ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAQWAN M. JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212696

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by ruling the case would have to go to trial where the defense objected to the state controlled docket, which was held unconstitutional in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), and where the defense objected to the refusal to grant a continuance given the complexity of the case, and the number of witnesses involved?

2.

Whether the court erred by ruling the defense opened the door to evidence appellant was in a gang simply by agreeing in its opening statement that, while the murder committed by others may have been gang related appellant was not at the scene of the shooting, and evidence appellant was in a gang constituted highly prejudicial impermissible bad character evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offenses of murder and attempted murder. R. p. 868. The solicitor would later tell the jury in closing that the state did not have to prove appellant fired the fatal shots but that he was guilty under the theory of "hand of one is the hand of all" if the jury believed he was present with the other young men involved in the shooting. R. p. 793, l. 16 – 795, l. 20. Appellant's case was called to trial on July 26, 2012, July 30, 2012–August 3, 2012, and August 8, 2012 before the Honorable R. Knox McMahon, and a jury. Appellant was represented by Greg Collins and John Newton. K. Luck Campbell, Meghan Walker, and Jeremiah Shellenberg, II were the assistant solicitors. R. p. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. p. 865, l. 18 – 866, l. 3. Judge McMahon sentenced appellant to fifty years imprisonment for murder and thirty years imprisonment for attempted murder. R. p. 867, ll. 16-23.

This appeal follows.

STATEMENT OF FACTS

Prior to trial Defense Counsel Collins noted that this case had been "noticed for trial many, many, many, many times. Dating back to the beginning of 2011, it has been scheduled for trial anywhere from six to eight different times." Collins complained the state's discovery "continued to trickle in . . ." R. p. 32, l. 5 – 51, l. 17.

Further, the defense recently learned there had been a federal indictment against about 37 Blood gang members in Richland County. Some of them were also apparently involved in the shooting in this case, which the state asserted was gang related. There was also a federal investigation involving this incident. R. p. 32, l. 5 – 51, l. 17. In addition, the defense also wanted to know the results of the Richland County gang database for its trial preparation. R. p. 50, l. 15 – 94, l. 24. R. p. 25, l. 3 – 28, l. 15.

Further, a key witness, Rontrell Henderson, who had implicated appellant in the shooting had been arrested "over the weekend." Henderson allegedly now was telling the police he lied when he implicated appellant. The defense therefore urgently needed to interview Henderson who had not been appointed a lawyer yet. R. p. 28, l. 8 – 33, l. 10.

There were also the matter of Crime Stoppers tips outstanding about appellant, and the shooting. Defense counsel told the judge their subpoena had not been fully compiled with in this regard. R. p. 28, l. 16 – 95, l. 5.

Collins argued that the solicitors had complete control of the docket and he objected to the "Solicitor-controlled" docket because the defense had done "everything in our power to get ready" but the defense now faced the prospect of being forced to go to trial not adequately prepared because the solicitor controlled the docket. Counsel noted that this case was very complex, and there were many potential witnesses. The judge ruled that the

solicitors controlled the docket, he denied the motion, and directly cited S.C. Code § 1-7-330 in support of his ruling. R. p. 94, ll. 9-24.

Making this case more complex was the fact that the defense objected to any evidence about appellant being in a gang as inadmissible bad character evidence. The solicitor stated that she did not want to attack anyone's character but she claimed it was appellant's "beef that happened to be with the Bloods." She alleged appellant being in a gang led to the fatal shooting with rival gang. As will be seen infra, the defense did not offer any evidence, and it tested the state's case on cross-examination, and put the state to its burden of proof. R. p. 90, l. 9 – 94, l. 25.

Opening Statements

In his opening statement, Assistant Solicitor Shellenberg told the jury that the victim "and some of the other witnesses you are going to hear from are gang members. They are know as the Bloods. Some of the other people you are going to hear from are members of the Folk Nation. Those are rival gangs. Ladies and Gentlemen, this is gang violence." R. p. 112, ll. 9-15.

