

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

TINA DOCKERY,

APPELLANT

Appellate Case No. 2011-183266

---

ANDERS BRIEF OF APPELLANT

---

DAYNE C. PHILLIPS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

**RECEIVED**

OCT 26 2012

**SC Court of Appeals**

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES ..... 2

STATEMENT OF ISSUE ON APPEAL ..... 3

STATEMENT OF THE CASE ..... 4

STATEMENT OF FACTS ..... 5

ARGUMENT ..... 8

CONCLUSION ..... 10

PETITION TO BE RELIEVED AS COUNSEL ..... 11

**TABLE OF AUTHORITIES**

**Cases**

*Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000)..... 8

*State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987)..... 8

*State v. Reid*, 324 S.C. 74, 476 S.E.2d 695 (1996)..... 8, 9

**Rules**

Rule 402, SCRE..... 8

**Constitutional Provisions**

U. S. Const. amend. V..... 9

U. S. Const. amend. VIII..... 9

U.S. Const. amend. XIV ..... 9

**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in allowing the State and the co-defendant to introduce improper evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries, thereby denying Appellant her constitutional right to a fair trial?

## STATEMENT OF THE CASE

On August 19, 2010, Appellant Tina Dockery was indicted by the Spartanburg County Grand Jury for (1) unlawful conduct towards a child and (2) child abuse with great bodily injury. R. 514 – 515.

On January 4, 2011, Appellant and her co-defendant, Leonard Scott Moore, proceeded to trial before the Honorable J. Derham Cole and a jury. R. 1. Appellant was represented by Andrea Price, her co-defendant was represented by Michael Rudasill, and the State was represented by Assistant Solicitors Jennifer Jordan and Susan Reese.

On January 7, 2011, the jury found Appellant (1) guilty of unlawful conduct towards a child and (2) not guilty of child abuse with great bodily injury. R. 504, l. 25 – 505, l. 9. Judge Cole then sentenced Appellant to ten years imprisonment suspended upon the service of one year imprisonment followed by three years probation. R. 510, l. 18 – 511, l. 10; 516.

This appeal follows.

## STATEMENT OF FACTS

### **Background**

Appellant and her co-defendant were both charged with inflicting great bodily injury upon their four-month-old baby and placing their infant baby “at an unreasonable risk of harm affecting the child’s life, physical, or mental health and safety” causing injury to the infant’s body. R. 71, ll. 13-23; R. 514 – 515. Co-defendant’s counsel told the jury during his opening statement:

What I want you to listen for, as they tell you about the interrogation or the investigation of [co-defendant] and [Appellant], is I want you to listen for which one of those individuals showed love, or lack of love, for their child, concern, or lack of concern, for their child, or any emotion at all for their child.

R. 77, ll. 1-6.

### **Motion to Exclude Reference to Appellant’s Demeanor**

At trial, defense counsel moved “to preclude the State from referencing [Appellant’s] demeanor at the hospital and in any subsequent interviews that she had.” R. 159, ll. 15-18. Defense counsel noted that Detective Nikki Cantrell referenced Appellant’s demeanor in her investigative report and argued “that this is absolutely irrelevant to the case at hand.” R. 159, l. 19 – 160, l. 2. Co-defendant’s counsel objected and maintained that evidence describing Appellant’s demeanor after the infant was injured was relevant. R. 160, ll. 7-8. The State agreed with co-defendant’s counsel and stated the following:

Your Honor, I believe it’s completely relevant to this case . . . she is the mother - - a mother of [a] four-month-old who is at the hospital suffering from head injuries. And, at that point in time, what they had already seen or - - just the head swelling and everything, and *she sits there unemotional, unresponsive, with no concern at all*. I do believe it’s - - it’s very imperative. . . . And I think [Detective Cantrell’s]

observations are very important for the jury to get an idea and understanding of what was going on that day . . . .

R. 160, l. 14 – 161, l. 2 (emphasis added).

The trial court ultimately denied defense counsel's motion and found that evidence describing Appellant's demeanor was relevant. R. 161, ll. 8-10. Defense counsel then requested, "Please note my objection, Your Honor." In response, the trial court stated, "Note her objection. All right, what else?" R. 161, ll. 11-13.

