STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 14 2014
SC Court of Appeals

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL TYRONE QUARLES,

APPELLANT

APPELLATE CASE NO. 2013-001159

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the 911 tape from the call the victim made immediately following the robbery because it was emotionally charged, meant to inflame the passions of the jury, and was not needed since it only bolstered the victim's testimony which made the 911 call prejudicial?

STATEMENT OF THE CASE

On May 13, 2013, the Aiken County Grand Jury indicted Michael Tyrone Quarles on the charges of armed robbery and kidnapping. On May 14-15, 2013, Quarles proceeded to trial before the Honorable Doyet A. Early and a jury. Quarles was represented by Michael Chesser, and the state was represented by Nicholas R. McCarley and Kevin Malony. The jury returned verdicts of guilty on both charges as indicted. Judge Early sentenced Quarles to twenty-eight years on each charge with the sentences to run concurrent. R. 190, ll. 13 – 25. Quarles' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On February 19, 2013, Carlos Williams and Jamaques Salley entered the Quick Cash in Aiken with a BB gun pistol style and a taser intending to rob the store. R. 20, ll. 5 – 15; R.72, ll. 2 – R. 73, ll. 24. Penny Guerriari was working in the store at the time, and had about $450 in cash in the drawer. R. 26, ll. 2 – R. 30, ll. 25.

Carlos held the gun on Penny while Jamaques took the money. As Carlos was leaving ahead of Jamaques, he heard the taser go off and heard Penny, the victim, fall. Then he and Jamaques ran to the car where Appellant Quarles was waiting. R. 94, ll. 5 – R. 100, ll. 25.

Carlos' story was that he, Jamaques Salley and Appellant Quarles planned the robbery. He and Jamaques approached Quarles a few days before and told him they needed his help in carrying out this armed robbery. Quarles was to enter the Quick Cash first and check out the place. They used a BB gun. R. 72, ll. 1 – R. 78, ll. 19.

On the morning of the robbery, the three of them went in Carlos' car and parked in the area of a daycare across the street from the Quick Cash. Quarles went to the Quick Cash and came back and said there was one woman working. Quarles stayed with the car. R. 83, ll. 2 –R. 94, ll. 25. Quarles was the lookout man. After the robbery, the three of them went to the street where Quarles lived and divided the money. Quarles got one hundred dollars. R. 103, ll. 1- 25.

Penny Guerrari's testimony was that on the morning of the robbery, a man whom she later identified from a photo lineup as Quarles, came into the store and asked about a loan. He stayed about four to five minutes and left. She saw two other black males with

black hoodies walking down the street. She became suspicious and called 911 at public safety. R. 26, ll. 1 - R. 35, ll. 25.

The two men with the black hoodies returned to the store and proceeded to carry out the robbery. They held her in the corner beside the file cabinet and made her open the drawer and give them the cash. She felt the taser on her back. She called 911. R. 36, ll.- R. 37, ll. 1.

Appellant Quarles testified that he did not know that Carlos and Jamaques were planning to rob the Quick Cash. He owed Jamaques money so Jamaques took him to get a loan so he could pay Jamaques. He went into the Quick Cash and obtained the information about a loan. He returned to the car where Jamaques and Carlos were waiting and told them he did not get the loan because he did not have all of the information he needed. Carlos and Jamaques left the car. Quarles drove it a little distance and then left and went to his aunt's house. He talked to Jamaques later that day who told him what they had done. He did not see them until he saw them on the news later. They did not give him any money. R. 144, ll. 17 - R. 150, ll. 5.

In a pretrial motion, defense counsel told the court that he had a motion to suppress the 911 call the victim made immediately after the incident based on the fact that the call was more prejudicial than probative pursuant to a Rule 403, SCRE, analysis. R. 5, ll. 18 – R. 7, ll. 5.

Defense counsel argued that the call was "as emotional as it can get." The state was going to present the victim, Penny Guerriari, to testify about this 911 call she made. She was going to testify to the facts of the incident so the only reason the state wanted to admit the 911 call was for the emotional impact which was "overwhelming." Counsel continued to

argue that the 911 call was hearsay as it was a prior out of court statement made by this witness. R. 8, ll. 7 – R. 9, ll. 25.

