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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMAR JAVEELL NANCE,

APPELLANT

APPELLATE CASE NO. 2023-000172

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting video clips from the responding officer's body camera that contained inadmissible hearsay?

STATEMENT OF THE CASE

In August of 2022, the Lexington County Grand Jury indicted Appellant, Tamar J. Nance, for burglary first degree, criminal sexual conduct first degree, kidnapping, and financial transaction card theft, indictments #2022-GS-32-02762, 02763, 02764, 02765. On January 23, 2023, Appellant proceeded to jury trial before the Honorable Debra R. McCaslin. Sarah H. Mauldin and Stephen R. Story Jr. represented Appellant. Suzanne Mayes and Whitney Taylor prosecuted the case. The jury found Appellant guilty on all four indictments. Judge McCaslin sentenced Appellant to thirty (30) years for burglary first degree, twenty-five (25) years consecutive for criminal sexual conduct first degree, fifteen (15) years consecutive for kidnapping and four (4) years consecutive for financial transaction card theft for an aggregate sentence of seventy-four (74) years. A timely notice of intent to appeal was served on February 1, 2023. This appeal follows.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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 429–30, 632 S.E.2d at 848.

ARGUMENT

The trial judge erred in admitting video clips from the responding officer's body camera that contained inadmissible hearsay.

On June 23, 2021, at 6:19 AM Officer Benjamin Arrowood with the Columbia Police Department responded to a 911 call about a home invasion resulting in a sexual assault inside an apartment at a complex in the Harbison area located in Lexington County within the City of Columbia. (R. p. 284, lines 1-14). The officer met with the resident of the apartment, Denise Kennedy, and her upstairs neighbor who called 911. (R. pp. 290-292). Ms. Kennedy reported a burglary and sexual assault as well as the theft of her bank card. The conversation between the officer and Ms. Kennedy was captured on the officer's body camera.

Prior to trial Appellant moved to suppress portions of the video captured on Officer Arrowood's body camera. (R. p. 54, line 17 – pp. 55 - 60). Appellant argued that the questions and responses captured on the body camera did not qualify as excited utterances as an exception against the rule against hearsay. The State, citing State v. Heath, 433 S.C. 506, 860 S.E.2d 673 (Ct. App. 2021) and State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct. App. 1996), argued that the statements met the excited utterance exception. (R. p. 55, line 12 – p. 56, lines 1-21). The judge withheld ruling on the motion stating, "Oh, the excited utterance statements. You know, it appears to me to be excited utterance, it's right there at the scene, the break in and the assault had just occurred. However, I really haven't heard any testimony on it from the officer and I think I'll rule as you put him on the stand when you get ready for excited utterance, I'd like to hear his testimony before I allow it in." (R. p. 181, lines 9-16).

Ms. Kennedy testified at trial. Following Ms. Kennedy's testimony, Officer Arrowood testified. The officer identified State's exhibits #1, #2, and #3 as three clips from his body camera footage. (R. p. 290, line 23 -p 291, lines 1-9). The State moved to admit the clips in

evidence. (R. p. 291, lines 10-11). Appellant objected. (R. p. 291, lines 13-16). The judge asked, “Is that what we took up in pretrial?” (R. p. 291, line 17). The prosecutor answered, “It is, Your Honor.” (R. p. 291, line 18). The judge stated, “Okay. Then so noted for the record.” (R. p. 291, lines 19-20). State’s exhibits #1, #2, and #3 were admitted in evidence and played for the jury. (R. p. 291, line 21 – p. 292, lines 1-13). The trial judge erred in admitting the video clips from Officer Arrowood’s body camera that contained inadmissible hearsay.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. “Hearsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute.” Rule 802, SCRE.

In State v. Heath, 433 S.C. 506, 515–16, 860 S.E.2d 673, 678 (Ct. App. 2021), the South Carolina Court of Appeals wrote:

An excited utterance is an exception to the rule against hearsay evidence. Rule 803(2), SCRE. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Id. “The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication.” State v. Burdette, 335 S.C. 34, 42, 515 S.E.2d 525, 529 (1999) (alteration in original) (quoting State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978)).


“A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception.” State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). Our supreme court “has generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack.” Burdette, 335 S.C. at 43, 515 S.E.2d at 530.

Viewing the totality of the circumstances in this case, the answers given by Ms. Kennedy in response Officer Arrowood’s questioning and captured on State’s exhibit #3 do not qualify as

excited utterances. As correctly noted pretrial, there was some delay between when the incident occurred and when the officer arrived at the apartment. (R. p.58, line 14 – p. 59, lines 1-4). Ms. Kennedy told a detective that the intruder left her apartment at 5:39 AM. (R. p. 413, lines 12-13). The officer arrived at the apartment at 6:19 AM. (R. p. 290, lines 1-6). Also, Ms. Kennedy's statements on the video were not spontaneous but were instead the result of questioning by the officer. The trial judge erred in admitting State's exhibit #3 because it contained inadmissible hearsay.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of September, 2023.

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APPELLATE CASE NO. 2023-000172

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tamar Javeell Nance states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Debra R. McCaslin, which was held on January 23-27, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Tamar Javeell Nance.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of September, 2023.

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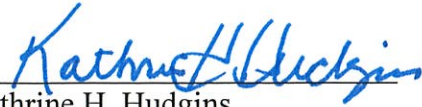
APPELLATE CASE NO. 2023-000172

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

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

- (1) True-billed indictments and sentencing sheets;
- (2) Full Trial Transcript pp. 1-706;
- (3) State's Exhibits #1, #2, #3 – clips from body cam at the apartment – **TO BE TRANSPORTED;**
- (4) State's #6 – surveillance video from CK Mart June 23, 2021- **TO BE TRANSPORTED;**
- (5) State's #7 – Audio of 911 call – **TO BE TRANSPORTED;**
- (6) State's #10 – Video of July 5, 2021, interview – **TO BE TRANSPORTED;**
- (7) State's #70 – Photo of Appellant at CK Mart – **TO BE TRANSPORTED;**
- (8) State's #81 - #90 – Photos of car – **TO BE TRANSPORTED;**
- (9) State's #99 – surveillance video from ATM – **TO BE TRANSPORTED;**
- (10) State's #107 – footage from body cam June 30, 2021 – **TO BE TRANSPORTED;**
- (11) State's #128 – surveillance video from ATM – **TO BE TRANSPORTED.**

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



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This 7th day of September, 2023.

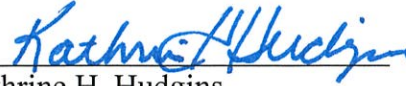
CERTIFICATE OF COUNSEL

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."

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Tamar Javeell Nance, #360895, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 7th day of September, 2023.


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