STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHANNEN F. RICKS,

APPELLANT

APPELLATE CASE NO 2016-002158

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by failing to charge the jury on spoliation of evidence where the undisputed evidence showed Appellant called 911 from his cell phone following the shooting, the 911 calls were *not* requested by the lead investigator despite the investigator's knowledge the calls were maintained for only ninety days, the 911 call was manually deleted from Appellant's cell phone, his cell phone was in the custody of the police following his arrest, and the lead investigator used Appellant's phone while it was in his custody to make a telephone call?

STATEMENT OF THE CASE

On May 12, 2016, a Richland County grand jury indicted Appellant for the murder of Thomas Pauling (2016-GS-40-2836). R. 1519-1520. Appellant, through counsel, Aimee Zmroczek, filed a motion for a hearing to determine whether he should be entitled to immunity pursuant to the Protection of Persons and Property Act. R. 10, ll. 15-18. The Honorable Alison Renee Lee presided over the hearing, which began on August 1, 2016. R. 1. Zmorczek represented Appellant. R. 1. April Sampson and Justin Williams represented the state. R. 1. The hearing resumed on August 8, 2016. R. 459. And the final day of the hearing occurred on September 12, 2014. R. 523. At the conclusion of the hearing, Judge Lee determined Appellant was not entitled to immunity from prosecution. R. 566, l. 24 – R. 570, l. 23.

The case proceeded to a trial before the Honorable R. Markley Dennis, Jr., on October 10-13, 2016.[1] R. 576. Zmroczek represented Appellant, and Sampson and Williams represented the state. R. 576. After a multi-day trial, the jury found Appellant guilty as charged. R. 1369, ll. 8-13. Judge Dennis sentenced Appellant to forty years imprisonment. R. 1389, ll. 7-10; R. 1521.

Appellant served his notice of appeal on October 21, 2016. This brief of appellant follows.

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[1] The cover of the trial transcript lists the judge as the Honorable DeAndrea G. Benjamin. R. 576. This is an error. The Honorable R. Markley Dennis, Jr., presided over the trial. R. 588, l. 5.

ARGUMENT

The trial judge erred by failing to charge the jury on spoliation of evidence where the undisputed evidence showed Appellant called 911 from his cell phone following the shooting, the 911 calls were *not* requested by the lead investigator despite the investigator's knowledge the calls were maintained for only ninety days, the 911 call was manually deleted from Appellant's cell phone, his cell phone was in the custody of the police following his arrest, and the lead investigator used Appellant's phone while it was in his custody to make a telephone call.

Relevant facts

Knowing the May 25, 2014, shooting had been reported by a call to 911, the lead investigator, Kerry Johnson, wanted to determine who called 911. On May 27, 2014, he called dispatch. R. 1068, ll. 22-24. He requested the name of the caller and the phone number of the caller. R. 1069, ll. 2-4. He was provided with a phone number and the name of Tommy Goodwin. R. 1069, ll. 4-5. Johnson was aware that the 911 dispatch kept the records for only ninety days. R. 1081, ll. 10-14. Thus, he was aware that if he wanted to preserve the 911 calls related to the shooting, he would have to request them within ninety days. R. 1081, ll. 15-17. Nevertheless, Johnson made no request. R. 1081, ll. 18-19. He relied solely on his conversation with dispatch concerning Goodwin. R. 1081, ll. 20-25.

Johnson received an incident detailed report from 911 shortly after the shooting – well within the ninety-day preservation period. R. 1082, ll. 3-10. On the third page of the report, a male caller is listed along with a phone number. R. 1082, ll. 13-16. Although Johnson initially claimed he read the report, he backtracked by saying he could not say he saw "that" on the report. R. 1082, ll. 16-17. To explain this lapse, he offered "it's 17 pages." R. 1082, ll. 19-20.

During the trial, Johnson confirmed that the telephone number listed on the detailed report belonged to Appellant. R. 1083, ll. 5-10.