### **Detective Nikki Cantrell**

The next witness to testify following the trial court's ruling was Detective Nikki Cantrell of the Spartanburg County Sheriff's Office. R. 163, ll. 10-17. The State asked Detective Cantrell, "[W]hat was the demeanor of both [co-defendant] and [Appellant]?" Detective Cantrell replied, "[Co-defendant] was trying to comfort the child . . . and [Appellant] was completely unemotional. [Appellant] wasn't even looking over at the baby while they were drawing blood." R. 164, ll. 23-25 (emphasis added). The State again asked Detective Cantrell, "Can you describe [Appellant's] physical appearance for the jury that night or that following morning hours?" In response, Detective Cantrell stated, "*When I was talking to her, again, she was still very unemotional. She wasn't crying.*" R. 168, ll. 10-14 (emphasis added).

The State asked Detective Cantrell for the third time, "Can you describe to the jury again what [Appellant's] demeanor was when you finished speaking to her?" Detective Cantrell reiterated, "*Again, like I said, [Appellant] was completely unemotional. [Appellant] would sniff and rub her eyes, but tears never even fell from her eyes . . . it appeared to me she was faking being upset.*" R. 173, ll. 6-12 (emphasis added). For the fourth time on direct-examination, the State inquired, "Did you also have an - - an

opportunity - - or describe for the jury, again, what [Appellant's] demeanor appeared to be like while you were walking through the house with her?" Same as his previous three answers, Detective Cantrell replied, "*Again, [Appellant] was still very unemotional; no crying, just very, very calm and unemotional...*" R. 186, ll. 9-14 (emphasis added).

Notably, the State also asked Detective Cantrell, "Could you describe [co-defendant's] demeanor to the jury that evening as you finished your . . . interview with him?" Detective Cantrell maintained, "In my interview with [co-defendant], he was - - he was crying. His nose was running. And he was trembling during the investigation. *He - - he appeared very remorseful.*" R. 178, ll. 12-17 (emphasis added).

#### **Investigator Theodore Saar**

On cross-examination by co-defendant's counsel, Investigator Theodore Saar, of the Spartanburg County Sheriff's office, testified that Appellant showed "*a strong lack of emotion*" during her interview with Detective Cantrell. R. 227, ll. 3-25 (emphasis added).

#### **Closing Arguments**

Co-defendant's counsel stated the following in his closing argument:

I asked you to pay close attention to the testimony you were going to hear, from the investigating officers, regarding [co-defendant's] demeanor, [Appellant's] demeanor; . . . specifically I said I wanted you to listen to whether you - - they observed love, by either of them for their children, concern by either of them for their children, or any emotion whatsoever, once they were made aware of the injuries to [the infant] and the extent of the injuries to [the infant]; whether they showed any emotion at all. . . . *But, throughout all of that contact, what came out consistently was this: [Appellant] showed no emotion whatsoever with regard to the extent, to the children, to what was taking place; no mention.*

R. 420, l. 4 - 421, l. 24 (emphasis added).

## ARGUMENT

**The trial court erred in allowing the State and the co-defendant to introduce improper evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries, thereby denying Appellant her constitutional right to a fair trial.**

In *State v. Reid*, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996),<sup>1</sup> the South Carolina Supreme Court held, “References to a defendant’s lack of remorse are . . . improper as violative of a defendant’s Fifth, Eighth, and Fourteenth Amendment rights.” Such rules are “rooted in due process and the belief that justice is best served when a trial is fundamentally fair.” *Edmond v. State*, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000) (quotation citation omitted). This Court has further held, “Comments by the prosecution upon an accused’s failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent.” *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317, 319 (1987).

