

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2014-001848

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SC Court of Appeals

THE STATE,RESPONDENT

v.

BENNY L. WEBB,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The circuit court properly affirmed the trial court's admission of an audio recording of Appellant assaulting Paul Curry, where the recording was properly authenticated by the party who made the recording and satisfied the evidentiary standards imposed by Rule 401, SCRE and Rule 403, SCRE, and there was no evidence presented of material alterations or deletions of the audio recording.

STATEMENT OF THE CASE

Appellant was charged with assault and battery in the third degree in Horry County. He proceeded to trial before the Magistrate Judge Gregory D. Blanton, and a jury on January 10, 2013. Appellant was convicted as charged and sentenced by Judge Blanton to thirty days imprisonment suspended upon the payment of a \$500 fine. Appellant filed a notice of appeal to the Horry County of Common Pleas. R. ____ [Notice of Appeal dated January 16, 2013]. The magistrate judge submitted his Return. R. ____ [Return of a Criminal Appeal]. A hearing regarding Appellant's appeal was convened on May 14, 2014. On July 29, 2014, the Honorable D. Craig Brown issued an order affirming the Magistrate Court. R. ____ [Order Affirming Magistrate Court dated July 29, 2014]. Appellant filed and served notice of appeal to this Court from Judge Brown's order of July 29, 2014, and submitted a brief for this Court's consideration. This brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

On January 31, 2012, Paul Curry traveled to Atlantic Beach to request a copy of a contract of legal services under the Freedom of Information Act (FOIA). Tr. p. 38. Curry was interested in the identity and terms of employment of the town attorney. Tr. p. 39. Curry entered Atlantic Beach Town Hall and told the clerk he was there to see the contract for legal services. Tr. p. 39. The clerk asked Curry to sign-in to the guestbook. Tr. p. 39. Curry informed the clerk that he had a court order stating that the town is not to require people to give personally identifying information merely because they request public records. Tr. pp. 39-40. Curry obtained that court order after he had problems in the past with the town concerning FOIA requests. Tr. p. 40.

After telling the clerk that he believed the court order took precedence over the town policy of requiring people to sign in and fill out a FOIA request form, Appellant came out of his office and began yelling at Curry. Tr. p. 40. Appellant was Town Manager at the time. Tr. p. 40. Curry and Appellant have known each since 2004 and had a very tumultuous relationship over the years. Tr. p. 37. Appellant told Curry to get out if he was not going to comply with the town policy. Tr. pp. 40-41. Curry advised Appellant that he was going to take a few notes to document the incident for a police report that another refusal had occurred of a FOIA request. Appellant grabbed the clipboard in Curry's lap and grabbed Curry's arm. Tr. pp. 41-42. Curry asked Appellant if he was grabbing his arm, to which Appellant replied "Yes, I'm grabbing your arm." Tr. p. 42. Sheila Singletary, the municipal town clerk, corroborated Curry's testimony that Appellant put his hands on Curry. Tr. pp. 99-100. Appellant then continued yelling at Curry to get out. Tr. p. 42. Appellant followed Curry out of the office, continuing to berate him. Tr. p. 42. Appellant told Curry, "One of these days, I'm going to beat the living shit out of you." Tr. p. 42.

Curry informed Appellant that what Appellant just said constituted a threat of assault, to which Appellant replied “No, that’s not a threat. That’s a promise.” Tr. p. 43.

Curry continued to move to the exit of Town Hall, stopping at a park bench near the exit to call police dispatch about the incident. Tr. p. 43. Appellant was standing over Curry while Curry attempted to make his phone call. Tr. p. 43. Appellant was so close to Curry that spittle was falling from his mouth onto Curry. Tr. p. 43. Appellant also ordered Curry to “get your white ass out of town.” Tr. p. 71. A police officer came and told Curry to leave the property. Tr. p. 44. Curry immediately complied, moving to an adjacent sidewalk while trying to complete his phone call to Horry County dispatch. Tr. p. 44. Appellant followed Curry out to the sidewalk, telling him “If I ever see you outside of Horry County, I’m going to take care of you.” Tr. p. 44.

