

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
R. Scott Sprouse, Circuit Court Judge

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NOV 30 2016

SC Court of Appeals

THE STATE,

Respondent,

vs.

DEAN DISTASIO,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance or related mistrial motion because Appellant failed to attain a recording, that may or may not exist, of a phone conversation he participated in from an unspecified county agency in North Carolina.

STATEMENT OF THE CASE

The York County grand jury indicted Appellant Dean Distasio for his third criminal domestic violence offense. Distasio, represented by S. Jahue Moore, Esquire, proceeded to trial, and the jury found Distasio guilty on September 30, 2015. The presiding judge, the Honorable R. Scott Sprouse, sentenced Distasio to five years imprisonment suspended to one year imprisonment and five years probation.

STATEMENT OF FACTS

Appellant Dean Distasio slammed his wife (Victim) against the wall at the trucking company Victim runs, Double DD trucking.

Heather Cain testified as the first witness for the prosecution. She was working at Double DD Trucking that day. The office is located near the Buster Boyd Bridge in Lake Wylie near the North Carolina border. On November 5, 2014, Distasio walked into the office. Cain testified Distasio had not been to the office in a long time. Three people were in the office that day, Cain, Heather Tevella, and Victim. Not long after he walked in, Distasio started raising his voice during an argument with Victim. Cain was concerned because the other times he raised his voice, things did not end well. Tr. p. 48. Cain heard a commotion, then Cain heard Victim asking Distasio to give her back her car keys. Cain realized “something serious” was happening and she called 911. Tr. pp. 48-49.

While she was on the phone, Distasio slung Victim into the wall, knocking a mirror off the wall. Victim stood in the doorway trying to get her car keys back and Distasio demanded she get out of the way. Distasio tried to get out of the office once he saw Cain on the phone. Law enforcement showed up quickly, only five minutes later. Tr. pp. 49-51.

On cross-examination, the jury learned that Distasio never worked at the company much. While on cross-examination, Cain admitted Victim grabbed Distasio’s shirt as she tried to retrieve her keys from him; on redirect, she noted that Victim was not using as much force as Distasio did. Tr. p. 59, p. 64. Cain noted on redirect that before Victim stood in the doorway trying to get her keys, there was an altercation “when he was still handling her and pushing her around and shoving her and choking her.” Tr. p. 64, lines 2-5.

Victim testified next. She owns DD trucking – everything is in her name. Distasio was not a regular employee of the company. He did get a check from the company. On the other hand, Victim works at the company about 80-100 hours a week. Distasio was around the office only sporadically and had not been at the office for a while at the time he came into the office on November 5. Tr. pp. 65-67. Victim just moved out of their residence on November 1. Tr. p. 67.

Victim was not expecting Distasio when he showed up at the office. He came into the dispatch office, the office Victim and Heather Tevella were in, and at first was speaking to Tevella. Tevella received a call about a load that she did not know about, and Distasio told her it was his load, which started the argument. Distasio called Victim a dumbass, said if she was not such a dumbass, the company would be bigger than UPS, and said she was incompetent. Distasio called her a bitch. He grabbed Victim by the cheeks and pushed her into Tevella's desk with both hands. As she fell, she noticed the contents of her purse were poured out. She grabbed Distasio's shirt, asking what he took from her purse, and she saw her key ring with her car keys in his hands. Tr. pp. 68-71.

Victim explained the importance of retrieving her car keys. Her daughter has a medical condition that could require treatment within one hour of a flare up. In her view, her daughter's life was on the line. Tr. p. 71. Victim explained to defense counsel, "If it means the difference of my daughter with a disease that has a forty percent mortality rate getting to a doctor, I'd run out in front of a bus." Tr. p. 91, lines 2-7. She tried to grab the key ring and held on to his shirt for only a matter of seconds. Distasio pushed Victim up against the wall and choked her. Victim testified she was pinned against the wall, off the ground. Victim tried hitting Distasio in the face so he would let go of her. Tr. pp. 71-73. Distasio grabbed Victim's arms and flung her into the wall, knocking the mirror down. Tr. p. 81.

Fortunately, law enforcement showed up minutes later. She denied Distasio's claims she jumped on him or pulled his shirt off. Tr. pp. 81-82. Victim provided law enforcement with a statement. She explained her written statement was a short statement because her adrenaline was still running high: "[M]y adrenaline was going through the roof. I'm trying to write. They said calm down, everything else. I'm trying to write coherently a story of what just happened and it was insane." Tr. p. 87, line 25 – p. 88, line 4.