Johnson was aware of Appellant's phone number because Johnson used Appellant's phone after Appellant was arrested. R. 1083, l. 11 – R. 1084, l. 7. Johnson claimed he was not familiar with the particular phone that Appellant owned. R. 1083, l. 22. However, he wanted to know Appellant's phone number. R. 1083, l. 23 – R. 1084, l. 1. In order to get Appellant's phone number, Johnson used Appellant's phone to call Johnson's phone. R. 1084, ll. 1-2; R. 1084, ll. 6-7; R. 1084, ll. 12-15. Johnson was forced to admit that he had Appellant's phone number when he had the 911 report and that had he looked at the report more thoroughly, he would have known that Appellant called 911 immediately after the shooting – at 5:32 a.m. R. 1084, l. 22 – R. 1085, l. 9; R. 1154, ll. 3-4. Johnson received a copy of one of Appellant's phone calls with the 911 operator when it was provided by defense counsel. R. 1085, ll. 10-13. However, this was not the call Appellant initially made to 911; rather, the recording was of a call from 911 dispatch to Appellant after Appellant's phone lost its signal. R. 1154, ll. 5-14.

Appellant's expert in digital forensics, Christopher Watkins, reviewed the telephone record evidence in the case. Watkins received the extraction report, which was produced by law enforcement from Appellant's phone. R. 1145, ll. 2-12. Watkins also requested Appellant's telephone records from the provider. R. 1145, ll. 13-22. Finally, Watkins gained access to Appellant's physical phone from the police. R. 1146, l. 23 – R. 1147, l. 1. Watkins compared the phone records, law enforcement's extraction report, and the phone. R. 1146, ll. 2-8. He noticed there were some inconsistencies. R. 1146, ll. 8-13. Watkins found a phone call to 911 from Appellant's phone in the phone records, but the call had been deleted from the phone and was not part of the extraction report. R. 1146, ll. 11-23. Watkins confirmed that the 911 call

was manually deleted from the cell phone, but he was unable to state when the deletion occurred. R. 1147, ll. 1-11; R. 1152, ll. 16-23.

At the conclusion of the presentation of evidence, the judge entertained requests to charge. Trial counsel requested a charge on "spoliation of evidence." R. 1508-1509. The request to charge was as follows:

> In this case, there are allegations of spoliation or destruction of evidence. The state not only has the burden of proof of guilt but also it has the burden of producing evidence which could establish the innocence of the defendant. When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party. If you find first that evidence was spoiled or destroyed, and if you further find that the evidence could help establish the innocence of the defendant, you may then consider those facts in deciding whether or not the state has met its burden of proof.

R. 1508-1509; R. 1518. Trial counsel had filed a motion regarding the matter. R. 1515-1518. The motion explained the "evidence of the 911 call which is the first contact with any law enforcement ... unfortunately was not preserved." R. 1515. Appellant's prior attorney had requested the calls and was able to obtain "some calls, but not [Appellant]'s first call which was 4 minutes long." R. 1515. Admittedly, counsel had the call detail report showing Appellant's first call to 911, but the report did not provide Appellant's "exact words and present sense impression." R. 1515. Counsel explained "the impact of the words that [were] spoken immediately after this incident [were] lost." R. 1515.

Trial counsel argued for dismissal of the charge, or in the alternative for a jury instruction, based upon the state's failure to secure the recording of the 911 call Appellant made to 911 following the shooting. R. 1515-1518. Trial counsel argued Appellant "'should not be made to suffer' because the state could not be bothered to collect the 911 call, which would reflect the exact words and present sense impression of the caller(s) especially in light of the

delay and the inconsistent information provided in the other accounts." R. 1517. Counsel requested the judge instruct the jury to "allow[] for a negative inference against this non-existent evidence and any documents pertaining to it." R. 1517. Counsel explained the jury instruction should explain the jury "shall disregard this evidence if they find that the state had notice that [Appellant] had claimed that the now-destroyed evidence could have been exculpatory and/or provided impeachment against the alleged victim and other state witnesses." R. 1517-1518.

