STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTOINE LAKIDA HIGHTOWER,

APPELLANT

APPELLATE CASE NO. 2018-000822

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On December 7, 2017, a York County Grand Jury indicted Appellant for the offenses of first degree burglary, kidnapping, assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime. R. 261 – 266. Appellant was represented by Devon Nielson and Mark McKinnon. R. 27. The State was represented by Chris Epting and Dan Porter. R. 27.

Motions were heard before the Honorable Daniel D. Hall in the weeks leading up to trial. R. 1; R. 13. Appellant was tried before the Honorable John C. Hayes, III, and a jury from April 23 – 25, 2018. R. 27; R. 187. Appellant was found guilty as indicted and the court sentenced him to serve concurrent terms of imprisonment of twenty-five years for first degree burglary, twenty-five years for kidnapping, twenty years for ABHAN, and five years for possession of a weapon during the commission of a violent crime. R. 267 – 270.

This appeal follows.

STANDARD OF REVIEW

"The ordering of a competency evaluation is within the discretion of the trial judge." *State v. Colden*, 372 S.C. 428, 641 S.E.2d 912 (2007) (citing *State v. Drayton*, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978); *State v. Singleton*, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). "The refusal to grant such an examination will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.*

In *Monahan v. State*, 365 S.C. 130, 132-34, 616 S.E.2d 422, 423-24 (2005), the South Carolina Supreme Court found no abuse of discretion where the trial court ordered that the defendant undergo a second criminal responsibility evaluation at the behest of the State. "The trial judge has the discretion to order a mental health evaluation where the defendant indicates an intent to introduce evidence at trial that he lacked criminal responsibility." *Id.* at 133, 616 S.E.2d at 424.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

STATEMENT OF FACTS

Schizophrenia

On March 27, 2018, Appellant appeared before the Honorable Daniel D. Hall for a motion to relieve his counsel, Devon Nielson. R. 1; R. 5, ll. 1-8. The court questioned Appellant about his background.

> THE COURT: Have you ever been treated for any mental or emotional disability?
>
> MR. HIGHTOWER: Yes, sir, I am.
>
> THE COURT: Tell me about that.
>
> MR. HIGHTOWER: I had kind of diagnosed back in 2000 with paranoid schizophrenia.
>
> THE COURT: All right. Are you on any kind of medication today?
>
> MR. HIGHTOWER: Yes, sir, I am.
>
> THE COURT: What type of medication?
>
> MR. HIGHTOWER: Seroquel.

R. 6, ll. 4-16.

The court asked Appellant if he understood his discussions with counsel about the consequences he would face if he accepted a plea bargain offered by the State, and Appellant said that he did not. R. 9, ll. 1-7.

> THE COURT: It's a mandatory fifteen-year sentence. So really what you're looking at through their offer, and I'm sure Mr. Nielson has explained this to you, is that you're looking at somewhere between fifteen and twenty years, if, you accepted the offer. Did you understand that?
>
> MR. HIGHTOWER: I didn't understand that part. But he was—I believe was trying to make me just take the fifteen and it's my first time being in trouble down here.

R. 9, ll. 1-9. The court denied the motion.

On April 4, 2018, the parties appeared before the court again and Appellant's counsel moved the court to order a psychiatric evaluation of Appellant. R. 13; R. 15, ll. 19-23. Counsel said that when Appellant came before the court the previous week and told the court that "he had suffered throughout his lifetime from schizophrenic episodes . . ." that was the first time counsel had heard of Appellant's "mental disorders." R. 16, l. 21 – 17, l. 1. Counsel moved that the court allow Appellant "to be evaluated by the Department of Mental Health before we proceed—proceed to trial." R. 18, ll. 7-10.

Counsel said an evaluation was necessary to determine whether Appellant "was going through a schizophrenic episode . . ." at the time of the offense, and to "prepare his defense in the best way we possibly can for this case." R. 17, ll. 11-18; R. 18, ll. 1-3.