Curry had a digital voice recorder on his person throughout his trip to Town Hall. Tr. p. 45. Curry stated that he recorded his trip to Town Hall because of the town’s history of not complying with the court order concerning FOIA requests. Tr. pp. 49-50. Curry testified that the recording admitted at trial was a copy of the original recording he took on his digital voice recorder. Tr. p. 45. The prosecutor showed Curry an optical disk and asked him if he recognized it. Tr. p. 45. Curry stated “This is a recording that I reviewed—a CD optical disk that contains a recording that I reviewed in your office. It has my initials on it and the date I reviewed it.” Tr. p. 45. Curry further testified that the recording truly and accurately reflected his interactions with Appellant on January 31, 2012. Tr. p. 46. The recording was played for the jury. Tr. p. 47. The recording at trial was an eight minute segment of the audio. Tr. p. 48. The entire recording taken by Curry lasted twenty eight minutes. Tr. p. 48. The recording played for the jury covers Curry’s trip to the courthouse from the time of arrival to the time Curry made his call to police dispatch. The portion of the recording that was not presented at trial consisted of “dead air” or “empty

time” after Curry’s altercation with Appellant was over while Curry waited on the police officer to respond to Curry and complete a report of the incident. Tr. p. 49. Curry sent the Atlantic Beach Police Department both the original version of the tape as well as the edited version that cut off the twenty minutes of “dead air.” Tr. p. 77. Curry testified that the recording presented at trial fully covered all of his interaction with Appellant on January 31st. Tr. p. 46.

ARGUMENT

The circuit court properly affirmed the trial court's admission of an audio recording of Appellant assaulting Paul Curry, where the recording was properly authenticated by the party who made the recording and satisfied the evidentiary standards imposed by Rule 401, SCRE, and Rule 403, SCRE, and there was no evidence presented of material alterations or deletions of the audio recording.

Appellant contends that the trial court erred in admitting the audio recording of his assault of Paul Curry. Specifically, Appellant asserts the court erred in admitting the evidence because the tape had been “altered and edited, with deletions made and was not complete” and “admission of the tape is contrary to the Rules of Evidence, including the chain of custody and Rule 901, 401, and 403.” The State submits that these arguments are without merit. The circuit court properly affirmed the magistrate court judge’s admission the evidence, as the recording was properly authenticated by Paul Curry and satisfied the evidentiary standards of Rule 401, SCRE and Rule 403, SCRE. Appellant’s assertion that the entirety of the tape should have been played at trial is not preserved for appellate review because the request was not made below. Furthermore, there is no evidentiary support for his meritless contentions that the tape has been materially altered. Finally, Appellant failed to show the requisite prejudice from the admission of the recording as the evidence contained in the recording was cumulative to other evidence presented at trial.

An appeal from a magistrate’s court conviction is made to the circuit court. S.C. Code Ann. § 18-3-10. The circuit court acts as an appellate court and reviews issues of preserved error raised by a proper exception. See S.C. Code Ann. §§ 18-3-10 & 18-3-70; State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006). On appellate review of the circuit court’s decisions on

appeal from cases arising in magistrate's court, this Court may only review for errors of law. State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (2011); State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct.App. 2001).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. The trial court is accorded broad discretion in ruling on questions concerning the relevancy of evidence. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). The decision of a trial court respecting the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Slocumb, 336 S.C. 619, 633, 521 S.E.2d 507, 514 (Ct. App. 1999).

Respondent submits that there was no abuse of discretion in the trial court's admission of the recording and the circuit court properly affirmed the ruling on appeal. The admission of the audio recording comported with the requirements for authentication enumerated in the South Carolina Rules of Evidence. Rule 901, SCRE, provides:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

At trial, Curry's testimony authenticated the tape under both Rule 901(b) (1) and Rule (901(b) (5). When presented with the physical copy of the audio disk, Curry stated "This is a recording I reviewed—a CD optical disk that I reviewed in your office. It has my initials on it and the date that I reviewed it." Tr. p. 45. Curry stated that he recognized the disk as a recording of his interactions with Appellant on January 31, 2012. Tr. p. 45. Curry later testified that the recording truly and accurately reflected his interactions with Appellant. Tr. p. 46.

In State v. Aragon, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003), this Court dealt with a case where Raul Aragon argued that the State failed to properly authenticate a tape because the State did not establish a chain of custody. The tape at issue in Aragon contained a taped conversation between Aragon and one of his victims. Id. at 335. The Court found that the State, consistent with the requirements of Rule 901, SCRE, established that the tape in question was what it was claimed to be. Id. at 336. In finding the tape to be authenticated, the Court placed emphasis on the fact that the victim had known Aragon for ten years, phoned Aragon and knew the conversation was being taped, listened to the tape, recognized the tape played at trial based on her initials on the tape, and testified that the tape fairly and accurately represented the phone conversation. Id. The Court also held that establishing a chain of custody was not necessary since the tape was otherwise authenticated. Id. at 337.

The underlying circumstances that led to the Court in Aragon finding that the tape was what it was claimed to be are almost identical to the underlying circumstances in Appellant's

case.¹ Curry had an extensive past history with Appellant, knew he was taping his interactions with Appellant at Town Hall, listened to the tape in the Solicitor's office, marked the tape with his initials, and testified that the tape truly and accurately represented his interactions with Appellant on the day of the assault. Furthermore, since the tape was properly authenticated, it was not necessary for the State to establish a chain of custody.