Judge Dennis refused to charge the jury on spoliation. R. 1275, ll. 2-6. He allowed that defense counsel could argue spoliation in closing, but refused to instruct the jury on the matter. Judge Dennis explained:

> I would decline to do that for the reason that I believe it's fair game for argument because it's a factual issue. And for me to charge, I'd have to make a call. And I would agree with you that the testimony - - if the jury wants to conclude that investigating officers did something to remove something, I guess, I mean they could certainly say that's spoliation. There's testimony about it. There's no proof how because it could have been deleted at any time.

R. 1275, l. 20 – R. 1276, l. 4. The judge noted he was "also relying on the constitution that prohibits [him] from charging on the facts." R. 1276, ll. 13-14.

During closing argument, defense counsel played the 911 call of Appellant reporting the shooting that was available at the time of trial. R. 1312, l. 18. Defense counsel argued that Appellant called 911 at 5:32 a.m., but a recording of that call was not available. R. 1312, ll. 2-8. She explained that Johnson, an "investigator of 30 years with law enforcement experience didn't get them." R. 1312, ll. 8-10.

To counter the defense argument, the solicitor told the jurors to look at the phone records to discredit Appellant's testimony. R. 1320, ll. 12-22. The solicitor incorrectly claimed Appellant asserted that he called 911 as soon as he could, but that the phone records showed his mother called him first. R. 1320, ll. 12-15. The solicitor correctly recounted the testimony from

Appellant's mother that she called him that morning and that she told him to call 911. R. 1320, ll. 17-19. Thereafter, according to the solicitor, Appellant "tries to call 911." R. 1320, ll. 19-20. The solicitor tells the jury, "Phone records don't lie. You've got his story versus the evidence beyond [Appellant]'s. They don't match." R. 1320, ll. 20-22.

The solicitor also tried to excuse law enforcement's lax investigation regarding the 911 calls:

> [Defense counsel] talks about how we could have gotten the call. The calls were gotten. Had he said in anything, Hey, my name is Channen, we'd have that call. If he said, Hey I shot Thomas in self-defense, we'd have that call. The only reason we knew to send help to Thomas Pauling is because Tommy Goodwin called. Think about that. If we only knew what [Appellant] told 911, have no idea. Thomas Pauling is dead. We'd have no idea where to go other than somewhere in Richland Village to look for somebody who has been shot at, but he wasn't there anymore. Thank God Tommy Goodwin called 911.

R. 1322, ll. 4-16. Thereafter, the solicitor contrasted Goodwin's 911 call with the one call available from Appellant. According to the solicitor a person is supposed to provide a name and phone number and offer to answer questions when reporting a crime. R. 1323, ll. 1-6. According to the solicitor, Appellant "should have done that and he didn't. He didn't even try because he's a murderer." R. 1323, ll. 6-7.

The solicitor made this argument, knowing (1) that Appellant's initial 911 call was not available because the lead investigator failed to request it, (2) that evidence of the very fact that the call was made was manually deleted from Appellant's phone, and (3) the lead investigator had used Appellant's phone after it was seized. The solicitor even juxtaposed Appellant's conduct after the shooting with that of the police during the investigation. According to the solicitor, the "police had enough respect to block him [from view of the gathering crowd] while they were trying to do their investigations," but Appellant, "who grew up with this man, had no respect. None. He didn't even call for help for his friend." R. 1333, ll. 3-7. This theme

continues as the solicitor remarks that Appellant walked away, "not calling anybody." R. 1333, ll. 11-12. She claimed Appellant "nonchalantly" walked away "not calling for help." R. 1333, ll. 15-19.

Discussion

Without question, South Carolina permits jury instructions on spoliation of evidence in civil cases. Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006). The South Carolina upheld a jury instruction advising the jury that "when evidence is lost of destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Kershaw County Bd. Of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). This Court explained in Stokes that a jury may accept the party's explanation for why evidence is not available, but that it is within the province of the jury "to draw a negative inference" from the party's failure to produce those pieces of evidence. Stokes, 368 S.C. at 521, 629 S.E.2d at 679. While South Carolina requires no specific language for a spoliation of evidence charge, the general language that has been approved by the appellate courts includes instructing the jury that it *may* draw an adverse inference from the failure of a party to preserve evidence. Id. at 522, 629 S.E.2d at 679. In other words, the instruction informs the jury that a *permissive* adverse inference is allowed.

