

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN DANIEL DRIGGERS,

APPELLANT

APPELLATE CASE NO 2017-000565

ANDERS BRIEF OF APPELLANT

RECEIVED
DEC 08 2017
SC Court of Appeals

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to declare a mistrial when a witness testified that the Appellant had abused his former girlfriend before when the charges for which Appellant was on trial involved allegations that Appellant assaulted his former girlfriend?

STATEMENT OF THE CASE

In June of 2016, the Berkeley County Grand Jury indicted Appellant Driggers for kidnapping, burglary first degree and attempted murder, indictments #2016-GS-08-1474, 1475, 1476. On February 21, 2017, Appellant proceeded to jury trial before the Honorable Kristi Lea Harrington. Julie Shivers and John Church represented Appellant at trial. Price Sigal and Wilton McNeely prosecuted the case. The jury found Appellant guilty of kidnapping and the lesser include offenses of burglary second degree and assault and battery second degree. Judge Harrington sentenced Appellant to thirty (30) years suspended upon the service of fifteen (15) years for the kidnapping charge, ten (10) years concurrent for the burglary charge and three (3) years concurrent for the assault charge. A timely notice of intent to appeal was served on March 2, 2017. This appeal follows.

ARGUMENT

The trial court erred in failing to declare a mistrial when a witness testified that the Appellant had abused his former girlfriend before when the charges for which Appellant was on trial involved allegations that Appellant assaulted his former girlfriend.

The jury found Appellant guilty of breaking into the mobile home where his former girlfriend, Brenda Mills, was living and assaulting her. The kidnapping charge arose from the assault. Ms. Mills' teenage son, Noah, was in the mobile home at the time of the incident and ran to a neighbor's house to get help. The State called Noah as a witness a trial. The following questioning took place:

Q. Why did you want somebody to call 911?

A. Because I thought my mom was about to get hurt.

Q. What made you think that?

A. Kevin [Appellant] abused my mom before.

(R. p. 356, lines 19-23). Appellant immediately objected and the trial judge held a bench conference. (R. p. 356, line 24 – p. 357, lines 1-2). Following the bench conference the judge instructed the jury, "Ladies and gentlemen, please strike that last statement from your notes. I have determined it was nonresponsive to the Solicitor's question and cannot [sic] considered by you in any way. Madame Foreperson, if that issue is spoken of in the jury room, you must indicate to the other jurors that that cannot be considered at all." (R. p. 357, lines 3-11). The judge then instructed the witness, "You need to listen to the Solicitor's question and answer only what she asks you. Okay?" (R. p. 357, lines 12-13). The witness responded, "Yes, ma'am." (R. p. 357, line 14).

During pre-trial hearings Appellant specifically moved to exclude the admission of any prior bad acts and the prosecution stated they did not intend to seek to admit a prior domestic violence between Appellant and his former girlfriend unless the defense opened the door. (R. p. 47, line 10 – p. 48, lines 1-5). The defense did not open the door. During the charge conference at the close of testimony Appellant declined any additional curative instruction in regard to the prior bad act. (R. p. 385, lines 17-23). The trial court erred in failing to declare a mistrial after the witness testified that Appellant had previously abused his former girlfriend. The curative instruction was not adequate to cure the error.

Generally, evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. State v. Lyle, 125 S.C. 406, 416, 118 S.E.2d 803, 807 (1923). “[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity.” State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). The State agreed not to introduce evidence of a prior domestic violence between Appellant and his former girlfriend. The son’s testimony that Appellant abused his mother on a prior occasion was improper. The trial court erred in failing to grant a mistrial.

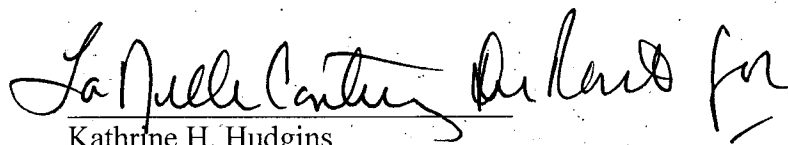
Whether to grant or deny a mistrial motion is a matter within the trial court’s sound discretion, and the court’s decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999); State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct.App. 2006). It is only in cases of abuse of discretion which result in prejudice that an appellate court will intervene and grant a new trial. White, 371 S.C. at 444, 639 S.E.2d at 162. “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

The judge's failure to grant a mistrial constitutes an abuse of discretion resulting in prejudice. The testimony that Appellant abused his former girlfriend on a prior occasion was improper. Appellant was prejudiced by the improper testimony because he was on trial for charges involving an assault of his former girlfriend. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); State v. Taylor, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct.App.2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). The judge erred in failing to grant the mistrial.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and sentences and remand the case for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathrine H. Hudgins", written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2017.

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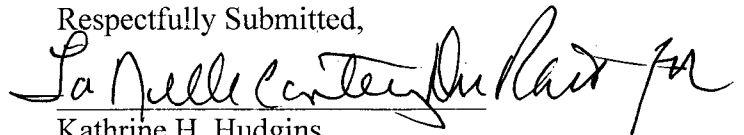
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Daniel Driggers states:

1. She is 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 Kristi Lea Harrington, which was held on February 21, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Kevin Daniel Driggers.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of December, 2017.

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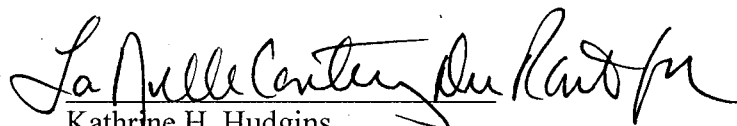
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) February 10, 2017, pre-trial hearing transcript;
- (3) February 21-23, 2017, trial transcript.

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

December 08, 2017


Kathrine H. Hudgins
Appellate Defender

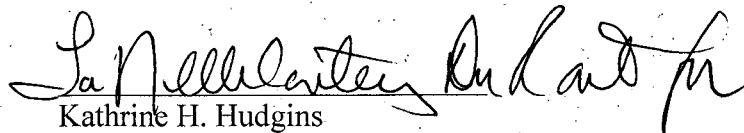
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CERTIFICATE OF COUNSEL

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 08, 2017.



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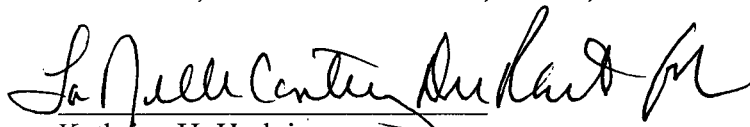
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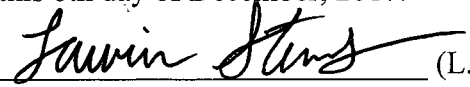
CERTIFICATE OF SERVICE

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 J. Ben Aplin, 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 Kevin Daniel Driggers, 291264, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of December, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of December, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.