

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY FRADY,

APPELLANT

APPELLATE CASE NO. 2014-001954

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred by admitting a cell phone and photographs that Appellant allegedly took of Tammi Frady's adult daughter, Appellant's step-daughter, where Frady gave the phone to the solicitor almost two years after Appellant's arrest, the photographs were not relevant to the CDV charge, and even if they were, they should have been excluded under Rule 403, SCRE, the State offered no evidence that the cell phone belonged to Appellant, and there was no evidence presented of when the photographs were taken?

STATEMENT OF THE CASE

On December 13, 2012, an Horry County grand jury indicted Appellant for criminal domestic violence, third offense. R.* The matter proceeded to a jury trial before the Honorable Edward Cottingham and a jury. Tr. 1. Melinda Allyson Knowles represented Appellant. Jennings Scott Hucks represented the State. Tr. 1.

After a two-day trial, Appellant was found guilty. Tr. 204. Judge Cottingham sentenced Appellant to five years imprisonment, suspended upon the service of four years, with three years of probation. Tr. 208.

Appellant appealed his conviction and sentence. This brief follows.

ARGUMENT

The trial judge erred by admitting a cell phone and photographs that Appellant allegedly took of Tammi Frady's adult daughter, Appellant's step-daughter, where Frady gave the phone to the solicitor almost two years after Appellant's arrest, the photographs were not relevant to the CDV charge, and even if they were, they should have been excluded under Rule 403, SCRE, the State offered no evidence that the cell phone belonged to Appellant, and there was no evidence presented of when the photographs were taken.

Motion to Exclude the Cell Phone and Photographs

Prior to trial, defense counsel moved to exclude a cell phone that Tammi Frady claimed belonged to Appellant. Tr. 33. Counsel also moved to exclude suggestive pictures of Frady's adult daughter, Appellant's step-daughter, that were on the phone. Tr. 33 – 34. Counsel argued that the cell phone and photographs were overly prejudicial and irrelevant to the CDV charge. Tr. 34. Counsel also questioned the authenticity of the photographs because Frady did not turn over the cell phone until almost two years after the alleged incident. Tr. 138, lines 2 – 11.

The solicitor argued that the cell phone and pictures corroborated Frady's story. Tr. 35, lines 12 – 14. The solicitor explained to the judge that his investigator downloaded the photographs from the phone. Tr. 35, line 25 – Tr. 36, line 2. He also explained that he would have Frady testify that she found the phone with the pictures on it and that is what started the argument between her and Appellant. Tr. 36, lines 6 – 9.

Judge Cottingham told the solicitor to have the investigator testify that she retrieved the photographs from the cell phone that Frady gave her. Tr. 36, lines 15 – 17. Over

defense counsel's objection, Judge Cottingham allowed the cell phone and photographs to be admitted into evidence. Tr. 37, lines 9 – 16; Tr. 133; Tr. 137.

Facts at trial

Tammy Frady claimed that on September 28, 2012, she was at her residence of 5308 Rush Road, in Horry County, sorting through her belongings. Tr. 54 – 55. After finding the title to her trailer that Appellant had taken from her, Frady discovered a cell phone lying on the television stand in Appellant's bedroom. Tr. 56, lines 2 – 13. She opened the cell phone and claimed to see suggestive pictures of her daughter and Appellant's step-daughter, Amber, with sexual words on top of them. Tr. 56, line 22 – Tr. 57, line 17. While Frady was looking through the cell phone in her living room, Appellant walked into the house. Tr. 59, lines 6 – 25.

According to Frady, Appellant saw the cell phone and title in her hands and walked into his bedroom. Tr. 59, lines 17 – 21. Frady immediately went to hide the title and cell phone in her daughter's baby's crib so that Appellant would not take them. Tr. 60, lines 1 – 2. Appellant started "fussing" with her about going through his things and walked "closer and closer." Tr. 60, lines 5 – 24. As she tried to walk away from him, Appellant allegedly grabbed her around the neck and started choking her. Tr. 61, lines 15 – 18.

Appellant then walked into the room where Frady hid the title. Tr. 61, lines 24 – 25. While trying to grab the title and cell phone before Appellant could find it, Frady claimed that she was hit in the face. Tr. 62, lines 12 – 13. She grabbed the title and cell phone from inside the crib and ran out the door. She called 9-1-1 and stayed outside until officers arrived. Tr. 62, lines 13 – 19.

