

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 02 2013

Appeal from Georgetown County

D. Garrison Hill, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

PRENTISS LOVE,

APPELLANT

APPELLATE CASE NO. 2012-212037

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err, pursuant to Rule 601, SCRE, in refusing to admit a recording of a telephone conversation between the Appellant and his wife when the State only questioned the wife about a portion of the conversation dealing with perjury and without hearing the conversation as a whole, the State's questioning implied that the wife was trying to improperly influence the testimony of Appellant?

STATEMENT OF THE CASE

In May of 2011, the Georgetown County Grand jury indicted Appellant for criminal sexual conduct with a minor second degree and lewd act on a minor, indictments #2011-GS-22-431, 432. On April 23, 2012, Appellant proceeded to jury trial before the Honorable D. Garrison Hill. Attorney Jonathan Eric Fox represented Appellant at trial. Attorney Candice A. Lively prosecuted the case on behalf of the State. On April 25, 2012, the jury returned a verdict of not guilty for criminal sexual conduct with a minor second degree. The jury returned a verdict of guilty for lewd act. Judge Hill sentenced Appellant to fifteen (15) years. A timely notice of intent to appeal was served on May 3, 2012. This appeal follows.

ARGUMENT

The trial court erred, pursuant to Rule 601, SCRE, in refusing to admit a recording of a telephone conversation between the Appellant and his wife when the State only questioned the wife about a portion of the conversation dealing with perjury and without hearing the conversation as a whole, the State's questioning implied that the wife was trying to improperly influence the testimony of Appellant.

The minor witness testified to three general instances of improper behavior by Appellant. According to the minor witness, the first incident took place on New Year's Eve, 2009. (R. pp. 149-152). The minor witness testified that additional incidents took place during two or three fishing tournaments. (R. pp. 153-157). According to the minor witness, the last incident took place on September 11, 2010. (R. pp. 159-162). Appellant's wife, Tabitha Love, testified that on September 11, 2010, she was with her husband the whole day. She testified that they went to the Dead Dog Saloon earlier in the day, came home and watched a Carolina football game and Appellant never left the house. (R. pp. 287 – 292).

The evening of the second day of trial, after Appellant's wife testified, the State obtained a recording of a phone conversation between Appellant and his wife. (R. pp. 304 – 322). The next day, the judge reviewed the phone conversation, marked as Court's Exhibit #5, and, over objection, allowed the State to recall Tabitha Love and question her about the phone conversation the night before. (R. pp. 313 – 322).

The State asked Mrs. Love, "And in your exact testimony isn't it true that you told him, 'No, you did not go back to the Dead Dog Saloon on September the 11th,' whenever he told you he thought he had?" (R. p. 328, line 25 – p. 329, lines 1-3). Mrs. Love answered, "He asked me, 'Did I,' and I said 'No, you didn't,' because I did not remember and I just clarified, 'No, you didn't.'" (R. p. 329, lines 4-6). The State then asked, "Okay. And clearly in your response to him you said, 'If you say you went, then I'm going to jail for perjury.'"

Didn't you say that?" Mrs. Love responded, "I'm not sure if those were the exact words but I told him to say what he believed, I did not tell him to lie, I told him to, 'Say what you believe,' and I said, 'But if you do change it they will get me for perjury.'" (R. p. 329, lines 10-14). Mrs. Love later testified, "It was not me saying what he needed to say, I told him to say what he believed in. I did tell him, you know, 'No, you didn't go to Dead Dog,' but I told him to stay calm, I told him you know, he was with me, just to keep going, you know, don't give up, but it was never exactly saying for him not to say certain things or get n the stand and lie or anything like that." (R. p. 332, lines 1-8). The final question from the State was, "The exact words regarding testimony of September the 11th, 2010, your husband was asking you, 'Didn't I go back to Dead Dog with Tony and A.J.,' and you said, 'No, you did not. If you say you went, then I'm going to jail for perjury.' Are those the words that you used?" (R. p. 333, lines 14-19). Mrs. Love answered "That is the words that I recall but I did not say right after that fact but yes, those words were in that area." (R. p. 333, lines 20-22).

Counsel for Appellant questioned Mrs. Love and then moved to publish the recording of the phone conversation to the jury. (R. pp. 334-336). The State objected. (R. p. 336, lines 13-14). Counsel for appellant argued that the whole conversation was relevant to "show the whole picture." (R. p. 338, line 3). Counsel argued, "She's been asked about this conversation, about her statements regarding perjury and I think the jury is entitled and we're entitled to present the entire picture of that conversation, have that testimony put in context, so I think it is clearly admissible and we can easily address the question of redacting that small portion is concerned." (R. p. 338, lines 3-10).

The trial judge found the recording inadmissible pursuant to Rule 613(b) and 801(d), SCRE. (R. p. 340, lines 1-14). The trial judge erred. The recording should have been admitted pursuant to the rule of completeness found in Rule 106, SCRE.

Rule 106, SCRE provides:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In State v. Cabrera-Pena, 361 S.C. 372, 377-378, 605 S.E.2d 522, 524-525 (2004) the South Carolina Supreme Court, citing State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975) wrote:

In State v. Jackson, it was held:

When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore **the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it.**"

265 S.C. at 284, 217 S.E.2d at 797 (emphasis supplied; internal citations omitted).

In Cabrera-Pena the State questioned an officer about statements made to him by the defendant. The trial court, however, did not allow the defendant to cross examine the officer about remaining self serving statements. A majority of the South Carolina Supreme Court found that the trial court erred in limiting the cross examination. The Court wrote, "Under Jackson, once the state elected to utilize Officer Membreno's

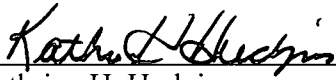
testimony to elicit incriminating statements made by Cabrera–Pena, justice required that his remaining statements tending to explain or qualify those statements should have been considered in connection therewith. Accordingly, we find Cabrera–Pena's cross-examination of Membreno was improperly limited.” 361 S.C. at 378, 605 S.E.2d at 525.

In the present case, the rule of completeness found in Rule 106, SCRE, requires admission of the recording of the entire phone conversation. Justice requires that the statements elicited by the State in regard to perjury needed to be heard in the context of the whole conversation. The trial judge abused his discretion in not allowing the jury to hear the whole conversation. The error was not harmless and requires reversal.

CONCLUSION

Based on the above argument, Appellant's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

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D. Garrison Hill, Circuit Court Judge

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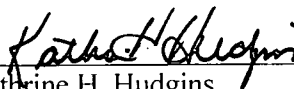
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Prentiss Love 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 D. Garrison Hill, which was held on April 26, 2012, 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 Prentiss Love.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

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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 and sentencing sheet;
- (2) Entire Trial Transcript;
- (3) Court's Exhibit # 4 (Regina Frye statement);
- (4) Court's Exhibits #3 and #8 (Juror notes);
- (5) Court's Exhibit #5 (Detention center Phone Records) – to be transported.

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

August 2nd, 2013.



Kathrine H. Hudgins
Appellate Defender

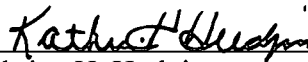
South Carolina Commission on Indigent Defense
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(803) 734-1343

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 2, 2013



Kathrine H. Hudgins
Appellate Defender

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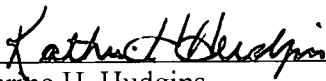
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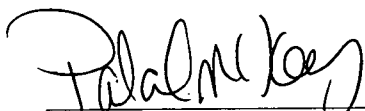
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Prentiss Love, #315271 at Macdougall Correctional Institution, 1516 Old Gilliard Road Ridgeville, SC 29472 this 2nd day of August, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.