

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

TERRANCE LEMAN CALLOWAY,

PETITIONER

APPELLATE CASE NO 2016-001958

Appeal from Abbeville County

Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 2018-UP-107

PETITION FOR REHEARING

RECEIVED  
MAR 29 2018  
SC Court of Appeals

Pursuant to Rule 221(a), SCACR, counsel for Terrance Leman Calloway petitions the Court for rehearing and respectfully submits that this Court misapprehended what constitutes a business record for purposes of the business records exception to the rule against hearsay. In the present case the State did not seek to admit a business record. Instead, Sandy Purdy, an Anderson County 911 employee, was allowed to testify as to what another 911 operator noted that a witness, Sherry Williams, told her. The recording of the 911 call to the original 911 operator was not introduced in evidence by the State. 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. While Williams’ statement to the original 911 operator may have met an exception to the rule against hearsay, the original 911 operator’s statement does not. The original 911 operator’s statement about what Williams said is not a business record.

**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 Petitioner assaulted her when the testimony was inadmissible hearsay.**

On the evening of August 3, 2012, Sherry Williams left the Time Out Club with Petitioner. (R. p. 20, line 11 – p. 21, line 1) Williams and Petitioner attended high school together at Dixie High School. (R. p. 18, lines 3-22). Williams’ aunt, Tessie Singleton, testified that Williams and Petitioner dated while in high school. (R. p. 59, lines 13-14). According to Williams, Petitioner 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, Petitioner drove her outside of town and assaulted her. (R. p. 21-24). According to Williams, when Petitioner 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 Petitioner 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 CAD<sup>1</sup> report, Petitioner 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 information in the CAD report, Petitioner 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). Petitioner 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). Petitioner 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). Petitioner 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 Petitioner 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

---

<sup>1</sup> Computer-aided dispatch.

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 original 911 dispatcher may have met an exception to the hearsay rule. Purdy, the 911 employee who testified at trial, however, was not the original 911 dispatcher who took the call from Williams. Purdy's testimony about what the original 911 dispatcher said, in the form of a note, was not a business record and did not meet an exception to the hearsay rule. The trial judge erred in allowing Purdy to testify about what the original 911 dispatcher said that Williams told her when she called 911.

Petitioner 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 Petitioner 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.

In affirming this Court found that Williams’ statement to the original 911 operator was admissible as an excited utterance. This Court then found that Purdy’s testimony about what the original 911 operator said that Williams told her was admissible under the business records exception to the rule against hearsay writing:

We further find Sandy Purdy's testimony about the victim's statement to the 911 operator was admissible under the business records exception to the hearsay rule. See Rule 803(6), SCRE (providing the business records exception to the rule against hearsay: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term 'business' as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.").

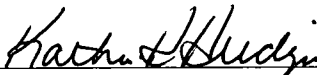
Counsel respectfully submits that this Court misapprehended what constitutes a business record for purposes of the business records exception to the rule against hearsay. While the business records exception might include the fact that a 911 call was made from a particular phone number, the content of that 911 call is not covered by the business records exception.

Importantly, a business record was not admitted in evidence. Instead, Purdy testified about what the original 911 operator noted in the CAD report that Williams told her. As this Court noted in Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 72–73, 773 S.E.2d 607, 614–15 (Ct. App. 2015) (footnote omitted):

The plain language of Rule 803(6) allows for the admission of “[a] memorandum, report, record, or data compilation,” not testimony describing such a document. We hold Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence. See Thompson v. State, 705 So.2d 1046, 1048 (Fla. Dist. Ct. App. 1998) (“While the business-records exception to the hearsay rule allows the admission of ‘[a] memorandum, report, record, or data compilation,’ it does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence.” (citation omitted)); State v. Watkins, 148 Idaho 418, 224 P.3d 485, 492 (2009) (finding written notes relied on by the witness “were not offered into evidence” and “[i]n the absence of any document ... there was simply no ‘business record’ that might fall within this hearsay exception”); Bass v. Washington Kinney Co., 119 Ill. App. 3d 713, 75 Ill. Dec. 295, 457 N.E.2d 85, 96 (1983) (“[I]t is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.”).

Based on the above argument, Petitioner respectfully seeks rehearing.

Respectfully Submitted,

  
KATHRINE H. HUDGINS  
Appellate Defender

This 29th day of March, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
MAR 29 2018  
SC Court of Appeals

\_\_\_\_\_  
Appeal from Abbeville County

Honorable Alison Renee Lee, Circuit Court Judge

\_\_\_\_\_  
THE STATE,

RESPONDENT,

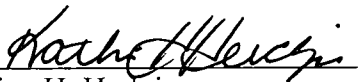
V.

TERRANCE LEMAN CALLOWAY,

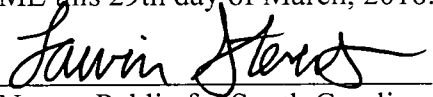
PETITIONER

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Ranee Saunders, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Terrance Calloway, #240292, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 29th day of March, 2018.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 29th day of March, 2018.

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