

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

RECEIVED

SEP 30 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JULIUS CURRY,

APPELLANT

APPELLATE CASE NO. 2014-000569

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the State did not introduce the recording in evidence and the judge failed to determine if any probative value of the recording was far out weighed by the prejudicial impact?
2. Did this Court err in ordering a remand for reconstruction of recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the recordings were not introduced in evidence at trial?
3. Did the trial judge, on remand for reconstruction, err in finding that the record of the phone calls could be adequately reconstructed?
4. Did the trial judge err in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend when, based on the improper reconstruction hearing, any probative value of the recording of the phone calls was far out weighed by the prejudicial impact?

STATEMENT OF THE CASE

In 2013, the Chesterfield County Grand jury indicted Appellant Curry for criminal domestic violence of a high and aggravated nature [CDVHAN], assault and battery second degree, resisting arrest with a deadly weapon and attempted murder, indictments #2013-GS-13-697, 698, 699, 700. On March 3, 2014, Curry proceeded to jury trial before the Honorable Paul M. Burch. Matthew Swilley represented Curry at trial. Kernard Redmond prosecuted the case. The jury found Curry not guilty of CDVHAN. The jury found Curry guilty of assault and battery second degree, resisting arrest with a deadly weapon and the lesser included offense of assault and battery first degree. Judge Burch sentenced Curry to ten (10) years for assault and battery first degree, ten (10) years consecutive for resisting arrest with a deadly weapon and one and a half years consecutive for assault and battery second degree. A timely notice of intent to appeal was filed on March 10, 2014. On November 12, 2014, Appellant filed the initial brief and designation of matter. The issue raised in the initial brief of Appellant was whether the trial judge erred in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the State did not introduce the recordings in evidence and the judge failed to determine if any probative value of the recordings was far out weighed by the prejudicial impact.

On January 26, 2015, the State moved to hold the appeal in abeyance in order to allow the State to obtain the content of the recordings that were played for the jury, over objection, but never admitted in evidence. Because the recordings were never admitted in evidence, the judge never made a finding as to admissibility. On February 6, 2015, Appellant filed a return to the State's motion to hold the case in abeyance. Appellant

asserted that the appeal could be decided without the content of the recordings because the issue on appeal involved the judge's failure to making findings in regard to admissibility of the recordings. Appellant submitted, however, that if the Court finds that the content of the recording is necessary for a determination of the issue on direct appeal, Appellant would not oppose the appeal being placed in abeyance in order for the State to obtain a transcript of the recording prepared by the original court reporter from her tapes from the trial.

On March 12, 2015, while the motion to hold the case in abeyance was still pending, the State filed a motion to remand for reconstruction of the record. The court reporter did not record the recordings that were played for the jury but not admitted in evidence and the original recordings from the jail could not be retrieved. The State moved to reconstruct the recordings that were played for the jury.

On March 15, 2015, Appellant filed a return to the motion to remand for reconstruction. Appellant opposed the motion to remand for reconstruction based on the fact that the issue on appeal could be decided without the content of the recordings. On March 30, 2015, this Court granted the State's motion to remand.

On April 8, 2015, a reconstruction hearing was held before the Honorable Paul M. Burch, the trial judge. Matthew Swilley represented Appellant at the hearing. Kenard Redmond represented the State. Appellant objected to the reconstruction hearing. On April 21, 2015, Appellate counsel received a copy of the transcript from the reconstruction hearing. On April 24, 2015, Appellant filed a motion to file an amended initial brief. The State consented to the motion for file an amended initial brief. On June 4, 2015, this Court granted the motion to file an amended initial brief. This amended initial brief follows.

STATEMENT OF FACTS

On August 30, 2013, Appellant Curry and his then girlfriend, Marshell Wright, had been drinking and doing drugs all day. (R. 38, line 22 – R. 39, line 1). As they were walking home from the Magnolia Lane trailer park, two guys stopped and offered them a ride home. (R.39, lines 2-19). Marshell accepted the ride home with the guys but Curry did not. When Curry got home a physical altercation took place between Marshell and Curry. (R. 39, lines 20 – 25). Marshell's daughter, Shiquan Wright also became involved in the physical altercation. (R. 41, lines 5-10). According to Marshell and Shiquan, Curry pulled out a knife during the course of the fight and Shiquan grabbed an empty bottle of Hpnotiq.¹ (R. 44, lines 13-21; R. 68, line 7 – R. 69, lines 1-7). Shiquan eventually left and called the police from a neighbor's house. (R. 69, lines 16-23). Staff Sergeant Jimmy Coombs with the Chesterfield County Sheriff's Department arrived and met with Shiquan. (R. 87, lines 20 – R. 88, lines 1-6). Sergeant Coombs pushed the front door open, stepped inside and pulled his taser out. (R. 89, lines 2-7). Sergeant Coombs testified that he heard voices coming from a bedroom and he identified himself as being with the Sheriff's Department. (R. 90, lines 5-13). According to Sergeant Coombs, when he kicked the bedroom door in, he saw Curry with a knife in his hand. (R. 91, lines 7-25). Sergeant Coombs described the encounter as a deadly force encounter and deployed his taser. (R. 91, line 20 – R. 92, lines 1-7). Sergeant Coombs testified that Curry continued to struggle after being tased and tried to stab Coombs with the knife. (R. 92, line 8 – R. 93, lines 1-25). Another officer with the Chesterfield County Sheriff's Department arrived and Curry was arrested and taken to the hospital for injuries he sustained in the struggle.

