STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2015-001495

THE STATE,

Respondent,

v.

TERRANCE SEABROOK,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court correctly found the record of Appellant's trial had been sufficiently reconstructed to allow meaningful appellate review.

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Terrance Seabrook[1] (Appellant) for armed robbery and kidnapping during the December 16, 2010 term. (R. p.502-505.) On February 27, 2012, Appellant's case was called before the Honorable Roger M. Young, Sr., who granted a continuance the following day after Appellant's co-defendant accepted an offer of immunity in exchange for his testimony against Appellant. On March 19, 2012, the case proceeded to the Honorable Carmen T. Mullen and a jury. Larry Weidner, Esquire, represented Appellant, and Assistant Solicitor James Bannon, Esquire, represented the State. The jury found Appellant guilty of armed robbery but not guilty of kidnapping, and Judge Mullen sentenced him to life without parole in accordance with S.C. Code Ann. § 17-25-45. (R. p. 279, 282.)

Appellant filed a timely Notice of Appeal and subsequently learned the trial transcript was incomplete. He then filed a motion with this Court to remand to the circuit court to reconstruct the record. On April 15, 2015, the Honorable Carmen T. Mullen held a reconstruction hearing, during which the parties reconstructed the portions of the trial that were not available in a transcript. Specifically, these consisted of pretrial motions and a Jackson v. Denno hearing that presumably took place on March 19, 2012.[2] Judge Mullen ruled the record was sufficiently reconstructed to allow for meaningful appellate review, and Appellant appealed the ruling.

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[1] Appellant's brief indicates "Terrance" is the correct spelling of Appellant's first name. Additionally, the SCDC website, sentencing sheet, and indictment contain the same spelling. However, in the April 15, 2015 Transcript, Appellant spells his name to the court reporter "Terrence."

[2] As Appellant pointed out in his brief, confusion exists about when the Jackson v. Denno hearing was held and before which judge.

Appellant subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

ARGUMENT

The trial court correctly found the record of Appellant's trial had been sufficiently reconstructed to allow meaningful appellate review.

Appellant argues the trial court erred by finding the record of his trial was sufficiently reconstructed to allow meaningful appellate review. Specifically, he argues the parties and witnesses were only able to recall pretrial testimony, motions, and arguments in "summary fashion." On the contrary, the witnesses and attorneys were able to recall numerous specific details regarding the testimony and objections during the Jackson v. Denno hearing. The trial court properly found the record sufficiently reconstructed, and this Court should affirm its ruling.

Where court reporter records are unavailable or a transcript has been lost or destroyed, an appellate court can remand to the trial court to reconstruct the record. Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456,460 (2004), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The reconstructed record must be sufficient to allow for meaningful appellate review. Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012). To demonstrate a new trial is necessary, an appellant must show that the reconstructed record does not allow for meaningful appellate review and show resulting prejudice from the inadequate record. State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). As Appellant points out in his brief, "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." Id. at 324, 644 S.E.2d at 273. The trial court has discretion to determine how to reconstruct missing portions of the transcript provided the procedure abides with procedural due process. Adams, 397 S.C. at 658, 726 S.E.2d at 13. "The

majority of circuits have maintained that to obtain a new trial, . . . the defendant must show that the transcript errors specifically prejudiced his ability to perfect an appeal." United States v. Huggins, 191 F.3d 532, 537 (4th Cir. 1999).

In Ladson, no part of the trial was recorded. Here, a majority of the trial was: two out of the three days. Essentially the only missing portions were the Jackson v. Denno hearing and any pretrial motions. This Court in Ladson noted that "[m]ost cases around the country addressing this subject concern situations where only a part of the trial transcript is unavailable. In many such circumstances, meaningful appellate review can occur and the rights of the parties are not prejudiced." Ladson, 373 S.C. at 326-27, 644 S.E.2d at 274. This Court then made the distinction that in Ladson, it was "essentially left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multi-day and fact-intensive trial . . . ." Id. at 327, 644 S.E.2d at 274 (emphasis added). Also in Ladson, this Court noted glaring errors in recollection by the trial judge such as confusing two expert witnesses and being wrong about whether there were any questions regarding chain of custody and even a dispute over whether Ladson testified. This Court referred to the latter as "but one example of the trial court and counsel groping in the dark as to what actually happened at trial." Id. at 326, 644 S.E.2d at 274. Here, the trial judge had an excellent recollection of most of the pretrial proceedings. At no time did she or counsel seem to be "groping in the dark."