The court questioned Appellant and learned that he had been receiving mental health treatment since age fifteen[1] and received supplemental security income for his mental illness. R. 17, ll. 11-14; R. 18, ll. 23-24; R. 19, ll. 19-24. The court heard that Appellant was being administered the medication Seroquel at the detention center. R. 19, ll. 7-18. According to Appellant, he had not seen a doctor for his mental illness since 2016. R. 19, ll. 2-6. Appellant informed the court that prior to his arrest, he was "working at Ruby Tuesday, but they had stopped working me because of my mental situation." R. 20, ll. 9-12.

The solicitor objected to Appellant receiving an evaluation, and argued the motion was merely a "delay tactic" by Appellant. R. 16, ll. 8-13; R. 25, ll. 2-5.

The court denied the motion and said, "There doesn't appear to be any basis by which the Court believes his ability to understand the difference between right and wrong at the time of the occurrence was affected by his mental state." R. 21, ll. 9-12. "I find he certainly has obtained a

[1] Appellant was forty years old at the time of his trial. R. 18, ll. 14-16.

GED. He appears to be properly medicated. He understands what's going on in court here today." R. 21, ll. 5-8. "He's very—is articulate, and so I find no basis by which this Court will order a mental evaluation." R. 21, l. 24 – 22, l. 1.

Counsel took exception to the ruling, "[A]t the time of the occurrence, you did not ask him any questions about that, and he was not on his med—medications at the time of the occurrence." R. 22, ll. 7-10.

However, the court said the fact that Appellant "was not on his medication at the time of the occurrence . . . there doesn't seem to be any basis by which that—that in and of itself would merit an evaluation as far as his ability to know the difference between right and wrong, criminal responsibility at the time." R. 22, ll. 15-21. The court continued, "I will note that court judges have just been very recently cautioned on being—on signing an [order] for mental evaluations . . . not to rush to sign mental evaluations, and I find him to be—there's no need for that in this case." R. 22, l. 22 – 23, l. 4.

The parties proceeded to trial from April 23 – 25, 2018, before the Honorable John C. Hayes, III. R. 27; R. 187. During pretrial motions, defense counsel renewed his motion for an evaluation. R. 68, ll. 2-10. Counsel told the trial judge the parties "went before Judge Hall about three weeks [ago] after it came to our attention that my client suffers from schizophrenia throughout his lifetime and made a motion for a mental health evaluation by the Department of Mental Health. That was turned down." R. 68, ll. 2-9.

The trial court asked, "Well, do you have anything that's different from when Judge Hall ruled?" and counsel replied, "We do not." R. 68, ll. 11-13. The court ruled, "Well, then, I find Judge Hall's ruling is the law of the case and there being no reason for the Court to revisit it since there's nothing additional or new or supplemental being offered." R. 68, ll. 14-17. After the

State rested its case, defense counsel renewed his motion for a mental health evaluation. R. 197, ll. 8-10.

Incident at the hotel

On the night of August 23, 2017, Tymel McCullough (McCullough) and his friend Maurice Taylor (Taylor) were sharing a hotel room at the Hillside Inn with two female guests. R. 110, l. 7 – 111, l. 8. According to McCullough, he had a passing acquaintance with Appellant because Appellant had worked with McCullough's father at Ruby Tuesday. R. 52, l. 23 – 53, l. 4.

McCullough was incarcerated at the time of the trial but was brought up from the holding cell to testify. R. 47, ll. 2-3.

McCullough claimed that Appellant approached him in the hotel parking lot and asked him for a light. R. 140, ll. 9-12. McCullough said he told Appellant that he did not have a lighter on him and went back in his hotel room where he told Taylor, "[Y]o this guy out here is looking real strange." R. 140, ll. 14-24. According to McCullough, he did not leave the room to give Appellant a light, "Because I didn't trust the way he was acting. It didn't set well with me." R. 141, ll. 11-13. "[H]is whole demeanor was strange from the start." R. 139, ll. 4-5.