Defense Counsel Newton responded in his opening statement:

> What the State wants you to do is they want to talk about gang warfare, rival gangs, fighting each other, killing each other. That's what happened here. Okay? Five people went in to Gable Oaks Apartments and shot it up because they were fighting with another gang. **But Daqwan Johnson was not there. Okay?**

R. p. 115, l. 23 – 116, l. 3. (emphasis added).

As will be seen infra, from defense counsel's mere mention of gangs, in response to the state's opening argument, to tell the jury appellant was not present at the crime scene,

the trial judge would rule that the state could offer evidence appellant was a member of a gang because the door had been opened to it.

State's evidence

Investigator Andrew Richbourg was a patrolman with the Columbia Police Department at the time of the shooting at the Gable Oaks Apartments in Eau Claire. He responded to a "shots fired" call and he observed a large group of people in the common grounds of the apartment complex. He was directed to Apartment E where the police observed a large amount of blood on the wall and the dead victim in the back room. Richbourg estimated there were about fifty people milling around outside of the apartment complex at the time. R. p. 125, l. 6 – 126, l. 22.

Kenneth St. John lived at the Gable Oaks Apartments with his five foster children. He remembered on the night of June 19, 2010 he heard thirty to forty gunshots. The shooting lasted for three to four minutes. St. John testified earlier, at about 12:30 that afternoon, his friend Mr. Whitney was going to the garbage can when a car drove by and the driver and passenger leaned out the window and started shooting at Whitney. R. p. 128, l. 12 – 132, l. 10. St. John did not get a good look at the shooters because they were wearing masks. R. p. 135, l. 3 – 136, l. 1.

The state introduced a security camera videotape through property manager Jerome Singleton. It merely showed the shooting. There was no assertion appellant was readily identified from the videotape. R. p. 143, l. 5 – 147, l. 23. The state also offered evidence that paperwork with appellant's name on it was found in a Buick that apparently had been riddled in bullets. However, the date of the paperwork in appellant's name was remote. R. p. 238, l. 3 – 239, l. 12.

Prior to the testimony of Marquez Prophet, the judge ruled that Prophet could make an in-court identification of appellant. Marquez was twenty years old and presently incarcerated at the Alvin S. Glenn Detention Center. R. p. 297, l. 8 – 298, l. 24.

The solicitor asked Prophet if he was in a gang and Prophet denied being in a gang. Prophet said he knew people in gangs, and he identified Terrance Patterson as one of them. R. p. 298, ll. 2-10. The solicitor then asked Prophet if he knew "who else do you hang with that's in a gang?" Prophet answered "G-man [appellant]." R. p. 298, ll. 11-12. The defense immediately objected and the jury was removed from the courtroom. R. p. 298, ll. 14-22.

Defense counsel argued this was impermissible character evidence against appellant. Counsel noted: "the State has said that we said in our opening that this was gang-related activities; however, we are saying our client wasn't involved in that. . . We had a motion at the beginning of this trial asking - - [to remove] any references to that." Counsel argued evidence that appellant was in a gang was inadmissible, and he asked that it be struck from the record as impermissible bad character evidence. R. p. 298, l. 11 – 299, l. 25.

The assistant solicitor repeated her pre-trial assertion that this gang membership evidence was not meant to be an impermissible comment on appellant's "character." She argued the state's theory of the case was that this shooting was gang retaliation. R. p. 300, ll. 2-23.

The judge then noted that the defense had requested *voir dire* on gang activity and although the evidence of appellant's bad character may not be admissible, the judge reasoned that this same evidence that appellant was allegedly in a gang could be admissible "on another issue." The judge blamed the defense for mentioning the subject of gangs in its

opening statement, and wanting *voir dire* on the subject. "I don't mean that by way of fussing." R. p. 301, l. 23 – 303, l. 21.

Defense Counsel Newton further complained that if Prophet was not in a gang, how could he allege first-hand knowledge of appellant's alleged gang affiliation. The judge responded: "I'm not at the Knights of Columbus, but I can guarantee you I can tell who might be there tonight." Defense counsel again argued: "He's not in a gang; therefore, he's not there and wasn't a part of it. That's what we are saying, Your Honor. Again, I believe it was improper to go that route." The judge overruled the defense objection. R. p. 301, l. 23 – 303, l. 21.

