

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED
JAN 25 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FREDERICK R. CHAPPELL,

APPELLANT

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

In a trial for five counts of sexual exploitation of a minor third degree, did the trial judge err in allowing Phyllis Lewis of the Greenville County Sheriff's Department to testify to the hearsay statement made by the appellant's deceased mother that she found child pornography on a computer in the house she shared with her husband and the appellant?

STATEMENT OF THE CASE

In June of 2011, the Greenville County Grand Jury indicted Appellant for five counts of sexual exploitation of a minor third degree, indictments #2011-GS-23-327, 328, 329, 330 and 331. On March 5, 2012, Appellant proceeded to jury trial before the honorable Robin B. Stilwell. Attorney Susannah Ross represented Appellant at trial. Attorney Mark Moyer prosecuted the case. The jury returned verdicts of guilty as charged. Judge Stilwell sentenced Appellant to ten concurrent for four of the charges and ten years consecutive for one of the charges for an aggregate sentence of twenty years. A timely notice of intent to appeal was served on March 14, 2012. This appeal follows.

ARGUMENT

In a trial for five counts of sexual exploitation of a minor third degree, the trial judge erred in allowing Phyllis Lewis of the Greenville County Sheriff's Department to testify to the hearsay statement made by the appellant's deceased mother that she found child pornography on a computer in the house she shared with her husband and the appellant.

Prior to trial the State informed the trial judge that Appellant's mother, a State's witness, died the day before. (Tr. p. 60, lines 21 – p. 61, lines 1-5). The State sought to allow a police officer to testify as to a statement made by the mother to the police officer. (Tr. p. 61, lines 1-5). The State argued that pursuant to State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App. 2003), the statement by the mother was not hearsay because it was not offered for the truth of the matter asserted and the statement explained the action taken by the police officer. (Tr. p. 61, lines 11-20). Appellant objected stating, "I think clearly if something came in to the effect of, I saw child pornography on my son's computer, that would be hearsay." (Tr. p. 61, lines 23-25). Appellant also objected on Confrontation Clause grounds citing Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The judge ruled that the officer could testify that the mother provided information to the police that a computer in her home contained child pornography. (Tr. pp. 64-67).

The first witness called by the State was Phyllis Lewis of the Greenville County Sheriff's Department. Officer Lewis testified that, "Ms. Galloway [Appellant's mother] called stating that she was on the computer that's in her home and found some pornography. And she wanted someone to come and take the computer." (Tr. p. 85, lines 21 – 24). Instead of asking the officer what steps she took after receiving the information from the mother, the State asked the officer, "Did you follow up with her when she talked about

pornography? As far as getting more specific.” (Tr. p. 85, line 25 – p. 86, line 1). As the officer replied, appellant objected. (Tr. p. 86, lines 2-4). The judge overruled the objection. (Tr. p. 86, lines 5-8).

Officer Lewis then testified that she asked if the pornography was adult pornography and the mother replied, “No, it was children.” (Tr. p. 86, lines 10-18). When the State asked if the mother provided any specifics about the pornography, Officer Lewis testified, “Other than it was disturbing.” (Tr. p. 86, line 21). Lewis’ testimony in regard to the mother’s statements exceeded the limited purpose of explaining why a government investigation was undertaken and constituted impermissible hearsay.

“Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Love, 767 F.2d 1052 (1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986).” State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The officer’s testimony could have been limited to allow the State to explain the investigation and why officers went to the home and took the computer by simply referencing the fact that the mother called the police and requested that they remove the computer. Instead, the statement by the mother that she found pornography, specifically child pornography, on her computer and that it was disturbing was offered for the truth of the matter of asserted.

The present case is distinguished from both Thompson and Brown. In Thompson, the South Carolina Court of Appeals found that statements made by a bystander to the


police that the person driving the victim's car was in a particular place was not hearsay because it explained why the officers went to that particular rather than being offered for the truth of the matter asserted. In Brown, the South Carolina Supreme Court found that statements about why officers initiated surveillance were not offered for the truth of the matter asserted and were not hearsay. Instead, the statement was admitted to explain why the police set up surveillance.

In contrast, the mother's statement that she found child pornography on the computer was offered for the truth of the matter asserted. If the statement in the Brown case had been that someone found crack in Brown's apartment, the police officer would not have been able to testify to the statement as it is offered for the truth of the matter asserted and hearsay, like the mother's statement in the present case. Instead, the statement in Brown involved general complaints received to explain why the police set up surveillance. The judge erred in allowing the officer to testify as to the hearsay statement by the mother that she found child pornography on the computer. The error is not harmless as it goes to an element of the offense.

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of January, 2013.

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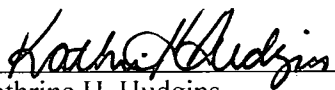
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frederick R. Chappell 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 Robin B. Stilwell, which was held on March 5, 2012, 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 Frederick R. Chappell.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

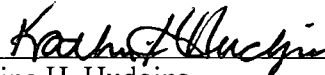
ATTORNEY FOR APPELLANT

This 25th day of January, 2013.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 25, 2013



Kathrine H. Hudgins
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant 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 a copy of the Anders Brief of Appellant and Record on Appeal have been served on Frederick R. Chappell, #214069 at Perry Correctional Institution, this 25th day of January, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of January, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: August 23, 2014.

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