McCullough claimed Appellant knocked on the door several times and the men told him they could not have any more company in the hotel room. R. 141, ll. 15-23. The men heard a "big bang at the door" and "after a couple of kicks or shoves" the door opened. R. 142, ll. 8-13. McCullough said he saw Appellant with a handgun and thought, "Oh, shit." R. 143, ll. 2-7. It turned out to be a BB gun. R. 178, ll. 3-7.

According to McCullough, Appellant said, "Where is the guy with the gold," and McCullough ran out of the room with Appellant chasing him. R. 143, l. 12 – 144, l. 11. McCullough said Appellant "grabbed me, picked me up, carried me a little short distance and

slammed me to the ground and started beating me with a pistol." R. 144, ll. 12-16. Appellant was not speaking. R. 144, ll. 20-22. According to McCullough, he picked up a brick and hit Appellant with it and ran back to the room, but Appellant followed him in and hit McCullough with the brick until McCullough was "knocked out." R. 144, l. 24 – 146, l. 20. McCullough needed stitches in his head and his back and neck were injured. R. 158, l. 23 – 159, l. 12.

Taylor corroborated McCullough's version of events. Taylor described an unprovoked, bizarre, and chaotic event with Appellant kicking the door in, the females in the room screaming, Taylor attempting to arm himself with a closet rod, and Appellant beating McCullough and ripping his underpants off. R. 113, ll. 20-21; R. 115, ll. 4-5; R. 117, ll. 7-9.

Neither the men nor the State were able to ascribe a motive to the attack. R. 165, ll. 12-19; R. 129, ll. 23-25. Taylor said he was acquainted with Appellant and they were on good terms, "I've even sat and had dinner with [Appellant] at his house." R. 122, ll. 20-23.

In addition to the testimony of Taylor and McCullough, the State introduced video surveillance footage[2] from the hotel that depicted: Appellant kicking the hotel room door open; Appellant running after McCullough outside the hotel; Appellant holding a what appeared to be a gun and a brick at times; and a physical altercation in the parking lot. State's Exhibit #1. The State introduced the bloody brick and pieces of a broken BB gun found at the scene, and it introduced photographs of McCullough's injuries taken by police officers. R. 178, l. 3 – 180, l. 8; R. 104, ll. 5-24.

However, the solicitor was not content with this evidence and sought to introduce State's Exhibit #3, a video and audio recording captured on Officer Brown's body camera.[3] On the

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[2] The hotel surveillance footage comprised State's Exhibit #1 and is on file with this Court.

[3] The officer's bodycam recording comprised State's Exhibit #3 and is on file with this Court.

recording, McCullough and Taylor give detailed statements about the incident in response to questions by Officer Brown. State's Exhibit #3. The two men describe what happened and describe the assailant. State's Exhibit #3. The recording was seven and a half minutes long.

The solicitor redacted the officer's statements (and Officer Brown could not be present at the trial) but left the statements by McCullough and Taylor on the recording. State's Exhibit #3; R. 62, l. 19 – 63, l. 4. Defense counsel moved pretrial to exclude the body camera recording, and argued the recording was hearsay and cumulative. R. 62, ll. 7-9; R. 63, ll. 18-24; R. 64, ll. 10-16. Defense counsel noted the "two witnesses are both available. They can both testify." R. 64, ll. 10-12.

The solicitor argued the bodycam recording was admissible because it showed the hotel room, and showed McCullough's "state of mind" and his injuries. R. 62, ll. 15-18. According to the solicitor, because McCullough and Taylor were going to testify at trial, their recorded statements were not hearsay. R. 63, ll. 8-16.