¹ Hpnotiq is defined on its webpage as a refreshing blue blend of premium French vodka, exotic fruit juices and a touch of cognac.

ARGUMENTS

1. The trial judge erred in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the State did not introduce the recording in evidence and the judge failed to determine if any probative value of the recording was far out weighed by the prejudicial impact.

Prior to trial Curry moved to exclude recorded jail phone calls between Curry and Marshall Wright, his then girlfriend, based on the fact that defense counsel was only made aware of the recordings the week before trial and had not had an opportunity to review the recordings. (R. 9-14). The State advised the judge that the Sheriff's Office was unable to download the recorded phone calls and instead the Sheriff's Office provided a summary of the calls to the prosecutor. (R. 11, line 23 – R. 12, R. 13, lines 1-4). The prosecutor admitted that the summary got “buried on his desk” and had not been provided to defense counsel until the week before trial. (R. 12, lines 3-4).

The judge ruled stating, “No, sir. You’re not going to wait until the last second and turn information over to him like that. Now, I can understand with all this docketing we’ve got and all these pending cases why something like this would happen. But the best I can do here is I’m going to grant his motion unless you move for a continuance and we will try this case later on so he can have more time. But this mess, now, is waiting until the week before has got to stop.” (R. 14, lines 16-24). Inexplicably, defense counsel consented to the State’s motion for a continuance. (R. 16, lines 21-22; R. 15, lines 15-25).

The State then agreed to inform defense counsel of the limited specific parts of the recorded phone calls that would be offered at trial. (R. 17, lines 2-11). Defense counsel for Curry agreed but stated he may still have an objection pursuant to Rule 403, SCRE. (R. 17, lines 12-15). After listening to the recording of the jail phone calls, defense counsel for

Curry withdrew his Rule Five objection based on the state's failure to disclose the recorded phone calls in a timely fashion and instead argued for suppression based on the fact that the recordings were more prejudicial than probative. (R. 18, line 12 – R. 19, lines 1-12). The judge stated that he would make a decision when the recordings were offered in evidence. (R. 19, lines 13-18).

The recordings, however, were never offered in evidence. Instead, the State moved to simply publish the recordings to the jury. (R. 141, lines 2-5). Defense counsel for Curry renewed the Rule 403 objection and objected based on the fact that recordings were not in evidence. (R. 141, lines 6-9; R. 141, line 25 – R. 142, lines 1-3). Both objections were overruled. (R. 141, lines 17-18; R. 142, lines 4-6). In regard to the fact that the recordings had not been admitted in evidence, the judge ruled, "All right. Noted. I overrule it. Since there is no proffer here if I find a problem pops up I will have to step in. There could be ramifications." (R. 142, lines 4-6). The recordings were played for the jury. (R. 142, line 13 – R. 143, lines 1-10).

First, it was improper to allow the State to publish the recordings to the jury without admitting the recordings in evidence. Second, the judge erred in allowing the State to publish the recordings to the jury without making a determination that any probative value of the recordings was far outweighed by the prejudicial impact. Based on Curry's objection to the recordings, the judge should have listened to the recordings and ruled on the objection **before** allowing the State to publish the recordings. The appellate court can not determine if the recordings had probative value and if so if the probative value was out weighed by the prejudicial impact because the recordings were not introduced in evidence. The compounded errors require a new trial.

Rule 403, SCRE provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998).

The probative value, if any, of the recorded telephone conversations is unclear based on the record before this Court, as the recordings were not introduced in evidence. When Curry objected pursuant to Rule 403 the State argued, “And, Your Honor, we would simply say that it is relevant because the portions that we are going to be talking about address calls made to Ms. Marshell Wright whose [sic] still here in the courtroom in reference to this case and her testimony or non-testimony regarding this case. So we would assert that they are very relevant in the particular matter.” (R. 141, lines 10-16). The judge then overruled the objection, presumably without listening to the recording of the jail telephone calls and without a finding that the probative value outweighed the prejudicial impact. (R. 141, lines 17-18).