Detective Gregory Lent responded to Frady's home that night. Tr. 98, lines 16 – 17. He observed marks on her neck, redness on her face, and swelling under her eyes. Tr. 100, line 22 – Tr. 101, line 1. Appellant was inside of the house. Tr. 102, lines 21 – 22.

Despite Appellant's denial that anything happened, Det. Lent arrested him. Tr. 106, lines 2 – 3. Frady declined any medical treatment. Tr. 113, lines 14 – 15. Frady never said anything to the detective about pictures being on the cell phone nor was the phone collected as evidence. Tr. 117, lines 14 – 18.

Ginger Pop, an investigator with the Solicitor's office, did not recover the photographs from the cell phone until April 2014, almost two years after the alleged incident. Tr. 138, lines 2 – 11. She was unable to determine whether the cell phone even belonged to Appellant or when the photographs were taken. Tr. 140, lines 2 – 17.

Discussion

The trial judge erred by admitting a cell phone and photographs that Appellant allegedly took of Tammi Frady's adult daughter from the cell phone. Frady gave the phone to the solicitor almost two years after Appellant's arrest and there was no proof that the cell phone belonged to Appellant. The photographs were not relevant to the CDV charge and there was no evidence of when the photographs were taken.

It is elementary that all evidence must be relevant to be admissible. Rule 402, SCRE. Relevant evidence is evidence having the tendency to make some matter in issue more or less probable. Rule 401, SCRE; State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 898 (Ct. App. 2005).

However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. In analyzing probative

value, an appellate court “considers the importance of the evidence and the significance of the issues to which the evidence relates.” State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014); see also State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010).

To determine the prejudicial effect of offered evidence, an appellate court must look at the entire record. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). The result will generally turn on the facts of each case. *Id.* Before an appellate court reverses a case based on erroneous admission or exclusion of evidence, it must find error in the lower court’s ruling and prejudice resulting from that ruling. State v. White, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007).

Here, the suggestive photographs of Frady’s daughter and the cell phone that Appellant allegedly used to take the photographs should not have been admitted into evidence. The State failed to establish an evidentiary predicate. The photographs and cell phone were not relevant to prove the issue of whether Appellant assaulted Frady. Even if the photographs and cell phone were relevant to corroborate Frady’s account of why the argument between Frady and Appellant started, their probative value was substantially outweighed by their prejudicial effect to Appellant.

Given the age of Frady’s daughter at the time, nineteen, and the sexual words written over the photographs, seeing the photographs invited a conviction on an improper basis of the jury believing there was a spurious, improper relationship between Appellant and Frady’s daughter. Further, there is no evidence that the photographs were taken without the daughter’s consent. Frady’s daughter did not testify.

Other than what Frady claimed, there were no phone records or any other evidence presented that confirmed Appellant owned and used the cell phone. There was no evidence

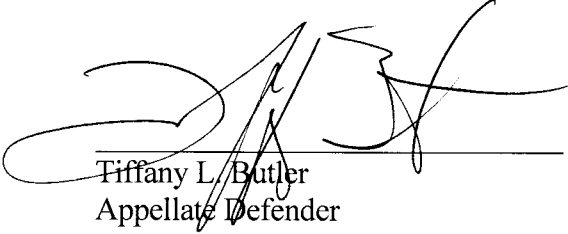
presented to show the jury when the pictures were taken, which was significant because Frady did not turn the phone over to the State until April 2014. The incident allegedly occurred in September 2012, but Frady never mentioned the cell phone or photographs to police.

The photographs had absolutely no probative value, and even if there was, the probative value was substantially outweighed by their prejudicial effect. Because the trial judge admitted them into evidence, Appellant was denied a fair trial.

CONCLUSION

For the foregoing reasons, Appellant Timothy Frady respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2015.

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CERTIFICATE OF SERVICE

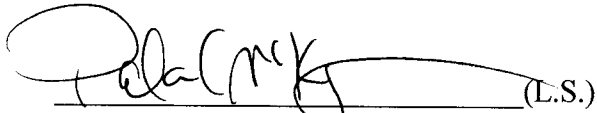
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of February, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2015.



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

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