Defense counsel responded, "They can say how they were feeling that day. They can say how they were hurt. There were pictures that were taken that can be shown to the jury. This is cumulative, it's—it's nothing but cumulative. It's nothing but bolstering." R. 64, ll. 10-16. Defense counsel offered that he had "no problem" with the State showing the demeanor of McCullough on the video if it would "mute" the audio. R. 150, ll. 18-19. However, the solicitor rejected the compromise.

The court ruled Taylor and McCullough's recorded statements the night of the incident were not hearsay because they were available to testify at trial: "[T]hat's not hearsay—technically, it's kind of hearsay, but it's not hearsay because the declarant is subject to cross-examination." R. 65, l. 24 – 67, l. 1.

ARGUMENT

1.

The court's denial of defense counsel's motion for an evaluation by the Department of Mental Health was error where the court heard that Appellant suffered from paranoid schizophrenia which was untreated at the time of the offense, since the denial deprived Appellant of the opportunity to determine the possible existence of an insanity defense.

The court's ruling denying Appellant an opportunity to be evaluated by the Department of Mental Health for criminal responsibility was arbitrary, since the court knew Appellant had paranoid schizophrenia, which was untreated the night of the offense, and it deprived Appellant of the opportunity to determine if he had an insanity defense.

As discussed above, the court knew that Appellant had a history of mental illness spanning twenty-five years and had been diagnosed with paranoid schizophrenia, which was being treated with the medication Seroquel. R. 18, ll. 19-24; R. 6, ll. 4-16. The court knew that Appellant had not been medicated at the time of the offense. R. 22, ll. 9-17. Counsel correctly asked that Appellant be evaluated by the Department of Mental Health to determine whether he had been "going through a schizophrenic episode" at the time of the offense. R. 17, ll. 11-18. The court erred when it found there was no basis to believe Appellant's "ability to understand the difference between right and wrong at the time of the occurrence was affected by his mental state." R. 21, ll. 9-12.

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); U.S. CONST. amend. VI. This right is also guaranteed by the South Carolina Constitution. S.C. Const. art. I, § 14. "Insanity is

an affirmative defense to a prosecution for a crime." *State v. Lewis*, 328 S.C. 273, 277, 494 S.E.2d 115, 117 (1997); S.C. Code Ann. § 17-24-10.

"An accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts." *Davenport v. State*, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990). "The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial." *Monahan v. State*, 365 S.C. 130, 133, 616 S.E.2d 422, 423 (2005).

"[W]hen it appears to counsel that the accused is mentally ill and that he cannot afford to consult a psychiatrist, it is counsel's duty to inform the court of this situation and move for a psychiatric examination. Such requests are not lightly turned aside." *Proffitt v. United States*, 582 F.2d 854, 859 (4th Cir. 1978) (citations omitted). "[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

The Fourth Circuit has addressed whether a trial court's denial of a defendant's pretrial motion for a psychiatric evaluation to determine criminal responsibility deprived him of "an adequate opportunity to determine the possible existence of a substantial defense of insanity," and found that it did. *United States v. Taylor*, 437 F.2d 371, 373 (4th Cir. 1971).

Taylor was charged with attacking another man with a metal mop wringer, an attack that was "apparently without rational motive," and he had an "extensive history of mental disturbance" including psychosis and paranoia. *Id.* at 373-74. However, the trial court denied his

counsel's motion for an evaluation to determine competency to stand trial and to determine criminal responsibility. *Id.* at 375. As a result, no insanity defense could be offered at trial. *Id.*

The Fourth Circuit found no error in the trial court's determination that Taylor was competent to stand trial—it was not alleged that he experienced difficulty communicating with his attorney or did not understand the proceedings. *Id.* at 376. However, the Court explained that unlike competency to stand trial, "[a] claim that the defendant is not criminally responsible . . . is unconcerned with the defendant's understanding of the situation at the time of trial, but is directed entirely to his capacity to understand and to control his conduct at the time of the commission of the offense." *Id.* at 375. The Court clarified that the question of competency "may have little or no bearing upon" the question of criminal responsibility, "for many defendants who may not be held criminally responsible for their unlawful acts are clearly competent to stand trial." *Id.* at 376. The Fourth Circuit concluded, "Manifestly, under these circumstances counsel required expert assistance in determining whether there was a basis for a substantial defense of insanity and in preparing and presenting such a defense if, after examination, it appeared justified. *Id.*

