

STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2014-001054

THE STATE,

Respondent,

v.

TIMOTHY FRADY,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

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

JIMMY A. RICHARDSON
Solicitor, 15th Judicial Circuit

Post Office Box 1276
Conway, SC 29928
(843) 915-8608

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court judge did not err in allowing the introduction of explicit photographs found on the Appellant's cell phone because the pictures corroborated the victim's testimony and their probative value outweighed any prejudicial impact on the jury.

II.

The trial court did not err in allowing the admission of the cellphone because the proper evidentiary foundation was demonstrated at trial.

III.

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STATEMENT OF THE CASE

Appellant was indicted for criminal domestic violence, third offence, on December 13, 2012, by an Horry County grand jury. (Indictment.) The Appellant was found guilty before a jury trial before the Honorable Edward Cottingham. (T. p. 204 line 1) The Appellant was represented by Melinda Allyson Knowles, Esquire and Assistant Solicitor Jennings Scott Hucks represented the State. Judge Cottingham sentenced Appellant to five years imprisonment, suspended to four years imprisonment, with three years of probation (T. p. 208, lines 18-22). Appellant filed a timely Notice of Appeal, and this Appeal follows.

STATEMENT OF FACTS

The victim, Tammi Lynn Frady, and the Appellant, Timothy Leroy Frady, were married in November of 2001. (T p.54, lines 14-18.) At the time of the incident, the Appellant and the victim were both living in the marital home, a mobile home located at 5308 Bush Road, but maintained separate bedrooms. (T. p. 54, lines 1-25 and p. 55, lines 3-4.)

On September 28, 2012, the victim was looking for some missing items and documents that belonged to her, including the title to the mobile home in which the victim and the Appellant were currently living. (T. p. 55, lines 8-12). The title was in her name only. (T. p. 55, line 24). She was also missing some of her pictures. (T. p. 56, line 9.) She found the title in the Appellant's bedroom on a TV stand beside a mattress on which he was sleeping. (T. p. 56, lines 12-13.) At the same time she found the title to the trailer, she also found a cell phone she did not recognize. (T. p. 56, line 15.) She opened the phone and began "pressing buttons." (T. p. 56, lines 19-20.) She then saw the pictures of her youngest daughter, the Appellant's stepdaughter. (T. p. 56, line 25 and p. 57, line 8.) The pictures contained images of the victim's daughter with the stepdaughter's name and explicit language written on top of the pictures.(T. p. 57, lines 11-17). The victim found images of other females on the phone that were of a graphic sexual nature. (T. p. 58, lines 10-11.). After finding the pictures and the title to her home in the Appellant's room, the victim felt "sick." (T. p. 59, lines 2-5.) She sat down in the living room with the title and the cell phone in her hands and was looking at the photos on the phone when Appellant walked in. (T. p. 59, lines 12-15.) Appellant had a bottle of alcohol in his hands. Appellant stared at the victim with the title and phone in her hands, and then walked back to his bedroom. (T. p. 59, lines 19-21.)

When Appellant walked back to his bedroom, the victim hid the title and phone in a baby crib that was set up in anticipation of the birth of her grandchild. (T. p. 60, lines 1-2.) The victim's daughter (the subject of the pictures) was pregnant at the time. (T. p. 60, line 9.)

Appellant returned from his room and the two began arguing over the phone and the title. (T. p. 60, lines 13-19.) The victim refused to return the phone to Appellant, stating that she was going to show the photographs to others so she could show "what kind of a person he really was." (T. p. 60, lines 18-19.) The argument escalated, and the victim, recognizing the signs of Appellant becoming enraged, attempted to get away from Appellant by claiming she needed to get something to drink. (T. p. 61 lines 7-9.) Appellant began choking the victim and claimed that no one would find her body. (T. p. 61, lines 17-21.) The victim was able to break free and get his hands off of her neck. (T. p. 61, lines 24.)

Appellant then went to the other bedroom that contained the crib to look for the items the victim hid. (T. p. 62 lines 1-3). Appellant began searching the room for the items, but the victim was able to grab the title and phone from the crib before Appellant could reach them. (T. p. 62, lines 4-12.) During this altercation, the victim was struck in the face. (T. p. 62, lines 12-13.) She ran out of the room and out of the back door of the house and tried to call 911, but was disconnected. (T. p 62, lines 13-16.)

