

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

JUL 10 2019

Appeal from Anderson County

SC Court of Appeals

Honorable J. Cordell Maddox Circuit Court Judge

THE STATE,

RESPONDENT

v.

DAMORIUS DONTAVIUS GAINES

APPELLANT

APPELLATE CASE NO. 2018-001672

PRO SE BRIEF OF APPELLATE

DAMORIUS GAINES

APPELLANT

Lee Correctional Institution

990 Wisacky Highway

Bishopville, SC 29010

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U.S. V. ELLISON, 798 F.2d 1102 (7<sup>th</sup> cir. 1986)

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U.S. V. AJMAL, 67 F.3d 12 (2<sup>nd</sup> cir. 1995)

Rules, 701, 602, 4103. SCRE.

## STATEMENT OF ISSUE ON APPEAL

1) Did trial judge abuse his discretion by admitting opinion testimony from Appellant's mother and his ex-girlfriend, concerning the identity of the suspect caught on surveillance footage from the attempted armed robbery in violation of RULE 701, SCRF, since their identifications (1) were not rationally based on their perceptions, and (2) were not helpful to a clear understanding of the determination of a fact in issue, rather the testimony likely confused the jury?

2) Was prosecutorial misconduct used, under Brady violation, in allowing Hanisha Patel to take witness stand in trial taking Appellant by surprise?

3) Was trial counsel ineffective by not objecting to Hanisha Patel taking witness stand?

4) Did trial judge abuse discretion by allowing the state to perform the "Jencks Act" by subpoenaing Connie Gaines to take witness stand, without any written, or oral statement?

5) Did trial judge abuse discretion in allowing state to lead witness Sherika Harper?

## STATEMENT OF THE CASE

An Anderson County grand jury indicted Appellant on July 18, 2017 for kidnapping, attempted armed robbery, armed robbery, and two counts of possession of a weapon during the commission of violent crime. R. 350-353. The case was called to trial on September 4, 2018 before the Honorable J. Cordell Maddox, and a jury. R. 1. Assistant Solicitors Stan Overlay and Catherine Huey represented the state, and Hadden Lucas and Gordon Sennerius represented Appellant. R. 1.

On September 6, 2018, the jury found Appellant guilty as indicted. R. 338, 1. 8-339, 1. 16. Appellant was sentenced to twenty years suspended upon the service of fifteen years imprisonment and five years probation for kidnapping and attempted armed robbery, fifteen years for armed robbery, and five years for each count of the weapons offense. All sentences were ordered to be served concurrently. R. 347, 11. 11-19.

This appeal follows.

## STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Westmoreland, 421 S.C. 410, 418-419, 807 S.E.2d 413, 417 (2011) State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law" Id. at 419, 807 S.E.2d at 706 (State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

"Both identifications are also unduly suggestive and, thus, unreliable. By Sherilka Harper, and Connie Gaines.

## STATEMENT OF FACTS

At approximately 7:40 p.m. on February 16, 2017, an armed and masked man wearing blue jeans, a black hooded sweatshirt, and black gloves attempted to enter the Little General, a Convenience Store in Anderson. While the store was open for business at the time, the front door was locked because the ATM inside the store was being refilled by Jimmie Strange. But the store owner's daughter Hanisha Patel was witness at trial. Taken the stand under oath making false statements as being the one in the store at time incident took place. R. 154, 1-4-155, 1-18; R. 163, 1-18-22. After being unable to open the door, the man ran around to the back of the building and removed his mask. A Surveillance Camera on the outside of the building captured the man removing the mask. The footage is not 100% clear, and captures the man removing the mask from his face at a distance. About twenty five minutes later another man entered the Dollar Tree store at or around 8:00 clock. The time from the Little General camera, and the Dollar Tree camera doesn't match. The man approached the cashier, who was in the Newby Stock room located at the back of the store, put a gun in her face, and demanded she walk to the register and give him cash. R. 101, 1-4-102, 1-17;

R. 110, ll. 13-21. The man took the cash and fled through the front door. R. 102, l. 22-103, l. 11; R. 110, l. 24-111, l. 12. The manager of the store was in the office, called the police. R. 104, ll. 8-16. The police arrived about ten minutes later.

