

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

RECEIVED

Honorable Daniel D. Hall, Circuit Court Judge MAR 03 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEAN GUISEPPI DISTASIO,

APPELLANT

APPELLATE CASE NO. 2015-002130

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant the defenses' motion for continuance, and later for a mistrial, where who called 911 first was crucial and the State deliberately withheld information which would have shown that Appellant made the initial 911 call, denying Appellant his right to present a complete defense and violating the fundamental tenants of fairness?

STATEMENT OF THE CASE

On June 18, 2015, the York County Grand Jury indicted Appellant Dean G. Distasio for criminal domestic violence, third offense.¹ R. 210 – 211. Prior to trial, defense counsel filed a motion for discovery. Supp. R. 1 – 6.

On September 30, 2015, Distasio appeared for trial before the Honorable R. Scott Sprouse and a jury. R. 1. Distasio was represented by S. Jahue Moore, and the State was represented by assistant solicitor Matthew Hogge. R. 1. The jury found Distasio guilty. R. 202, ll. 2-9. Judge Sprouse sentenced Distasio to the mandatory minimum sentence of five years, suspended upon the service of one year, to be followed by five years of probation. R. 206, l. 16 – 207, l. 7.

This appeal follows.

¹ Distasio was originally indicted for criminal domestic violence, second offense, on March 26, 2015.

STATEMENT OF FACTS

Introduction

Distasio and his wife, Dione Distasio,² were embroiled in a bitter divorce, complicated further by the fact that they owned a trucking business, Double DD Trucking, where they both worked. R. 151, ll. 4-6. One day, a dispute occurred between Distasio and Dione at their York County office. Distasio said that Dione, who is five feet tall and weighs 230 pounds, attacked him. R. 64, ll. 8-9; R. 74, ll. 1-2; R. 152, l. 18 – 153, l. 10.

The 911 calls became critical evidence in this case because Distasio maintained that he called 911 first to report that he was being attacked by his wife. R. 152, l. 25 – 157, l. 3. The State originally maintained that the only 911 recording available was of the call made by the office manager, Heather Cain, at 11:25 a.m. R. 16, l. 23 – 17, l. 14; State's Ex. 1 (Cain's 911 call, on file with this Court). In the background of that call, a man's voice says: "Sir, my wife will not let go of me," a partial address, and "Sir." State's Ex. 1 (Cain's 911 call). The York County Computer-Aided Dispatch (CAD) report reflected that a call came in from Distasio at 11:28 a.m. R. 17, ll. 4-11. Defense counsel saw the reference to Distasio's 911 call on the CAD report and requested a copy of it from the solicitor. R. 19, ll. 17-23.

The solicitor contacted Ralph Merchant, the York County 911 operations manager, who was finally able to locate the recording of the second portion of Distasio's 911 call two days prior to the trial. R. 17, l. 12 – 18, l. 21; R. 32, ll. 1-3. York County is located near the border between North and South Carolina. It appears that the first portion of Distasio's 911 call was routed to a 911 operator in North Carolina, who then re-routed it to South Carolina. See R. 31, l. 23 – 32, l. 10. It is a reasonable inference that the first portion of Distasio's call occurred either

² For ease of reference, Dione Distasio will be referred to as "Dione" throughout the Brief.

before or contemporaneously with the call made by Cain based on the times noted on the CAD report and Distasio's statements in the background of Cain's call, which are consistent with relaying information to a 911 operator. See State's Ex. 1 (Cain's 911 call). The recording of the first portion of Distasio's 911 call would have corroborated his version of events and showed that the State's witnesses were lying when they said he never called 911. See R. 20, ll. 2-21; R. 21, ll. 6-16, R. 65, l. 15 – 66, l. 5. When the North Carolina operator transferred the call, he told the York County operator that it is "a male," Distasio, "saying that his wife was hitting him." See Defendant's Ex. 4 (Distasio's 911 call, on file with this Court). In the second portion of the 911 call, which was provided by the solicitor, Distasio said that his wife was threatening to break his glasses, tore his shirt, and grabbed his keys. Defendant's Ex. 4 (Distasio's 911 call).