Because Ladson's entire trial had to be reconstructed from scratch, and Appellant's trial was recorded in its entirety with only the pretrial motions missing, Ladson has little application to this case except to demonstrate how unlike this case it was. Numerous specifics were recollected by the parties and witnesses in this case. Indeed, the following testimony was laid out during the reconstruction hearing:

Brian Chapman

Master Sergeant Brian Chapman recalled testifying:

On direct:

(1) that Appellant was in custody at the time of his interview and was in handcuffs. (R. p. 303, line 24–p. 304, line 7.)

(2) about reading him his Miranda rights. (R. p. 304, lines 8–10.)

(3) that Appellant did not initial each right on the form because he was handcuffed and also did not sign the form, noting that the form itself indicated he was in handcuffs. (R. p. 305, lines 1–20.)

(4) that Appellant did not appear to be under the influence of anything. (R. p. 306, lines 6–12.)

(5) that no promises or threats were made. (R. p.306, lines 13–17; p. 310, lines 4–15.)

(6) that Appellant understood his rights. (R p. 313, 12–15.)

(7) that he asked Appellant if he would be willing take a polygraph and Appellant agreed to take one. (R. p. 314, lines 11–18.)

(8) that Master Sergeant Brian Baird administered the polygraph. (R. p. 315, lines 5–10.)

(9) that he participated in the November 3 interview after Baird asked him to come into the interview room. (R. p. 316, lines 13–23.)

(10) that he watched the interview on closed-circuit television. (R. p. 317, lines 3–7.)

(11) that he was cross-examined on training in interview techniques and specifically

testified about going from subject to subject and good cop/bad cop. (R. p. 318, lines 1–15.)

(12) that he was asked about using those techniques with Appellant and Shatike Shabazz. (R. p. 318, line 19–P. 319, line 7.)

On cross:

(13) that his trial testimony was consistent with what occurred during the Jackson v. Denno hearing. (R. p. 321, line 25–p. 322, line 25.)

(14) regarding the voluntariness of Appellant's statement during the Jackson v. Denno hearing. (R. p. 325, lines 3–7.)

Brian Baird

Master Sergeant Brian Baird recalled testifying:

On direct:

(1) that he believed there was a Jackson v. Denno hearing and that his testimony there would have been the same as his trial testimony. (R. p. 334, line 19–p. 335, line 13.)

(2) that Appellant was in handcuffs. (R. p. 340, lines 10–15.)

(3) that Appellant was not under the influence of drugs or alcohol and that no threats or promises were made. (R. p. 341, lines 5–24.)

(4) that Chapman brought in an audio recorder and the interview was recorded but the polygraph was not. (R. p. 342, lines 2-11.)

(5) that he left Chapman in the room with Appellant. (R. p. 343, line 19–p.344, line 2.)

On cross:

(1) that Appellant understood his rights and agreed his statement was all true. (R. p. 345, lines 14–19.)

Larry Weidner

Larry Weidner recalled testifying:

On direct:

(1) that Baird and Chapman testified at the Jackson v. Denno hearing. (R. p. 351, lines 2–11.)

(2) that he argued there was coercion because the officers told Appellant they were going to give him a polygraph and used that as a persuasion tool to get him to talk. (R. p. 353, line 4–p. 354, line 10.)

(3) that he also argued the interview environment itself was coercive because it was conducted in the polygraph room at the jail with two officers present. (R.p. 356, lines 18–24.)

(4) that he further argued the officers used a "good cop/bad cop" interrogation technique on Appellant, which was also coercive. (R. p. 356, line 25–p. 357, line 14.)