The police used a K-9 to attempt to track the suspect. The K-9 tracked from the Dollar Tree to the Little General. R. 132, ll. 4-15; 134, l. 7-135, l. 8. However, law enforcement was unable to locate a suspect. Despite appellant being the accused, and staying less than a half a mile from Dollar Tree, and Little General. Officers obtained the surveillance footage of the robbery and attempted robbery from the Dollar Tree and the Little General respectively. R. 114, l. 4-115, l. 9; R. 160, ll. 7-23.

Weeks after, law enforcement had no leads in the case. Investigator Craig Gardner with the Anderson City Police Department eventually received a tip from a Confidential informant. R. 200, ll. 12-16. Based on this tip, Gardner "pulled an incident report involving a traffic stop". Appellant was singled out from this tip. And compared to this person on the video footage, from attempted armed robbery. There's nothing to compare to on the Dollar Tree footage because man never removes his mask during that

that time. Gardner went to Appellant's mother house. Questioned her about her son, stating he wanted to talk with her about a robbery her son was involved in, before he was ever charged with a robbery. R. 207, l. 10-204, l. 21. According to Gardner, Ms. Gaines "Shook her head in disgust and said, "I don't know what's got into him." R. 206, ll. 7-14.

Investigator Gardner located Sherika Harper, who was incarcerated in the city jail. Harper "was said to be appellant's girlfriend at the time. R. 213, ll. 13-24. Gardner went to the jail and had Harper "pulled so [he] could talk her up to the investigations division and talk with her." R. 214, ll. 2-5. He told Harper that she wasn't being charged with anything and that he "just needed to talk wither about her relationship with appellant. R. 214, ll. 6-10. Gardner showed Harper a still image from the surveillance footage. And also the video footage from which the image came. Harper was given a deal that she would be released from jail for her cooperation. Conveniently, Gardner saw one of the judges as he was leaving the jail and told the judge of Harper's cooperation, and had her released the same day she wrote statement. R. 217, ll. 10-12; R. 252, l. 7-253, l. 12.

After speaking with Harper, Gardner obtained warrants for Appellant and served them to Appellant while he was incarcerated for traffic violations. R. 218, l. 21 - 219, l. 6.

Harper denied telling Gardner, "Yep. That's Damarius Gaines [Appellant] in the picture." R. 169, ll. 9-16; R. 175, ll. 5-8. However she was forced by solicitor Cathy Huey during trial to read the statement she wrote. "I could not identify by picture but by video the person is Damarius Gaines" R. 175, l. 9 - 176, l. 10.

Harper explained that she never really looked at the video, and she only stated the person in the video was Appellant, because she wanted him to stay in jail at the time. When she met with Gardner she was angry with Appellant because the two just had broken up. Harper testified that the person in the video footage was not Appellant. R. 177, l. 22 - 178, l. 15. Harper also stated that she was not afraid of Appellant and the two broke up because of problems. R. 178, l. 25 - 179, l. 25.

Connie Gaines, Appellant's mother, testified that investigator Gardner showed her a still image from the surveillance footage and that she shook her head "no" when she saw the picture because the picture was not of her son. R. 186 l. 12 - 187, l. 5.

Ms. Gaines testified that she did not make that comment. "I don't know what's got into that boy."

R. 184, l. 11-186, l. 4; R. 187, ll. 10-13.

The jury ultimately found Appellant guilty of attempted armed robbery of the Little General, the armed robbery of the Dollar Tree, kidnapping, and possession of weapon during the commission of a violent crime. R. 338, l. 8-339, l. 16.

## ARGUMENT

1) The trial judge abused discretion by admitting opinion testimony from Appellant's mother and ex-girlfriend concerning the identity of the suspect caught on surveillance footage. From the attempted armed robbery in violation of rule 701, since the identification (1) were not rationally based on their perceptions and (2) were not helpful to a clear understanding of the determination of a fact in issue, rather the testimony likely confused the jury.

