STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JULIUS CURRY,

APPELLANT

APPELLATE CASE NO. 2014-000569

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the State did not introduce the recording in evidence and the judge failed to determine if any probative value of the recording was far out weighed by the prejudicial impact?

STATEMENT OF THE CASE

In 2013, the Chesterfield County Grand jury indicted Appellant Curry for criminal domestic violence of a high and aggravated nature [CDVHAN], assault and battery second degree, resisting arrest with a deadly weapon and attempted murder, indictments #2013-GS-13-697, 698, 699, 700. On March 3, 2014, Curry proceeded to jury trial before the Honorable Paul M. Burch. Matthew Swilley represented Curry at trial. Kernard Redmond prosecuted the case. The jury found Curry not guilty of CDVHAN. The jury found Curry guilty of assault and battery second degree, resisting arrest with a deadly weapon and the lesser included offense of assault and battery first degree. Judge Burch sentenced Curry to ten (10) years for assault and battery first degree, ten (10) years consecutive for resisting arrest with a deadly weapon and one and a half years consecutive for assault and battery second degree. A timely notice of intent to appeal was filed on March 10, 2014. This appeal follows.

STATEMENT OF FACTS

On August 30, 2013, Appellant Curry and his then girlfriend, Marshell Wright, had been drinking and doing drugs all day. (Tr. p. 6o, line 22 – p. 61, line 1). As they were walking home from the Magnolia Lane trailer park, two guys stopped and offered them a ride home. (Tr. p. 61, lines 2-19). Marshell accepted the ride home with the guys but Curry did not. When Curry got home a physical altercation took place between Marshell and Curry. (Tr. p. 61, lines 20 – 25). Marshell's daughter, Shiquan Wright also became involved in the physical altercation. (Tr. p. 63, lines 5-10). According to Marshell and Shiquan, Curry pulled out a knife during the course of the fight and Shiquan grabbed an empty bottle of Hpnotiq.[1] (Tr. p. 66, lines 13-21; p. 90, line 7 – p. 91, lines 1-7). Shiquan eventually left and called the police from a neighbor's house. (Tr. p. 91, lines 16-23).

Staff Sergeant Jimmy Coombs with the Chesterfield County Sheriff's Department arrived and met with Shiquan. (Tr. p. 109, lines 20 – p. 110, lines 1-6). Sergeant Coombs pushed the front door open, stepped inside and pulled his taser out. (Tr. p. 111, lines 2-7). Sergeant Coombs testified that he heard voices coming from a bedroom and he identified himself as being with the Sheriff's Department. (Tr. p. 112, lines 5-13). According to Sergeant Coombs, when he kicked the bedroom door in, he saw Curry with a knife in his hand. (Tr. p. 113, lines 7-25). Sergeant Coombs described the encounter as a deadly force encounter and deployed his taser. (Tr. p. 113, line 20 – p. 114, lines 1-7). Sergeant Coombs testified that Curry continued to struggle after being tased and tried to stab Coombs with the knife. (Tr. p. 114, line 8 – p. 115, lines 1-25). Another officer with the Chesterfield County

[1] Hpnotiq is defined on its webpage as a refreshing blue blend of premium French vodka, exotic fruit juices and a touch of cognac.

Sheriff's Department arrived and Curry was arrested and taken to the hospital for injuries he sustained in the struggle.

ARGUMENT

The trial judge erred in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the State did not introduce the recording in evidence and the judge failed to determine if any probative value of the recording was far out weighed by the prejudicial impact.

Prior to trial Curry moved to exclude recorded jail phone calls between Curry and Marshell Wright, his then girlfriend, based on the fact that defense counsel was only made aware of the recordings the week before trial and had not had an opportunity to review the recordings. (Tr. pp. 31-36). The State advised the judge that the Sheriff's Office was unable to download the recorded phone calls and instead the Sheriff's Office provided a summary of the calls to the prosecutor. (Tr. p. 33, line 23 – p. 34, p. 35, lines 1-4). The prosecutor admitted that the summary got "buried on his desk" and had not been provided to defense counsel until the week before trial. (Tr. p. 34, lines 3-4).

The judge ruled stating, "No, sir. You're not going to wait until the last second and turn information over to him like that. Now, I can understand with all this docketing we've got and all these pending cases why something like this would happen. But the best I can do here is I'm going to grant his motion unless you move for a continuance and we will try this case later on so he can have more time. But this mess, now, is waiting until the week before has got to stop." (Tr. p. 36, lines 16-24). Inexplicably, defense counsel consented to the State's motion for a continuance. (Tr. p. 38, lines 21-22; p. 37, lines 15-25).

