ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Berkeley County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY LEE IRBY,

APPELLANT

APPELLATE CASE NO. 2014-001663

<u>ANDERS</u> BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Antoinette Irby to testify pursuant to Rule 404(a)(2), SCRE, that the decedent had never physically assaulted her since Antoinette's testimony was not relevant and was not being offered by the prosecution to rebut evidence that the decedent was the first aggressor as the court ruled?

STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Appellant at the November 14, 2012 term of General Sessions for murder and attempted murder. R.718-721. A hearing was held on June 5, 2014 before the Honorable Deadra L. Jefferson on the state's motion to obtain a handwriting sample from Appellant pursuant to State v. Frasier, 341 S.C. 546, 534 S.E.2d 711 (Ct. App. 2000). R.1. A second hearing was held on July 11, 2014 before the Honorable Roger M. Young, Sr. on Appellant's motion for a continuance. R. 7. His case was ultimately called to trial on July 21, 2014 before Judge Young, and a jury. R. 18. Assistant Solicitors Anne Miller Williams and Matthew Ozment represented the state, and Chad Shelton and David Schwacke represented Appellant. R. 18.

At the conclusion of the trial on July 24, 2014, the jury found Appellant guilty. R. 641, ll. 13-22. Judge Young sentenced Appellant to thirty years imprisonment for murder and thirty years concurrent for attempted murder. R. 651, ll. 5-14.

This appeal follows.

ARGUMENT

The court erred by allowing Antoinette Irby to testify pursuant to Rule 404(a)(2), SCRE, that the decedent had never physically assaulted her since Antoinette's testimony was not relevant and was not being offered by the prosecution to rebut evidence that the decedent was the first aggressor as the court ruled.

Relevant Facts

Appellant's son, Telly Irby, Telly's long term girlfriend, Michelle Wiggins, and Michelle's three daughters unexpectedly moved to South Carolina from Florida in early August 2012. They moved into Appellant's small two bedroom home that he shared with his brother, Gene Irby. R. 480, l. 20 – 481, l. 12. Appellant tried to help the family get back on their feet by providing them with a place to stay, helping Telly look for employment, and assisting the girls with enrolling in school. R. 487, l. 18 – 488, l. 24.

Tension slowly arose between sixty-year-old Appellant and thirty-five-year-old Telly. Appellant, who was very involved in his church, disapproved of some of Telly's lifestyle choices. The night before the altercation, Appellant told Telly that one of the church elders had expressed disapproval of Telly and Michelle living together because they were not married. This upset Telly and he was angry Appellant and the church elder had talked behind his back. Tr. 489, l. 4 – 491, l. 3.

On the night of the altercation, Appellant came home around 8:00 pm to find Telly, Michelle, and his brother Gene drinking in the front yard at a small table. This angered Appellant who had just told Telly the night before that he did not want him drinking in the yard in front of Appellant's neighbors. Appellant preferred Telly and the

others drink inside the house. Appellant confronted Telly and told him that if he did not respect his rules, Telly, Michelle, and the girls would have to move out. R. 496, ll. 4-23.

Appellant testified that Telly immediately stood up and angrily stated that he was a man and "he [would] do what he want[ed] to do." R. 496, l. 23 – 497, l. 3. This was unlike Telly who was usually very respectful towards his father. Appellant walked away from Telly and up the steps to the front porch. He noticed the girls were watching television in the living room and told them to go outside and play because he wanted time to himself. As soon as the girls got outside, Telly told them to go inside. There was a little back and forth where Appellant told the girls to go outside and Telly repeatedly demanded they go inside. R. 498, ll. 1-17. The girls remained on the porch confused. R. 364, ll. 3-5.

Telly's combative attitude began to intimidate Appellant because Telly had always been very respectful towards him and this behavior was out of character. Moreover, Telly was a very large man compared to Appellant. Telly was approximately 6'3" and two hundred fifty pounds while Appellant was only 5'9" and one hundred seventy-nine pounds. R. 468, l. 16-25; R. 504, ll. 18-25. In addition to the differences in size, Appellant was aware of an incident where Telly had physically assaulted his mother and grabbed her arm and twisted it. R. 497, ll. 15-23.

Appellant testified that at this point he "didn't know what [Telly] was going to do," but he thought Telly was "getting ready to do something he wasn't supposed to be doing." R. 498, ll. 9-22. Out of fear, Appellant walked to his bedroom located at the back of the small home and retrieved his firearm. R. 498, l. 23 – 499, l. 9. He knew he

"wouldn't have stood a chance if [Telly] decided to actually get physical with [him]," which is why he thought the firearm was necessary. R. 499, ll. 10-17.