Marshell Wright testified that Curry called her when he was in jail and asked her to drop the charges against him. (R. 53, line 8 – R. 54, lines 1-16). On direct examination Curry admitted making the phone calls and discussing Wright not coming to court. (R. 176, lines 21 – R. 177, lines 1-11). In closing argument counsel² argued that the jail calls had no bearing on guilt and told the jury that the State played the jail calls simply to make Curry

² Counsel incorrectly advised the jury that the jail calls were in evidence. (Tr. p. 217, lines 8-10).

look bad. (R. 195, lines 7-25). The jail phone calls should not have been published to the jury.

In State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009), the South Carolina Court of Appeals wrote:

This Court reviews a trial court's decision regarding the admissibility of evidence under Rule 403 pursuant to the abuse of discretion standard and must give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct.App.2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id. at 358, 543 S.E.2d at 593-94. The trial court's determination should be reversed only in exceptional circumstances. Id. at 357, 543 S.E.2d at 593.

A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")).

In the present case the trial judge failed to exercise discretion. The trial judge failed to conduct a Rule 403 balancing test once the objection was made. Instead, the trial judge simply allowed the State to publish the recording for the jury without requiring the State to admit the recordings in evidence. The trial judge's failure to exercise discretion amounts to an error of law requiring reversal.

2. This Court erred in ordering a remand for reconstruction of recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the recordings were not introduced in evidence at trial.

On January 26, 2015, after Appellant filed the initial brief, the State moved to hold the appeal in abeyance in order to allow the State to obtain the content of the recordings that were played for the jury, over objection, but never admitted in evidence. Because the recordings were never admitted in evidence, the judge never made a finding as to admissibility. On February 6, 2015, Appellant filed a return to the State's motion to hold the case in abeyance. Appellant asserted that the appeal could be decided without the content of the recordings because the issue on appeal involved the judge's failure to making findings in regard to admissibility of the recordings. Appellant submitted, however, that if the Court found that the content of the recording is necessary for a determination of the issue on direct appeal, Appellant would not oppose the appeal being placed in abeyance in order for the State to obtain a transcript of the recording prepared by the original court reporter from her tapes from the trial.

On March 12, 2015, while the motion to hold the case in abeyance was still pending, the State filed a motion to remand for reconstruction of the record. The court reporter did not record the recordings that were played for the jury but not admitted in evidence and the original recordings from the jail could not be retrieved. The State moved to reconstruct the recordings that were played for the jury.

On March 15, 2015, Appellant filed a return to the motion to remand for reconstruction. Appellant opposed the motion to remand for reconstruction based on the fact that the issue on appeal could be decided without the content of the recordings. On

March 30, 2015, this Court granted the State's motion to remand. At the time of the reconstruction hearing, Appellant again objected to the remand. (April 8, 2015, R. 258, line19 – R. 259, lines 1-3). Counsel for Appellant respectfully submits that this Court erred in remanding the case to the circuit court to reconstruct jail phone calls that were not introduced in evidence at trial.

At the close of the case, the State should have realized that the recording had not been admitted in evidence. The State should have, at that time, introduced the jail recordings. Alternatively, pursuant to Rule 29, S.C.R.Crim.P., the State had ten days to move to re-open the case and move to have the jail recordings admitted in evidence. The remand in this case improperly allowed the State to re-open the case and admit evidence which was not properly admitted a trial.

Rule 210(c) SCACR provides, "The Record on Appeal shall include all matter designated to be included by any party under rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 209(b) SCACR provides, "The designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal. [See Rule 210(c)]." Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004).

Appellant objected to the admission of the jail recording. The lower court, however, never ruled on the issue because the State failed to formally introduce the

recording in evidence. The jail recordings in the present case would not have been properly designated to be included in the record on appeal because the recordings were not entered in evidence as exhibits pursuant to Rule 209(b). While the recordings were improperly played for the jury by the State, the recordings were not admitted in evidence and therefore were not presented to the lower court as required by Rule 210(c). This Court erred in remanding the case to reconstruct taped recordings of the jail phone calls that would not have been a part of the record on appeal because the recordings were never admitted in evidence.

In State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011), this Court held that the improper submission to the jury of defendant's two written statements, which had not been admitted into evidence, was reversible error. As discussed in issue one, the judge erred in allowing the State to publish the recordings to the jury without requiring the State to introduce the recordings in evidence and without making a determination that any probative value of the recordings was far outweighed by the prejudicial impact. The error requires reversal.