She stayed outside in the back yard and called again, worried that Appellant would come out of the house into the backyard and find her. (T. p. 62, lines 18-25 and p. 63, lines 5-8.) She was hiding when the officers arrived. (T. p. 63, line 8). The victim refused to come out of hiding and around to the front part of the house until the officers told her that Appellant was detained in the patrol car. (T. p 63, lines 23-25 and p.64, lines

1-3.) The officers then took photos of the victim. (T. p. 64, line 5.) The photographs showed marks under her eye (T. p. 65, line 22-23), red marks and fingerprints on her neck (T. p 66, lines 19-24). The victim delivered the cell phone to the solicitor's office some time later. (T. p. 65, line 1). She claimed she did not turn the phone over to the police on the day of the assault because she "didn't know if they could do anything." (T. p. 90, line 2.) Although she knew the phone was the Appellant's (T. p. 90, lines 23-24.), she was unsure when the photos were taken and if her daughter was underage at the time. (T. p 91, lines 4-7).

Detective Gregory Lent was the responding officer to the 911 call. (T. p 97, lines 2-24.) He found the victim crying and distraught in the back of the residence. (T. p 99, lines 4-5.). Detective Lent noted her injuries to her neck and face. (T. p. 99, lines 14-17.) Detective Lent determined Appellant was the primary aggressor. (T. p. 105, line 2.) Detective Lent noticed the title and cell phone in the victim's hands upon his arrival, but did not take the phone into evidence. (T. p. 108, lines 20-25.) Investigator Ginger Pop was later unable to download the images, but was able to reproduce copies of the images on the cell phone by taking pictures of the images. (T. p. 132, lines 11-15.)

ARGUMENT

I.

The trial court did not err in allowing the introduction of explicit photographs found on Appellant's cell phone because the pictures corroborated the victim's testimony and their probative value was not substantially outweighed by any prejudicial impact on the jury.

Appellant argues that the admission of the cell phone and photographs are not relevant to his CDV charge, and even if so, should have been excluded pursuant to Rule 403, SCRE. The trial court, however, correctly found the photos were relevant because they corroborated the victim's testimony, were probative of the circumstances leading to the assault, and ultimately, were harmless in light of the State's overwhelming evidence of Appellant's guilt.

Broadly speaking, evidence is relevant if it tends to make more or less probable a fact in issue. State v. Huggins, 336 S.C. 200, 205, 519 S.E.2d 574, 576 (1999). Whether evidence is relevant in a criminal prosecution is an issue within the trial judge's discretion. State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996). Appellate courts have been highly deferential to the trial judge's discretion. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) .

With respect to pictures, "the relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). Admitting photographs which serve to

corroborate testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

The photographs in this case were clearly used to corroborate the victim's testimony of the events leading to the altercation between the victim and the Appellant. The victim testified she was aware that her daughter, the subject of the photographs, had a hostile relationship with Appellant (T. 81, lines 18-25.), and Appellant had tried to "look up under her bedroom door." (T. 81, line 22.) She also testified that discovering these photos made her feel "sick," and that Appellant "saw what she had." (T. p. 59, lines 8 and 17-19.). The phone was mentioned again at trial by Detective Lent, who noticed the victim holding a phone and piece of paper in her hands. (T. 108, lines 22-2). Detective Lent testified the victim stated that Appellant was attempting to take the cell phone from her at the time of the assault. (T. p 109, lines 2-3.) Although the phone was not entered into evidence by the police on the day of the assault, evidence of a cell phone and "a piece of paper" are indeed corroborated by Detective Lent's testimony. The photographs, in addition to the missing title to the mobile home, aid in the jury's understanding of why the victim and Appellant were in conflict. Moreover, the explicit nature of the wording over the photographs of the victim's daughter would reasonably predict that the conflict might become volatile. The pictures also refute the defense's assertion that the allegation was fabricated, by providing physical evidence, which, on its face, provide a reason for the victim's distress. In other words, the cell phone and pictures are relevant because they corroborate the victim's version of events.

The Appellant alleges the photographs were unduly prejudicial because they suggested a "spurious, improper relationship between Appellant" and the victim's daughter. (Initial Brief of Appellant, p. 8.) A prior bad act may be admissible under the

res gestae theory where it is “an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.” State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001). As previously stated, the photographs explain why the victim was upset and why Appellant was angry. They provide clear contextual evidence for the crime.