After retrieving the firearm, Appellant walked back out the front door. Telly was standing right there in front of Appellant on the porch and immediately lunged for the gun that was in Appellant's right hand. R. 499, l. 24 – 500, l. 4. The men struggled over the gun. Appellant had his finger on the trigger and Telly had his hand on top of the slide. At some point during the struggle, the gun went off striking Telly in the chest. He immediately fell to the ground. R. 501, l. 7 – 502, l. 15.

After Telly fell to the ground, Appellant walked into the yard and fired the gun into the air to empty the clip. When the clip was empty, Appellant threw the gun onto the ground and sat down in a chair near the corner of the yard. A police officer arrived shortly thereafter and arrested Appellant. R. 502, l. 21 – 503, l. 9.

Appellant did not remember shooting Michelle after Telly was fatally injured, but he agreed he must have shot her because "she was shot with the same weapon Telly was shot with" and he did not believe anyone else had shot her. R. 527, ll. 11-24. Appellant thought his memory problems were caused by shock.

The state's witnesses, including Michelle and her three daughters, likewise testified that Telly and Appellant struggled over the firearm before it discharged. However, the rest of their testimony differed from Appellant's account. For example, Michelle testified that while Appellant and Telly were wrestling for the gun, they fell to the ground. She claimed when the two stood up and regained their balance, Appellant "lifted the gun and he shot him [Telly]." R. 282, l. 22 – 283, l. 17.

Moreover, Michelle, who had been standing behind Telly on the porch, testified that after Telly fell to the ground, she screamed and Appellant "lifted the gun and he points it at me and he shoots me." R. 283, l. 19 – 284, l. 1. She claimed that after she was shot, she ran from the porch and Appellant continued shooting at her, but missed. She and her daughters ran to the next door neighbor's apartment and shortly thereafter law enforcement arrived. R. 284, l. 2 – 285, l. 3.

Both Telly and Michelle were shot once in the chest. Michelle suffered a few broken ribs, a punctured lung, and acute bleeding. R. 174, l. 24 – 175, l. 12. The emergency room doctor who treated Michelle testified that she was "lucky" because her injuries "could have been substantially worse by just a small change in the projectile's trajectory" since the bullet struck "just a few centimeters away from the heart." R. 175, l. 13 – 176, l. 17. In Telly's case, the bullet passed through the sack that surrounds the heart and struck his aorta causing significant blood loss. R. 334, ll. 5-18; R. 338, l. 3 – 339, l. 2. The pathologist who conducted the autopsy testified that Telly would have died sometime within a few seconds to a couple of minutes after being shot. R. 339, ll. 3-16.

The court charged the jury on murder and attempted murder as well as the lesser included offenses of voluntary manslaughter, involuntary manslaughter, and assault and battery of a high and aggravated nature (ABHAN). The court also charged the jury on self-defense and accident. However, the jury was instructed that it could only consider self-defense for murder and not for attempted murder. R. 621, l. 23 – 635, l. 8.

Objection and Ruling

Immediately before the state called Antoinette Irby as a witness, defense counsel objected to her testimony. At this stage of the trial, the jury had already heard the audio

recorded statement Appellant gave law enforcement the night of the shooting. During his statement, Appellant told the officers that he feared Telly and believed he was in imminent danger of death or serious injury because he knew Telly had previously attacked Antoinette, who was Telly's mother and Appellant's ex-wife, and grabbed her arm and twisted it. Antoinette was going to testify that this event never occurred and that Telly had never physically assaulted her. Defense counsel argued Antoinette's testimony was irrelevant because the issue was what Appellant "perceived as a reason for his reasonable apprehension of fear." He further argued that the truth was immaterial and that what mattered was what Appellant believed. R. 420, l. 20 – 421, l. 8.

The assistant solicitor argued that whether Telly attacked his mother was a "factual issue in the trial" and the state should be able to "put up the witness that actually was supposed to have been attacked by Telly Irby because she says that didn't happen. So it's just an impeachment of the statement, and it's a relevant issue because it's in trial. Mr. Shelton [defense counsel] asked about it." R. 421, ll. 9-14.

The court ruled that the testimony could "come in under 404(a)(2), second part of 404(a)(2) as evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that a victim was the first aggressor." R. 422, ll. 1-5. The court further stated, "[H]e's [Appellant is] insinuating that by having attacked - - by Telly having attacked his mother, he wants to use that evidence to suggest Telly was first the aggressor for purposes of a self-defense; therefore, the State should be allowed to rebut that." R. 422, ll. 6-11.