As to Appellant's vague contention that the admission of the taped conversation violated Rule 401, SCRE, and Rule 403, SCRE, the State submits that the evidence was properly admitted, as it was highly relevant and satisfied the Rule 403 balancing test. Appellant's Rule 401 argument is rooted in his contention that the tape was not properly authenticated. Appellant avers that if the evidence were not properly authenticated, it could not possibly be relevant. As discussed above, the tape was properly authenticated by Curry's testimony. Furthermore, the evidence of the tape was highly relevant. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2005). The audio recording was highly relevant, as it directly pertained to whether Appellant assaulted Paul Curry. The evidence provided in the video recording made it much more probable that Appellant assaulted Curry. Appellant provides no support for his passing mention of Rule 403, SCRE, in his Statement of Issue on Appeal, however the State submits that the prejudicial effect of having evidence of his assault of Paul Curry presented to the jury does not substantially outweigh the probative value of the evidence.

Appellant makes a variety of vague arguments alleging material alterations and deletions of the tape and complaining that the full tape was not played for the jury. The relief Appellant

¹ The only distinction between the current case and Aragon is that the tape at issue in Aragon was unedited. While there are no South Carolina opinions where the court directly addresses the authentication of an edited tape, a number of courts in other states have addressed the issue, finding edited tapes to be properly authenticated. See Tookes v. State, 159 G.A. App. 423, 283 S.E.2d 642 (Ga. Ct. App. 1981), People v. Weaver, 200 A.D.2d 696, 607 S.Y.S.2d 58 (2d Dep't 1994), Lawson v. State, 619 N.E.2d 964 (Ind. Ct. App. 1993).

seeks is “to have the state introduce the original recording in a triall (sic) in a court of competent jurisdiction” The State submits that this issue is not preserved for appellate review, as Appellant failed to seek the admission of the entire tape pursuant to Rule 106, SCRE. Rule 106, SCRE states “When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Had Appellant raised this objection, the judge may have required the jury to listen to the version of the tape with roughly twenty minutes of silence at the end. At trial, Appellant merely alleged that material alterations of the tape and the fact that the original copy of the tape was not played for the jury were grounds for dismissal in his motion to dismiss and later motion for directed verdict. Appellant never sought to have the complete tape played for the jury. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). If Appellant wanted the jury to hear the full version of the tape that included the “dead air”, he should have made an appropriate objection at trial.

There is also no evidentiary support for the proposition that the tape contained material alterations and deletions other than Appellant’s rank speculation. Curry testified that he edited out the final portion of the recording that occurred after his interaction and altercation with Appellant because it contained only “dead air.” The magistrate judge found that the recording was edited only by removing the “dead air” that occurred after the altercation between Curry and Appellant and that nothing was altered or deleted during the recording of the actual interaction and altercation between the two. R. ____ [Return of a Criminal Appeal]. Curry’s edited version

of the tape fully presented the events at issue at trial. Omitting a portion of the video where nothing is happening does not constitute a material alteration or deletion. Aside from Appellant's flat denial that he touched Curry, there was no evidence presented at trial that refutes the version of events in the audio tape. Appellant lacks any support or testimony for his baseless proposition that Curry made any alterations aside from removing the irrelevant portion at the end. Appellant offered no evidence that the editing process somehow rendered the recording inaccurate. Thus, Appellant's contentions that the video tape contained material alterations or deletions are without merit.

Furthermore, the audio tape was merely cumulative to the other evidence admitted at trial and even if admission was erroneous, the error did not result in the requisite prejudice to Appellant. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008). When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001). In Martin v. Floyd, 285 S.C. 229, 328 S.E.2d 637 (1985), the Court dealt with an alienation of affection and criminal conversation action where tape recordings were admitted at trial. In a previous Family Court action, the Court had ordered the tapes edited to delete all conversations except those between the allegedly adulterous parties. Id. at 231. The appellant in that case asserted that the tapes should have not been admitted because they had been edited. Id. The Court found that the appellant in the case could not challenge the accuracy of the conversations or demonstrate that the editing corrupted the tapes in any way. Id. Notably, the Court found that even if the tapes had been inadmissible, they were merely cumulative to the significant evidence presented at trial. Id. In the current case, the

evidence contained in the audio tape was merely cumulative to other evidence presented at trial. The audio tape revealed essentially the same information as Paul Curry's testimony of events and Sheila Singletary's statement that she saw Appellant physically grab Curry. Therefore, any alleged error is harmless due to the evidence being cumulative.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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THE STATE,

Respondent,

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Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing one copy of the same in the United States mail, postage prepaid, addressed Benny Lee Webb, 710 Windrow Drive, Sumter, SC 29150.

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

This 2nd day of October, 2015.



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