In this case, defense counsel moved “to preclude the State from referencing [Appellant’s] demeanor at the hospital and in any subsequent interviews that she had.” R. 159, ll. 15-18. Defense counsel noted that Detective Cantrell referenced Appellant’s demeanor in her investigative report and argued “that this is absolutely irrelevant to the case at hand.” R. 159, l. 19 – 160, l. 2; *See* Rule 402, SCRE (providing that “[a]ll relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina”) (emphasis added). Despite the plain language of Rule 402, SCRE, which allows for the exclusion of relevant evidence on a constitutional ground, the trial court denied defense counsel’s motion and found that

---

<sup>1</sup> *Overruled on other grounds by State v. Watson*, 349 S.C. 372, 563 S.E.2d 336 (2002).

evidence describing Appellant's demeanor was relevant. R. 161, ll. 8-10;

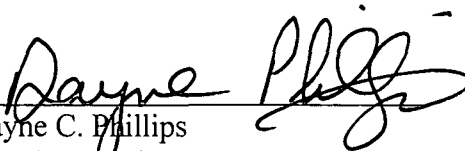
At trial, Detective Cantrell referenced Appellant's lack of emotion and remorse *four* separate times in response to the State's questions regarding Appellant's demeanor after her infant baby was injured. R. 164, ll. 23-25; R. 168, ll. 10-14; R. 173, ll. 6-12; R. 186, ll. 9-14. To further prejudice Appellant, co-defendant's counsel told the jury in his opening statement to pay close attention to this improper evidence as it relates to Appellant and her co-defendant. R. 77, ll. 1-6. In a case where Appellant and her co-defendant have mutually antagonistic defenses, the State asked Detective Cantrell, "Could you describe [co-defendant's] demeanor to the jury that evening as you finished your . . . interview with him?" Detective Cantrell maintained, "In my interview with [co-defendant], he was - - he was crying. His nose was running. And he was trembling during the investigation. *He - - he appeared very remorseful.*" R. 178, ll. 12-17 (emphasis added).

Amounting to a deprivation of Appellant's due process rights, the prejudicial effect came full circle when co-defendant's counsel stated in his closing argument, "*what came out [at trial] consistently was this: [Appellant] showed no emotion whatsoever with regard to the extent, to the children. . . .*" R. 421, ll. 21-23 (emphasis added). Therefore, the trial court erred in allowing the State and the co-defendant to introduce improper evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries, thereby denying Appellant her constitutional right to a fair trial. *See Reid*, 324 S.C. at 78, 476 S.E.2d at 696; U.S. Const. amend V; U.S. Const. amend VIII; U.S. Const. amend XIV.

CONCLUSION

For the foregoing reasons, Appellant Tina Dockery requests that this Court reverse and remand her conviction and sentence to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

TINA DOCKERY,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

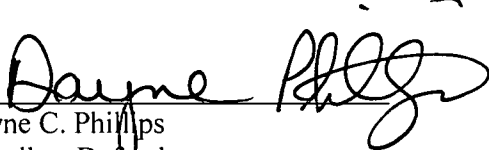
---

Counsel for Tina Dockery states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on January 7, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Tina Dockery.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TINA DOCKERY,

APPELLANT

---

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

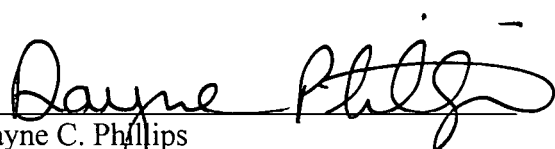
---

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

- (1) True-billed indictments;
- (2) Sentencing Sheet;
- (3) Entire transcript of proceeding pursuant to Anders procedure.

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

October 26th, 2012

  
Dayne C. Phillips  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

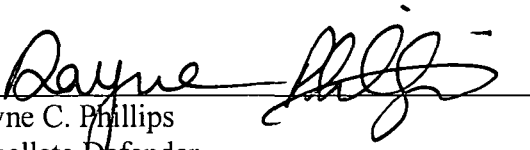
V.

TINA DOCKERY,

APPELLANT

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

The undersigned attorney 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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Tina Dockery, at 165 Clark Circle, Spartanburg, SC 29307, this 26th day of October, 2012.

  
\_\_\_\_\_  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 26th day of October, 2012.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013