ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE NICHOLAS CRAWFORD,

APPELLANT

APPELLATE CASE NO. 2018-001216

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting photographs line-ups and an in-court identification of appellant by witness Martin, where Martin told the police, while viewing a photographic line-up, that appellant was in the "proximity" of the shooting when it occurred, and while remaining in contact with the police a month later, while viewing another lineup, Martin claimed appellant was actually the shooter, since this identification procedure was unduly suggestive and conducive to an irreparable misidentification?

STATEMENT OF THE CASE

Appellant was indicted by the Colleton County Grand Jury for the offenses of murder, attempted murder, possession of a weapon during the commission of a violent crime, and obstruction of justice. R. *. A pre-trial hearing on the identification procedure was held on December 11, 2017, before the Honorable Brooks Goldsmith. R. *.

Appellant's case was called to trial on June 18, 2018, before the Honorable Perry N. Buckner, and a jury. Tr. 1. Matthew Walker represented appellant. Tameaka Legette was the assistant solicitor. Tr. 2.

On June 20, 2018, the jury found appellant guilty on all four counts. Tr. 663, l. 16 – 664, l. 3. Judge Buckner sentenced appellant to thirty-five years imprisonment for murder, thirty years imprisonment for attempted murder, and ten years imprisonment for obstruction of justice. Those sentences were concurrent. Judge Buckner also sentenced appellant to a five year consecutive sentence for possession of a weapon during the commission of a violent crime. Tr. 683, ll. 3-21.

This appeal follows.

STANDARD OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The court erred by admitting photographs line-ups and an in-court identification of appellant by witness Martin, where Martin told the police, while viewing a photographic line-up, that appellant was in the "proximity" of the shooting when it occurred, and while remaining in contact with the police a month later, while viewing another lineup, Martin claimed appellant was actually the shooter, since this identification procedure was unduly suggestive and conducive to an irreparable misidentification.

Relevant Facts

A Neil v. Biggers, 409 U.S. 188 (1972), hearing was held before Judge Goldsmith on the admissibility of an in-court identification by the surviving security guard, Bruce Martin. The other security guard, Jesse Guy, died of his gunshot wound which he suffered just moments prior to the gunshot injury to Martin. Detective Kurt Wallace of the Colleton County Sherriff's Office testified he was "the secondary detective assigned to that case to help with the primary investigator." PTr. 34, l. 6 – 35, l. 8.[1]

Wallace lived in Goose Creek, South Carolina, and he was telephoned by colleagues in the very early morning hours of May 28, 2016, and instructed to go to Trident Hospital in Goose Creek to meet victim Martin there. PTr. 35, l. 9 – 36, l. 10. However, Martin was "heavily sedated. He was in critical condition. But he was aware that I was there and I advised him that I would be back and talk with him later when he's in a better condition to talk." PTr. 36, l. 25 – 37, l. 11. Wallace said, "He was in no condition to talk about anything." PTr. 37, ll. 16-25.

Two days later, on May 30, 2016, Wallace again visited Martin in the Trident Hospital ICU unit. He was in much better condition. And I felt at that time I would be able to speak with

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[1] "PTr." refers to pre-trial transcript of the hearing held before Judge Goldsmith.

him, which I did." PTr. 38, ll. 7-12. Wallace said that Martin "just basically told me how he saw the incident and what he experienced at the club." PTr. 41, ll. 6-15.

Wallace visited Martin for the third time on Saturday, June 4, 2016. He showed Martin a photographic lineup. PTr. 41, l. 16 – 43, l. 20. Wallace asked Martin to point out the person who was actually fighting with his fellow security guard, decedent Guy. Wallace showed Martin a separate lineup and asked him to point out the person who was "in close proximity or that was in some shape, form, or fashion involved in the situation." PTr. 43, l. 21 – 45, l. 7.

Wallace said Martin selected DaQuan Crawford, appellant's brother, "as the person that he actually pulled apart or assisted in pulling apart and fighting . . ." PTr. 45, ll. 8 – 18. Wallace said he then presented Martin with a second photo lineup where "he actually circled and initialed Mr. Andre Crawford," as the person involved who *"was in close proximity to the situation."* PTr. 45, l. 25 – 46, l. 18. (emphasis added).

On June 28, 2016, Wallace visited Martin at his home to speak with him again about the shooting. Wallace termed this "a welfare check." PTr. 51, l. 4 – 52, l. 4.

