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Feb 25 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County

R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES W. OWENS,

APPELLANT.

APPELLATE CASE NO. 2022-001458

MOTION FOR A NEW TRIAL

On March 14, 2023, this Court remanded appellant's case to the circuit court to determine whether the record below could be reconstructed. After a hearing, Judge Cothran issued a written Order on February 19, 2025, ("Reconstruction Order" attached as Ex. A) finding that the record cannot be reconstructed. Because appellant cannot have any meaningful review of his convictions, he now moves this Court to grant him a new trial.

Appellant James Owens ("Owens") was indicted by a Kershaw County grand jury for first degree criminal sexual conduct with a minor, two counts of lewd act on a minor child, and two counts of degree criminal sexual conduct with a minor. The allegations in the indictments concerned three victims. His week-long trial began September 16, 2013,

and the jury convicted him on September 20, 2013. Owens' trial counsel, Jason D. Kirincich timely filed a motion for a new trial.

Owens' motion for new trial was not decided until Judge Cothran denied it eight years later on September 27, 2021. The motion was not a "run of the mill" new trial motion as testified to by the trial lawyers and found by Judge Cothran. (Reconstruction Order, para. 11). Two issues required post-trial investigation. Id. A clerk from the solicitor's office entered the jury room during deliberations. Id. One of the complainants gave a post-trial statement that required further investigation. (Reconstruction Order, para. 12). The sheriff's office re-interviewed the complainant. (Reconstruction Order, para. 12). Judge Cothran found the complexity of these issues contributed to the delay in ruling on the motion for a new trial. Id.

After the trial judge denied the new trial motion, Owens filed a timely notice of appeal and ordered the trial transcript. Court Administration and the court reporter informed appellant that the recordings no longer existed. (Reconstruction Order, para. 5). The Attorney General made its own attempt to locate the recordings and that attempt was also unsuccessful. Id. Unlike many situations where only part of the trial transcript is missing, in Owens' case, no part of the transcript of this week-long sexual abuse trial exists.

After remand, Judge Cothran found the record could not be reconstructed. (Reconstruction Order, para. 13). The solicitor who tried the case as first-chair died after the trial. (Reconstruction Order, para. 6). The second-chair solicitor has little recollection of the trial and does not believe it can be reconstructed. (Reconstruction Order, para. 6). Owens' trial counsel similarly testified that he does not recall all of the objections and rulings and believes that it cannot be reconstructed. (Reconstruction Order, para. 7). Judge

Cothran found both trial lawyers' testimony at the hearing credible on these points. (Reconstruction Order, para. 8).

Judge Cothran remembered the trial in general terms, but does not have notes or a recollection sufficient to reconstruct the record. (Reconstruction Order, para. 9). The lower court found, "Without even a partial transcript, with the untimely death of the solicitor, the passage of nearly twelve years, the length of this five-day trial, and the number of victims, this Court finds that it would be impossible to reconstruct this record." (Reconstruction Order, para. 13).

At the remand hearing, the Attorney General floated the idea of using laches to bar appellant from getting a new trial. (Reconstruction Order, para. 10). After taking testimony from the trial lawyers, "the Attorney General stated it did not intend to push the issue of laches and agreed that the case for this equitable doctrine was not strong." *Id.* Judge Cothran commended the Attorney General for its candor and found the State had not met its burden of proof for showing laches. *Id.* The trial judge further stated, "This Court finds no fault on the part of Owens or the State and concludes that the inability to reconstruct this record is an unfortunate confluence of events." (Reconstruction Order, para. 13).

In State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007), this Court discussed the requirements for reversing convictions and granting a new trial because of a missing transcript. Despite no recordings from the trial and the passage of over a year, the State assured the appellate court that the record could be easily reconstructed. Ladson at 321, 644 S.E.2d at 271. The trial court found the record reconstructed even though the post-hearing testimony was conclusory and incomplete. *Id.* at 321-22, 271-72.

The Ladson court concluded that the appellant demonstrated prejudice because the reconstructed record would not allow for meaningful appellate review. Id. at 273-74, 644 S.E.2d at 325. The court cited South Carolina's strict error preservation rules, the passage of more than a year, and the length of the three-day trial and reversed the trial court's finding that the record was reconstructed. Id.

Here, the trial court found that after a good faith attempt, the record of a more than ten-year old, five-day trial with multiple objections, rulings, and witnesses could not be reconstructed. In Ladson, the crime was burglary. Here, the charges concerned child sexual abuse. Child sexual abuse trials are among the most legally complex cases and are often full of appellate issues. The trial court credited appellant's trial lawyer's testimony that the objections and rulings during the trial exceeded what was raised in Owens' new trial motion. (Reconstruction Order, para. 7). Trial counsel testified about one such example—a thumbnail of a shot from a movie taken from appellant's telephone that was entered into evidence over objection.