Given the trial court’s discretion to admit photographic evidence that corroborates testimony at trial, the judge did not err in allowing these photographs on the Appellant’s cell phone to be admitted.

II.

The trial court did not err in allowing the admission of the cellphone because the proper evidentiary foundation was demonstrated at trial.

Appellant argues the trial court should not have allowed the cell phone and photographs into evidence because “the State failed to establish evidentiary predicate.” (Initial Brief of Appellant, p. 8.) At trial, however, the victim testified she identified the cell phone as belonging to Appellant because she found the phone in his room beside his bed and recognized the subject of the photographs. (T. p. 56, lines 12-23.) The victim also identified the cell phone from the phone’s number, which she recognized as Appellant’s. (T. p. 90, lines 22-24.) At trial, she identified State’s Exhibit’s 3 – 9 as the photographs she saw on the cell phone. (T. p. 58, lines 17-21.) Appellant argues that because the police did not take the phone into evidence at the time of the incident, that the evidentiary predicate was not established. Rule 901 states “evidence sufficient to support a finding that the matter in question is what its proponent claims” satisfies the authentication requirement for admissibility. Rule 901(a), SCRE. The victim’s testimony was sufficient to lay the foundation to submit the evidence to the jury. She recognized the photos and identified them as the ones she found on Appellant’s phone on the day of the assault. (T. p. 58, lines 17-21.)

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge’s ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to Appellant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great

deference to the trial court.” (emphasis added)). In this case, the trial judge correctly used his considerable discretion to allow the cell phone and photographs into evidence when the proper evidentiary foundation was presented by the State.

III.

Even if the trial court should not have allowed the photographs into evidence, their admission was harmless error, as the jury had substantial additional evidence to corroborate the victim's testimony.

Generally, our courts find error harmless beyond a reasonable doubt if it did not contribute to the verdict obtained. State v. Collins, 409 S.C. 524, 537-38, 763 S.E.2d 22, 29 (2014), reh'g denied (Sept. 24, 2014) “To say that an error did not ‘contribute’ to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial....” Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Rather, “[t]o say that an error did not contribute to the verdict is ... to find that error unimportant *in relation to everything else the jury considered on the issue in question*, as revealed in the record.” Id. at 166, 420 S.E.2d at 839 (citation omitted) (emphasis added). In Collins, the court also cited State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006), saying error “is harmless where a Appellant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014), reh'g denied (Sept. 24, 2014).

Even if the trial court erred in admitting the cell phone and photographs into evidence, the error was harmless, as the State provided other conclusive, competent evidence of Appellant's guilt for the jury's consideration. The victim testified Appellant choked her and hit her in the eye. (T. p. 61, line 18 and p. 62, lines 12-13.) Her testimony was corroborated by the Detective Lent, who testified he saw the marks on the victim's face and neck (T. p. 112, lines 15-16), and by the photographs taken of the victim. (T. p. 103, lines 9-14.) The jury also saw the video taken at the time of the incident, and was able to assess the victim's credibility on that basis, as well. (T. 107, lines 7-8.) Further, during deliberations, the jury expressed interest in the whereabouts of the daughter at the

time of the 911 call, the instigator of the 911 call, and Detective Lent's testimony about the marks on the victim's neck. (T. p. 192, lines 1-25 and p. 193, lines 1-2.) These questions suggest what the jury considered important in relation to everything else submitted by the State. Thus, the State's other compelling evidence of Appellant's guilt demonstrated that the jury could reach no other rational conclusion, and the error, if any, was harmless.

CONCLUSION

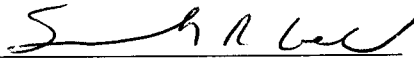
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

JIMMY A. RICHARDSON
Solicitor, 15th Judicial Circuit

BY: 
Susannah R. Cole
Bar # 68383

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

ATTORNEYS FOR RESPONDENT

May 12, 2015

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The Honorable Edward Cottingham, Circuit Court Judge

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THE STATE,

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v.

TIMOTHY FRADY,


Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of May, 2015.



ANNE MUELLER
Legal Assistant

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



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ALAN WILSON
ATTORNEY GENERAL

May 12, 2015

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Timothy Frady
Appellate Case No. 2014-001054

Dear Ms. Butler:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Susannah R. Cole
Staff Attorney
Bar # 68383

SRC/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services