Several weeks prior to trial, Appellant's counsel moved for an evaluation by the Department of Mental Health. The trial court heard that Appellant had a history of mental illness that spanned twenty-five years, and that he suffered from paranoid schizophrenia, a condition for which he was unmedicated the night of the crime. The court stated it was denying the motion because Appellant was "articulate," had "obtained a GED," and appeared to "understand[ ] what's going on in court here today." R. 21, l. 24 – 22, l. 1. However, while relevant to competency, these considerations are not determinative as to whether Appellant was criminally

responsible on the night of the offense. The court erred when it apparently confused competency with criminal responsibility.

It appears the trial court allowed a recent "caution" to the bench that judges should not be in a "rush to sign mental evaluations" to erroneously cloud its judgment in this case, where an evaluation was plainly warranted, since the court recognized that Appellant suffered from paranoid schizophrenia and "was not on his medication at the time of the occurrence." R. 22, ll. 16-17.

Paranoid schizophrenia is a condition "characterized predominantly by delusions of persecution and megalomania." Stedman, Thomas L. *Stedman's Medical Dictionary for the Health Professions and Nursing* (2014). "The key feature of this subtype of schizophrenia is the combination of false beliefs (delusions) and hearing voices (auditory hallucinations), with more nearly normal emotions and cognitive functioning (cognitive functions include reasoning, judgment, and memory). *The Gale Encyclopedia of Medicine* (Jacqueline L. Longe, ed., 4th ed. 2012). Paranoid schizophrenia was the mental illness at issue with the defendant in *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

In finding the trial court erred when it denied the defendant's motion to be evaluated for criminal responsibility, the Fourth Circuit in *Taylor*, *supra*, 437 F.2d at 377, observed that his counsel's "motions were replete with factual allegations casting serious doubt on Taylor's responsibility for his conduct." *See also Wood v. Zahradnick*, 430 F. Supp. 107, 111 (E.D. Va. 1977), *aff'd*, 578 F.2d 980 (4th Cir. 1978) (defense counsel was ineffective in failing to investigate criminal responsibility and competency where the "crime itself was of such a bizarre nature" as to call into question the defendant's mental condition).

Here, in addition to Appellant's twenty-five-year history of mental illness, the odd nature of the factual allegations in his case illustrate the need for a criminal responsibility evaluation. According to the State, Appellant kicked in the door of acquaintances unprovoked, asked for "the guy with the gold," and chased Tymel McCullough, beating him badly and tearing his underpants off. No motive was established. McCullough said just prior to the allegedly unprovoked attack, Appellant was "looking real strange" and had a "strange" demeanor.

When it denied counsel's motion for an evaluation, the trial court foreclosed the possibility of an insanity defense. Without the results of an evaluation, the facts were insufficient to support a jury instruction on insanity. *See State v. Lewis*, 328 S.C. at 280-81, 494 S.E.2d at 118. Given the bizarre nature of the crime and Appellant's lengthy history of mental illness, it cannot be said that the denial of counsel's motion to have the Department of Mental Health evaluate Appellant was harmless beyond a reasonable doubt.

The trial court's denial of counsel's pretrial motion for an evaluation of Appellant by the Department of Mental Health was error, as it was uncontroverted that he was afflicted with untreated paranoid schizophrenia the night of the offense. Absent the requested expert assistance to determine whether the defense of insanity would apply, Appellant was arbitrarily deprived of his right to present a complete defense. U.S. CONST. amend. VI; S.C. Const. art. I, § 14; *United States v. Taylor*, 437 F.2d at 373.