The very next day, June 29, 2016, Martin came and talked to Wallace at the police annex. Martin told Wallace that he now remembered who shot him. Martin was then shown another photographic line-up: "He did not hesitate at all to circle Mr. Andre Crawford *as the person who actually shot him.*" PTr. 52, ll. 5-19; ptr. 54, l. 9 – 55, l. 17. (emphasis added).

The following occurred on direct examination of Wallace:

> Q: Now, once Mr. Martin identified for you the person who was involved in the fighting as being DaQuan and the person who shot him as Andre Crawford, did he ever tell you anything else?
>
> A: Yes, the main thing that he mentioned in this particular incident, *as he brought it back to memory*, he specifically said that while he was breaking up the fight or assisting in breaking up the fight, all right, he remembered a voice saying, That's wrong what you're doing to my brother. That brought -- that person saying that

> is what made him look back to see where that voice is coming from. And that's when he said that he identified Mr. Andre Crawford. And upon that person saying, That's wrong what you're doing to my brother *and the minute that he actually looked back is when shots was fired.*

PTr. 55, l. 18 – 56, l. 8. (emphasis added).

On cross-examination, Wallace confirmed that he had visited Martin four times before Martin claimed appellant was the shooter on June 29, 2016. PTr. 57, l. 7 – 60, l. 10.

Defense counsel argued that considering the Neil v. Biggers, 409 U.S. 188 (1972) factors that the ultimate identification of appellant as the shooter was "inherently unreliable." PTr. 62, l. 6 – 65, l. 25. Counsel explained, "So, we've gone from can't identify the shooter to oh, *I recognize these two guys as having been there*, which my client, of course, has admitted the whole time, along with a lot of other people being there, to June 29th, *no [now], I'm certain that this is the guy that shot me."* PTr. 62, ll. 12-17. At one point, Martin just admitted, "I don't remember, I just saw the gun." PTr. 62, l. 18 – 63, l. 2.

Ultimately, on June 29, 2016, Martin claimed that he could positively identify appellant as the shooter. The accuracy of the prior descriptions by Martin about what appellant was doing that night belied that claim. PTr. 63, l. 4 – 64, l. 6. Counsel also pointed out that science was now showing that "certainty" in such eyewitness identifications – here meaning Martin's alleged 100% certainty a month later – in reality was not scientifically reliable. PTr. 64, l. 7 – 65, l. 21. Counsel moved to suppress the identification of appellant as inherently unreliable. PTr. 65, ll. 22-25.

The solicitor said that this was a "traumatic event" and that Martin's memory had "evolved and he was remembering more and more . . ." The solicitor asked the judge to deny the motion to suppress the identification. PTr. 66, l. 9 – 67, l. 12. The judge denied the motion to suppress the identification of appellant as the shooter without stating any reason or analysis.

The judge respectfully abdicated his responsibility in this case by stating the substantial likelihood of irreparable misidentification pre-trial argument went to the "weight" of the identification evidence for the jury. That was reversible error. PTr. 67, ll. 13-18. Tr. 67, ll. 13-18; ptr. 388, ll. 2-19. Defense counsel renewed his objections to the line-ups used during the identification of appellant at trial. PTr. 375, l. 16 – 376, l. 25.

Jury in

At trial, Eric Bryan, the owner of Leon's Social Club, testified the club was a "non-profit organization." "We do shooting matches sometimes. We have parties, we have DJs. So, it's a place where people come together to mingle and to socialize." Only members were allowed to enter the club. Tr. 162, l. 7 – 163, l. 5. As will be seen infra, this painting of this social club by owner Bryan appeared very misleading given the facts to follow. All indications were that a very tough and rumble crowd – at least in part – frequently this club. Bryan even admitted to being afraid to go outside into the parking lot while carrying money. Tr. 166, ll. 11-24.

Bryan remembered the night of May 28, 2016. "I was a door man to get in. My job is to make sure that we maintain safety for all of our customers, all of our members. We do membership, so all of our members do have a membership card when they come in. And so -- because it's a non-profit organization, we have to abide by that. And that's per the department of revenue requires us to do that as well. . . . It's not possible for someone to get in without having -- being a member." Tr. 166, ll. 11-24.