Trial counsel requested a continuance to obtain the first portion of Distasio's call. He did not learn of the possibility that the call was originally routed to North Carolina until the break taken after jury selection, when he was able to speak with Ralph Merchant directly. R. 13, l. 2 – 14, l. 18; R. 19, l. 10 – 20, l. 21; 21, ll. 6-16; 22, l. 14 – 23, l. 20; R. 31, l. 23 – 32, l. 10; R. 32, l. 25 – 33, l. 3. Trial counsel renewed the motion and requested a mistrial once it became apparent that the solicitor intended to prey upon the defense's inability to present the first portion of Distasio's call by arguing that Distasio did not call 911 until after he was outside. The motions were denied. R. 65, l. 7 – 66, l. 5; R. 70, l. 14; see also R. 169, ll. 6-11.

Relevant Facts

To ease the tension caused by their marital difficulties, Distasio worked from 5:00 a.m. to 9:00 a.m., before Dione and the other employees came into the company's Lake Wylie office. R. 151, ll. 2-4; R. 157, ll. 9-18. Even so, when Dione's Mercedes R350 was not "running right," Distasio offered to get a diagnostic test run on her car. He drove it to work on the morning of

November 5, 2014, and took it by an auto shop after he left. Since Distasio had taken her car, Dione drove Distasio's "truck," which was a Porsche Cayenne SUV. R. 151, ll. 6-10; R. 158, l. 12 – 159, l. 25. The two lived in separate residences in the same housing development. R. 151, ll. 4-6.

That same day, Distasio had decided to revive his previously dormant trucking company, Double D Express, in which Dione had no business interest. Their first load was scheduled for that morning, but he needed certain paperwork in order for his newly employed driver to lawfully transport the load. He returned to Double DD Trucking's Lake Wylie office to get the documents, which is when an argument with Dione ensued. R. 151, l. 10 – 153, l. 12.

Distasio testified that when he returned to the business that morning, he went into the large office where Dione and Heather Tevella, the trucking dispatcher, were working. When a call came in about a load going from Columbia, South Carolina to Illinois, Distasio said that the call was in reference to Double D Express. Dione became very upset, apparently because Distasio had documents related to Double D Express coming to the Double DD Trucking office. R. 151, l. 2 – 152, l. 17. Dione would not provide him with the information that he needed, so he printed the rate confirmation sheet for the load and picked up the keys to his truck, which Dione had driven that morning. R. 152, ll. 9-17.

Dione started yelling at Heather Cain, an employee who was in another officer, to call the police. Distasio tried to jump over Dione's leg to get to the front door, but Dione grabbed the back of his shirt. He tried to pull away from her and dialed 911 on his cell phone. As he was on the phone, he again went toward the door while Dione grabbed his neck. Distasio said that he told the operator "She's choking me. She's choking me" and that Dione said "No, I'm not. I'm just holding him here." R. 152, l. 19 – 153, l. 7; see also State's Ex. 1 (Cain's 911 call). Dione

then put at least one foot on the exit door as she yanked Distasio's shirt and pulled him backwards. That is when they both hit the wall, Dione let go of him, and Distasio was able to go out of the door. Distasio remained outside on the phone with 911 until the police arrived. Even though Distasio had the keys and could have left, he remained there "because [he] didn't do [anything] wrong." R. 153, l. 7 – 154, l. 10. The police report documented that Distasio's hand was bleeding, the collar of his shirt was stretched out, and a button was falling off of his shirt. R. 106, l. 13 – 108, l. 18.

The solicitor presented testimony from Dione and two of her employees, Heather Cain and Heather Tevella. Dione and Cain, who both provided written statements to the police comprised of a few sentences, testified with a surprising amount of detail. Compare R. 208 – 209, with R. 36 – 92. In her written statement, Dione wrote:

I was at work at my desk and my husband took my purse and my keys. [A]t that point I tried to grab the keys and he pushed me off. I went to the front door and tried to block it. [T]hat's when he pushed me into the wall and I had one of my employees called [sic] 911. Also there were scratches on my neck from him trying to get me away from the door.

R. 209. Notably, there was no mention of any physical altercation in the back office, Dione admitted that she tried to keep Distasio from leaving, and she did not mention anything about being choked. R. 77, l. 25 – 81, l. 21. At trial, Dione said that she was surprised when Distasio came to the office between 11:00 a.m. and noon. R. 57, l. 9 – 59, l. 8. She agreed that they argued about the load he had for Double D Express. She now claimed that he grabbed her cheeks while he cursed at her and then pushed her three feet into the desk chair of Heather Tevella. R. 59, l. 9 – 61, l. 19. She said that she saw the contents of her purse on the floor, grabbed Distasio's shirt, and then realized that he had taken a set of car keys. R. 61, l. 21 – 62, l.