2.

The court's denial of defense counsel's motion for an evaluation by the Department of Mental Health was error where § 44-23-410 mandates the court order an evaluation if it has reason to believe an accused is not fit to stand trial, where the court improperly denied the motion based solely on two brief interactions with Appellant, since Appellant's history of mental illness spanned twenty-five years was of such severity that it at times precluded him from working.[4]

The court erred when it found that further inquiry into Appellant's fitness to stand trial was not warranted based solely on speaking with Appellant briefly on two occasions. Appellant's education and demeanor was not dispositive of his fitness to stand trial, given that he had a lengthy history of mental illness.

As noted above, the court failed to give weight to Appellant's twenty-five-year history of mental illness including paranoid schizophrenia, an affliction so disabling that he received supplemental security income. R. 6, ll. 8-9; R. 17 ll. 11-14; R. 18 l. 14 – 19, l. 24. The court knew that Appellant's mental illness was severe enough that at times his prior employer, Ruby Tuesday, deemed him unable to work. R. 20, ll. 9-12.

Appellant also explained to the court that he "didn't understand" some of the discussions with his counsel. R. 9, ll. 1-7. "I didn't understand that part. But he was—I believe was trying to make me just take the fifteen and it's my first time being in trouble down here." R. 9, ll. 6-9. Appellant's remarks to the court in this regard indicate that he may have been undergoing some paranoid thinking about the role of his counsel—Appellant said he felt counsel was trying to "make" him plead guilty to a sentence of imprisonment for no reason. R. 9, ll. 7-9.

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[4] Appellant hereby incorporates the argument from Issue 1, above, into Issue 2.

The court erred when it denied defense counsel's motion for an evaluation by the Department of Mental Health, and stated, "This is the second time [Appellant has] been in front of the Court, He was in front of this Court last week. I was able to observe the same apparent ability to clearly understand what he's doing. He communicated with the Court." R. 21, ll. 20-24. While an accused's "demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Pate v. Robinson*, 383 U.S. 375, 386 (1966).

"The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.'" *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968); U.S. CONST. amend. XIV. "Due process of law prohibits the conviction of a person who is mentally incompetent." *State v. Colden*, 372 S.C. 428, 440, 641 S.E.2d 912, 919 (Ct. App. 2007). "[A] person whose mental condition is such that he lacks the capacity to understand the nature and objects of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

A state court's failure to invoke statutory procedures that exist to protect an accused's "right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172. South Carolina law provides

> Whenever a judge of the circuit court or family court **has reason to believe** that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> (1) order examination of the person by two examiners designated by the Department of Mental Health . . .

S.C. Code Ann. § 44-23-410 (emphasis added). "Thus if the judge believes the person **may** be unfit to stand trial, a competency evaluation is mandatory." *Colden*, 372 S.C. at 441, 641 S.E.2d at 919 (emphasis added).

A close reading of *Colden* is instructive in parsing out when a competency evaluation is compulsory. In support of their motion for a mental health evaluation, Colden's lawyers offered that Colden was at times "not really responsive" and had a "tendency sometimes to ramble on." *Id.* at 432, 641 S.E.2d at 915. However, Colden's grandmother told the court she had never noticed that he needed to see a doctor. *Id.* Colden confirmed he had never received any mental health treatment. *Id.* at 433, 641 S.E.2d at 915. In denying the motion, the court observed that there was nothing "in [Colden's] past that might indicate some mental health issues" *Id.* at 434, 641 S.E.2d at 916.

This Court found the trial court did not abuse its discretion in refusing to order a competency evaluation. *Id.* at 430-31, 641 S.E.2d at 914. It was significant that "[t]he reasoning behind the competency request did not rely upon any pre-existing history of mental illness . . ." *Id.* at 441, 641 S.E.2d at 920. This Court noted that three factors identified in *State v. Burgess*,[5] 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003), "(1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial," supported the conclusion that an evaluation was not warranted. *Id.* at 441-42, 641 S.E.2d at 920.

