ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of General Sessions
Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIELLE OLIVA LASHANE DAVIS KOCSIS,

APPELLANT

APPELLATE CASE NO. 2019-000687

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatise

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in refusing to charge the jury with a burglary charge that reflected current South Carolina burglary law?

II. Did the Circuit Court err in failing to grant Appellant's directed verdict motion on her burglary charge, in light of the fact that the prosecution never established the owner of the property at issue and said property did not meet the definition of a "dwelling house" under burglary law?

III. Did the Circuit Court err in sentencing Appellant to imprisonment for kidnapping when she was subject to a sentence of imprisonment for murder?

IV. Did the Circuit Court err in failing to grant Appellant's directed verdict motion on her kidnapping charges, in light of the fact that the prosecution never established the intent to commit this crime as to the alleged victims?

V. Did the Circuit Court err in allowing the State to play a 911 call for the jury where the call served no purpose but to inflame its passions?

STATEMENT OF THE CASE

Appellant Gabrielle Oliva Lashane Davis-Kocsis ("Kocsis") was arrested for murder, burglary, two counts of kidnapping, and criminal conspiracy. (Indictments). These charges arise out of Kocsis' alleged effort on September 27, 2015, to recover approximately $1,700 and a motorcycle stolen by Mark Connor, who was hiding out in a well-known "trap house" located at 512 McCrystal Circle, Moncks Corner, SC 29461 ("McCrystal Circle"). During this alleged recovery effort an armed friend of Kocsis fell through the rotten floor of the house, causing his handgun to discharge and resulting in the death of Connor. (Tr. Trans. pp. 382-384).

Kocsis was tried on April 8-10, 2019 before Circuit Court Judge Maite Murphy in Moncks Corner, South Carolina. (Tr. Trans. p. 1). The State was represented by Bart Stegall and Jordan Smith of the Ninth Circuit Solicitor's Office, and Kocsis was represented by Grant Smaldone and Jason Luck. (Tr. Trans. p. 2). The jury found Kocsis guilty of all charges, and Judge Murphy sentenced Kocsis to fifty years' imprisonment for murder, fifty years for burglary, thirty years for each count of kidnapping, and five years for conspiracy. (Tr. Trans. pp. 529-530). Judge Murphy ordered these terms to be served concurrently. (Tr. Trans. pp. 529-530). Kocsis timely served her notice of appeal on April 18, 2019.

ARGUMENT

I. The Circuit Court failed to charge the jury with the current South Carolina law of burglary.

Standard of review

An appellate court will not reverse the trial court's decision regarding jury charges absent an abuse of discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (citation and quotation marks omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "In general, the trial court is required to charge only the current and correct law of South Carolina." State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

Relevant facts and legal analysis

Kocsis requested the following change to the Circuit Court's proposed charge for burglary:

Remove

> IF A PERSON ENTERS A BUILDING BY USING DECEPTION, ARTIFICE, TRICK, OR MISREPRESENTATION TO GET CONSENT TO ENTER, THIS IS AN ENTRY WITHOUT CONSENT.

Replace with

> The entry must be without consent. "Enters a dwelling without consent" means to enter "without the consent of the person in lawful possession." In addition to the normal meaning of entry without consent, the phrase also includes entering by using deception, artifice, trick or misrepresentation to gain consent to enter from the person in lawful possession.
>
> A person in "lawful possession" has custody and control of, and the right and expectation to be safe and secure in, the dwelling in question.

(Memorandum Regarding Jury Charges p. 3). The Circuit Court refused to make this change, overruled Kocsis' objections, and charged the jury with the language it originally proposed. (Tr. Trans. pp. 449, 506-509, 522). The Circuit Court also denied a motion for new trial based on the erroneous instruction. (Tr. Trans. pp. 532-544).

"The law of burglary is primarily designed to secure the sanctity of one's home, especially at night time when peace, solitude, and safety are most desired and expected." State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981). "Thus, at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night." Id. at 113, 283 S.E.2d at 831. "[B]urglary is an offence against the *habitation* of some other person." State v. Trapp, 17 S.C. 467, 471 (1882) (emphasis in original); see also State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011) ("We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership"). "[T]he core of a dwelling constituting one's home for burglary purposes is the expectation of peace and security therein. Mere ownership does not automatically confer this status on a person. That ownership interest must be examined in light of who possesses that expectation of sanctity in the dwelling." Singley, 392 S.C. at 276, 709 S.E.2d at 606.

Kocsis' proposed change is based on the language of State v. Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606-607 (2011), as interpreted by Judge Anderson. See Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2012, § 2-13(2). This charge includes the "expectation to be safe and secure" language, which is relevant to this case, where the jury needed to determine if McCrystal Circle was actually a home and subject to burglary. Kocsis' convictions must be vacated, and this case be remanded for a trial with the correct jury instructions.