Bryan testified appellant was not a member and he added: "he doesn't come in the club. I know he wasn't in the club that night, that particular night. So I know -- I see the faces and I know that he wasn't in the club that night." Bryan said he could not say whether appellant was outside the club in the parking lot that night. "I'm not sure because my role is not to go outside

and to patrol the premises because with that kind of money and that responsibility, they really don't allow me. And the security guards will tell you they just don't want me -- because if I take that kind of money outside, something could happen and then nobody gets paid." Tr. 169, ll. 5-11. Bryan explained that on a good night at the club -- which was open on Thursday, Friday, and Saturday nights, and sometimes Sunday night -- he could make "between $1,200 and $1,500 a night." He paid the disc jockey $300 and he tried to give his bartenders a hundred dollars apiece. The security guards apparently were also given a hundred dollars each night. Tr. 168, ll. 9-20.

Bryan said he typically closed the club around three o'clock in the morning but he repeated that he did not go outside to see what was happening in the parking lot, because "it's too dangerous for me to have that kind of money going outside." Tr. 171, ll. 2-10.

Bryan said when the club shut down he always fed the DJ, bartenders, and security guards chicken wings made by his wife. "We have probably the best chicken wings in the state." However, this night, Bryan remembered hearing a "commotion" about closing time. "I was counting the money. I said, you know, let me put the money up . . . I checked for my bartenders, looked at them and made sure everything was okay." When he went outside, he saw Martin was laying "in the highway." He grabbed Martin's hand and he then realized Martin had been shot. Jesse Guy, his other security guard, had also been shot. Guy died during surgery at the hospital a short time after arrival. Tr. 173, l. 9 – 177, l. 17.

There was evidence that security guard Guy carried a taser. Tr. 209, ll. 4-21. The state's theory of the case was that Guy used the taser on appellant's brother, and that appellant shot and killed Guy, and shot and injured Martin. Tr. 209, ll. 4-21. Guy died of "lung and liver destruction due to a single penetrating gunshot wound to the back." Tr. 271, ll. 3-8. Guy was six

foot one and he weighed 289 pounds. Tr. 279, ll. 1-2. Martin, like Guy, was a large man, 6'1, 305 pounds. Tr. 428, l. 4 – 431, l. 2.

Anthony "Ant" Hampton was at the club on the night of the shooting. He did not know appellant but knew his brother. Tr. 296, l. 23 – 297, l. 23. Hampton knew appellant's brother as "Red Dog." Tr. 297, ll. 19-23.

Hampton said he could probably name about 100 people who were at the club that night, and he said he usually stayed "until it was closed," which was about three a.m. Tr. 300, l. 2 – 301, l. 20. Hampton said that "Red Dog" sucker punched him, and they were wrestling on the ground when he heard two gunshots. Tr. 301, l. 21 – 307, l. 2. Hampton did not see who was shooting. Tr. 307, ll. 5-6.

The solicitor in her opening and closing argument admitted that the state's case against appellant came down to the word and claim of Martin that appellant was the shooter. Tr. 147, l. 25 – 148, l. 4; tr. 591, ll. 1-8; Tr. 592, ll. 19-24. Police Officer Kelly Padgett acknowledged that the probable cause to arrest appellant was "the statement of Bruce Martin that he saw [appellant] shoot." Tr. 353, ll. 19-25.

Kurt Wallace testified that appellant admitted to the police that he was at the club that night but appellant said he said not know who started the problem that led to the shooting. Appellant was not the shooter.[2] Tr. 364, l. 18 – 365, l. 23. When appellant maintained he left the club with Anthony "Ant" Hampton that night, Wallace had appellant arrested for obstruction of justice because appellant, Wallace believed, lied to the police about Hampton giving him a ride home. Tr. 368, l. 12 – 369, l. 8.

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[2] The tapes of appellant's statements, State's Exhibits 31 and 33 are on file with this Court, and a transcript of one of appellant's "hard to hear" statements, State's Exhibit 44 is at R. p. *.

As to the lineups he showed Martin, Wallace testified "the first photo lineup I presented to him, he selected DaQuan Crawford as a person who was actually physically in the fight. The second photo lineup that I presented to him, he selected Andre Crawford *as a person of interest that was in close proximity of the fight."* Tr. 374, ll. 20-25. (emphasis added). This was on June 4, 2016. Tr. 375, ll. 4-6.

Wallace remembered on June 4, 2016, Martin also told him, "It's like a dream you're trying to remember. You know you've seen something, you know you have a recollection of it, but you just can't really remember what it was. He said at the time that -- that's the reason why I advised him. I said, if anything comes to your memory, if you can please give me a call and let me know. He advised me that it was more he wished he could tell me that he could remember, but at the time, he just couldn't, he just couldn't remember." Tr. 378, l. 20 – 379, l. 4.