"Absent any showing of the existence of a mental illness, the court properly denied Colden's counsel's request for a mental examination for competency to stand trial." *Id.* at 442, 641 S.E.2d at 921. Here, unlike in *Colden*, there was evidence of mental illness—paranoid

[5] *Burgess* is distinguishable from the case at hand because Burgess, unlike Appellant, gave detailed testimony before the jury that "undercut any question of her lack of competency to stand trial." *Burgess*, 356 S.C. at 576, 590 S.E.2d at 44.

schizophrenia—the same mental illness suffered by the defendant in *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

Also, unlike in *Colden*, Appellant told the court he had not understood discussions with his counsel. And, pursuant to *Burgess*, there was "evidence of irrational behavior" at the time of trial in that Appellant rejected a favorable plea deal because he seemed to have paranoid thoughts about his counsel.

This case is similar to *State v. Singleton*, 322 S.C. 480, 472 S.E.2d 640 (Ct. App. 1996). In *Singleton*, this Court found the circuit court abused its discretion in refusing to order a mental evaluation pursuant to § 44-23-410. *Id.* at 483, 472 S.E.2d at 642. Singleton's counsel told the court he had symptoms that suggested schizophrenia and Singleton's mother provided the court with information on the duration and seriousness of his mental problems. *Id.*

Here, the court knew Appellant's history of mental illness was lengthy and his impairment was so disabling as to preclude employment at times. If Appellant's mental illness was so disabling that he could not function as a restaurant employee, it is certainly possible his condition was disabling enough to preclude him from being competent to stand trial.

All of this evidence, heard by the court, provided "reason to believe" that Appellant may have been unfit to stand trial, which meant an evaluation was mandated by § 44-23-410. The court erred when it considered only Appellant's demeanor with the court in denying counsel's motion for a competency evaluation, since Appellant had a twenty-five-year history of mental illness and indicated he had not understood some of his conversations with his counsel. *Pate v. Robinson*, 383 U.S. 375, 386 (1966).

In issuing the writ of habeas corpus in *Pate v. Robinson*, 383 U.S. at 386-87, the United States Supreme Court discussed the "difficulty of retrospectively determining an accused's

competence to stand trial," and found Robinson was entitled to be discharged or tried anew. Again, in *Drope v. Missouri*, 420 U.S. at 183, the Supreme Court found an accused entitled to a new trial, "Given the inherent difficulties of such a nunc pro tunc determination . . ." about whether Drope had been competent to stand trial several years before.

Because the same such nunc pro tunc difficulty would exist in ascertaining whether Appellant was competent at a date long past, this case should be remanded for a new trial.

3.

The trial court erred where it admitted prior consistent statements given by the alleged victims, Tymel McCullough and Maurice Taylor, in response to questioning by Officer Brown the night of the incident, since McCullough and Taylor testified at trial, which rendered the statements bolstering hearsay.

The court erred when it admitted the prior video and audio-recorded statements of McCullough and Taylor to Officer Brown, as they were inadmissible hearsay. The statements were prior consistent statements. Defense counsel correctly objected to the admission of the statements as hearsay, cumulative, and bolstering. R. 63, ll. 18-24; R. 64, ll. 10-16.

The hearsay rule[6] is "a restriction on the proof of fact through extrajudicial statements." *Dutton v. Evans*, 400 U.S. 74, 88 (1970). "The prior consistent statements of a witness are, as a general proposition, inadmissible as substantive evidence." *United States v. Hedgepeth*, 418 F.3d 411, 422 (4th Cir. 2005).