11. She said that their daughter had a medical condition that could require emergency care such that her car keys were of extreme importance.³ R. 62, l. 2 – 63, l. 3; Tr. 81, l. 24 – 84, l. 2.

As Distasio went down the hallway, Dione pursued him, trying to grab the keys. She claimed that Distasio “turned and [put her] up against the wall and start[ed] choking [her].” R. 63, ll. 15-25. Dione, who is five feet tall and weighs 230 pounds, alleged that Distasio put both hands around her neck and lifted her two inches off of the ground. Yet, she had no bruising on her neck. R. 63, l. 23 – 64, l. 10; R. 84, l. 3 – 87, l. 12; see R. 140, ll. 18-24; State’s Ex. 2 (photo, on file with the Court). All of this allegedly occurred before she went to the door and said “Dino, just give me the keys, just give me the keys.” R. 64, ll. 21-23. She claimed that Distasio then grabbed her by both arms, allegedly causing bruising, and threw her into the wall. R. 72, ll. 13-18; R. 73, ll. 7-14. She said that at that point, “it was over.” R. 72, l. 20. Dione claimed that the only time she grabbed Distasio’s shirt was while they were in the back office and she was trying to see what was in his hand – the keys. R. 90, l. 22 – 92, l. 10.

Heather Cain, the office manager, and Heather Tevella, the trucking dispatcher, both seemed under the impression that the keys in Distasio’s hand belonged to Dione. R. 41, ll. 12-13; R. 133, ll. 4-5. Cain admitted that her written statement was not based entirely on her personal observations, as she had not actually seen Distasio take any keys out of Dione’s purse. Despite Dione’s contention that she did not pull Distasio’s shirt in the lobby, Cain said that she observed Dione stand in front of the doorway and grab Distasio’s shirt, physically restraining him from leaving the office building. Cain said that Dione was not going to let Distasio leave without getting her keys. She also heard Distasio repeatedly say “Get off of me,” as can be heard in the background of Cain’s 911 call. R. 41, ll. 12-15; R. 49, l. 20 – 52, l. 23; see also State’s Ex.

³ Dione made no mention of the fact that the keys Distasio took were actually to his truck. R. 55, l. 23 – 92, l. 10; see R. 152, ll. 9-17.

1. On re-direct, Cain claimed that this occurred after Distasio had pushed, shoved, and choked Dione. R. 54, l. 20 – 55; l. 8. Notably, Cain never mentioned that Dione was choked in her written statement. See R. 208.

Heather Tevella agreed that Distasio and Dione argued in the office. However, she said that Distasio's teeth and hands were clenched, in contradiction to Dione's testimony that Distasio was squeezing her cheeks. R. 120, l. 1 – 121, l. 5. She claimed that Dione was then "literally like pushed" into her chair, and that after that it was "literally like wrestling" down the hallway over the keys. R. 121, l. 5 – 122, l. 14. On redirect, Tevella claimed that she saw Distasio push Dione, slam her against the wall, and choke her. R. 138, ll. 1-8. Tevella denied that Dione was being "physical" and said that she was standing in front of the door but was not "blocking it." She said that Dione was "trying to protect her keys and her life," though she clarified that her keys were her "lifeline to her child." R. 135, l. 11 – 137, l. 19.

Dione, Cain, and Tevella, all denied seeing a cell phone in Distasio's hand, implying that he was lying about calling 911 as Dione attacked him. R. 42, ll. 8-12; R. 49, ll. 16-22; R. 63, l. 9 – 64, l. 2; R. 122, ll. 19-21. However, in the background of the very beginning of Cain's 911 call you can hear a man's voice say "Sir, my wife will not let go of me," a partial address, and "Sir," such that it appears that Distasio was on the phone with a 911 operator when Cain's 911 call was answered.⁴ See State's Ex. 1 (Cain's 911 call). Distasio's use of a cell phone during the incident

⁴ It is unclear whether the statements in the background of the recording could be heard by the jury in the courtroom. When he played one of the 911 calls, the solicitor told the jury "[y]ou might not be able to hear on these speakers," so he encouraged them to listen to the recordings on a laptop in the jury room. R. 183, ll. 19-25. However, when the jury requested a laptop, the one provided was unable to play the discs. Instead, the recordings of the 911 calls were just replayed again in open court. Even then, only the 911 call made by Distasio was played with the assistance of a microphone. R. 197, l. 13 – 201, l. 12.

would also cast further doubt on Dione's claim that he used both hands to choke her and lift her off of the ground. See R. 63, l. 23 – 64, l. 16.

