

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Alison Renee Lee, Circuit Court Judge

ORIGINAL

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AUG 17 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TERRANCE LEMAN CALLOWAY,

APPELLANT

APPELLATE CASE NO 2016-001958

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	
The trial judge erred in allowing an Anderson County 911 employee to testify that the complaining witness told another 911 dispatcher, who did not testify at trial, that Appellant assaulted her when the testimony was inadmissible hearsay.	3
CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<u>State v. Bryant</u> , 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)	5
<u>State v. Hendricks</u> , 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014)	5
<u>State v. Jenkins</u> , 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015)	5
<u>State v. Tapp</u> , 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)	5

Rules

Rule 801(c), SCORE.....	4
Rule 802, SCORE.....	4
Rule 805, SCORE.....	4

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing an Anderson County 911 employee to testify that the complaining witness told another 911 dispatcher, who did not testify at trial, that Appellant assaulted her when the testimony was inadmissible hearsay?

STATEMENT OF THE CASE

On August 26, 2016, the Abbeville County Grand Jury incited Appellant Calloway for kidnapping and criminal sexual conduct in the first degree, indictments #2016-01-0411, 433. On August 31, 2016, Appellant proceeded to jury trial before the Honorable Alison Lee. Patricia Bolen and Kami Granade represented Appellant at trial. C. Yates Brown and Lance Sheek prosecuted the case. The jury found Appellant not guilty of criminal sexual conduct but guilty of kidnapping. Judge Lee sentenced Appellant to five years in prison for the kidnapping charge. A timely notice of intent to appeal was served on September 9, 2016. This appeal follows.

ARGUMENT

The trial judge erred in allowing an Anderson County 911 employee to testify that the complaining witness told another 911 dispatcher, who did not testify at trial, that Appellant assaulted her when the testimony was inadmissible hearsay.

On the evening of August 3, 2012, Sherry Williams left the Time Out Club with Appellant. (R. p. 20, line 11 – p. 21, line 1) Williams and Appellant attended high school together at Dixie High School. (R. p. 18, lines 3-22). Williams' aunt, Tessie Singleton, testified that Williams and Appellant dated while in high school. (R. p. 59, lines 13-14). According to Williams, Appellant agreed to drive her to Burger King. (R. p. 20, lines 16-18). The Burger King was close to the club, only a few blocks away. (R. p. 78, line 23 – p. 79, lines 1-13). Williams claimed that instead of taking her to Burger King, Appellant drove her outside of town and assaulted her. (R. p. 21-24). According to Williams, when Appellant drove her back into town she jumped out of the car, ran to Burger King and then to another aunt's apartment where she called 911. (R. p. 24, line 12 – p. 25, lines 1-14). The State did not introduce the 911 tape in evidence.

Instead, Sandy Purdy, an employee of Anderson County 911, testified at trial for the State. Purdy, however, was not the dispatcher who received the phone call from Williams on August 3, 2012. (R. p. 71, lines 17-23). During Purdy's testimony Appellant noted a matter of law and a sidebar discussion took place. (R. p. 68, lines 15-20). When Purdy referred to a notation from a CAD¹ report, Appellant objected stating, "Your Honor, at this time I'd just object referencing our sidebar conference to hearsay." (R. p. 69, lines 16-18). The judge instructed the State to rephrase the question. (R. p. 69, line 19). When asked about the source of

¹ Computer-aided dispatch.

information in the CAD report, Appellant again objected stating, "Just renew my objection based on hearsay. She's referencing information received from other parties." (R. p. 70, lines 8-10). The judge overruled the objection stating, "As – as long as there's not a discussion as to what was said and who – who said it." (R. p. 70, lines 11-13). The State then asked Purdy, "And called in relation to what kind – what was the call about again?" (R. p. 70, lines 21-22). Appellant objected on the same hearsay grounds. (R. p. 70, line 24). The State replied, "I think she's already testified to that. I was just double checking." (R. p. 71, lines 3-4). Appellant responded, "In that case, my objection would be based on asked and answered already." (R. p. 71, lines 5-6). The judge ruled, "I'll allow her to answer." (R. p. 71, line 7). Purdy then testified, "It's documented that the caller stated that she had been raped by a Terry Calloway in a – and he left in a white car, unknown direction of travel." (R. p. 71, lines 8-11). Appellant renewed the objection to hearsay at the close of the State's case. (R. p. 158, line 3 – p. 159, lines 1-13). The trial judge erred in allowing Purdy to testify that Williams told another 911 dispatcher that Appellant assaulted her.

"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. "Hearsay is not admissible" unless an exception applies, or "as provided by ... other rules ... or by statute." Rule 802, SCRE. Williams called 911 and spoke to a 911 dispatcher who took notes that were included in the CAD report. Testimony from the original 911 dispatcher about Williams' phone call to 911 would have been hearsay that may have met an exception to the rules against hearsay. The original 911 dispatcher, however, did not testify at trial. Instead, the State called Purdy who testified about what the other 911 dispatcher said or noted that Williams said in the 911 call. Purdy's testimony contained hearsay within hearsay. Rule 805, SCRE

provides, “Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” No exception exists to allow Purdy to testify about what the other 911 operator noted or said about what Williams said during the 911 call.

In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), the South Carolina Court of Appeals found that statements made by the complaining witness to her mother met an exception to the hearsay rule. The mother’s statements, however, to the 911 operator about statements made by the complaining witness did not meet an exception to the hearsay rule and were improperly admitted. In the present case statements made by Williams to the 911 dispatcher may have met an exception to the hearsay rule. The 911 dispatcher’s notes or statements, however, about Williams’ statement in the 911 call did not meet an exception to the hearsay rule. The trial judge erred in allowing Purdy to testify that Williams told another 911 dispatcher that Appellant assaulted her.

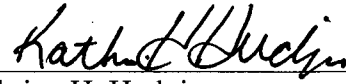
Appellant was prejudiced by the improper admission of the hearsay testimony. There was no physical evidence to corroborate Williams’ claims. Williams’ credibility was a critical factor to be determined by the jury. The jury found Appellant not guilty of criminal sexual conduct, an indication that the jury found Williams not credible. In State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015), the South Carolina Supreme Court wrote:

An error is harmless if it did not reasonably affect the result of the trial. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (“Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.”).

Based on the overall weakness of the State’s case, the error in admitting the improper hearsay testimony was not harmless as it contributed to the guilty verdict.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.



Kathrine H. Hudgins
Appellate Defender

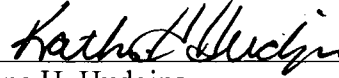
ATTORNEY FOR APPELLANT

This 17th day of August, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 17th, 2017



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