The State then agreed to inform defense counsel of the limited specific parts of the recorded phone calls that would be offered at trial. (Tr. p. 39, lines 2-11). Defense counsel for Curry agreed but stated he may still have an objection pursuant to Rule 403, SCRE. (Tr.

p. 39, lines 12-15). After listening to the recording of the jail phone calls, defense counsel for Curry withdrew his Rule Five objection based on the state's failure to disclose the recorded phone calls in a timely fashion and instead argued for suppression based on the fact that the recordings were more prejudicial than probative. (Tr. p. 40, line 12 – p. 41, lines 1-12). The judge stated that he would make a decision when the recordings were offered in evidence. (Tr. p. 41, lines 13-18).

The recordings, however, were never offered in evidence. Instead, the State moved to simply publish the recordings to the jury. (Tr. p. 163, lines 2-5). Defense counsel for Curry renewed the Rule 403 objection and objected based on the fact that recordings were not in evidence. (Tr. p. 163, lines 6-9; p. 163, line 25 – p. 164, lines 1-3). Both objections were overruled. (Tr. p. 163, lines 17-18; p. 164, lines 4-6). In regard to the fact that the recordings had not been admitted in evidence, the judge ruled, "All right. Noted. I overrule it. Since there is no proffer here if I find a problem pops up I will have to step in. There could be ramifications." (Tr. p. 164, lines 4-6). The recordings were played for the jury. (Tr. p. 164, line 13 – p. 165, lines 1-10).

First, it was improper to allow the State to publish the recordings to the jury without admitting the recordings in evidence. Second, the judge erred in allowing the State to publish the recordings to the jury without making a determination that any probative value of the recordings was far outweighed by the prejudicial impact. Based on Curry's objection to the recordings, the judge should have listened to the recordings and ruled on the objection **before** allowing the State to publish the recordings. The appellate court can not determine if the recordings had probative value and if so if the probative value was out weighed by the

prejudicial impact because the recordings were not introduced in evidence. The compounded errors require a new trial.

Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998).

The probative value, if any, of the recorded telephone conversations is unclear based on the record before this Court, as the recordings were not introduced in evidence. When Curry objected pursuant to Rule 403 the State argued, "And, Your Honor, we would simply say that it is relevant because the portions that we are going to be talking about address calls made to Ms. Marshell Wright whose [sic]still here in the courtroom in reference to this case and her testimony or non-testimony regarding this case. So we would assert that they are very relevant in the particular matter." (Tr. p. 163, lines 10-16). The judge then overruled the objection, presumably without listening to the recording of the jail telephone calls and without a finding that the probative value outweighed the prejudicial impact. (Tr. p. 163, lines 17-18).

Marshell Wright testified that Curry called her when he was in jail and asked her to drop the charges against him. (Tr. p. 75, line 8 – p. 76, lines 1-16). On direct examination Curry admitted making the phone calls and discussing Wright not coming to court. (Tr. p.

198, lines 21 – p. 199, lines 1-11). In closing argument counsel[2] argued that the jail calls had no bearing on guilt and told the jury that the State played the jail calls simply to make Curry look bad. (Tr. p. 217, lines 7-25). The jail phone calls should not have been published to the jury.

In State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009), the South Carolina Court of Appeals wrote:

> This Court reviews a trial court's decision regarding the admissibility of evidence under Rule 403 pursuant to the abuse of discretion standard and must give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct.App.2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id. at 358, 543 S.E.2d at 593–94. The trial court's determination should be reversed only in exceptional circumstances. Id. at 357, 543 S.E.2d at 593.

A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")).

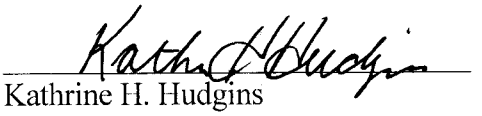
[2] Counsel incorrectly advised the jury that the jail calls were in evidence. (Tr. p. 217, lines 8-10).

In the present case the trial judge failed to exercise discretion. The trial judge failed to conduct a Rule 403 balancing test once the objection was made. Instead, the trial judge simply allowed the State to publish the recording for the jury without requiring the State to admit the recordings in evidence. The trial judge's failure to exercise discretion amounts to an error of law requiring reversal.

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of November, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.