Gina Hudson runs the business next door. She heard a loud commotion from Double DD Trucking and then heard a loud slamming against the wall. Tr. pp. 103-04.

Deputy Forsythe arrived at the scene around the same time as Sergeant Doody. She testified she was unaware Distasio called the police. She confirmed Distasio's shirt buttons were pulled out and his collar was disheveled. She did not remember Distasio having any injuries but the report indicated he had a scab on his hand that was bleeding. She testified she did not see the alleged injury herself though.

Heather Tevella works as a dispatcher at Double DD Trucking. She testified Distasio does not work there on a regular basis and she had not seen him in a couple of weeks until the day he came to the office. Tr. pp. 126-27. Distasio gave Tevella a form to fill out but she put it aside to tend to a phone call. Tevella referenced a company Distasio owned that was dormant. Tevella testified an argument broke out between Distasio and Victim about the load that was the subject of the phone call. Distasio called Victim a dumbass and was yelling and cursing. He was calling her names. Tevella saw Victim's purse fall and items scattering. Distasio pushed Victim into Tevella's chair. Victim tried to get away and then tried to get her keys. Tevella testified Victim never jumped on Distasio's back. Distasio pinned Victim against the wall. At no point did she see Distasio on his

phone. Tevella tried to call 911 but found out Cain already called 911. Tr. pp. 128-32. When asked how long law enforcement was at the scene, Tevella replied an hour and a half or maybe an hour; it “[s]eemed like a long time, but it was all very disturbing and shocking for this to happen at work. It’s hard to remember.” Tr. p. 132, lines 15-20. Tevella also called her husband to come over to the office. Tr. p. 133. Tevella confirmed she was scared: “I didn’t know what was going to happen next, if I got hurt, [Victim] was going to get hurt, you know, what was going to happen.” Tr. p. 133, lines 6-8. On redirect, Tevella confirmed that Distasio was choking, slamming, and pushing Victim. Tr. p. 147.

Distasio claimed he owns Double DD Trucking and Double DD Express. Distasio claimed he works at Double DD Trucking from five until nine in the morning every day. Distasio testified the morning of the incident, Victim came to Distasio’s house and told him her car was not running. Distasio claimed Victim borrowed his truck and Distasio had her car checked out before driving it to the trucking company. Distasio claimed he argued with Victim over a pin number he needed to find. Tr. p. 160. Distasio did not know how to pronounce Tevella’s last name (“Tevella, Tevello”). Tr. p. 160, lines 23-25. Distasio claimed Victim was fighting him over the keys to his truck. Under Distasio’s version of events, he failed to find the pin number and when he was leaving to take his truck to the office in Lugoff, Victim blocked the door, telling Distasio not to take his truck. Tr. p. 161.

Distasio claimed Victim attacked him and pulled on his shirt while telling Cain to call the police. Distasio tried to get out of the office but could not. He claimed he called 911 from the office. Tr. pp. 161-62. Distasio claimed he told the dispatcher the following:

She’s choking me, she’s choking me. He said, No, she’s not – or she

said, No I'm not, I'm just holding him here. As she said that, she put both feet on the exit door and yanked on my shirt and pulled me backwards and that's when we hit the wall. When we hit the wall, she let go of me and I ran for the front door. And I was still on the phone with 911 till they got there.

Tr. p. 162, lines 2-12. He claimed he never touched Victim. Tr. p. 162.

On cross-examination, Distasio doubled down on his claim he worked at the office every day.

This claim fell apart as cross-examination proceeded further:

Q: Can you tell us how to pronounce Heather's last name?

A: I don't know how to pronounce her last name. Cain or the other one? I hired them both.

Q: The other one.

A: I hired them both, No, I don't.

Q: Can you pronounce her name?

A: No, I cannot.

Tr. p. 166, lines 13-25. He claimed he dragged Victim across the room while he was on the phone and she was pulling on his shirt. He complained she was choking him by pulling on his shirt. He claimed she put her feet up on the exit door and pushed, pulling him backwards into the wall. Tr. pp. 172-73. He claimed he called 911 **at the same time** Victim told Cain to call 911. Tr. pp. 171-72.

ARGUMENT

The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance or related mistrial motion because Appellant failed to attain a recording, that may or may not exist, of a phone conversation he participated in from an unspecified county agency in North Carolina.

Distasio claims the trial court erred in denying his motion for continuance to find a recording of a conversation Distasio may have participated in that may or may not exist from a North Carolina county. Distasio does not even know which county, maybe Mecklenburg, maybe Gaston. Distasio asked for ten days to make any further post-trial motions, but apparently did not find the recording in that ten day period. The trial court did not err in denying the motion for a continuance based on the possibility of a recording that might be in the possession of one of North Carolina's county agencies.