The judge responded to defense counsel that the victim's testimony did not need to be bolstered by the 911 tape as it was cumulative, bolstering, and highly prejudicial due to the emotional effect. R. 10, ll. 1 – 20.

The state argued that the 911 tape was extremely probative because she was talking about what happened seconds after this event occurred. The state argued that it was an excited utterance which prevented it from being hearsay. The victim was not going to testify as to anything said on the 911 tape so it would not be cumulative. The judge said he still had to conduct a 403 analysis as to whether it was more prejudicial than probative. The state admitted that the judge would hear screaming and shouting on the 911 tape. The judge told the state not to mention the 911 call until he ruled. The judge said they could do a proffer during the trial. R. 10, ll. 18 – R. 19, ll. 12.

During the testimony of the victim, Penny Guerriari, when she said she called 911 immediately after the robbery, the state said they may need to proffer testimony. Defense counsel objected on the grounds previously stated. The judge said they discussed it pretrial, and he was going to allow it. He said he had made a ruling which he would put on the record outside the presence of the jury. The judge told defense counsel he was protected on all of his arguments. R. 38, ll. 1 – 21.

Later during the trial, the judge entered on the record his ruling on the admissibility of the 911 tape. His ruling was that based on the totality of the circumstances, he found the 911 tape more probative than prejudicial. R. 70, ll. 1 – 25.

ARGUMENT

The trial court erred in admitting the 911 tape from the call the victim made immediately following the robbery because it was emotionally charged, meant to inflame the passions of the jury, and was not needed since it only bolstered the victim's testimony which made the 911 call prejudicial.

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013). For purposes of determining whether challenged evidence is unduly prejudicial, prejudice that is unfair is distinguished from the legitimate impact all evidence has on the outcome of a case; unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence, but rather refers to evidence which tends to suggest a decision on an improper basis. State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012).

All evidence is meant to be prejudicial; it is only unfair prejudice which must be scrutinized under the rule requiring the balancing of probative value against prejudicial effect. Id. In State v. Lee, Id. the Court of Appeals reversed the case due to the erroneous admission of unduly prejudicial photographs in the prosecution for multiple offenses involving a child which the court said was not harmless beyond a reasonable doubt. The Court cited State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), for the rule that photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts or conditions.

Bolstering, according to Black's Law Dictionary, 120 (Abridged Sixth Edition 1991) occurs in evidence law when one item of evidence is improperly used by a party to add credence or weight to some earlier un-impeached piece of evidence offered by the same party.

In State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2002), the Supreme Court held that the tape recording of the murder victim's 911 call, revealing the victim's physical pain and suffering after being shot by the defendant, was relevant and properly admitted in the sentencing phase of this murder prosecution to prove the aggravating circumstance of physical torture.

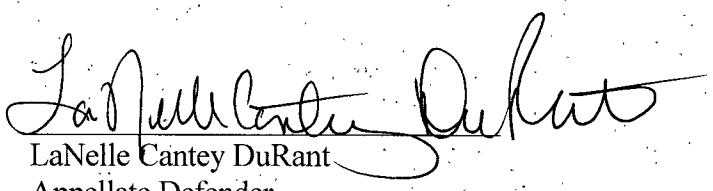
Quarles' case is distinguished because the admission of evidence is broader in the sentencing phase, and the victim in Quarles' case testified as to her own 911 call. The 911 call was not needed to substantiate any fact or condition. The victim testified as to the facts as did the co-defendant, Carlos. No one contested the clerk being robbed. The only reason for the 911 tape was to inflame the emotions of the jury to show the victim's fear.

In his closing argument, the solicitor told the jury that they would have the 911 call to review. The solicitor argued that the "one in the store" was "terrified, absolutely terrified." R. 167, ll. 1 – 20. The trial court's Rule 403 analysis was not adequately put on the record, and it was clearly erroneous.

CONCLUSION

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

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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 14th, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of August, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.