In the presence of the jury Prophet then testified that appellant was in a gang. R. p. 304, ll. 6-19. Prophet said appellant also drove a Buick which the state suspected may have been the vehicle from which shots were fired in the earlier shooting at the apartment complex. R. p. 310, l. 11 – 312, l. 19.

In addition, Prophet asserted appellant had been in a fight with a man named "Weeny," and that the fight was over gangs. Prophet testified Weeny shot at them while he was in appellant's car with two other men. Appellant was not present. Prophet said he did not know if Weeny was in a gang. Prophet said he telephoned appellant to tell him that his "car got shot up." Prophet said no one got hurt and he said did not shoot back. Prophet said appellant was angry and told him to bring him his car back. R. p. 310, l. 11 – 312, l. 19.

Prophet maintained appellant then told the men "to get the guns." Prophet claimed the men then retrieved assault rifles, other weapons and a handgun. They went to

the apartment building, and Prophet heard gunshots being fired. Prophet testified he did not know who had done the shooting. R. p. 311, l. 10 – 321, l. 18.

The state's physical evidence showed that .223 shells were found under appellant's bed at his grandmother's house. Two of these rounds found at the crime scene matched rounds found in appellant's weapon. R. p. 699, l. 1 – 700, l. 25.

Armed with the judge's approval that the defense opened the door to the gang evidence the state closed its case with the testimony of Vince Goggins of the Richland County Sheriff's Department gang unit. Goggins testified that a person [obviously appellant] who would change his name from "B-Man" to "G-Man" would be doing so as a sign of disrespect to the Blood gang. Goggins offered there were different sections of the Folk Nation in Columbia. R. p. 774, l. 23 – 779, l. 25.

Goggins also testified that the Bloods were formed in the 1970's in California, and the Folk Nation was a Chicago based gang that was formed in the prison system in that state. R. p. 777, ll. 9-23. The state's ended its case as follows:

> Q. In 2010 you were with the gang unit then?
>
> A. Yes, I was.
>
> Q. How were the relationships between the Bloods and the Folk in 2010?
>
> A. They have been rivalries since the inception of the Folk Nation and Bloods nation. So it has always been a rivalry here in Richland County as well.
>
> Q. So violence between those two gangs, was that going on in 2010 here in Columbia?
>
> A. Yes, it was.

R. p. 780, ll. 6-15.

ARGUMENT

1.

The court erred by ruling the case would have to go to trial where the defense objected to the state controlled docket, which was held unconstitutional in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), and where the defense objected to the refusal to grant a continuance given the complexity of the case, and the number of witnesses involved.

As seen, Defense Counsel Collins argued that the solicitors had complete control of the docket and he objected to the "Solicitor-controlled" docket because the defense had done "everything in our power to get ready" but the defense now faced the prospect of being forced to go to trial not adequately prepared because the solicitor controlled the docket. Counsel noted that this case was very complex, and there were many potential witnesses. The judge ruled that the solicitors controlled the docket, he denied the motion, and directly cited S.C. Code § 1-7-330 in support of his ruling. R. p. 94, ll. 9-24.

In State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) our Supreme Court held that the S.C. Code § 1-7-330 was unconstitutional. This Court found the issue preserved even though it was never raised to the trial judge. In the present case, defense counsel was correct and partially clairvoyant in objecting to the solicitors having exclusive control of the dockets for General Sessions court. The trial here, as seen above, cited S.C. Code § 1-7-330 in support of his ruling that the solicitor controlled the docket, and they had the right to call the present case to trial at the time of their choosing.

Our Supreme Court noted that the only reference to solicitors in the Constitution was in the Article creating the Judicial Department. S.C. Const. art. V, § 24. However, the section provides that the General Assembly shall provide by law for their duties. "To

that end, S. C. Code § 1-1-110 squarely places the solicitors in the Judicial Branch." State v. Langford, 400 S.C. at 434, 735 S.E.2d at 478.

The Court in Langford held that "setting the trial docket therefore is the prerogative **of the court**." Therefore the preparation of the docket being exclusively in the hands of the Circuit Solicitor, as stated in S.C. Code § 1-7-330, constituted "a complete invasion into the Court's domain." State v. Langford, 400 S.C. 421, 435, 735 S.E.2d at 478.