### How the Issue was Presented Below

Appellant objected pretrial to any opinion testimony from Appellant's mother, Connie Gaines, and Appellant's ex-girlfriend, Sherika Harper, concerning the identification of the suspect caught on surveillance footage from the Little General during the attempted armed robbery on

February 16, 2017 pursuant to rule 701, SCRF.  
R. 82, l. 16-83, l. 7. Harper's prior identification  
was not based on her rational perception as required  
under Rule 701. Harper claims that she did not really  
look at a video, and she only wrote statement saying it was  
Appellant, because she was mad at him, and wanted him  
to stay in jail. R. 82, l. 16-83, l. 7. Both Harper and  
Gaines alleged identification do not help provide a clear  
understanding of the identification of who the suspect is.  
Both witnesses say that it is not Appellant in video footage  
R. 83, l. 13-84, l. 5.

2) Indictment No: 2017-GS-04-01681, Attempted  
armed robbery. " The defendant, Damarious Dontavius  
Gaines did or about February 16, 2017, in Anderson  
County, South Carolina, while armed with a deadly weapon  
or while displaying what a person present during  
the robbery would reasonably believe to be a deadly  
weapon, attempt to take by means of force, threats  
or intimidation, goods or monies from the person  
or presence of Jimmie Strong, an employee of  
Little General Store. All in violation of 16-11-0330  
(B) of the South Carolina Code of Laws (1976) as  
amended

152; 2-25, 153; 1-25, 154; 1-25, 153; 1-25  
Harisha Patel was sworn in under oath, and gave false

testimony as being witness present at the time suspect ran up to the door of the Little General Store. Appellant was taken by surprise when witness Hanisha Patel took to the Stand. Appellant had no personal knowledge of Hanisha Patel being a witness until Ms. Patel was sworn under oath.

No supplemental discovery by Solicitor office was ever made about Ms. Patel being a potential witness. Which violates Appellant's due process under Brady violation. Also prosecutorial misconduct. Which according to South Carolina Supreme Court is a reversible error.

LARRISON V. U.S. F. 2d 82 (7<sup>th</sup> Cir. 1928)

(A) New trial should be granted when, (a) the Court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it jury might have reached a different conclusion; and (c) that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet or did not know of its falsity until after the trial"

Hanisha Patel was considered a key witness in attempted armed robbery. If Ms. Patel would not have took to the witness Stand, there would not have been a witness to speak for attempted armed robbery of the Little General.

There was never a Supplemental discovery of Ms. Patel being a potential witness. 164; 7. Trial Counsel was ineffective by not cross-examining witness.

DAVIS V. ALASKA, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974): "Counsel may be found ineffective for failure to subject prosecution to meaningful adversarial challenge. The Court stated that the main and essential purpose of the Sixth Amendment right to confrontation is to secure the opportunity of cross-examination, and one way to discredit a witness is to introduce evidence of a prior criminal conviction of that witness" to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." The Court added, "A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the

Brady Claim: (1) prosecution suppressed evidence; (2) evidence suppressed was favorable to the defense or exculpatory; (3) evidence suppressed was material. There is no Brady violation if defendant or his attorney knows of exculpatory evidence before trial.

BROWN V. BORG, 951 F.2d 1011 (9<sup>th</sup> Cir. 1991)

"Prosecutor's failure to notify defense counsel of material exculpatory evidence and arguing false evidence to the jury was misconduct serious enough to warrant the granting of a writ of habeas corpus.

DEMARCO V. U.S., 928 F.2d 1074 (11<sup>th</sup> Cir.)

"Failure of prosecutor to correct perjured testimony of witness is grounds for reversal of conviction.

JENCKS V. U.S., 353 U.S. 657, 1 L.Ed.

2d 1103, 77 S.Ct. 1007 (1957): "We hold that the criminal action must be dismissed when the government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial."

3) 152, 1-25. Counsel Hadden Lucas (Trial counsel) was ineffective by not objection to witness Hanisha Patel taking witness Stan. Appellant, more counsel was aware of witness until witness took the Stan.

Constitutionally protected right of Cross-examination."