What is less clear in South Carolina is whether a spoliation of evidence charge is proper in criminal cases. A recent decision from this Court appears to foreclose the giving of a spoliation of evidence jury instruction in a criminal case. State v. McBride, 416 S.C. 379, 389-390, 786 S.E.2d 435, 440 (Ct. App. 2016). Law enforcement lost the complaining witness's shirt, which allegedly had some evidence on it to support or dispel the complaining witness's

allegations. Id. at 386-387, 786 S.E.2d at 438-439. McBride requested the trial judge instruct the jury that it may infer the lost evidence would have been adverse to the state. Id. at 389, 786 S.E.2d at 440. The judge refused the request, and McBride raised the failure to so instruct on appeal. Id.

Affirming the trial judge's refusal to give a spoliation of evidence of trial, this Court explained that a "trial judge's refusal to give a requested charge must be both erroneous and prejudicial." Id. After describing the requested charge as one that permitted the jury to infer the lost evidence was adverse to the state, this Court stated that "[a]dverse inference charges are rarely permitted in criminal cases." Id. Thereafter, this Court found no error by the trial court in denying the request for the spoliation of evidence charge. Id. at 390, 786 S.E.2d at 440.

In arriving this conclusion, this Court cited two cases: State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015), and State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (Ct. App. 1973). In Reaves, the South Carolina Supreme Court examined whether a defendant was deprived of a fair trial as a result of potentially exculpatory evidence lost by police. Reaves, 414 S.C. at 125, 777 S.E.2d at 216. Although the trial judge refused to dismiss the charge against Reaves, the judge permitted Reaves' attorney to cross-examine the police on the deficiencies and charged the jury on a permissive adverse inference on the lost evidence. Id. at 128, 777 S.E.2d at 218. Regarding that jury instruction, the Court stated "the propriety of this charge under state evidence law is not before the Court, but that [h]eretofore, an adverse inference based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina." Id. at 128 n. 5, 777 S.E.2d at 218 n. 5.

In Batson, the Court addressed what is commonly referred to as the missing witness jury instruction. Batson, 261 S.C. at 136-137, 198 S.E.2d at 521. Specifically, Batson requested the

trial judge charge the jury that when "the state had witnesses known only to it and under its peculiar control and did not produce them, that their testimony would be presumed to be against the state." Id. The Court explained that "[i]n quite a number of civil cases we have stated and/or applied the rule that if a party, without explanation, fails to produce the testimony of an available, material witness who is within some degree of control of the party, it may be inferred that the testimony of such witness, if presented, would be adverse to the party who failed to call the witness." Id. at 137, 198 S.E.2d at 521. However, in criminal cases, the Court has held repeatedly, the state is not required to produce all available witnesses. Id. at 137, 198 S.E.2d at 522. After reviewing the pertinent case law, the Court expressed "grave doubt as to the propriety, in a criminal case, of the adverse inference from the failure to produce a material witness." Id. at 138, 198 S.E.2d at 522. Nevertheless, the Court acknowledged that "a charge of this proposition to a jury on a behalf of either the state or the defense is not warranted except under most unusual circumstances." Id.

In another case, State v. Breeze, 379 S.C. 538, 548, 665 S.E.2d 247, 252 (Ct. App. 2008), this Court noted that it is an open question in South Carolina whether a spoliation of evidence jury instruction is proper in a criminal case. The police destroyed the marijuana that formed the basis for the charge of possession of marijuana with intent to distribute. Id. at 545, 665 S.E.2d at 251. "[D]uring the jury charge conference, Breeze requested the jury be charged that an adverse inference could be drawn against the state for failing to produce the marijuana." Id. at 547, 665 S.E.2d at 252. The trial judge denied the request. Id. Affirming the trial judge's refusal, this Court explained the case cited by Breeze in support of his request was a civil case and "therefore, clearly distinguishable on that ground to this criminal case." Id. at 548, 665 S.E.2d at 252.

Without deciding whether a charge is proper in a criminal case, this Court held that even if the failure to give the instruction was erroneous, no prejudice resulted from the failure to give it. Id.