Unlike in Ladson, not even conclusory summaries of witness testimony are available for this Court's review. Also unlike Ladson, the State agreed at the remand hearing that the record could not be reconstructed. (Reconstruction Order, para. 10). Owens cannot get meaningful appellate review without any record at all.

Appellate courts have denied a new trial when the missing transcript is the fault of the appellant, but the lower court here found no fault on either side. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007). In Serrette, the defendant was tried in his absence and remained a fugitive for over ten years. Serrette at 651, 654 S.E.2d at 554. The court in Serrette declined to remand for even an attempt at reconstruction because of the

passage of ten years. Id. at 652, 654 S.E.2d at 555. Serrette ultimately dismissed the appellant's appeal because his fugitive status was the cause of the missing transcript. Id.

Owens was not a fugitive. He spent the entire pendency of his motion for a new trial in prison. Judge Cothran found no fault on the part of Owens or the State for the missing transcript. (Reconstruction Order, para. 13). The court also found that the State did not meet its burden of proof for asserting laches. (Reconstruction Order, para. 10). No reason exists to impose the harsh sanction of eliminating Owens' appellate rights. No evidence below was presented that this record could be reconstructed such that Owens could have any meaningful appellate review. (Reconstruction Order, para. 14). Therefore, this Court should grant Owens' motion, reverse his convictions, and remand for a new trial.



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

This ___ day of February, 2025

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)	
)	Appellate Case No. 2022-001458
State of South Carolina,)	Case Nos. 2012-GS-28-1241; 1242; 1243 and
)	2013-GS-28-831; 832
Respondent,)	
)	ORDER FINDING RECORD CANNOT BE
v.)	RECONSTRUCTED
)	
James Walter Owens,)	
)	
Appellant.)	

This matter is before this Court on remand from the Court of Appeals. The Court of Appeals granted appellant James W. Owens' Motion to Remand to Reconstruct the Record. On February 11, 2025, this Court held a hearing and now makes the following findings of fact and conclusions of law:

1. Owens was indicted by a Kershaw County grand jury for first degree criminal sexual conduct with a minor, two counts of lewd act on a minor child, and two counts of degree criminal sexual conduct with a minor. The allegations in the indictments concerned three victims.
2. On September 16, 2013, Owens was tried before this Court and a jury. The trial lasted five days, until September 20, 2013. The jury convicted Owens and this Court sentenced Owens to an aggregate of twenty-five years' imprisonment.
3. At the trial, Owens was represented by Jason D. Kirincich. Nicole Simpson and Kathryn Cavanaugh represented the State.
4. On September 20, 2013, defense counsel for Owens filed a Motion for New Trial which was denied on September 27, 2021. Owens timely filed a notice of appeal.

5. Appellate Defense assumed representation of Owens and ordered the trial transcript, but was informed by the court reporter and Court Administration that the recordings of the trial did not exist. After remand, appellate counsel for the State initiated another investigation with Court Administration that ultimately found no recordings.
6. The solicitor who was first chair in the case, Ms. Simpson, is deceased. The second chair solicitor, Ms. Cavanaugh, testified at the hearing that she has little recollection of the trial and does not believe it can be reconstructed.
7. Mr. Kirincich testified that he does not have his notes, which in any event would be limited because he was the sole attorney trying the case. Mr. Kirincich does not recall all of the objections and rulings from the trial and does not believe it can be reconstructed. His motion for a new trial did not contain all of the objections and rulings made during the course of this long trial.
8. The Court finds the testimony of Ms. Cavanaugh and Mr. Kirincich credible on the inability to reconstruct this record.
9. The Court remembers the trial, but does not recall the testimony or rulings with anything like the detail necessary to reconstruct this record. The Court does not have its own notes from the trial.
10. At the hearing, Benjamin Aplin from the Attorney General represented the State and David Alexander from Appellate Defense represented Owens. Before taking testimony from the trial lawyers, both sides informed the Court they did not believe this record could be reconstructed. The Attorney General indicated at the beginning of the hearing that it may pursue a claim of laches against Mr.

Owens for failing to order the trial transcript during the pendency of the new trial motion. At the conclusion of testimony, the Attorney General stated it did not intend to push the issue of laches and agreed that the case for this equitable doctrine was not strong. Owens argued that the State could have lost the motion for a new trial and, to the extent that any duty to order a transcript during the pendency of the motion existed, the State was in an equal or better position to do so given its resources and the fact that it could have been the appellant. The Court appreciates the candor of the Attorney General and finds that the State did not meet its burden of proof for showing laches.