(5) that the following day he argued the statements were not admissions, recalling that he cited the Rules of Evidence, including Rule 403 and possibly Rule 801. (R. p. 358, line 10–p. 359, line 20.)

(6) that he also argued the State was trying to impeach Appellant with his own testimony from the tapes and, thus, was burden-shifting. (R. p. 359, line 20–p. 361, line 10; p. 361, line 20–p. 363, line 1.)

(7) that he made a continuing objection on the impeachment issue that was renewed in the trial transcript. (R. p. 361, lines 10–19.)

(8) that the statements were relevant and more prejudicial than probative and were used for inappropriate purposes. (R. p. 363, lines 8–10.)

Weidner also recalled the judge ruling the statements could come in and were not coerced and that Appellant had voluntarily, knowingly, and freely waived his Miranda rights. (R. p. 365, lines 13–20.) He further recalled having portions of the tapes redacted before they were played for the jury. (R. p. 368, lines 4–24.) The trial judge specifically recalled Weidner objecting to the edited tapes because he was concerned possible favorable information had been removed. (R. p.368, lines 16–22.) Weidner also recalled wanting to make sure all the parts where Appellant said he did not do it were left in. (R. p. 369, lines 1–15.)

Concerning the jail phone calls, Weidner recalled arguing they were not admissions and the judge agreed that was what he argued. (R. p. 372, line 20–p. 373, line 6; p. 379, lines 14–19.) He also recalled making a Rule 403 objection to the phone calls to Appellant's girlfriend regarding Shabazz and getting their stories straight. (R. p. 376, line 13–p. 377, line 25.) He recalled the judge ruling against him. (R. p. 379, line 2; p. 380, lines 10–11.) Next, Weidner answered questions regarding the inaudible portions of the transcript and was usually able to recall what was said. (R p. 380–415.)

On cross, Weidner recalled testifying:

(1) that his second main issue was the distinction between confessions and admissions and a Rule 403 argument. (R. p. 419, lines 2–24.)

Weidner further testified that no gross inconsistencies existed between the Jackson v. Denno testimony and trial testimony. (R. p. 422, lines 2–8.) He explained that when Exhibits 37 and 38 (the jail calls) were admitted, the judge recognized his prior objection to their admissibility. (R. p. 430, lines 2–21.)

Appellant

Appellant recalled:

On direct:

(1) that the Jackson v. Denno hearing was held in February before the trial was continued. (R. p. 441, line 25–p. 442, line 3.)

(2) that the officers who were on the scene during his statements testified. (R. p. 442, lines 4–24.)

(3) that the officers testified there were two different statements. (R. p. 443, lines 1–4.)

(4) that the officers testified they read him his Miranda rights and that he agreed to give a statement and voluntarily waived his rights. (R. p. 443, lines 10–17.)

(5) that Weidner asked Officer Chapman about his interrogation techniques. (R p. 443, lines 22–25.)

(6) that Officer Baird testified he told Appellant he failed a polygraph and asked if he would like to make a statement. (R. p. 445, lines 4–15.)

(7) Weidner objecting that the statements were coerced and Officer Chapman used unprofessional tactics. (R. p. 445, lines 21–25.)

(8) that Judge Mullen heard the Jackson v. Denno hearing and ruled the statements were admissible. (R. p. 446, lines 6–19.)

(9) Weidner objecting to jail calls and statements pretrial on the basis of relevancy and that there was no admission of guilt when Appellant talked to his mother on the jail phone. (R. p. 447, line 4–p. 448, line 5.)

(10) Weidner objecting to Exhibit 26, a photo from the store surveillance video footage. (R. p. 450, lines 7–24.)

Jim Bannon

Jim Bannon recalled:

On direct:

(1) Chapman and Baird testifying. (R. p. 460, lines 22–24.)

(2) Weidner objecting to the admissibility of the statements, particularly whether they were admissions or statements, and also on the basis of relevancy. (R. p. 463, line 18–p. 464, line 2.)

(3) the judge finding the statements freely and voluntarily given. (R. p. 465, lines 12–17.)