Appellant's case presents the "extraordinary circumstance" for which a spoliation of evidence charge was proper and required. Appellant's case depended upon whether the jury believed he shot Pauling in self-defense. There was no question Appellant shot Pauling, and there was no question Pauling died as a result of the gunshot wound. Additionally, neither Appellant nor the state requested any lesser-included offenses be instructed to the jury. Thus, the only question for the jury was whether Appellant shot Pauling in self-defense. Some of the best evidence of whether the shooting was the product of self-defense was Appellant's conduct immediately following the shooting. The solicitor's closing argument makes this clear as the solicitor repeatedly told the jurors to focus on what Appellant did after the shooting, particularly, when the solicitor juxtaposed Appellant's conduct with that of Goodwin, the caller on the 911 tape that was available for trial. The failure of the state to secure the 911 calls was inexcusable. The lead investigator had over thirty years of experience and was well aware the calls were kept for only thirty days. The investigator was also aware that an unidentified male had called to report the shooting according to the detailed incident report provided by 911 dispatch. His failure to secure the calls was not mere negligence, but it rose the level of abject neglect.

In light of Appellant's inability to present the jury with his initial call to 911 to disprove the state's argument that presented him as uncaring and malicious due to law enforcement's unquestionably lax investigation, Appellant was entitled to a jury instruction to permit the jury to draw an adverse inference against the state concerning the missing evidence. Appellant's 911 call would have shown he was not acting with malice as the state insisted, but that he was acting in self-defense. His state of mind would have been clear for the jury to evaluate, which is

imperative in a self-defense case, which requires a showing of fear. Certainly, the initial 911 call would have permitted the jury to evaluate whether Appellant expressed any fear only minutes after the shooting. This case presents the extraordinary circumstances necessary for a spoliation of evidence charge.

CONCLUSION

Based upon the trial judge's failure instruct the jury on spoliation of evidence, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of December, 2017.

STATE OF SOUTH CAROLINA
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Appeal from Richland County

Alison Renee Lee, Circuit Court Judge
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THE STATE,

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CHANNEN F. RICKS,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Channen F. Ricks 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 pretrial motions hearings before Judge Alison Renee Lee on August 1-3, 2016, August 8, 2016, and September 12, 2016, and Appellant's trial before Judge Markley Dennis, Jr., on October 10-13, 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 (1967), 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 Channen F. Ricks.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 13th day of December, 2017.

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IN THE COURT OF APPEALS

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THE STATE,

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

1) Entire transcripts from Protection of Persons and Property Act hearing:
   a. Entire transcript dated August 1-3, 2016 (PPPA I);
   b. Entire transcript dated August 8, 2016 (PPPA II);
   c. Entire transcript dated September 12, 2016 (PPPA III);
2) Exhibits from Protection of Persons and Property Act hearing:
   a. Court's Exhibit #1 (stipulations for the purpose of the Immunity Hearing);
3) Entire trial transcript dated October 10-13, 2016 (Tr.);
4) Exhibits from trial:
   a. State's Exhibit #3 (photo);
   b. State's Exhibit #5 (photo);
   c. State's Exhibits #14-16 (photos);
   d. State's Exhibits #21-22 (photos);
   e. State's Exhibits #27-29 (photos);
   f. State's Exhibit #37 (photo);
   g. State's Exhibits #47-48 (photos);
   h. State's Exhibits #105-106 (photos);
   i. State's Exhibit #109 (911 call);
   j. State's Exhibit #110 (911 call);
   k. State's Exhibit # 111 (911 call);

l. Defendant's Exhibit #9 (printout from phone records);
m. Court's Exhibit #1 (stipulations);
n. Court's Exhibit #2 (proposed jury instructions);
o. Court's Exhibit #3 (jury question & self-defense instruction);

5) Motion to Dismiss or give appropriate Jury Instruction Regarding Spoliation of Evidence;
6) True-billed indictment; and
7) Sentence sheet.

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

December 13, 2017

Susan B. Hackett

Susan B. Hackett
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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."

December 13, 2017.

Susan B. Hackett

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STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Channen F. Ricks, 323802, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of December, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of December, 2017.

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