11. Both Mr. Kirincich and Ms. Cavanaugh credibly testified that Owens' motion for a new trial was not a "run of the mill" motion confined solely to the trial record. The motion required additional investigation of two issues. First, a clerk with the solicitor's office entered the jury room during deliberations to assist with a computer. Both lawyers agreed that discovering exactly what happened in the jury room contributed significantly to the delay in ruling on the motion and this Court so finds. The investigation revealed that nothing improper occurred and the Court denied the motion for a new trial on this ground, but it was necessary to ascertain exactly what happened so that the Court could rule.
12. Trial counsel also both testified that one of the complainants gave a post-trial statement that required further investigation and delayed the ruling on the motion. Mr. Kirincich credibly testified that the complainant's post-trial statement was the basis for his ground number four in his motion for a new trial

and the statement in this Court's Order denying the motion that "The defense and prosecution both conducted in and participated in additional investigation, but no additional evidence has been produced that would warrant a nullification of the jury's verdict and the granting of a new trial." Mr. Kirincich recalled that the sheriff re-interviewed the complainant and he recalled attending that interview. This Court finds this investigation also contributed to the delay in ruling on the motion.

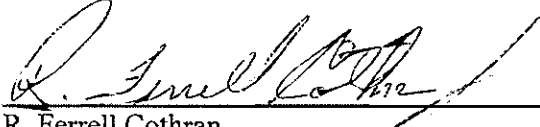
13. Without even a partial transcript, with the untimely death of the solicitor, the passage of nearly twelve years, the length of this five-day trial, and the number of victims, this Court finds that it would be impossible to reconstruct this record. The transcript was not due to be ordered until the commencement of the appeal. This Court finds no fault on the part of Owens or the State and concludes that the inability to reconstruct this record is an unfortunate confluence of events.
14. The Court also finds that the parties have made a good faith attempt at the task of determining whether this record can be reconstructed. "South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal." State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). No evidence is before this Court that the record can be reconstructed and the Court concludes that such a reconstruction would be impossible.

THEREFORE, IT IS ORDERED that the record on this case cannot be reconstructed. As the reason for the appellate court's remand is now complete, Counsel for appellant is ordered to file this Order with the Clerk of Court for Kershaw County and

with the Court of Appeals within ten (10) days of receipt and upon doing so, jurisdiction in the Circuit Court shall be extinguished.

IT IS SO ORDERED.

February 19, 2025



R. Ferrell Cothran
Circuit Court Judge

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

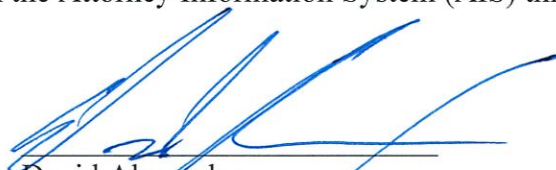
JAMES W. OWENS,

APPELLANT

Appellate Case No. 2022-001458
Lower Court Case Nos. 2012-GS-28-1241; 1242; 1243 and
2013-GS-28-831; 832

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true copy of the Motion for a New Trial in the above-referenced case has been served upon Benjamin J. Aplin, Esquire and Curtis A. Pauling, III, Esquire, at the primary e-mail addresses listed in the Attorney Information System (AIS) this 25th day of February, 2025.



David Alexander
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [Ben Aplin](#); susanspencer@scag.gov; pauling.curtis@richlandcountysc.gov
Cc: mfarthing@scag.gov; [SC - COLLINS CAROLINE](#); [Alexander, David](#)
Subject: 2022-001458 - State v James Owens - Motion for a New Trial
Date: Tuesday, February 25, 2025 12:28:00 PM
Attachments: [2022-001458 - State v James Owens - Motion for a New Trial.pdf](#)
[2022-001458 - State v James Owens - Motion for a New Trial - Cover letter to Court of Appeals.pdf](#)

Mr. Aplin and Mr. Pauling,

Please find attached for service the Motion for a New Trial for James Walter Owens's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock

Administrative Coordinator
Commission on Indigent Defense
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SC Court of Appeals



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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 25, 2025

The Honorable Jenny Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: State v. James W. Owens, Appellate Case No. 2022-001458

Dear Ms. Kitchings:

The Court remanded the above-referenced case for an attempt to reconstruct the record. That remand has been completed. Attached for filing is a copy of an Order signed by the Honorable R. Ferrell Cothran finding the record cannot be reconstructed. I am sending this Order to the Kershaw County Clerk of Court for filing today, as well. The Order states that the reason for the remand is completed and that the circuit court's jurisdiction is extinguished. Together with the Order, I am also filing a Motion for New Trial in this Court based on Judge Cothran's Order.

If the Court has any questions or needs any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DAVID ALEXANDER', with a long horizontal flourish extending to the right.

David Alexander

c: The Hon. R. Ferrell Cothran
Benjamin Aplin, Esquire
Curtis A. Pauling, III, Esquire
Client