Wallace said he then visited Martin at home on June 28, 2016. Tr. 379, l. 8 – 380, l. 12. Wallace said that Martin called him on June 28, 2016 -- apparently after the house call -- and Wallace asked him to come to the police annex the following day, June 29, 2016. Tr. 380, l. 13 – 381, l. 21. "We wanted to interview him in reference to what he now remembered that he didn't remember then." Tr. 382, ll. 2-5.

On June 29, 2016 Wallace showed Martin another photo lineup and this time, Martin claimed appellant was the shooter. Tr. 383, l. 3 – 384, l. 1. Martin now also maintained he saw appellant "holding the firearm." Tr. 393, ll. 5-9.

On cross-examination, Wallace confirmed that during the first interview, Martin said that he did not see the shooter but slightly saw a gun. Tr. 397, ll. 13-21. On June 4, 2016, Wallace showed Martin a lineup in the hospital and Martin selected appellant's brother, DaQuan Crawford, as being in the fight with the security guard, Guy. Martin identified appellant as being

"within close proximity" of the fight. He did not claim appellant had a gun or that appellant shot him or anything of that nature. Tr. 399, ll. 10-24.

However, on June 29, 2016, after the house call, when viewing another lineup with appellant's photograph again in it, Martin now claimed that appellant was the shooter, and the gun was potentially a .40-caliber automatic pistol. Tr. 400, l. 22 – 401, l. 11. Wallace acknowledged that on his prior visits when showing lineups to Martin, Martin had "flashes of memory or incomplete [recollections]." Tr. 403, ll. 8-13.

Bruce Martin testified that Jesse Guy, the other security guard, was a good friend. They had worked in security together for the Navy. Tr. 420, l. 3 – 427, l. 1. Martin said he had probably seen appellant about five times at the club prior to the night of the shooting. Tr. 428, l. 4 – 431, l. 2. Martin estimated he had seen appellant's brother between thirty and forty times before the night of the shooting. Tr. 433, ll. 2-20.

At trial, Martin claimed that Jesse Guy grabbed appellant's brother and that Guy was yelling, "Taser, taser, and tased him [appellant's brother] one time just to try to make them let go." Martin maintained he saw appellant shoot Guy. Tr. 447, l. 2 – 449, l. 15; tr. 451, ll. 18-22. Martin said he did not recall telling the solicitor in October 2017 that appellant was wearing shorts, a gray t-shirt, and light-colored tennis shoes on the night of the shooting. "I don't -- I recall saying something, but I don't recall the date or -- I had a lot of interviews, so I don't know exactly what day I said that." Martin said he recalled viewing two or three lineups in this case. Tr. 479, ll. 7-25.

Martin said during the June 4, 2019, meeting with Detective Wallace, he told Wallace he could give him "bits and pieces of what I could remember, but nothing hard core." Martin said, "hard core" meant "as the definite answer [as to] the person that shot me." Martin admitted he

had been diagnosed with post-traumatic stress disorder as a result of the shooting. Tr. 480, l. 20 – 481, l. 5. However, Martin denied that his memory was not reliable, especially given his post-traumatic stress disorder. Tr. 483, ll. 9-15.

Martin said he saw three lineups in all, and he admitted it was only on the third lineup that he claimed appellant was the shooter. Tr. 485, l. 23 – 488, l. 8. Until that third lineup, the best that Martin could say was "the defendant's brother [was] the fighter and the defendant being in the vicinity." Tr. 487, l. 22 – 488, l. 8.

Discussion

"In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (*citing* Biggers, 409 U.S. at 199-200)." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

The identification of appellant as the shooter in this case on viewing the third lineup with appellant's photograph in it, and on the fifth visit with the police -- May 28, 2016, May 30, 2016,

June 4, 2016, June 28, 2016, and June 29, 2016 -- was highly unusual and very disturbing. As defense counsel aptly argued, "We've gone from can't identify the shooter to oh, I recognize these two guys as having been there . . . to June 29th, no [now], I'm certain that this the guy that shot me." Tr. 62, ll. 12-17. "As to opportunity to view, he was there, he either saw it or he didn't." Tr. 62, ll. 18-22.