A trial court's denial of a motion for continuance is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion resulting in prejudice to the defendant. State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Reversals from the denial of a defendant's motion for continuance are as "rare as the proverbial hens' teeth." State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). As to the overlapping mistrial issue: "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

Distasio's counsel moved for a continuance the day of trial claiming he needed time to find a recording of Distasio's alleged 911 call to North Carolina. Distasio's counsel admitted he did not

know whether the recording existed or not. Tr. pp. 13-14. In response to the motion, the prosecution explained the following:

Whenever I first got the case, I immediately requested all the 911 calls. I requested the CAD report, the detailed call for service report. In that report, it lists out the times and the callers of each call made to 911 or to any law enforcement entity.

And it states in that CAD report, which I provided to the defense very early on in this case, it states, received a call from Dino Distasio, advised Dione was hitting him, started because he was trying to get his keys. And that is logged at 11:28:08. And it has before that around 11:25, a new call from Heather Cain, . . .

. . . I asked Ralph Marchant, who handles these sorts of things, were there any other phone calls made and he said that he could not find any. I asked him a week ago if he could double-check that for me. And then I asked him again yesterday could he please double-check that for me. He provided me a second 911 call, which I advised the Defense.

. . . And when I asked Ralph Merchant why he was late in getting that, he told me in an e-mail, I quote, "It was a transfer from another county so it wasn't on the 911 system. It was just like a regular phone call, which we get hundreds of a day."¹

Tr. p. 16, line 23 – p. 18, line 2. The solicitor noted he had no other recordings of Distasio speaking with anyone else. The solicitor noted that Distasio had the power to subpoena someone if there was a recording at another agency. Tr. p. 18, lines 4-14. The solicitor noted again that the information about Distasio's call was in the CAD report. Tr. p. 18, line 22 – p. 19, line 9. Distasio's counsel admitted having the CAD report and admitted "it may be looking for a needle in the haystack." Tr. p. 20.

The trial court denied the continuance motion, but requested the prosecutor allow Distasio the opportunity to speak with the 911 operator the State intended to call as a witness. Tr. p. 22. Counsel later renewed the motion for a continuance claiming:

We've had some telephone calls with the 911 dispatchers who are over the recordings and know what they're doing and it's my understanding that there is a very high likelihood a portion of that audio recording is housed, kept by somebody at Mecklenburg County or Gastonia County in North Carolina.

Tr. p. 41, lines 3-10.

Distasio made a mistrial motion after Victim and Cain each confirmed Distasio was not on the phone during the altercation. Distasio, without any offer of proof, suggested a recording might exist from Gaston or Mecklenburg County that would disprove these assertions. Tr. pp. 74-75. After the verdict, Distasio renewed his motions and asked for ten days to make any post-trial motions. Tr. p. 212. Apparently, Distasio failed to locate the alleged recordings during this ten day period.

The trial court did not err. Distasio should have known he was transferred from North Carolina to South Carolina, he agreed with this in response to his counsel's leading direct examination question, although he oddly failed to elaborate. Tr. p. 163, lines 21-25. Distasio made no effort to determine if one of the North Carolina counties possessed a recording of the alleged conversation. Further, Distasio failed to locate the recording in the ten day window following trial. Given the elapse of this ten day period, there is no reason to believe Distasio would have found the evidence he imagines existed if he received a continuance. Quite simply, the trial court did not abuse its wide discretion in denying the motion for a continuance.

¹ In his statement of the case, Distasio falsely claims the State "deliberately" withheld evidence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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November 30, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal From York County
The Honorable R. Scott Sprouse, Circuit Court Judge

SC Court of Appeals

Appellate Case No: 2015-002130

THE STATE,

Respondent,

v.

DEAN DISTASIO,

Appellant.

PROOF OF SERVICE

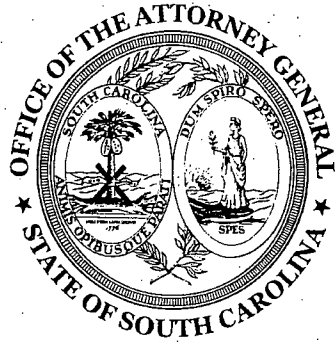
I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 30th day of November, 2016.



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ALAN WILSON
ATTORNEY GENERAL

November 30, 2016

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Dean Distasio
Appellate Case No: 2015-002130

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Laura R. Baer, Esquire (with two copies)
Ms. Trisha Allen