II. The State never proved the elements of burglary in its case-in-chief.

Standard of review

> On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.
>
> If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. When a motion for a directed verdict is made in a criminal case in which the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.

State v. Zeigler, 364 S.C. 94, 101-102, 610 S.E.2d 859, 6-7 (Ct. App. 2005) (citations omitted).

Relevant facts and legal analysis

At the conclusion of the State's case, Kocsis moved for directed verdict, arguing, *inter alia*, that the State had failed to present any evidence supporting the elements of the crime of burglary, and that McCrystal Circle did not constitute a "dwelling" under the law of burglary. (Tr. Trans. pp. 335-342, 449-450). The Circuit Court denied this motion; this is reversible error.

A. The State never established the entry was without the consent of the person in lawful possession.

The crime of burglary in the first degree requires the person (1) enter a dwelling (2) without consent (3) with the intent to commit a crime in the dwelling and (4) the existence of an enumerated aggravating circumstance. S.C. Code Ann. § 16-11-311(A). Burglary is "a crime against possession, not against property." State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981). In order to determine if a defendant committed burglary, the State must prove the alleged victim had "custody and control of, and the right and expectation to be safe and secure in, the dwelling

burglarized...." Singley at 277, 709 S.E.2d at 606.

The State never presented evidence that Rosemary Hoffberg, the alleged victim, was the owner of the dwelling allegedly burglarized. Rosemary Hoffberg[1] never testified in this matter, and none of the State's witnesses uttered her name during the State's case-in-chief.[2] While some of the State's witnesses mentioned a "Ms. Rose," the State never established that "Ms. Rose" was Rosemary Hoffberg. Further, the burglary indictment does not specify an address for the alleged crime. (Indictment). With no evidence showing that "Ms. Rose" was Rosemary Hoffberg, and no evidence of Rosemary Hoffberg's relationship to McCrystal Circle, the State could not prove that Rosemary Hoffberg had "custody and control of" McCrystal Circle. The Circuit Court erroneously failed to direct a verdict of acquittal on this charge.

B. The house at McCrystal Circle was not a structure that could be burglarized.

"The law of burglary is primarily designed to secure the sanctity of one's **home**..." Singley at 276, 709 S.E.2d at 606. (emphasis added) (internal quotation omitted). A home, at least for the purposes of the law of burglary, is a place where the person in custody or control of has "the right and expectation to be safe and secure" Id. at 277, 709 S.E.2d at 606. Any person who was at McCrystal Circle had no expectation of safety and security:

1) Alexis Murray testified the commotion during the alleged home invasion was "nothing out of the ordinary" for this house. (Tr. Trans. pp. 97, 111-112).

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[1] Hoffberg is apparently a 70-year-old methamphetamine user who traded drugs with other persons in this case. (Tr. Trans. pp. 186, 377).

[2] The Trial Court did mention her name once during voir dire. (Tr. Trans. p. 42).

2) Nicholas Varner testified that if one called 911 and mentioned he was at Miss Rose's, law enforcement would know the address. (Tr. Trans. p. 143). "Everyone in the neighborhood" stays at Miss Rose's. (Tr. Trans. p. 142).

3) Tommy Kennedy testified a "lot of people" stay at McCrystal Circle. (Tr. Trans. p. 167).

4) Richard Curtis testified "Miss Rose" traded drugs with the people who visited her house. (Tr. Trans. p. 186).

5) Whitney Chance testified the house was in such a state that she "didn't even know whose house that was..." (Tr. Trans. p. 203).

All of the above testimony was from the *State's* witnesses.[3] McCrystal Circle was not a home – it was a place of illegal recreation, as evidenced by the photographs introduced by the State.[4] (State's Exs. 2-12, 17-18). It is not a structure subject to the law of burglary, and thus could not be burglarized. The Circuit Court erroneously failed to direct a verdict of acquittal on this charge.

[3] Defense witness Curtis Jamison also testified it was a "known drug house." (Tr. Trans. p. 420).

[4] If there was anywhere in McCrystal Circle arguably subject to being burglarized, it would have been Miss Rose's room, which she never left. (Tr. Trans. p. 141).

III. Kocsis cannot be sentenced for kidnapping in light of her murder sentence.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Relevant facts and legal analysis

After her sentencing, Kocsis moved for a new trial (Tr. Trans. pp. 531-532). One of the grounds for a new trial was that the jury did not receive the proper instruction that would allow for separate sentences for both kidnapping and murder.

South Carolina's statutory scheme forbids the imposition of a sentence for kidnaping when a defendant is also convicted of murder of the same alleged victim. S.C. Code Ann. § 16-3-910. Specifically, the governing statute provides

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years **unless sentenced for murder** as provided in section 16-3-20.