(4) that certain portions of the statements were redacted, such as Appellant's criminal history, probation, or parole. (R. p. 466, lines 2–18.)

(5) that the parties agreed on what portions to redact. (R. p. 467, lines 2–11.)

(6) that Weidner's specific objections regarding the jail calls were relevance, admissibility of Appellant's differing stories, and burden-shifting. (R. p. 467, line 24–p. 468, line 7.)

Judge Mullen

When asked about her recollection of her rulings, Judge Mullen recalled, based on her notes, that Officers Christine Wilson and Chapman interviewed Appellant on November 2 and Chapman and Baird interviewed him on November 3. (R. p. 474, lines 3–22.) She recalled finding Appellant was not coerced in any way. (R. p.475, lines 5–20.) She also recalled that the defense objected that the statements were not admissions. (R. p. 475, lines 20–24.) She recalled considering Rule 801(d)(2), SCRE, and finding the statements were admissible. (R. p. 476, lines 6–24.)

Appellant determined the potential issues for appeal are as follows: (1) the voluntariness and admissibility of his statements (Ex. 28 and 29), (2) the admissibility of a photograph (Ex. 26), and (3) the admissibility of recorded jail calls (Ex. 37 and 38.). All of these issues were recollected in detail by the parties, witnesses, and the trial judge as noted in the above lists of specifics. Based on the specific recollection of the parties and witnesses, it is clear Appellant objected to the first issue—the voluntariness and admissibility of his statements—based on the arguments that (1) the interview techniques and environment were coercive, (2) the statements were not admissions (including Rules 403 and 801 objections), and (3) the State's attempt to impeach him was burden-shifting. Specifically as to the second issue, when appellate counsel asked at the reconstruction hearing about any objection to the surveillance footage or still shots, defense counsel recalled raising objections involving "unfair prejudice, . . . confusing the issues, which is the same [as Rule] 403, and misleading the jury." (R. p. 395, lines 16–25; p. 396, lines 2–5.) Additionally, when appellate counsel asked about a continuing objection to the video of the surveillance footage, defense counsel explained that his objection was that none of the audio or video evidence should come in unless or until Appellant testified. (R. p. 393, line 4–p. 394, line 16.) Finally, the third issue, the admissibility of recorded jail calls, was objected to on the basis of relevance, admissibility of differing stories, and burden-shifting. (R. p. 467–line 24–p. 468, line 7.) Appellant also argued they were not admissions. (R. p. 372, line 20–p. 373, line 6; p. 379, lines 14–19.)

Despite Appellant's argument to the contrary, these objections were certainly recalled in much more than "summary fashion" and the reconstructed record is sufficient for meaningful appellate review rather than being "largely conclusory." Direct testimony by defense counsel himself, and from the judge, solicitor, and Appellant, provided details

of what specific arguments were made and what the trial court's rulings were. Based on the very specific recollections by the parties of what happened during the Jackson v. Denno hearing and other pretrial matters, it is clear this case was quite different from the "groping in the dark" that went on while trying to reconstruct an entire trial and the resulting "bare bones summary" in Ladson. Additionally, the issues are unarguably preserved for appellate review and Appellant has demonstrated no clear prejudice as required by Ladson. Therefore, the trial court correctly found the record was sufficiently reconstructed and this Court should affirm its ruling.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the trial court's ruling be affirmed.

Respectfully submitted,

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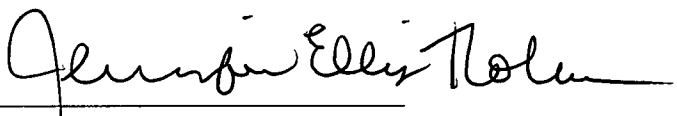
BY: 
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May 3, 2016

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACT.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
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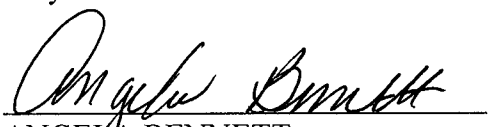
I further certify that all parties required by Rule to be served have been served.
This 3rd day of May, 2016.



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