After the court's ruling, Antoinette testified before the jury that "Telly has never grabbed me" and that he never put his hands on her. She claimed, "He wasn't that type of child." R. 424, l. 25 – 425, l. 9.

Discussion

The court erred by allowing Antoinette Irby to testify pursuant to Rule 404(a)(2), SCRE, that Telly had never physically assaulted her since Antoinette's testimony was not relevant and was not being offered by the prosecution to rebut evidence that Telly was the first aggressor as the court ruled.

Under Rule 402, SCRE, "[e]vidence which is not relevant is not admissible." As defense counsel argued, Antoinette Irby's testimony that Telly had never physically assaulted her or grabbed her arm was irrelevant and therefore should have been excluded by the trial court. Appellant told the officers on the night of his arrest that Telly "could snap a frail person in two" and that he knew he could not fight Telly because of Telly's size and strength. Appellant also mentioned during this statement "that he was aware of a time that Telly got in a fight with his mother." R. 409, l. 6 – 410, l. 1. Appellant's statements in this regard were to show why he *believed* he was in imminent danger of death or serious bodily injury. This evidence only went to Appellant's belief during the altercation. Whether the fight between Telly and his mother actually occurred was not relevant.

Moreover, Antoinette's testimony was also not admissible under Rule 404(a)(2), SCRE. Rule 404(a) states in relevant part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . (2) Character of Victim. Evidence of a pertinent trait of character of the victim of a crime offered by an accused, or by the prosecution to rebut the

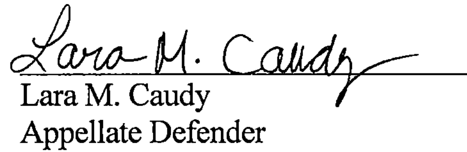
same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." See also State v. Douglas, 411 S.C. 307, 323, 768 S.E.2d 232, 241 (Ct. App. 2014).

The court ruled that Antoinette's testimony was admissible under the second part of Rule 404(a)(2), specifically: "evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." However, the assistant solicitor admitted that the state only sought to admit this testimony to impeach Appellant's statement to law enforcement. The solicitor never indicated that she sought to admit the testimony to rebut evidence that Telly was the first aggressor. Thus, the court erred by admitting Antoinette's testimony pursuant to this rule.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2015.

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Roger M. Young, Circuit Court Judge

THE STATE,

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V.

JOHNNY LEE IRBY,

APPELLANT

APPELLATE CASE NO. 2014-001663

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Lee Irby states:

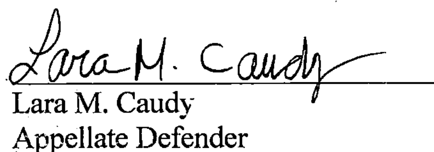
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Roger M. Young, which was held on July 21-24, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Johnny Lee Irby.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2015.

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APPELLATE CASE NO. 2014-001663

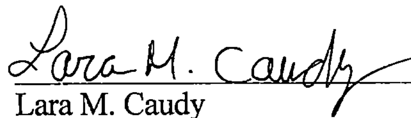
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments;
(2) Entire June 5, 2014 Transcript;
(3) Entire July 11, 2014 Transcript;
(4) Entire July 21, 2014 Transcript;
(5) Entire July 22-23, 2014 Transcript;
(6) Court's Exhibit No. 1 (Stipulation);
(7) Court's Exhibit No. 2 (Stipulation);
(8) State's Exhibit No. 70 (Advisement of Rights Form).

I certify that this designation contains no matter which is irrelevant to this appeal.

June 12th, 2015



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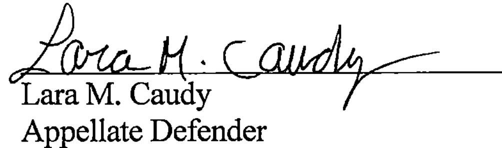
Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

June 12, 2015



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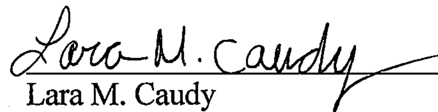
CERTIFICATE OF SERVICE

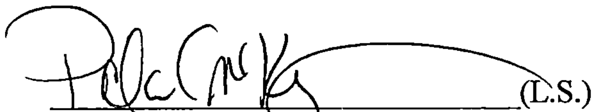
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and that a true copy of the Anders Brief of Appellant and Designation of Matter and the Record on Appeal have been served on Johnny Lee Irby, #360844 at Lieber Correctional Institution, this 12th day of June, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of June, 2015.


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