The court erroneously ruled the recorded statements by McCullough and by Taylor were "not hearsay because the declarant is subject to cross-examination." R. 66, l. 24 – 67, l. 1. It can be inferred the court was allowing the statements admitted pursuant to Rule 801(d)(1), SCRE, which provides that a statement is not hearsay if

> **The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and** the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose, or (C) one of identification of a person made after perceiving the person, or (D)

6 "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

> consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident . . .

However, none of the enumerated exceptions in Rule 801 apply. The statements were not inconsistent—they were consistent with the men's testimony at trial. *See* State's Exhibit #3. There had been no charge of recent fabrication or improper influence or motive. This was not a criminal sexual conduct case. Nor was the statement "one of identification made after perceiving the person."[7]

The statements were cumulative to the men's trial testimony. The statements were also cumulative to other documentary evidence introduced by the State, including photographs taken by police officers and the hotel video surveillance footage.[8]

"Hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985) (citations omitted). "However, reversal is not required unless appellant was prejudiced by the error." *Id.* "Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis in original). "The danger of erroneously admitting a

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[7] Although the recording did show the men providing a physical description of the assailant, the recording did not show them identifying Appellant. State's Exhibit #3. The United States Supreme Court explained in *United States v. Owens*, 484 U.S. 554, 562-63 (1988), that the exception for an "identification of a person made after perceiving the person" was directed at a witness whose memory loss "makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification." This was not the case here, and McCullough and Taylor made in-court identifications of Appellant.

[8] *See* State's Exhibit #1.

prior consistent statement is its bolstering effect." *State v. Foster*, 354 S.C. 614, 620, 582 S.E.2d 426, 429 (2003).

In *State v. Whisonant*, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999), this Court found the repetition of a victim's pretrial remarks about the incident were prejudicial due to their cumulative nature, as was discussed in *Jolly*. "The stepmother's testimony mirrored the victim's testimony, improperly bolstering the victim's story in the minds of the jury."

Although the hearsay that was cumulative to the victim's testimony in *Jolly* and *Whisonant* came from another testifying witness, rather than from the video and audio-recorded statements of McCullough and Taylor, the prejudice analysis is the same. Both scenarios allow the corroborating hearsay statements (a repetition of what the alleged victim said shortly after the alleged crime) to be improperly admitted at trial, thereby bolstering their testimony. Defense counsel correctly objected to the admission of the recordings as "bolstering." R. 64, ll. 15-16.

The admission of the bodycam recording was error, and because it bolstered the testimony of McCullough and of Taylor, the alleged victims, it cannot be harmless.

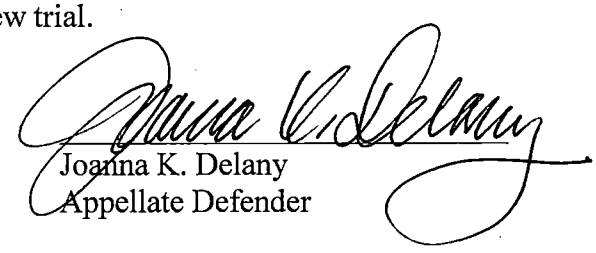
That prejudice flows from the admission of bolstering hearsay cumulative to witness testimony is not limited to child sexual abuse cases. *See State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001) (erroneously admitted prior consistent statement of witness in murder trial was not harmless—its cumulative effect enhanced "the devastating impact of improper corroboration"); *State v. Foster*, 354 S.C. at 622-24, 582 S.E.2d at 430-31 (admission of prior consistent statement of witness in murder case was error and abuse of discretion—it served only to improperly bolster the witness's testimony and could not be harmless).

The court's admission of the recorded statements of McCullough and Taylor to law enforcement was error, as the statements had an impermissible tendency to suggest that because

the men said the same thing on a prior occasion, it must be true. Appellant was prejudiced by the devastating impact of this improper corroboration evidence. *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566; *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



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ATTORNEY FOR APPELLANT

This 16th day of May, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 16, 2019.

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