As will be discussed more fully *infra*, defense counsel made a pre-trial motion for continuance so that the first part of Distasio's 911 call could be located. The solicitor provided him with a partial recording of Distasio's 911 call just two days prior to trial. The trial judge took a recess after jury selection so that the attorneys could confer with Ralph Merchant, the York County 911 operations manager who handles the solicitor's requests for such recordings. R. 13, l. 2 – 14, l. 18; R. 16, l. 21 – 23, l. 20; R. 32, ll. 1-3; Defendant's Ex. 4 (Distasio's 911 call). After speaking with Mr. Merchant, it was determined that the first portion of Distasio's call likely originally went to a county in North Carolina, either Mecklenburg or Gaston. Defense counsel renewed his motion for continuance, which was denied. R. 31, l. 23 – 32, l. 10; R. 32, l. 25 – 33, l. 3. After the solicitor elicited testimony that Distasio did not call 911 while he was inside of the office building, defense counsel renewed his motion and asked for a mistrial. The motions were denied. R. 42, ll. 8-12; R. 49, ll. 16-22; R. 63, l. 9 – 64, l. 2; R. 65, l. 7 – 66, l. 5; R. 70, l. 14; see also R. 102, ll. 10-25; R. 122, ll. 19-21; R. 184, l. 18 – 185, l. 14. Defense counsel renewed all of his motions at the close of the defense's case. R. 169, ll. 6-11.

ARGUMENT

The trial court erred in refusing to grant the defenses' motion for continuance, and later for a mistrial, where who called 911 first was crucial and the State deliberately withheld information which would have shown that Appellant made the initial 911 call, denying Appellant his right to present a complete defense and violating the fundamental tenants of fairness.

Introduction

Distasio's call to 911 was an integral part of his defense at trial. Defense counsel argued that it would have evidenced that he was the first person to place a call to 911 and provided the clearest recording of the events as they occurred. R. 19, l. 17 – 20, l. 21; R. 21, ll. 6-16. Despite his timely requests for the recording of Distasio's 911 call, only a portion of the call was provided by the solicitor, having been delivered to defense counsel just the Monday prior to Distasio's Wednesday trial. R. 16, l. 23 – 18, l. 3; R. 19, ll. 10-23; Supp. R. 1 – 5. Though it was obvious that the recording was not of the complete 911 call, the solicitor provided no explanation to defense counsel of why the beginning of the call was not provided. It was not until the day of trial that Merchant told defense counsel that Distasio's call was initially routed to one of two counties in North Carolina. R. 31, l. 23 – 32, l. 10. The motion for continuance, and renewals thereof, to request the remainder of the recording were denied. R. 22, ll. 18-25; R. 32, l. 25 – 33, l. 3; R. 70, l. 14.

Without the complete recording, the witnesses were free to deny that Distasio placed a 911 call during the altercation, and that is exactly what they did. R. 42, ll. 8-12; R. 49, ll. 16-22; R. 63, l. 9 – 64, l. 2; R. 102, ll. 10-25; R. 122, ll. 19-21. The solicitor argued that the second portion of Distasio's call that the jury heard was made only after he got outside and changed to "damage control" mode. R. 184, l. 18 – 185, l. 14. Had the entire 911 call been available and played for the jury, it would have corroborated Distasio's version of events. It would have

further belied the State's witnesses' testimony that they never saw Distasio on his cell phone and that he used two hands to choke Dione. See R. 19, l. 17 – 20, l. 21; R. 21, ll. 6-16; R. 65, l. 19 – 66, l. 4.

How the Issue Arose at Trial

Defense counsel filed a motion for discovery pursuant to Rule 5, SCRCrimP. R. 19, ll. 10-23; Supp. R. 1 – 5. Pursuant to that request, the solicitor provided defense counsel a copy of the CAD report and the 911 call made by Heather Cain. The CAD report indicated that two 911 calls came in, the other one being from Dean Distasio. A week prior to trial, apparently at the request of defense counsel, the solicitor contacted Ralph Merchant about the recording of Distasio's call. The solicitor followed up with Merchant again the week of trial and was provided with the portion of Distasio's call recorded by York County dispatch. R. 16, l. 23 – 19, l. 9. When the solicitor asked why the recording was not found earlier, Merchant wrote: "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. I'm sorry, but it can be [like] looking for a needle in a haystack sometimes." R. 17, l. 23 – 18, l. 3. Once he received it, the solicitor provided defense counsel with the partial recording of Distasio's 911 call. R. 13, l. 2 – 14, l. 18.

On the portion of the call that was provided, an unidentified third party says: "Hey, there. We've got a 911 call from up in York County. It's Charlotte Highway in between Montgomery and Bonum Road. It's a male saying his, uh, wife was beating him. . . . His wife was hitting him." The York County operator, Tripp, responds "We've got a call in that area. We're getting units on the way out there." Distasio, who provides his first and last name to the operator, says "Sir. I'm outside now. She broke my glasses. Tore my shirt off me." He answered the

operator's questions and said that his wife had hit him and "jumped on [his] back as [he] was trying to leave." Defendant's Ex. 4 (Distasio's 911 call).

Defense counsel made a pre-trial motion for continuance so that he could attempt to locate the missing, beginning portion of Distasio's 911 call. R. 13, l. 2 – 14, l. 18. The solicitor argued that it does not "change the case that much," that the recording was not in the State's possession, and that defense counsel could have subpoenaed someone to look for the call based on the notation in the CAD report that Distasio made a call. R. 18, ll. 4-14. Defense counsel responded that it was because of the notation on the CAD report that he asked the solicitor to check again for a recording, ultimately resulting in the retrieval of the partial recording that the solicitor provided the Monday before trial. R. 19, ll. 17-23. He also took exception to the solicitor's argument that the recording is not "that important in this case," arguing that Distasio is facing five years in jail and clear audio of the events as they are actually taking place is "crucial." R. 19, l. 24 – 20, l. 9.

Defense counsel simply requested that someone go back and verify whether the first portion of the call was recorded or not. R. 20, ll. 10-21. He was not seeking an unreasonable delay, arguing: "And if they have it to give me now, I think they can certainly go back and find it today." R. 20, ll. 18-20. The solicitor opined that the jury would hear the incident in the background of Heather Cain's 911 call and Distasio's description of the events after the fact on the portion of his 911 call provided. R. 20, l. 22 – 21, l. 5; R. 21, l. 25 – 22, l. 5. Defense counsel responded that the case is a "he said, she said" and that the recording of the first portion of Distasio's call could be "the tipping point." R. 21, ll. 6-16. The trial judge said that he understood defense counsel's concern and desire to speak with Merchant himself. Thus, he denied the motion for continuance but took a recess after jury selection for both of the attorneys

to talk to Merchant. The judge said: "If there is another 911 tape that hasn't been provided to you, then we'll revisit that issue at that time." R. 21, l. 17 – 23, l. 20.

Following an apparent in chambers conference and the preliminary charge to the jury, trial counsel renewed his motion for continuance. The trial judge denied the motion and said: "I have considered all the circumstances and extensive conversation with counsel in chambers and due to the circumstances. I'm going to deny your motion for continuance." R. 31, l. 23 – 32, l. 10; R. 32, l. 25 – 33, l. 3. After the solicitor elicited testimony from Heather Cain and Dione that Distasio did not call 911 while he was inside of the office building, defense counsel renewed his motion and asked for a mistrial. R. 42, ll. 8-12; R. 49, ll. 16-22; R. 63, l. 9 – 64, l. 2; R. 65, l. 7 – 66, l. 5. Counsel argued:

There [are] two witnesses now who have testified my client wasn't on the phone when the physical altercation took place. And I think that we have the ability to conclusively disprove those assertions if we were able to get the 911 videos [sic] from Mecklenburg or the other county, Gastonia [sic]. You know, if it were a mere -- you know, **I think we were all under the assumption that the State would essentially confirm that we made a telephone call, said we were getting jumped on and it was done, at least, around the time the physical altercation took place. That apparently is not the case.**

R. 65, l. 19 – 66, l. 4 (emphasis added). The motion was denied. R. 70, l. 14.

The trucking dispatcher, Heather Tevella, who was in the back office with Dione and Distasio when the incident began, also denied any knowledge that Distasio placed a 911 call. R. 122, ll. 19-21. The responding officer, Jenny Forsythe, was uncertain of whether Distasio placed any 911 call. R. 102, ll. 10-25. Distasio testified that he called 911 when Dione first grabbed his shirt, in the back office because he "wanted to get out of there with no problems." He agreed with defense counsel that Defendant's Exhibit 4 was a recording of only a portion of his call. R. 152, l. 18 – 153, l. 12; R. 154, l. 11 – 156, l. 9. Defense counsel renewed all of his motions at the close of the defense's case, which were again denied. R. 169, ll. 6-11.

Defense counsel argued in closing that Distasio “called the police too” and waited for them to arrive, illustrative of his innocence. R. 177, ll. 7 – 178, l. 3; R. 179, ll. 5-15. In the solicitor’s closing argument, he argued that Distasio only called 911 after he saw Cain calling 911. He said that Distasio had “to go on damage control.” R. 184, l. 18 – 185, l. 14. The jury asked for a device to play both of the 911 calls during their deliberations. However, because of difficulties with the laptop that was sent back to the jury room, the jurors were brought into the courtroom to hear the recordings. Even then, a microphone was only used to amplify Distasio’s call, not Cain’s call. R. 197, l. 13 – 201, l. 12; see also R. 183, ll. 19-25. Following the guilty verdict, defense counsel renewed his motions, saying:

It seems that the jury placed some -- we obviously don’t know what was the deciding factor, but they, at least, asked to hear the audio again, which leads me to just question, you know, why. And I wish -- truly wish that I was able to show them the audio of my client standing in the business having the dispute with his wife. And again, only until yesterday did I learn there was even a 911 audio of my client calling, so I would renew those motions.

R. 203, l. 13 – 204, l. 1. The judge proceeded to sentencing. R. 204, l. 14 – 207, l. 7.

Discussion

A. The Court Should Have Granted the Motion for Continuance

While reversal for the denial of a motion for continuance is admittedly rare, the trial judge’s ruling in this case amounted to an abuse of discretion. It is axiomatic that the determination of a motion for continuance must depend upon the particular facts and circumstances of each case. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). In Ungar v. Sarafitr, the United States Supreme Court noted that “it is not every denial of a request for more time that violates due process even if the party fails to offer evidence” 376 U.S. 575, 589, 84 S.Ct. 841, 849 (1964). However, the Court wrote: “Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render

the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” Id. at 589, 84 S.Ct. at 849-50.

Our Supreme Court’s opinion in State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), is instructive. In Tanner, the defendant was charged with multiple counts of felony driving under the influence and reckless homicide. 299 S.C. at 460, 385 S.E.2d at 833. Tanner’s defense at trial was that he was the passenger of the car, not the driver. Id. at 461, 385 S.E.2d at 833. While Tanner’s defense counsel was aware that blood, skin, and hair samples were taken from the car in which Tanner was an occupant, the solicitor’s office informed him, in response to multiple inquiries, that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pre-trial hearing, SLED brought the samples to court. Id. The Tanner Court found that the trial judge abused his discretion in denying the defense’s motion for continuance to conduct an independent examination, or at least await SLED analysis, of the samples. Id. at 463, 385 S.E.2d at 834. The Court found that the samples were critical to the case and that “[n]o real harm would have befallen the State from [a] continuance.” Id. In fact, the Court noted that once the analysis is conducted, it may be that the samples will be supportive of the State’s case. Id. Regardless, the defendant satisfied his burden of “demonstrating other evidence that could have been produced, and other points in his behalf that could have been raised.” Id. at 462-63, 385 S.E.2d at 834 (citing State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966)).

Like the defense attorney in Tanner, Distasio’s attorney requested the recording of the 911 call and relied upon the solicitor’s representation that the call did not exist. Once the partial call was provided, Distasio’s attorney asked for a continuance to obtain the first part of the

recording from North Carolina, having then been provided with two counties to request it from. While defense counsel proffered that the recording would be favorable to the defense, if it did not confirm that Distasio called first and provide exculpatory audio of the incident, it would be favorable to the State. Just as in Tanner, there would have been no real harm to the State if the trial judge had granted Distasio's motion for continuance.

A majority of the South Carolina cases affirming the denial of a motion for continuance involved a general request for additional time to prepare for trial or the defense was at fault in the need for a delay. For example, in State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966), our Supreme Court ruled: "There is no showing that any other evidence on behalf of the appellants could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial." Similarly, the cases of State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968), State v. Greene, 255 S.C. 548, 557-59, 180 S.E.2d 179, 183-85 (1971), and State v. Vaughn, 268 S.C. 119, 123, 232 S.E.2d 328, 329 (1977) all upheld the denial of a continuance for attorney preparation because the appellant failed to show prejudice. See also State v. McKennedy, 348 S.C. 270, 280-81, 559 S.E.2d 850, 855-56 (2002) (affirming denial of continuance where appellant "made no showing that any new or exculpatory evidence would have been likely to surface if more time was granted."); State v. Colden, 372 S.C. 428, 436-40, 641 S.E.2d 912, 917-19 (Ct. App. 2007) (affirming denial of continuance to pursue witnesses where prior continuance was granted for attorney preparation and to pursue a witness and motion at trial did not contain any reference to the name or need for any additional witnesses).

In State v. Ashbury, 328 S.C. 187, 493 S.E.2d 349 (1997), the Court affirmed the denial of the request for a continuance to obtain prior trial transcript because trial counsel could have

requested court reporter's back-up tapes to impeach witnesses during the trial. However, in State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), the Court reversed for new trial, holding that the trial court erred in denying a continuance to obtain the transcript of the defendant's first trial where the witness testified differently at the second trial and no tapes or transcript were available to subpoena to impeach witness. Here, defense counsel's motion for continuance was specifically requested to obtain the missing portion of the 911 call, which he diligently requested from the solicitor. Defense counsel did not know where to send any subpoena for the records until the day of trial when the solicitor arranged for him to speak with Merchant, the 911 operations manager for York County.

Recognizing that our Courts have not outlined the criteria that a trial judge should consider in the exercise of his discretion as to a motion for continuance, the dissenting justice in State v. Fields, 264 S.C. 260, 270, 214 S.E.2d 320, 323-24 (1975) (Bussey, J., dissenting), discussed the Sixth Court of Appeals' opinion in Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971). The Giacalone Court wrote:

Proper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, a court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all of the surrounding facts and circumstances. Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons or whether it is purposeful and dilatory; and other relevant factors.

445 F.2d at 1241; cf. United States v. Clinger, 681 F.2d 221, 223 (4th Cir. 1982) ("When a continuance is sought to secure the attendance of a witness, the following elements must be

proved by the party requesting the continuance: ‘who (the witnesses) are, what their testimony will be, that it will be relevant under the issues in the case and competent, that the witness can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for the trial as set.’”).

Considering such factors in the context of the present case, there was no dispute that had the solicitor had the first portion of Distasio’s 911 call in his possession, he would have turned it over to defense counsel. The solicitor said: “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.” R. 16, l. 23 – 17, l. 3. He immediately turned over the tape of Cain’s 911 call. R. 17, l. 4 – 18, l. 6. Additionally, defense counsel filed a motion for discovery pursuant to Rule 5, SCRCrimP, on March 31, 2015, just five days after Distasio was originally indicted. Supp. R. 1 – 5. The solicitor likely also had a duty to disclose the complete recording of Distasio’s 911 call pursuant to Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963), in which the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Once the CAD report was provided, defense counsel specifically requested that the solicitor provide the recording of Distasio’s 911 call. The solicitor said that no such recording existed. However, the solicitor contacted Merchant again about the 911 call the week before trial and again the week of trial. Finally, a partial recording of Distasio’s call was produced and delivered to the solicitor. The solicitor promptly supplied the partial recording to defense counsel on the Monday before Distasio’s Wednesday trial, but he provided no explanation for why the

recording of the call was incomplete. R. 13, l. 2 – 14, l. 18; R. 16, l. 23 – 18, l. 14; R. 19, ll. 10-23. It was only during the recess after jury selection that defense counsel was able to speak with Merchant, who explained that the call was likely transferred from one of two North Carolina counties. R. 31, l. 23 – 32, l. 10. Prior to that, defense counsel relied upon the solicitor's representations that a search for the call was fruitless. Thus, in the present case, defense counsel was not idle and the need for continuance was specific.

Further, there is no evidence in this case that the defense made any prior requests for continuance or that the instant motion was for any purpose other to obtain the recording of the complete 911 call. Counsel explained the necessity of the complete recording of the call to the defense's theory of the case. R. 19, l. 24 – 20, l. 21; R. 21, ll. 6-16. The trial lasted one day and counsel renewed his motion throughout the case. R. 1; R. 65, l. 7 – 66, l. 5; see also R. 203, l. 18 – 204, l. 1. The length of trial, in which the solicitor called only five witnesses, also cuts against any inconvenience to the State. See R. 2. Additionally, it is unlikely that a lengthy delay would have been necessary since simultaneous requests could have been made to both Mecklenburg and Gaston counties, which could have conducted a search for the specific date and time of Distasio's call and confirmed whether they still had the recording or any report related to the call and provided it. Prior to the day of trial, not even the solicitor, much less defense counsel, knew where the missing portion of the call may be housed in order to issue a subpoena. See R. 17, l. 23 – 18, l. 3; R. 31, l. 23 – 32, l. 10. Thus, the particular circumstances of this case all weighed in favor of a reasonable continuance to request the recording of the first portion of Distasio's 911 call. Therefore, the trial court erred in denying the motion for continuance.

