

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**RECEIVED**

**Aug 26 2020**

**SC Court of Appeals**

Appeal from Georgetown County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOHN NATHAN LINEN II,

APPELLANT

APPELLATE CASE NO 2019-001947

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ANDERS BRIEF OF APPELLANT

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TAYLOR D GILLIAM  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in denying Appellant's motion for a mistrial, where the jury found Appellant guilty of the lesser-included offense of robbery rather than armed robbery, where the jury also found Appellant guilty of a possession of a weapon charge, and where those verdicts were inconsistent?

**STATEMENT OF THE CASE**

Appellant was indicted by a Georgetown grand jury on May 31, 2017 for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. R. 422 – 428. He proceeded to trial before the Honorable Benjamin H. Culbertson and a jury on November 12, 2019. William F. Edgeworth, III represented Appellant; Keith R. Powell and Richard D. Todd, Jr. appeared on behalf of the state.

At the conclusion of the three-day trial, the jury found Appellant guilty of robbery, kidnapping, and possession of a weapon. R. 401, l. 22 – 402, l. 5. Judge Culbertson sentenced Appellant to life without parole on the kidnapping charge, fifteen years on the robbery offense, and five years on the weapon charge. R. 419, ll. 6 – 420, l. 7.

This appeal follows.

### **STANDARD OF REVIEW**

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). “Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.” Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

## ARGUMENT

The trial court erred in denying Appellant's motion for a mistrial, where the jury found Appellant guilty of the lesser-included offense of robbery rather than armed robbery, where the jury also found Appellant guilty of a possession of a weapon charge, and where those verdicts were inconsistent.

### Relevant facts

Tyesha Sparkman was working at Dollar General as the assistant store manager on March 20, 2017. R. 108, l. 23 – 111, l. 6. She opened the store that day; there were no other employees working in the morning hours. Id. A customer walked in and asked her where the t-shirts were located. R. 111, l. 18 – 112, l. 10. According to Sparkman, that customer left and later reentered the store. R. 113, ll. 2 – 10. She testified that the man grabbed a pack of white t-shirts and approached her cash register. Id.

Sparkman testified that the man showed her a gun in his hoodie and asked for the money in the safe. R. 113, l. 11 – 114, l. 17. When she informed him that opening the safe required a ten-minute wait, he requested the money in the register. Id. After she provided him that money, he tied her up in the break room using zip ties before leaving. Id.

Another customer came into the store and cut the zip ties off Sparkman. Id.; R. 326, ll. 3 – 23. Sparkman called 911, and the police arrived at the Dollar General soon thereafter. Id. An officer invited her back to the sheriff's office, where she participated in a photo line-up. R. 116, l. 21 – 118, l. 3. She also identified Appellant in the courtroom as the person who robbed her. R. 119, ll. 4 – 12.

One of the officers, Allen Flagler, recognized Appellant from the press release that was put together after the surveillance video was viewed by the police. R. 184, l. 15 – 188, l. 12.

Jonathan Griffith, another officer, obtained a search warrant for Appellant's residence. R. 218, l. 2 – 219, l. 10. While the search warrant was being executed, law enforcement located Appellant and placed him under arrest. R. 219, l. 12 – 220, l. 7.

After both parties rested and gave closing arguments, the trial judge charged the jury with the law. R. 376 – 389. After deliberating for less than an hour, the jury asked to see the surveillance video “of the gun being shown to Ms. Sparkman and for all three statutes in South Carolina that he is being charged for.” R. 391, ll. 7 – 13.

Following the jury's verdict of guilty of robbery, guilty of kidnapping, and guilty of the possession of a weapon charge, the trial judge noted the inconsistency of the verdicts. R. 402, ll. 7 – 18. The verdicts prompted a mistrial motion by the defense. R. 403, ll. 12 – 23. Counsel for Appellant argued that the jury was forced to either revert to armed robbery or find not guilty on the armed robbery charge. Id. The trial judge denied the mistrial motion and allowed the jury to “see if they can reach a verdict that is consistent on all charges.” R. 404, ll. 19 – 21.

The jury returned with a note indicating it linked the possession of a weapon charge to the kidnapping allegation and also believed a heightened standard existed for the armed robbery offense. R. 405, ll. 6 – 20. The trial judge accepted their verdicts of guilty of robbery, guilty of kidnapping, and guilty of possession of a weapon during the commission of a violent crime. R. 407, ll. 11 – 15.

