

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2014-000569

RECEIVED
MAR 18 2015
SC Court of Appeals

THE STATE,

Respondent,

v.

JULIUS CURRY,

Appellant.

REPLY TO APPELLANT'S RETURN TO MOTION TO
REMAND FOR RECONSTRUCTION OF THE RECORD

Appellant opposes Respondent's Motion to Remand for Reconstruction of the Record, contending reconstruction of the audio recordings at issue is not necessary for purposes of this appeal, because the circuit court failed to conduct a Rule 403 analysis. Respondent submits Appellant is simply wrong, and reconstruction is vital to this Court's consideration of the issue raised by Appellant.

The first part of Appellant's argument goes to whether the recordings were entered in evidence. Playing the recordings in open court before the jury was the functional equivalent of a witness testifying, and if portions of the witness' testimony cannot be transcribed for some reason, the testimony is still "in evidence." If possible, reconstruction of the missing testimony is the appropriate remedy. The Solicitor's Office

has contacted Appellant's trial counsel, and they are prepared to work with the circuit court to reconstruct the substance of the recordings played for the jury.

Appellant's contention the circuit court failed to make any findings regarding the recordings probative value/prejudicial effect is not the end of the discussion. Failure to make an on-the-record Rule 403 analysis is not reversible error if the record indicates the trial judge was cognizant of the evidentiary rule at issue when admitting the challenged evidence. State v. King, 349 S.C. 142, 561 S.E.2d 640, 647 (Ct. App. 2002). If the record so indicates, the trial court's ruling regarding admission of the evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion, which occurs when the trial court's conclusions either lack evidentiary support, or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 265 (2006).

The circuit court was cognizant of Rule 403 when admitting the recordings because that was a basis for Appellant's objection. (Trial Transcript pp. 39, 163-164, attached hereto as Exhibit A). The State set forth reasons the recordings were relevant and probative. By overruling Appellant's objection, the circuit court implicitly found the recordings' probative value outweighed their prejudicial effect. Thus, the substance of the recordings is necessary for this Court to determine if the circuit court abused its discretion in admitting them.

Finally, while the lack of specific 403 findings is not in and of itself reversible error, if the matter is remanded to reconstruct the record, the Court can also instruct the circuit court to make specific findings at the reconstruction hearing regarding its Rule 403 analysis. Since the remand relates to the recordings, expanding the scope of remand to require such findings would be appropriate. See State v. Spears, 403 S.C. 247, 742

S.E.2d 878 (Ct. App. 2013) (case remanded for Rule 403 hearing, with ruling subject to appellate review). Incorporating the Rule 403 hearing into the reconstruction proceeding will further judicial economy, because the parties and this Court can address the circuit court's analysis in the pending appeal.

Accordingly, Respondent requests that the Motion to Remand be granted.

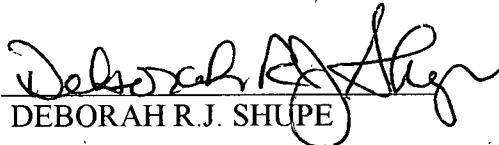
Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

By:


DEBORAH R.J. SHUPE

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ATTORNEYS FOR RESPONDENT

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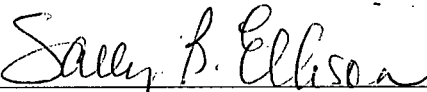
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Reply to Appellant's Return to Motion to Remand for Reconstruction of the Record on Appellant by depositing a copy in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 18th day of March, 2015.


SALLY B. ELLISON
Administrative Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

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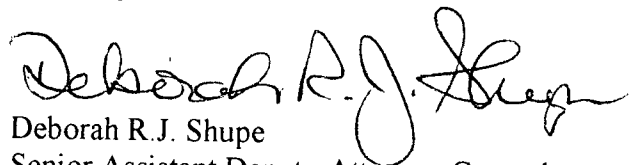
Kathrine H. Hudgins
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

Re: The State v. Julius Curry
Appellate Case No. 2014-000569

Dear Ms. Hudgins:

Enclosed is a copy of the Reply to Appellant's Return to Motion to Remand for Reconstruction of the Record, with proof of service, in the above-referenced case.

Sincerely,


Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosure

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)