The degree of attention Martin had also seems to have gone from an eyewitness naturally distracted by his security guard colleague and friend fighting with appellant's brother to, on June 29, 2016, claiming he was certain appellant had a gun in his hand, probably a .40-caliber gun, and that appellant shot him.

As defense counsel pointed out, factor three is very alarming in this case. When Martin first identified appellant, appellant was just a person who happened to be in the "proximity" of the shooting. "So, that description has changed from the same person, from didn't see anything to oh, that person was there and around, but, you know, I can't say that person shot me or didn't shoot me, to oh, I'm one hundred percent sure now." Tr. 63, ll. 4-20. Appellant went from mere presence, or being in "proximity of the shooting," to being the actual shooter. The accuracy of the prior descriptions of appellant's conduct not even being criminal to appellant being the murderer as of the June 29, 2016 was alarming. Tr. 63, l. 4 – 64, l. 6.

Further, the science on *the level of certainty by an eyewitness* is being attacked more and more by the scientific research as defense counsel argued, and this was well known to the criminal bench and bar. The trial testimony in this case of Wofford professor Dawn McQuiston to the jury on the problems with such "certainty" in memory and identifications illustrated what was already well known to the criminal bench and bar. Tr. 554, l. 24 – 585, l. 2.

As to the fifth factor, as defense counsel also accurately argued, Martin knew appellant from having seen him at the club before. He had seen him before at the club, and Martin could have simply said from the beginning, "That guy that's at the club all the time shot me." "And so, you know -- again, it reinforces the inaccuracy of his description." Ptr. 62, l. 6 - 68, l. 3. Martin was not picking out "this random person you don't know" and this adds another layer of a seemingly confident sense of confused accuracy into the process. Martin, as seen, did not identify appellant as the shooter until June 29, 2016, after several police visits and lineups. The out-of-court identification in this case was not, could not, and should not be deemed so reliable scientifically that it can be said that it was not the product of an otherwise unduly suggestive identification procedure. The photographic line-ups at a bare minimum should not have been allowed into evidence since they tainted Martin's identification of appellant. PTr. 65, ll. 12-25. The state will likely argue Martin could identify appellant without the photographic line-ups, and while appellant disagrees with that assertion, it is a separate argument nonetheless.

As stated, the solicitor admitted in her opening and closing statements that the state's case against appellant was the claim by Martin that appellant was the shooter. That identification in this very unusual case created a substantial likelihood of irreparable misidentification by Martin.

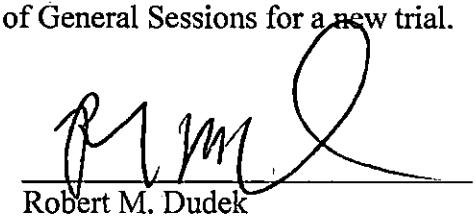
Finally, and very importantly, the trial court in this case made no specific findings as to why it found the identification procedure, given the totality of circumstances, was not unduly suggestive or why there was not a substantial likelihood of irreparable misidentification such that the identification was not unreliable. See, State v. Moore, 343 S.C. 282, 290, 540 S.E.2d 445, 449 (2000). Despite the thoughtful presentation and argument by the defense, the judge simply said, "I find that the photographs were not unduly suggestive," and he denied the motion. Tr. 67,

ll. 13-18. The trial judge, respectfully, abdicated his obligation to rule on the identification issue by saying the well-articulated arguments of the defense only went to "the weight of it/". Tr. 68, ll. 11-14.

While Martin said he was one hundred percent certain when he finally claimed appellant was the shooter in this case, that certainty belies both Martin's earlier inabilities to point to appellant as being the shooter, and the growing science on the problems with eyewitness identifications. Martin was attempting to help his friend Jesse Guy at a time when Guy was involved in a scuffle with a customer, apparently appellant's brother. Martin's attention was undoubtedly focused on helping his friend and his inability to remember appellant as anything other than being "in the proximity" at the time he heard gunshots was understandable. Martin suffered post-traumatic stress disorder. The belated June 29, 2019 claim that appellant was the shooter was, given the totality of circumstances, the result of unduly suggestive procedures and there was a substantial likelihood of irreparable misidentification such that the identification of appellant as the shooter in this case was not reliable, and the evidence should not have been admitted. See, State v. Moore, 343 S.C. 282, 290 540 S.E.2d 445, 449 (2000). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Colleton County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE NICHOLAS CRAWFORD,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Andre Nicholas Crawford, #376867, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 15th day of July, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of July, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028