### Discussion

The jury's verdicts were inconsistent, and the mistrial should have been granted. The jury found Appellant not guilty of armed robbery yet also guilty of the possession of a weapon charge, suggesting they did not believe he was armed at the time. Notwithstanding the abolition of inconsistent verdicts in South Carolina, Appellant's mistrial motion should have been granted

so that a new trial could have occurred. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). Armed robbery occurs when a person commits robbery either while armed with a deadly weapon or while the person was alleging he was armed and was using a representation of a deadly weapon. S.C. Code Ann. § 16-11-330.

A defendant may be convicted of armed robbery if the jury concludes that the robber alleged that he was armed under the requisite circumstances without having to conclude that he was, in fact, so armed. State v. Jones, 342 S.C. 248, 536 S.E.2d 396 (Ct. App. 2000). Words alone are not sufficient to establish a representation of a deadly weapon, for purposes of the armed robbery statute. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (Ct. App. 2007). “Deadly weapon” is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. State v. Scurry, 322 S.C. 514, 473 S.E.2d 61 (Ct. App. 1996). A gun used in a robbery is a deadly weapon regardless of its alleged inoperability. State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985).

Included in armed robbery is the lesser included offense of robbery. State v. Scipio, 283 S.C. 124, 125-126, 322 S.E.2d 15, 16 (1984). Our statutory scheme provides that the crime of robbery is defined by the common law. See S.C.Code Ann. § 16-11-325. The South Carolina

Supreme Court has described robbery as “the felonious taking and carrying away of goods of another against the will or without consent.” Scipio at 126, 322 S.E.2d at 15. “The common-law offense of robbery is essentially the commission of larceny with force.” State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979).

“If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60,” that individual is guilty of possession of a weapon during the commission of a violent crime. S.C. Code Ann. § 16-23-490.

During the course of the jury charge, the trial judge advised the jury: “Now, there are three possible verdicts which you may find in this case regarding the charge of armed robbery...” R. 387, ll. 10 – 11. Those three options were:

The possible verdicts in this case regarding the charge of armed robbery are, we, the jury, find the defendant guilty of armed robbery; or we, the jury, find the defendant guilty of robbery; or we, the jury, find the defendant not guilty.

R. 387, ll. 18 – 21. Previously the judge had explained how the jury could arrive at the conclusion that Appellant was guilty of robbery but not armed robbery:

If you find that the state has failed to prove that the defendant was armed with a deadly weapon, you may when consider whether the state has proved beyond a reasonable doubt that the defendant committed robbery. In order to prove robbery, the state must prove beyond a reasonable doubt all of the elements that I have just explained to you for armed robbery, except the element that requires the defendant to be armed with a deadly weapon. In other words, to prove robbery, the state must prove beyond a reasonable doubt that the defendant took the personal property from the person or presence of another person without that person’s consent and carried it away with the intent to permanently deprive the owner of the property and to convert the property to the defendant’s own use. The taking and carrying away of the property must have been done with violence or by putting the owner of the property in fear of violence.

R. 385, ll. 2 – 17.

The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is “whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

“Manifest necessity” is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Further, the word “necessity” is not to be interpreted literally. Arizona v. Washington, 434 U.S. 497, 505-06, 98 S.Ct. 824 (1978). Rather, there need only be a “high degree” of necessity in order to conclude that a mistrial is appropriate under the circumstances. Id. at 506, 98 S.Ct. 824. Whether a mistrial is mandated by manifest necessity is a fact specific inquiry. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000). Given the “varying and often unique situations arising during the course of a criminal trial,” the United States Supreme Court has recognized a broad discretion reserved to a trial judge in declaring a mistrial. State v. Kirby, 269 S.C. 25, 29, 236 S.E.2d 33, 35 (quoting Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973)). A trial judge's decision to grant a mistrial will not be overturned absent an abuse of discretion amounting to an error of law. Rowlands, 343 S.C. at 458, 539 S.E.2d at 719.

The jury's verdict appeared to hinge on whether Appellant was armed with a deadly weapon under the armed robbery statute or in possession of a firearm for the weapons charge. Because their verdicts were inconsistent, the motion for a mistrial should have been granted.

**CONCLUSION**

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



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Nathan Linen states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Benjamin H. Culbertson, which was held on November 12 - 14, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for John Nathan Linen.

Respectfully Submitted,



Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

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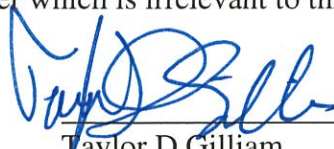
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire trial transcript dated November 12 – 14, 2019.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 26, 2020



Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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Columbia, SC 29211-1589  
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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

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

August 26, 2020.



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Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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