In Langford the defendant asserted prejudice because he was denied his right to a speedy trial, and because solicitor control allowed the solicitor to "judge shop." The Supreme Court rejected a finding of prejudice under both alleged grounds.

Here, conversely, appellant asserted prejudice because this was a very complex case with many witnesses. As seen above, at the time the solicitor called the case to trial the defense was at a great disadvantage. Counsel needed more time to be ready for this complicated trial. Yet the judge ruled the defense was at the mercy of the solicitor because she controlled the docket, and had the unconstitutional power to choose the time the case was called to trial.

If the judge had continued the trial as requested defense counsel could have been prepared to handle the many issues that arose during this trial without the jury constantly being sent out of the courtroom as this record shows. There is every reason to think the jury would conclude the defense was attempting to hide evidence from them because they were constantly being removed from the courtroom since these matters could not be resolved pre-trial because of the late discovery.

The trial did indeed involve many witnesses and complex issues as defense counsel correctly argued to the court. The defense was attempting to obtain data on a "gang database" in Richland County for its trial preparation. A key witness had also recanted his statement against appellant immediately before trial, and the defense wanted to interview him with time for some reflection and trial strategy.

It is important to note that the judge's ruling here was simply that the solicitor by statute controlled the docket, and the solicitor had called the case to trial. Appellant had stated meritorious grounds for a minimal continuance where appellant was incarcerated and the state was not prejudiced. Consequently, appellant should be granted a new trial given the highly unusual facts of this case.

2.

The court erred by ruling the defense opened the door to evidence appellant was in a gang simply by agreeing in its opening statement that, while the murder committed by others may have been gang related appellant was not at the scene of the shooting, and evidence appellant was in a gang constituted highly prejudicial impermissible bad character evidence.

As seen above, the judge ruled that the defense opened the door to this gang evidence merely because it mentioned gang activity in its opening statement in response to the state's opening statement. The judge also found the defense wanting voir dire on the subject opened the door to evidence **appellant was in a gang.**

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), our Supreme Court reiterated that in a criminal case, the state cannot not attack the character of the defendant unless the defendant himself places his character at issue. See State v. McElveen, 280 S.C. 325, 313 S.E.2d 289 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983). In Mitchell v. State, the solicitor introduced evidence alleging appellant was a "mafia" member and introduced evidence that she selected different colors of candles for the people she knew. In addition, the state presented evidence that people would come to Mitchell's home to "work the candles." Mitchell v. State, 298 S.C. at 188, 379 S.E.2d at 125.

Here, the state introduced evidence over appellant's objection that he was a gang member. Particularly in Richland County, South Carolina, for the last several years "gang activity" has been a sore spot with many citizens, who are also jurors. Introducing evidence that appellant was a member of a gang was very damning evidence. This Court can take

judicial notice of the fact that the front page of yesterday's State Newspaper, October 22, 2013 was dominated with news stories about the importance of stopping gang activity.

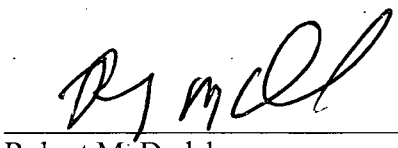
The defense also did not open the door to this testimony. When placing the handling of the "gang" matter in context, it was clear the defense was asserting appellant was not a gang member although is understood the state's case was going to be that the victim was killed during a gang retaliation. In his opening statement defense counsel only said that he understood the state was going to raise gang retaliation as an issue, which the solicitor already had in his opening **anyway**, but the defense insisted appellant was not a member of a gang and that evidence he was a member of a gang was impermissible bad character evidence. Appellant did not open the door to evidence he allegedly was a gang member, and too all of this evidence about gangs, their origins, and presence in Richland County.

Appellant did not testify in this case, and he did not offer a defense. He put the state to its burden of proof and the state impermissibly attacked appellant's character where he did not put it at issue. The state's case against appellant was far from overwhelming, and the smearing of his character entitles him to a new trial. Mitchell v. State, supra.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2014.

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 Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 30, 2014

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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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2014.

Rhonda Denesse Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .