STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE REEVES,

APPELLANT

APPELLATE CASE NO 2016-002316

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to permit defense counsel to question the complaining witness regarding a letter she wrote to Appellant approximately one year after the alleged sexual assault where (1) the content and specific language of the letter was relevant, (2) its probative value was not substantially outweighed by the danger of unfair prejudice, and (3) the letter qualified as an exception to the rule against hearsay pursuant to Rule 803(3), SCRE, because it was a statement of the complaining witness's then existing mental and emotional condition?

STATEMENT OF THE CASE

On November 10, 2016, an Aiken County grand jury indicated Appellant for criminal sexual conduct with a minor in the second degree (2016-GS-20-2375). R. 214-215. The state, represented by Ashley Hammack and Sam Grimes, called the case to trial before the Honorable R. Lawton McIntosh and a jury on November 15, 2016. R. 1. Michael Routzong represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 203, l. 23 – R. 204, l. 5. Judge McIntosh sentenced Appellant to twenty years' imprisonment. R. 210, l. 1; R. 216.

On November 21, 2016, Appellant, through counsel, served a notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in refusing to permit defense counsel to question the complaining witness regarding a letter she wrote to Appellant approximately one year after the alleged sexual assault where (1) the content and specific language of the letter was relevant, (2) its probative value was not substantially outweighed by the danger of unfair prejudice, and (3) the letter qualified as an exception to the rule against hearsay pursuant to Rule 803(3), SCRE, because it was a statement of the complainant witness's then existing mental and emotional condition.

Relevant facts

In the summer of 2012, Complainant met her father, Appellant, for the first time. R. 45, ll. 15-19; R. 46, ll. 10-13; R. 47, ll. 3-6. Fifteen-year old Complainant lived with her mother and sisters, but she despised them. R. 45, l. 20 – R. 46, l. 3. She was excited to get to know Appellant because of her tumultuous relationship with her mother. R. 47, ll. 7-14. She hoped she would have a parent with whom she could get "along with and could talk to, and ... kind of vibe with." R. 47, ll. 7-14. She also hoped her father would "kind of understand [her] better" than her mother and siblings. R. 47, ll. 7-14. Complainant and Appellant went to the mall and basketball court. R. 48, ll. 10-17. They would "hang out," walk around the neighborhood, and "sit outside." R. 48, ll. 10-17. Additionally, Appellant took Complainant to his home. R. 48, ll. 18-20. Joyce Williams, who was Appellant's girlfriend and lived with him, was often at the home when Complainant visited. R. 49, ll. 16-20. Sometimes, the visits to Appellant's house would be very short. Other times, the visits would be longer to allow them to watch movies and "chill." R. 49, l. 23 – R. 50, l. 2.

Complainant described one incident that was "something what you wouldn't expect out of a father/daughter relationship." R. 50, l. 22 – R. 51, l. 1. She recalled Appellant picked her up

from her mother's house and took her to visit a cousin or grandfather or uncle in downtown Augusta. R. 51, ll. 2-16. She could not remember who this person was, but she recalled visiting for "like an hour or so. Maybe an hour and a half." R. 51, ll. 16-18. Thereafter, Appellant and Complainant went to Appellant's home. R. 51, ll. 18-22. On the drive, the two talked about Appellant's family and Complainant's rocky relationship with her boyfriend. R. 55, l. 23 – R. 56, l. 22.

Appellant and Complainant sat on the couch "watching a movie, or TV or whatever" for "a good hour or so." R. 52, ll. 5-9. Complainant claimed Appellant moved closer to where she was on the couch and put his arm around her. R. 52, l. 24 – R. 53, l. 16. According to Complainant, Appellant then rubbed her legs. R. 53, l. 17 – R. 54, l. 8. Appellant leaned in and tried to kiss her on her neck, but Complainant "inched" away. R. 59, ll. 24-25. She claimed Appellant "kind of like got on top of" her "and put his weight on" her. R. 60, ll. 18-19. Appellant then "kind of like grabbed [her] legs" and put them on the couch. R. 60, ll. 18-22. While on top of her, Appellant somehow managed to pull down her shorts and underwear. R. 61, ll. 6-14. Then, he inserted his penis into her vagina. R. 62, ll. 6-10.

Complainant believed Appellant stopped because he heard something outside. R. 62, ll. 24-25. She claimed that Appellant got up and "like looked out the window, and was like checking to see if someone had pulled up or something." R. 63, ll. 1-4. Appellant then walked to another room. R. 63, ll. 9-10. Complainant got up and put on her clothes. R. 63, ll. 11-13. Complainant returned to watching television and Appellant returned to the living room. R. 63, ll. 13-15. Eventually, Complainant returned to her mother's house. R. 63, ll. 19-23.

Complainant alleged she had sexual intercourse with Appellant more than once, and always at Appellant's home. R. 65, l.14 – R. 66, l. 11. However, she could only describe the

first encounter and the last encounter. Prior to the last alleged sexual encounter, Complainant, Appellant, and Joyce went to Augusta for "First Friday." R. 68, ll. 2-8. They stayed in Augusta for "two or three hours." R. 68, ll. 8-9. Appellant then took Complainant to her mother's home. R. 68, ll. 9-12. Complainant and her older sister got into a physical fight "for a good hour" – "good fighting each other, boxing and everything." R. 68, ll. 16-18. Complainant knew that if she stayed with her sister any longer it was "not going to be a good situation," and her mother was not at home. R. 68, ll. 21-24. Complainant called Appellant to pick her up. R. 68, l. 21 – R. 69, l. 3. He arrived within thirty minutes. R. 69, ll. 4-5. Knowing she had dance practice the following day, Complainant took clothes with her so that she could spend the night at Appellant's home. R. 69, ll. 9-17.

Appellant, Complainant, and Joyce watched television that evening. R. 70, ll. 1-3. Later, Complainant went to sleep on the couch while Appellant and Joyce slept in their bedroom. R. 71, ll. 10-22. Complaint alleged she woke up with Appellant on top of her. R. 71, ll. 23 – R. 72, l. 2. She further alleged that Appellant pulled down her shorts and underwear and inserted his penis into her vagina. R. 72, ll. 6-13. This encounter lasted "at least 30 minutes." R. 72, lines 14-16. Complainant alleged Joyce woke up and walked into the living room. R. 72, ll. 17-18. According to Complainant, Joyce saw Appellant assaulting Complainant. R. 72, l. 19. When Joyce walked into the room, "she did a double take," but "didn't say anything." R. 72, ll. 19-21. Rather, Joyce walked into the kitchen, where she stood "for like 20 minutes." R. 72, ll. 21-24. Appellant "got off of" Complainant and went into the kitchen to talk to Joyce. R. 72, l. 24 – R. 73, l. 1. Complainant got up and put her clothes on while Appellant and Joyce argued. R. 73, ll. 9-15. Joyce then left. R. 73, ll. 16-25. And Complainant fell asleep again. R. 74, ll. 5-11. The following day, Appellant took Complainant to her mother's house. R. 74, ll. 12-16.

At some point after the alleged sexual encounter, Joyce arrived at Complainant's home asking to speak with Complainant's mother. R. 74, l. 23 – R. 75, l. 6. Joyce and Complainant's mother had a discussion outside, out of Complainant's hearing. R. 75, ll. 6-9. Complainant's mother called Complainant outside and instructed her to apologize to Joyce for being disrespectful to her. R. 75, l. 13 – R. 76, l. 10. Complainant never returned to Appellant's home again. R. 76, ll. 11-13. Complainant claimed she never talked to her dad again. R. 77, l. 25 – R. 78, l. 2.

Complainant did not tell anyone about the alleged sexual encounters because she "was afraid," "embarrassed by the situation," and did not think anyone would believe her. R. 66, ll. 15-21; R. 78, ll. 9-10. She claimed that she continued to visit with Appellant because "everything at ... [her] mother's home was going horrible." R. 67, ll. 1-5. Complainant and her mother argued "constantly." R. 67, ll. 5-6. Complainant and her mother did not "get along for anything in this world," and "could not see eye to eye at all." R. 67, ll. 6-9. Complainant was fighting – sometimes physically – with her sisters as well. R. 67, ll. 9-10; R. 67, ll. 14-16. She perceived her sisters were taking her mother's side. R. 67, ll. 10-11. In her mind, "everybody in the house was going against [her]." R. 67, ll. 11-13.

In June or November of 2013, Complainant moved in with Marquette Davis, a family friend, because she was not "getting along at all" with her mom. R. 76, ll. 16-19; R. 114, ll. 9-14; R. 115, ll. 16-23; R. 119, ll. 3-10. In fact, the Georgia Department of Family and Children were involved concerning the relationship between Complainant and her mother and the home environment her mother was creating. R. 116, ll. 2-4. Marquette owned a dance group called Royalty to Loyalty, and Complainant was a dancer within that group. R. 110, ll. 12-16; R. 114, ll. 17-24. Complainant was happy living with Marquette. R. 110, ll. 17-18. Complainant told

Marquette that Appellant sexually abused her. R. 77, ll. 20-22; R. 117, ll. 7-10. Marquette contacted Complainant's mother and the police. R. 76, l. 23 – R. 77, l. 9; R. 118, ll. 6-13. Although Complainant told Marquette she had told her mother about the abuse, Complainant testified she never told her mother about the alleged sexual abuse because they did not have a relationship that permitted Complainant to talk to her mother "about anything." R. 78, ll. 5-12; R. 79, ll. 13-18; R. 121, ll. 20-23.

During cross-examination, Complainant admitted she gave Appellant a handwritten letter in June 2013, complaining about Appellant and her mother. R. 79, ll. 19-24. Concerning the contents of the letter, the state objected that the letter was hearsay. R. 80, l. 10 – R. 81, l. 2; R. 81, l. 12-14. Defense counsel explained that the letter concerned Complainant's home life, which the state had made an issue in the case. R. 82, ll. 5-6. Additionally, defense counsel noted the letter contradicted Complainant's testimony that she had not seen Appellant after the last alleged sexual encounter. R. 82, ll. 6-11.

When the testimony resumed, Complainant affirmed that in June of 2013, or about a year after the alleged abuse, she gave a handwritten note to Appellant. R. 84, ll. 3-8. However, a subsequent question by trial counsel regarding the contents of the letter drew another hearsay objection from the state. R. 84, ll. 9-15.

The judge posed two questions to trial counsel during an in camera hearing on the admissibility of Complainant's testimony: whether the questions elicited hearsay as the state claimed and what was the relevance of the testimony, which had not been raised by the state. R. 85, ll. 2-6; R. 85, ll. 15-16. Trial counsel argued the questions were not intended to elicit hearsay because he was merely questioning her about her prior writing. R. 85, ll. 12-14. Additionally, trial counsel argued the letter explained why Complainant was motivated to lie about Appellant.

R. 85, ll. 17-20. The judge agreed that there were "some things," "such as, when she last had contact with her father" in the letter that were inconsistent with Complainant's prior testimony, and therefore, defense counsel could question Complainant about those under Rule 801(d), SCRE. R. 86, l. 24, l. 21 – R. 87, l. 3.

Defense counsel argued the remaining portions of the letter were not hearsay, and that the letter contained relevant information because it explained why Complainant was not telling the truth – she had a motive to lie about Appellant due to her poor home life and promises not kept by Appellant. R. 87, l. 15 – R. 89, l. 2. The judge agreed the letter showed Complainant had a motive to lie – "I do think it goes to the evidence. And I think it is admissible." R. 89, ll. 4-7. The judge noted the state had "already" "brought out that this relationship was bad from the home front, that under a 403 analysis, that that prejudice doesn't outweigh the benefit of it." R. 89, ll. 7-11. Thereafter, the judge permitted defense counsel to proffer the testimony he sought to elicit.

During the proffer, Complainant affirmed yet again that she wrote the letter in question. R. 89, ll. 22-23. Complainant agreed that in the letter she confronted Appellant with a promise he did not keep – getting her hair done. R. 90, ll. 5-9; R. 212-213. This caused Complainant "to get fucked over by" "[t]hat retarded, ignorant bitch" that Appellant called her mother. R. 90, ll. 9-12; R. 212-213. According to Complainant, her mother thought Complainant owed her "the damn world" because her mother "paid for it to get done." R. 90, ll. 14-16. Additionally, Complainant was upset that in June, Appellant had said she could move in with him, but had failed to fulfill that promise as of September. R. 90, ll. 17-19; R. 212-213.

Based on defense counsel's questions using the form "admit or deny," the judge zeroed in on Rule 613, SCRE, concerning prior inconsistent statements. R. 90, l. 21 – R. 91, l. 4. Defense

counsel noted that he did not want to admit the letter as evidence; rather, he only wanted to question Complainant regarding the contents. R. 91, ll. 4-9. The state agreed that Complainant admitted she wrote the letter and that defense counsel could question Complainant regarding her relationship with her mother, even concerning the specific list of grievances contained in the letter. However, the state objected to defense counsel "using the exact language from" the letter because it would "disparage her with the language she used in it." R. 91, ll. 10-17; R. 100, ll. 16-25. The state agreed that defense counsel could ask "her about how bad her home life was and how bad she got along with her mom ... about whether or not her daddy paid for her to get her hair done." R. 101, ll. 3-7. The state objected to the verbiage of the letter because "she was using the F word and B word" and that would make Complainant "look bad in front of the jury." R. 101, ll. 7-9; R. 102, ll. 3-5. The state argued the use of that language was not admissible under Rule 403, SCRE. R. 101, ll. 9-10. The state also contended that Complainant had not "said anything ... inconsistent with what [was] in the letter yet." R. 91, ll. 17-19; R. 101, ll. 14-16. According to the state, it was not inconsistent for Complainant to have written a letter to Appellant and given that letter to Appellant over a year after the alleged incident because she testified she "never saw" Appellant and "never talked to" Appellant again. R. 101, ll. 14-16. The state agreed the parties could "quibble over whether or not that includes writing a letter." R. 101, ll. 17-19.

The judge again explained that the letter was inconsistent with Complainant's prior testimony "about not seeing, having contact with the father, after Joyce came by to see her mother." R. 91, l. 23 – R. 92, l. 1; R. 93, l. 25 – R. 94, l. 3; R. 101, ll. 20-22. However, the judge concluded that it was "not proper to read the letter and say did you say that" because this was "basically bypassing the rule," which required providing the witness with the date, time, and

place of the statement and allowing the witness to admit or deny the statement. R. 92, ll. 3-10. According to the judge, defense counsel could not "read the letter in front of the jury." R. 92, ll. 15-16.

Defense counsel explained he was not attempting to impeach Complainant under Rule 613, SCRE. R. 94, ll. 6-8. He was examining Complainant "about the events or the milieu that she [was] enduring in her own home." R. 94, ll. 9-11. He wanted to ask if she admitted or denied the states she made in the letter "[t]o give the jury a flavor of ... how she was living and her opinion of her home." R. 94, ll. 11-16. Defense counsel argued he only wanted "to have relevant statements affirmed or denied," and that he did not "have to quote the letter," but not quoting the letter would result in the jury losing "the flavor of the anger and vitriol" that Complainant felt toward her mother. R. 97, l. 19 – R. 98, l. 10; R. 102, ll. 11-13. Complainant's miserable home life answered "why she would lie about her dad to get out of the house." R. 97, ll. 21-25; R. 98, ll. 8-11. Complainant's contentions captured in the letter "would give the jury a flavor of her mental or emotional state at the time these events happened." R. 99, ll. 4-6. The letter, written a year after the alleged assaults, was important for the jury as it showed she was contacting Appellant, whom she claimed had done "very vile things to" her the year before. R. 99, ll. 7-12. The contents also elaborated upon testimony already revealed by the state that Complainant's home life was "very bad." R. 99, ll. 12-13. The letter showed Complainant would do anything, including making false allegations, to get out of her mother's house. R. 100, ll. 20-4.

The judge disagreed, explaining that he would not permit defense counsel to go into the letter that "talks about her home life in the graphic terms it does." R. 95, ll. 1-5; R. 95, ll. 14-16. He denied the request to question Complainant "over the letter." R. 102, ll. 18-21. However, he

would allow questions "regarding communications with her biological father, the defendant, that's inconsistent too with her testimony from the stand; which is, after Joyce communicated with her mother, she never saw her dad again." R. 102, l. 23 – R. 103, l. 3. Additionally, the judge would permit questioning "about writing in that letter communications she had where she indicates she does have a bad home life," and that "she indicated her anger with defendant." R. 103, ll. 5-10.

After the argument and ruling, defense counsel sought to finish his proffer so that the objection would be preserved for the record. Despite having twice admitted that she wrote the letter to Appellant approximately one year *after* the alleged sexual assaults, Complainant stated that because the letter did not show a date, she "really couldn't tell" "if it was a year after these events." R. 106, ll. 10-24. In complete contradiction to her earlier testimony, Complainant claimed she did not recall when she gave the letter to Appellant. R. 106, l. 25 – R. 107, l. 2. Thereafter, Complainant admitted most of the contents of the letter. R. 107, ll. 3-20; R. 108, ll. 2-11. However, she denied writing that the reasons for her "fuck you all attitude" was due to her list of grievances contained in the letter. R. 107, l. 21 – R. 108, l. 1.

When the judge inquired directly of Complainant about the date of the letter, she suddenly remembered that she composed the letter and provided to Appellant "before" she stopped seeing him. R. 108, ll. 15-23. She knew this "for a fact." R. 108, ll. 23-24. Complainant explained,

> Because I remember at the time, I was going through it with my mother, and that's the time when he came in. Even when I young and things like that, and things were horrible with my mother. So you know, he offered and said, well you can come stay with me. But every time he would say like, he would say, I'll come get you so you can move your stuff in my house, he would never do it. You know, and I'm sitting there stuck with my mother and my sister.

R. 108, l. 24 – R. 109, l. 8. Thereafter, the judge confirmed his earlier ruling that defense counsel's questioning of Complainant on the contents of the letter was "not admissible." R. 109, l. 10. The judge allowed examining Complainant on the existence of the letter and the fact that she was mad at Appellant and her mom. R. 109, ll. 11-18.

Joyce testified on Appellant's behalf. She recalled Complainant staying in her home, which was a small one bedroom house with paper-thin walls. R. 146, l. 13 – R. 147, l. 18. Complainant stayed in her home approximately three times. R. 147, ll. 19-21. Joyce specifically recalled one of Complainant's overnight visits because it occurred on a night when she and Appellant were supposed to have a date night. R. 147, l. 25 – R. 148, l. 2. Immediately prior to their date night, Appellant indicated he had to check on Complainant. R. 148, ll. 8-10. Much to Joyce's surprise, Appellant returned with Complainant. R. 148, ll. 10-17. The trio went to the dollar movie, and then home. R. 148, ll. 18-24.

Appellant and Complainant talked about what was going on in Complainant's life – school and her mother. R. 149, ll. 1-3. Joyce watched television in the bedroom and then washed dishes in the kitchen to allow Complainant some time to speak to Appellant about her troubles. R. 149, ll. 7-19. Shortly thereafter, Joyce and Appellant went to their bedroom. R. 150, ll. 5-8. Joyce and Appellant argued because she was upset that she and Appellant "didn't have a date, really," but "had more of a family date." R. 150, ll. 11-22. Joyce and Appellant took their argument outside with Joyce "doing most of the yelling." R. 150, l. 13 – R. 151, l. 4. After approximately thirty minutes of arguing outside, Joyce and Appellant went inside. R. 151, ll. 5-10.

Joyce never saw Complainant without her clothes on. R. 152, ll. 7-10. Joyce never saw Appellant on top of Complainant. R. 152, l. 11. Joyce never saw Appellant "appear to be

sexually aroused around" Complainant and never saw him do anything that "seemed inappropriate." R. 152, ll. 12-16; R. 155, ll. 13-16.

In closing argument, the state worked hard to refute Complainant's letter. Despite the uncontradicted testimony in the record that Complainant authored the letter and gave it to Appellant, the state argued Complainant "may or may not have sent" the letter. R. 176, ll. 3-4. According to the state, Complainant "said that she never talked to her dad again and she never saw her dad again after that." R. 176, ll. 5-6. The state conceded only a little: "She may have written him a letter. And that letter could have been closure. It doesn't matter. But what matters are the credibility of the witnesses." R. 176, ll. 8-13. Concerning Complainant's credibility, the state argued Complainant "had nothing to gain by making up a lie." R. 177, ll. 9-10. The state also argued that Complainant's emotions during her testimony showed she was believable:

> And members of the jury, if you're going to make up a lie to benefit yourself, when you're sitting in this chair and you crying. And you have to turn like this away from all the people watching you talk about that worst thing that's ever happened to you and you literally hunch over because of how terrible it is to talk about, if that's a lie, it would have been a whole lot easier for [Complainant] to tell you that story. You watched her testify. You watched her. [Complainant] had no reason to lie to anyone. She had nothing to gain.

R. 177, l. 21 – R. 178, l. 6.

Discussion

South Carolina imposes a system of rules to afford litigants and criminal defendants a fair judicial system. The Rules of Evidence govern how the parties present evidence and the admissibility of evidence in general. The Rules of Evidence have been designed to eliminate the introduction of unreliable evidence.

Relevant evidence

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004).

According to this Court, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008). Stated another way, "[e]vidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403.

In Lyles, supra, this Court explained the analysis for determining the relevancy and admissibility of evidence. The state made a motion *in limine* to exclude any comments regarding drug use or the existence of drugs at the alleged victim's apartment. Lyles, 379 S.C. at 335, 665 S.E.2d at 205. Following a proffer, "[t]he state objected and the trial judge conducted an inquiry to determine the relevance of the testimony." Id. at 336, 665 S.E.2d at 205. Thereafter, the judge excluded the testimony finding it was not "'relevant in any fashion in this case.'" Id. According to this Court, "the testimony [did] not serve as a defense to any of the offenses charged in this case nor [did] it excuse or mitigate [the defendants'] actions. It was not probative of any issue material to

reaching a verdict. This absence of a logical connection to the facts in debate ma[de] the evidence irrelevant and inadmissible." Id.

The South Carolina Supreme Court held the introduction of evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family by a criminal defendant "was clearly relevant and should have been admitted." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403. The defendant's "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a 'vendetta' against him." Id. at 303-304, 342 S.E.2d at 403. The Court held "the trial court's ruling on the motion to limit the testimony and its refusal to allow [the defendant]'s proffer of testimony effectively denied [the defendant] a fair and impartial trial because he was not allowed to present his defense." Id. at 304, 342 S.E.2d at 403.

The Supreme Court dealt with multiple pieces of erroneously admitted irrelevant evidence in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). The deceased, Joseph Barefoot, disappeared on May 25, 1997. Id. at 119, 551 S.E.2d at 243. Barefoot's body was found on September 16, 1997. Id. at 120, 551 S.E.2d at 243. Three of Saltz's friends provided statements implicating Saltzin Barefoot's death. Id. Appellant gave "seven consecutive statements" that were "highly contradictory" and one of which was "factually improbable." Id. at 120, 551 S.E.2d at 243-244.

The Court held the trial judge erred in admitting Saltz's attendance record showing he was absent from school on May 29, 1997. Id. at 127-128, 551 S.E.2d at 247-248. According to the Court, the fact Saltz "was absent from school on Thursday, May 29, 1997, did not tend to make 'the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Id. at 127, 551 S.E.2d at 247 (citing Rule

401, SCRE). The Court rejected the state's argument that the evidence showed Saltz's "whereabouts on that date were [as] unknown as" the Barefoot's. Id. at 127-128, 551 S.E.2d at 247 (alterations in original). "[T]he state presented no evidence Thursday, May 29, 1997, had any consequence to this case." Id. at 128, 551 S.E.2d at 247. Rather, "introduction of this irrelevant evidence encouraged the jury to speculate that Thursday, May 29, 1997, must be significant to the case in some way unknown to them." Id. at 128, 551 S.E.2d at 248. Also, "admission of this irrelevant evidence served to portray [Saltz] as a delinquent." Id.

Recently, this Court reversed a trial judge's decision to exclude testimony from a witness as irrelevant. State v. Page, 406 S.C. 272, 750 S.E.2d 623 (Ct. App. 2013). Page was charged with criminal sexual conduct when a woman alleged he raped her. Id. at 280, 750 S.E.2d at 627. Page wanted to call the woman's boyfriend as a witness to examine the boyfriend about a voicemail he left for the woman in which he claimed the woman told him she fabricated the allegations against Page and that the sexual encounter was consensual as it involved a trade of sex for drugs, which was what Page told the police. Id. at 281, 750 S.E.2d at 628. The state objected, arguing the boyfriend's testimony was not relevant because he told police the voicemail was not true. Id. The judge excluded the testimony, finding "not a scintilla of relevancy" in the testimony to Page's trial. Id. at 281-282, 750 S.E.2d at 628.

This Court found the boyfriend's testimony was relevant to whether Page's encounter with the woman involved consensual sex, which was what Page maintained and the boyfriend's voicemail supported. Id. at 288, 750 S.E.2d at 632. This Court was not persuaded that the boyfriend's claim that the voicemail was a "pure fabrication" rendered his testimony irrelevant. Id. According to this Court, testimony about whether the woman told her boyfriend that she engaged in sexual acts in exchange for drugs would certainly assist the jury in arriving at the

truth of the issue because, if the jury believed the boyfriend was telling the truth in his voicemail, then the boyfriend's testimony "undoubtedly would have tended to make a determination that [Page] engaged in consensual sex with [the woman] more probable." Id. at 288-289, 750 S.E.2d at 632. Additionally, this Court held boyfriend's testimony was relevant to the credibility of the woman because her testimony conflicted with what she allegedly told the boyfriend. Id. at 289, 750 S.E.2d at 632.

The contents of Complainant's evidence was relevant as it demonstrated Complainant had a motive to fabricate the allegations against Appellant in order to stay with Marquette indefinitely and to punish Appellant for not keeping his promises to her. The sole issue before the jury was whether Appellant sexually assaulted Complainant. The only evidence against Appellant was Complainant's testimony. The letter had a tendency to make it less probable that Appellant committed a sexual assault as it showed Complainant was angry at him for reasons other than alleged assault, it showed Complainant hated her mother and wanted nothing more than to be away from her, and it showed Complainant wanted to live with Appellant after the time she claimed the abuse occurred. The letter would have assisted the jury at arriving at the truth of whether the sexually assault occurred or whether Complainant was making it all up due to her uncontrollable anger. The letter showed, like the evidence in Schmidt, that Complainant had a vendetta against Appellant and she was exacting her revenge on him in Court.

Rule 403, SCRE

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting

from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Lyles, 379 S.C. at 338, 665 S.E.2d at 206. Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'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 [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C.

621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the letter was high in this case. Complainant's testimony was the *only* evidence against Appellant. The entire case depended upon the Complainant's credibility. The letter provided evidence of Complainant's motive to lie and fabricate horrible lies about Appellant based upon her anger and outrage over his failure to allow her to live with him, his broken promise of getting her hair done forcing her to rely upon her mother – a woman she hated unlike any other,

and her realization that Appellant was not on her side, just like everyone else in her life. The prejudicial effect of the letter was low. The jury was aware of Complainant's disagreements with her mother and sisters. Although the state argued the prejudicial effect arose from Complainant's use of curse words in the letter, the letter only contained three curse words, one of which was repeated. Essentially, the state wanted the jury to see one version of Complainant and hide the real version – the one that appeared in the letter – from the jury. The curse words used in the letter would not encourage the jury to decide the case on matters other than the evidence before it. Rather, the curse words and the rest of the letter demonstrated the level of disgust and hatred Complainant felt for her mother and sisters, her feelings of abandonment and loneliness, her strong desire to live with Appellant to be free of her mother, and her outrage when she does not get her way, demonstrating her motivation to lie. Balancing the high probative value of the letter against the low danger of unfair prejudice results in a conclusion that the letter was admissible under Rule 403, SCRE.

Exception to hearsay

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. However, "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is not hearsay. Rule 803(3), SCRE. As an example, the Court held "a statement by the victim that he or she planned to meet the defendant at the time or place of the

murder is admissible under Rule 803(3) as evidence of the declarant's then-existing state of mind." State v. Griffin, 339 S.C. 74, 78, 528 S.E.2d 668, 670 (2000).

In State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), the South Carolina Supreme Court explained that "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." This Court held testimony by two witnesses concerning what an alleged sexual assault victim said did not "fit within the exception provided in Rule 803(3)." Vail v. State, 402 S.C. 77, 87, 738 S.E.2d 503, 508-509 (Ct. App. 2013). One witness testified the alleged victim told her Vail was mad at her for telling the witness she and Vail had sex. Id. at 87, 738 S.E.2d at 508. Another witness testified the alleged victim was very upset Vail had left their church, that everyone would hate her because they would know she was the reason he left, and that she was really upset because she had given her virginity to Vail. Id. at 87, 738 S.E.2d at 508-509.

Perhaps the best known case interpreting Rule 803(3), SCRE, is State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). Weston was charged with killing his mother, whose body was never found. Weston, 367 S.C. at 282, 625 S.E.2d at 643. Mother's friend, Suzanne Allen, testified that prior to Weston moving in with Mother, Mother "was a happy person, cheerful, and fun to be with." Id. at 285, 625 S.E.2d at 644. Allen also testified that Mother was "'very unhappy'" concerning Weston. Id. Finally, Allen testified that Mother told her she intended to ask Weston to leave her home. Id. at 286, 625 S.E.2d at 645. Weston's sister and Mother's daughter, Toni Franchey, testified that Mother seemed "more nervous and anxious than normal" during the two-week period before her disappearance. Id. According to Franchey, Mother "just seemed more anxious and just uncertain," including that she requested no one touch anything in Weston's room because she "was afraid." Id. This Court held the testimony "was properly admitted" because the witnesses "did not

give a reason" for Mother's fear. Id. at 287, 625 S.E.2d at 646. Rather, the witnesses "testified only" that Mother "was afraid of Weston." Id. The Court determined that holding "that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid of the defendant" was "simply too constrained a reading of Garcia." Id. at 287-288, 625 S.E.2d at 646.

Recently, this Court had the opportunity to examine Rule 803(3), SCRE. State v. Hughes, 419 S.C. 149, 796 S.E.2d 174 (Ct. App. 2017). Hughes was accused of his killing his mother. Id. at 151, 419 S.C. at 175. Two days before her death, Hughes was released from the county jail after pleading guilty to forging two checks written on the deceased's bank account. Id. He received a probationary sentence. Id. Margo Green, the deceased's friend, testified that shortly before her death, the deceased was upset that Hughes was released without her knowledge and she would have to be very careful now as a result. Id. at 154, 796 S.E.2d at 177. Green also testified the deceased said she slept better when Hughes was in jail, that she was always afraid and on guard when he was not in jail. Id. at 154-155, 796 S.E.2d at 177. Ben Leaphart testified the deceased "indicated she was uncomfortable around Hughes, had some verbal confrontations with him, and was concerned about his 'drug use and his lifestyle.'" Id. at 155, 796 S.E.2d at 177. Max Few testified that the deceased asked him to watch out for her because Hughes was out of jail and she feared he would kill her. Id. Finally, Marion Beachum testified the deceased was deathly afraid of Hughes and feared he would kill her. Id.

This Court held the trial court "erred in admitting some of the challenged testimony," but determined Hughes was not prejudiced from the inadmissible hearsay. Id. at 156, 796 S.E.2d at 178. This Court explained the statements "were inadmissible because they not only revealed [the deceased]'s state of mind, they described the reasons for her state of mind." Id. at 157, 796 S.E.2d at 178.

As defense counsel argued, the contents of the letter captured Complainant's "mental or emotional state at the time these events happened." R. 99, ll. 4-6. The letter showed Complainant's "anger and vitriol" toward her mother and Appellant in light of his broken promises to her. R. 97, l. 19 – R. 98, l. 10; R. 102, ll. 11-13. The letter explained her mental state - "why she would lie about her dad to get out of the house." R. 97, ll. 21-25; R. 98, ll. 8-11.

Not harmless error

This Court concluded trial counsel provided ineffective assistance by failing to object to testimony from numerous witnesses that corroborated the testimony of the alleged victim in a criminal sexual conduct case. Vail v. State, 402 S.C. 77, 91, 738 S.E.2d 503, 511 (Ct. App. 2013). This Court explained the alleged victim's testimony was "'extremely crucial' to the outcome of th[e] case regarding the alleged sexual relationship between her and Vail, and there was otherwise an absence of overwhelming evidence of Vail's guilt." Id. at 90, 738 S.E.2d at 510. "The state's case was built upon victim's story against Vail's story." Id. This Court concluded that "[i]n light of the circumstantial evidence presented to the jury in addition to the heavy emphasis on victim's credibility," "the admission of the inadmissible hearsay" was not "harmless beyond a reasonable doubt." Id. at 91, 738 S.E.2d at 511.

In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), this Court held the judge erroneously admitted the testimony of the alleged victim's stepmother concerning what the alleged victim said about the abuse, including identification of the perpetrator and details of the abuse. Id. at 155, 515 S.E.2d at 771. This Court held the error was prejudicial because it corroborated the alleged victim's testimony. Id. at 156, 515 S.E.2d at 771. This Court noted the state introduced no physical evidence of the molestation; thus, the "case was essentially a swearing contest, pitting Whisonant's word against the victim's as to whether the incident occurred." Id. The

alleged victim's testimony was improperly bolstered in the minds of the jury by the stepmother's testimony, which mirrored the alleged victim's. Id.

The case against Appellant was far from overwhelming. The state's only evidence against Appellant was Complainant's testimony. There was no physical evidence to support Complainant's allegations. Although Complainant alleged Joyce saw Appellant sexually assault her, Joyce testified on Appellant's behalf and told the jurors she never saw Appellant abuse Complainant. This case was the quintessential "swearing match." In order to render its verdict, the jury was asked to decide whether to believe Complainant or Joyce and Appellant. The jury never learned why Complainant would fabricate such horrible accusations against Appellant because the jury never learned the full extent of her hatred for her mother and sisters, her desire to do anything to get out of her mother's home and stay with Marquette (or anyone) indefinitely, and how she felt betrayed by Appellant for not allowing her to live with him. The state cannot prove beyond a reasonable doubt that the judge's limitation of cross-examination concerning the letter did not contribute to the verdict.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE REEVES,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Lee Reeves states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge R. Lawton McIntosh, which was held on November 15-16, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738, she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Robert Lee Reeves.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
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THE STATE,

RESPONDENT,

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ROBERT LEE REEVES,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript dated November 15, 2016;
(2) Entire trial transcript dated November 16, 2016;
(3) Court's Exhibit #2 (letter);
(4) True-billed indictment: 2016-GS-02-2375; and
(5) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 26, 2017

Susan B. Hackett

Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

July 26, 2017.

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