expert opined that Appellant was unable to distinguish right from wrong or to recognize his acts as wrong. Id. at 471, 388 S.E.2d at 803.

At his trial, Poindexter presented lay testimony that he exhibited behavioral changes in the months prior to the murder for which he was charged. Poindexter presented an expert who testified that Poindexter was unable to absorb vitamin B-12 and was insane as a result. The jury rejected Poindexter's claim that he was insane, but found

him GBMI. Poindexter, 314 S.C. at 491-492, 431 S.E.2d at 254. The Supreme Court affirmed the trial court's refusal to direct a verdict of NGRI where the prosecution presented lay testimony that Poindexter fled after the murder, appeared normal within hours of the murder, and was cooperative during the arrest. Despite the strong evidence of Poindexter's insanity, the Court found evidence in the record from which the jury could have deduced that Poindexter was sane. "The jury was free to rely on circumstantial evidence to find Poindexter sane even though expert testimony favored a finding that he was insane." Id. at 493-494, 431 S.E.2d at 256.

Compelling testimony to support Appellant's contention that if he were guilty, then he was GBMI came from the officers and mental health specialist employed by the detention center. Hopkins, the alleged victim in the case, explained that Appellant was housed in an area of the detention center where inmates with special needs and mental health issues were placed. Appellant stayed alone in his cell and took his recreation alone. Hopkins was aware that Appellant was refusing to take medications around the time of the incident. After the alleged incident, Hopkins discovered that Appellant was hoarding feces under the sink in his cell, a clear sign of mental illness. Clawson, another officer with the detention center, testified that after the alleged incident, he and others cleaned feces from Appellant's cell, including on the linens, walls, and the toilet area. Appellant even had feces on his face and clothing.

Casandra Means, a counselor with the Department of Mental Health, explained that although Appellant initially interacted with her, his level of interaction decreased over time. Appellant was isolated, did not talk, and did not engage. Although he would make eye contact at times, he would not answer questions. Appellant always had a flat

affect, meaning he showed no expression or emotion. Appellant's willingness to engage in conversations fluctuated in that he would not communicate with Means or anyone else for long periods of time. She found him to be consistent in his conduct and mannerisms. Means testified specifically that at the time of the alleged incident, Appellant was presenting symptoms consistent with mania associated with bipolar disorder. Merrie Cherry, the psychiatrist at the detention center, testified similarly to Means regarding Appellant's seclusion, affect, and communication. Dr. Cherry diagnosed Appellant with bipolar affective disorder. She explained his disorder was defined by episodes of severe mania, including psychotic symptoms.

The testimony of Appellant and his family reinforced the testimony of the detention center employees that he was severely mentally ill. Appellant claimed that Ella Walker was not his real mother and that his real mother lived in New York; however Walker testified clearly that she had given birth to Appellant. Additionally, much of Appellant's testimony was irrelevant to the matter before the court because Appellant wanted to discuss the infringement of his constitutional rights and his being hit on the head with a sledgehammer by correctional officers. Appellant testified that he did not remember throwing feces on Hopkins; however, he did recall putting feces on the walls at the detention center more than once.

Walker testified that Appellant developed a distrust of her for no apparent reason. He changed his disability check to reflect another family member as payee rather than Walker. He would not eat food prepared by Walker because he feared she was poisoning him. She explained that Appellant slept under the bed rather than on it and feared people were trying to kill him. He had hallucinations of a "bald headed Mexican," who was

trying to harm him, which led to Appellant tearing down walls in his home in an effort to defend himself. Appellant insisted he had been cloned and wore sheets and aluminum foil around his waist as protection. Appellant repeatedly complained of hearing voices throughout his life. Appellant's daughter testified that Appellant often claimed he saw "small, little midgets, white people, ball headed Mexicans running around." Appellant believed that his family members had been replaced by clones. Appellant tore down the walls in the house because he thought people were inside the walls trying to get to him or kill him. Appellant believed the correctional officers had placed a tracking device in his chest. As a result, he always wore aluminum foil around his chest to keep the tracking device from working.

Although Dr. Domino was presented as a reply witness by the state, she informed the jury of Appellant's history of severe mental illness and repeated hospitalizations. She informed the jury of Appellant's decades-long battle with mental illness.

The jury had ample evidence to support Appellant's contention that he was GBMI from lay witnesses and an expert. Nevertheless, the trial judge refused to charge the jury as to GBMI. The judge's comments indicated that he required a witness to testify to "magic words" in order for such a verdict and charge to be given. He stated there was no testimony in the record that Appellant lacked the ability to distinguish right from wrong. The judge agreed that Appellant displayed "eccentric behavior," but determined there was no testimony that Appellant lacked the ability to distinguish right from wrong. What the judge disregarded was the clear evidence in the record concerning Appellant's mental illness and the indications that he was suffering from mental illness at the time of the alleged crime. Appellant's family testified as to his delusions regarding correctional

officers attempting to kill him, clone him, and implant tracking devices. The mental health specialists who saw him around the time of the incident testified to Appellant exhibiting characteristics of mania shortly before the incident and that mania is characterized by delusions.

It was for the jury to determine whether Appellant's mental illness rendered him unable to conform his conduct to the requirements of the law at the time of the crime. Neither South Carolina case law nor statutory law required Appellant to present expert testimony regarding an opinion of such. Rather it is the province of the jury to make such a determination. The trial judge required specific testimony that Appellant lacked the ability to conform his conduct to the requirements of the law in order to instruct the jury concerning GBMI, but this is not the state of the law. Only an expert would be permitted to render an opinion that a defendant lacked the ability to conform his conduct to the requirements of the law, but our case law specifically provides that expert testimony is not necessary in order to entitle a defendant to a GBMI verdict and charge. A lay witness could never offer such opinion testimony. Therefore, specific testimony that Appellant lacked the ability to conform is his conduct to the requirements of the law was not required.

III. In violation of Appellant's state and federal constitutional right to due process of law, the trial judge erred in failing to charge the jury regarding not guilty by reason of insanity where Appellant presented evidence that he lacked the ability to distinguish right from wrong or to recognize the particular act was wrong due to his severe mental illness.

A defendant is insane if, "at the time of the commission of the act constituting the offense, [he], as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(A). "[T]he key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself – to recognize the act complained of is either morally or legally wrong.'" Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (1997)(quoting State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992)). A defendant is presumed to be sane. State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993). The burden is on the defendant to prove the defense of insanity by a preponderance of the evidence. S.C. Code Ann. § 17-24-10(B). "However, when a defendant offers evidence of insanity, the state no longer enjoys the presumption, but must present evidence to the jury from which the jury could find the defendant sane." Smith, 298 S.C. at 208, 379 S.E.2d at 288.

As an initial matter, Appellant incorporates by reference the arguments and case law presented in reference to Issue II, supra. Just as the trial judge required actual testimony indicating Appellant lacked the ability to conform his conduct to the requirements of the law in order to instruct the jury concerning GBMI, the trial judge also required specific testimony indicating Appellant lacked the ability to distinguish right

from wrong in order to instruct the jury concerning NGRI. This was error. Appellant presented ample evidence from lay and expert witnesses regarding his mental health at the time of the incident.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court reverse his conviction and sentence and find that he was incompetent to stand trial. Appellant requests this Court remand the case to the trial court for proceedings consistent with a criminal defendant having been found incompetent. As to Issues II and III, Appellant respectfully requests this Court reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE STEWART CURRY,

APPELLANT

Appellate Case No. 2012-213370

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of January, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.