The issue on appeal involves, not simply the admission of the recordings, but the trial judge's failure to make any findings pursuant to Rule 403 before allowing the State to publish the recordings. Appellant submits that the issue presented on appeal can be decided without the content of the recordings of the jail phone call. Regardless of the content, the judge failed to make the required findings. This Court cannot review the trial judge's determination that any probative value of the recordings was far outweighed by the prejudicial impact because the trial judge failed to make any determination as to probative value and prejudicial impact. This Court erred in ordering a remand for reconstruction of

recorded phone calls between Appellant, while he was in jail, and his then girlfriend, when the recordings were not introduced in evidence at trial.

3. The trial judge, on remand for reconstruction, erred in finding that the record of the phone calls could be adequately reconstructed.

During the remand for reconstruction the State advised the trial judge that when the jail calls were published to the jury, the court reporter did not record or transcribe the phone calls. (April 8, 2015, R. 257, line 2 – R. 258, lines 1-17). The State explained that the calls were played for the jury from an officer's laptop computer and no disc was generated to preserve the recordings. (April 8, 2015, R. 258, lines 1-4). At the time of the reconstruction hearing, the recording had been deleted from the phone company's database. (April 8, 2015, R. 258, lines 4-7). The State submitted that the recording could be reconstructed based on notes taken by an officer who listened to the phone calls. (April 8, 2015, R. 258, lines 7-17). The officer's notes were entered in evidence over objection. (April 8, 2015, R. 260, lines 11-24).

After the State offered testimony from the officer, Appellant objected to any finding by the trial judge that the lost recordings had been adequately reconstructed. (April 8, 2015, R. 274, lines 6-8). The trial judge overruled the objection. The trial judge erred.

In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial ordered where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, this Court denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period,

which this Court explained was “not a situation where the court reporter’s equipment malfunctioned at trial leading to a loss of the trial transcript.” The missing recording in the present case is not due to Appellant’s absence. Instead, the recording is missing because the State failed to obtain a disc of the recording and introduce that disc in evidence. The judge erred in allowing the State to publish the recordings without introducing the recordings in evidence. See State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011). The portions of the recordings that were improperly published to the jury are impossible to reconstruct. This Court should not consider the notes from the officer in regard to the contents of the recording and instead should reverse the conviction based on the argument presented in issue one.

4. The trial judge erred in allowing the State to publish, over objection, recorded phone calls between Appellant, while he was in jail, and his then girlfriend when, based on the improper reconstruction hearing, any probative value of the recording of the phone calls was far out weighed by the prejudicial impact.

Without waiving issues one thru three, the trial judge erred in allowing the State to publish recordings of jail phone calls because any probative value of the improperly reconstructed recordings far out weighed the prejudicial impact. As discussed in issue one, Rule 403, SCRE provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998).

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In State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009), the South Carolina Court of Appeals wrote:

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³ Counsel incorrectly advised the jury that the jail calls were in evidence. (R. 195, lines 8-10).

matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” Id. at 358, 543 S.E.2d at 593–94. The trial court’s determination should be reversed only in exceptional circumstances. Id. at 357, 543 S.E.2d at 593.

While the trial judge failed to make findings as to prejudice, the improperly reconstructed recordings demonstrate prejudice far outweighing any purported probative value. The notes from the jail phone calls refer to statements made by Marshall Wright indicating that she was afraid Appellant would kill her next time. (R. 278). The notes also indicate that Ms. Wright stated that Appellant said he was going to kill the police on the night of the incident. (R. 278).

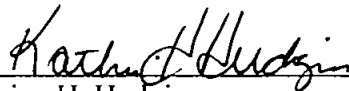
A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”)).

In the present case the trial judge failed to exercise discretion. The trial judge failed to conduct a Rule 403 balancing test once the objection was made. Instead, the trial judge simply allowed the State to publish the recording for the jury without requiring the State to admit the recordings in evidence. The trial judge’s failure to exercise discretion amounts to an error of law requiring reversal, especially in light of the highly prejudicial content of the recordings.

CONCLUSION

Based on the above argument, Curry's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of September, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

September 30, 2015


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THE STATE,

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CERTIFICATE OF SERVICE

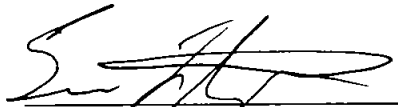
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Julius Curry, #327963, at McCormick Correctional Institution, 386 Redemption Way McCormick, SC 29899, this 30th day of September, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of September, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.