B. The Court Should Have Granted the Motion for Mistrial

Defense counsel renewed his motion for continuance and made a motion for mistrial after the solicitor questioned witnesses about when and whether Distasio called 911. R. 65, l. 15 – 66, l. 4. Defense counsel argued:

There's two witnesses now who have testified my client wasn't on the phone when the physical altercation took place. And I think that we have the ability to conclusively disprove those assertions if we were able to get the 911 [recordings] from Mecklenburg or the other county, Gastonia. You know, if it were a mere -- you know, I think we were all under the assumption that the State would essentially confirm that we made a telephone call, said we were getting jumped on and it was done, at least, around the time the physical altercation took place. That apparently is not the case.

R. 65, l. 19 – 66, l. 4. The motion was denied. R. 70, ll. 14.

“The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). “A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial.” Id.

The Sixth Amendment, applicable to the states pursuant to Fourteenth Amendment, guarantees a criminal defendant the fundamental rights “to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.” State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (2008); U.S. CONST. amend. VI; U.S. CONST. amend. XIV; see also S.C. CONST. art. 1, §§ 3 and 14. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 294, 302, 93 S.Ct. 1038 (1973). However, “[i]n the exercise of this right [to present a defense], the accused, as is

required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” Id. “Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission.” Lyles, 379 S.C. 328, 343, 665 S.E.2d 209.

Here, the judge erred in denying the motion for mistrial because Distasio was unable to present a complete defense without the complete 911 recording. Distasio’s statements during the first portion of his 911 call to the operator were excited utterances and present sense impressions such that they would have been admissible under the Rules of Evidence. See Rule 803(1)-(2), SCRE. The complete recording would have further shown that the State’s witnesses who claimed that Distasio did not call 911 from inside of the office were lying. See R. 42, ll. 8-12; R. 49, ll. 16-22; R. 122, ll. 19-21; see also R. 102, ll. 10-25.

Without the complete recording, the solicitor elicited evidence and argued that Distasio was not on the phone with the 911 operator while Heather Cain was on the phone with 911. Rather, he said that it was only after he saw Cain on the phone that Distasio went “on damage control” and called 911 himself. R. 184, l. 18 – 185, l. 14. This argument was contrary to the reliable evidence, as statements made in the background of Heather Cain’s 911 call are unmistakably statements made by Distasio to the 911 operator. A man’s voice says: “Sir, my wife will not let go of me,” a partial address, and “Sir.” State’s Ex. 1 (Cain’s 911 call). Further, it was obvious from the second portion of Distasio’s 911 call that there was a first portion missing and Merchant told them that it was because the call was routed to one of two North Carolina counties that were in close proximity to York County. Defendant’s Ex. 4 (Distasio’s 911 call); R. 31, l. 23 – 32, l. 10. Thus, the solicitor acted in bad faith when he used the

defense's inability to present the first portion of Distasio's 911 call as an opportunity to argue that it did not exist and attack Distasio's credibility. R. 42, ll. 8-12; R. 49, ll. 16-22; R. 63, l. 9 – 64, l. 2; R. 65, l. 7 – 66, l. 5; R. 102, ll. 10-25; R. 122, ll. 19-21; R. 184, l. 18 – 185, l. 14. Moreover, trial counsel proffered that statements made on the complete recording would have evidenced that Distasio placed the first call to 911 because he was the one being attacked. R. 20, ll. 2-21; R. 21, ll. 6-16.

Therefore, the trial court erred in denying the defense's motion for mistrial.

CONCLUSION

Based on the foregoing, Appellant Dean Giuseppe Distasio respectfully requests that this Court reverse his conviction and remand his case for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", written in dark ink. The signature is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

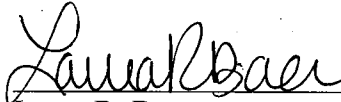
ATTORNEY FOR APPELLANT

This 3rd day of March 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 3, 2017



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