U.S. V. ELLISON, 798 F.2d 1102 (7<sup>th</sup> cir. 1986)

" A Criminal defendant is entitled to Counsel whose undivided loyalties lie with his Client

U.S. V. KROUT, 66 F.3d 1420 (5<sup>th</sup> cir. 1995):

"The court, however, will not address ineffective assistance of counsel claims on direct appeal

except in unusual cases. U.S. V. Higdon, 832

F.2d 312, 313-14 (5<sup>th</sup> cir. 1987) Cert. denied, 484

U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988).

Only in that rare instance where the details of Attorney's conduct are 'well developed' in the record is such a claim properly considered on direct appeal.

4) 62j-1-16. Investigator Gardner under Jackson v. Denno cross-examination admits to not taking any kind of note, statement, etc. from Appellant's mother Connie Gaines. Which is clearly a Jencks Act violation. Trial judge abuse discretion by denying motion to exclude Connie Gaines from being a witness. 211j-1-25. Trial judge abuse of discretion in denying, overruling to objecting under rule 801. Ms. Gaines was impeached, and made it aware on witness stand that she did not make comment.

"I don't know what's got into that boy." Trial judge abuse discretion by allowing Investigator Gardner to

make that statement. Stating that ms-Gaines made this comment, after she stated that she never made the comment. 244j 1-25. Detective Gardner states to the court that he did not take a statement from witness Connie Gaines, because she did not know about a robbery. U.S. v. TORU, 52 F.3d 207 (9<sup>th</sup> Cir. 1995): Cumulative effect of four errors relating to armed robbery charge deprived defendant of a fair trial, and defendant was therefore entitled to a new trial.

5) Did trial judge abuse discretion in allowing State to lead witness Sherika Harper?

171j 8-14. Appellant Counsel objected, and entered a motion under rule 403. That witness Sherika Harper testimony would confuse the jury. Rule 403 Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. 169j 17-25. Trial judge allowed State to lead witness after counsel objected to matter. "U.S. v. AJMAL, 67 F.3d 12 (2<sup>nd</sup> Cir. 1995) Jurors were allowed and even encouraged to extensively question witnesses at trial. District Court abused its discretion by allowing this

extensive questioning of witnesses, which tainted the process of the trial, promoted premature deliberations and changed the role of the jurors.

Here, the prior identification of Appellant made by Harper was not rationally based on her perception. Since Harper admitted, that she only made statement out of spite. She was angry, never really looked at the video. Harper made this statement out of the presence of the jury. Therefore allowing Ms. Harper to give statement on witness Stan was abuse of discretion. As far as Connie Gaines. A statement oral or written was never made. Ms. Gaines also stated for the jury that she did not make the comment that Investigator say she made. Therefore her statement as well confused the jury to make a conclusion based off irreparable mistaken identity. There was not a clear understanding given by Shanika Harper, Connie Gaines, or Hanisha Patel. Consequently, the trial judge abused his discretion by admitting this lay opinion testimony pursuant to rule 701, SCRE, Rule 403, Neil v. Biggers factor, Jencks Act, and Brady violation. Respectfully, this court should reverse Appellant's convictions and sentence and remand for a new trial.

## CONCLUSION

Based on the argument, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. State was unable to produce a clear understanding as to who suspect was in video footage. Appellant was not pointed out in a in-court identification. Appellant identification out-of-court was highly suggestive. And unconstitutional, violating Appellant's 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendment. Appellant asks that sentence be set aside, and respectfully remanded for a new trial.

Respectfully Submitted

Damarius D. Garner  
Appellant.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the pro se Brief of Appellant, Designation of Matters and Record on Appeal in the above referenced case have been served upon William M. Blich, Jr, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201;

*Damarius Gaines*

7-5-19

*Shana ...*  
Notary Signature

my Commission expires May 17, 2020

Damarius Dontavius Gaines # 3416524  
Lee Correctional Institution F-4, A-2248  
990 Wisacky Highway  
Bishopville SC, 29010

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Jenny Abbott Kitchings, **CLERK**

Post office Box 11629

Columbia, South Carolina 29211

Legal Mail