S.C. Code Ann. § 16-3-910 (emphasis added). "Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated." State v. Vick, 384 S.C. 189, 201-202, 682 S.E.2d 275, 281 (Ct. App. 2009); see also Owens v. State, 331 S.C. 582, 584-585, 503 S.E.2d 462, 463 (1998); State v. McCall, 304 S.C. 465, 470, 405 S.E.2d 414, 416-417 (Ct. App. 1991), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); State v. Livingston, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); State v. Perry, 278 S.C. 290, 495, 299 S.E.2d 324, 327 (1983); State v. Copeland, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982).

While a South Carolina criminal defendant can be convicted of a kidnapping incident to another crime, one exception to this rule is "where the defendant has been sentenced for murder, the kidnapping statute prohibits the trial court from separately sentencing the defendant for kidnapping." State v. Elders, 386 S.C. 474, n.6, 688 S.E.2d 857, n.6 (Ct. App. 2010) (citing S.C. Code Ann. § 16-3-910; State v. Livingston, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984)). It is possible that under State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003), an appropriate charge (requiring intent to commit two separate offenses) could have allowed a separate sentence, but the Circuit Court did not issue such a charge. Kocsis' convictions must be vacated and this case be remanded for a trial with the correct jury instructions.

IV. The State never met its burden of proof regarding the *mens rea* for kidnapping.

Standard of review

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

Relevant facts and legal analysis

Kocsis was charged with two counts of kidnapping: one of Whitney Renee Chance and the other of Alexis Nicole Murray. (Indictments). At the completion of the State's case (and at the end of trial), Kocsis moved for directed verdict on the ground that the State had failed to prove that Kocsis "knowingly" kidnapped these persons. (Tr. Trans. pp. 337, 449-450, 532). A person is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result. See Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2012, § 2-10; State v. Jefferies, 316 S.C. 13, n.8, 446

S.E.2d 427, n.8 (1994) (quoting U.S. v. Bailey, 444 U.S. 394, 405 (1980)). It was virtually impossible for Kocsis to be aware it was "practically certain" that Chance and Murray would be kidnapped, as she did not even know they were there: She had never met Chance and Murray before that night (Tr. Trans. pp. 394-395), and the text informing Kocsis of Connor's whereabouts did not mention them, either. (Tr. Trans. pp. 189-190, 312, 400). Viewing the facts in a light most favorable to the State, Kocsis travelled to McCrystal Circle to collect her stolen money from Connor; there is no evidence of specific intent to kidnap Chance and Murray. The Circuit Court erred in failing to direct an acquittal on these causes of action.

V. The 911 call played for the jury served no purpose but to inflame its passions.

Standard of review

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice.

State v. Bratschi, 413 S.C. 97, 114, 775 S.E.2d 39, 48 (Ct. App. 2015) (citations and quotations omitted).

Relevant facts and legal analysis

The very first piece of evidence the State provided the jury in this trial was a recording of a 911 call after the bungled attempt to recover Kocsis' stolen money. (State Ex. 1). Kocsis objected to introduction of this approximately ten-minute recording, arguing it was unfairly prejudicial under Rule 403, SCRE. (Tr. Trans. pp. 53-55, 80). The call consisted primarily of two of the State's witnesses (Whitney Chance and Alexis Murray) pleading with the operator for a quick response and begging Connor to not die. The State believed this recording was admissible, arguing: "It actually gives in real time what is taking place in that moment in trying to give law enforcement the address, the description of the cars, trying to get the description of the assailants in real time." (Tr. Trans. p. 54). The Circuit Court ultimately admitted this evidence "for corroborative purposes and establishing the elements of the offense." (Tr. Trans. p. 55).

This recording was wrongly admitted. Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires

consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011).

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the

jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

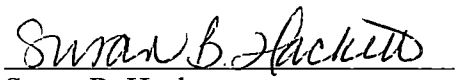
After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

"When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The 911 recording was raw and emotional, and it made such an impression on the jury that they requested to hear it again during their deliberations. (Tr. Trans. p. 524). The 911 recording does much to inflame the passions of listeners, but it has little probative value. "'A 911 call, ... and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance.'" Bratschi 413 S.C. at 115, 775 S.E.2d at 49 (quoting Davis v. Washington, 547 U.S. 813, 827 (2006)). The State called both of the persons speaking during the call as witnesses, and both testified as to the identity of the alleged assailants and their vehicles. The 911 call represented needless cumulative evidence that only resulted in inflaming the passions of the jury; the Circuit Court erred in admitting it, and Kocsis is entitled to a new trial.

CONCLUSION

The Circuit Court should be reversed.



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This 4th day of March, 2020.

STATE OF SOUTH CAROLINA

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THE STATE,

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V.

GABRIELLE OLIVA LASHANE DAVIS KOCSIS,

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 Gabrielle Oliva Lashane Davis Kocsis, #341232, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 4th day of March, 2020.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029