

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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NOV 26 2013

SC Court of Appeals

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSELL EDWARD NIX,

APPELLANT

APPELLATE CASE NO. 2013-000522

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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

Whether the court erred in denying Appellant's motion for a continuance when Appellant's first trial had ended in a mistrial the day before and where Appellant sought sufficient time to obtain the transcript of the first trial in order to have a proper and complete opportunity to impeach a key witness in the case?

STATEMENT OF THE CASE

A Pickens County Grand Jury indicted Appellant at the November 20, 2012 term of General Sessions for assault and battery of a high and aggravated nature (ABHAN). R. 396-397. His case was called to trial on February 27, 2013 before the Honorable G. Edward Welmaker, and a jury. R. 1; R. 5, l. 1. This trial ended in a mistrial after improper testimony from a state witness was heard by the jury. See R. 98, l. 12 – 103, l. 16.

Appellant's case was immediately retried on February 28, 2013. David Cantrell represented Appellant. Baker Cleveland and Graham Buckner were the Assistant Solicitors. R. 113.

At the conclusion of the trial on March 1, 2013, the jury found Appellant guilty. R. 384, ll. 7-13. Judge Welmaker sentenced Appellant to twenty years suspended upon the service of one hundred forty months (eleven years and eight months) imprisonment and five years probation. R. 392, l. 25 – 393, l. 8.

This appeal follows.

ARGUMENT

The court erred in denying Appellant's motion for a continuance when Appellant's first trial had ended in a mistrial the day before and where Appellant sought adequate time to obtain the transcript of the first trial in order to have a proper and complete opportunity to impeach a key witness in the case.

Relevant Facts

Appellant was charged with ABHAN after a physical altercation occurred between Appellant and Earle Guthrie, who had confronted Appellant after observing Appellant trespassing on his daughter's property. Mr. Guthrie's daughter, Diane Milton, lived across the street from Mr. Guthrie and his wife. R. 218, l. 9 – 219, l. 9.

After his wife observed Appellant trespassing on Milton's property, Mr. Guthrie and his wife got into their car and attempted to locate Appellant in effort to make sure he left the area. The couple saw Appellant on the other side of Highway 178 and returned home. Several minutes later, the couple again observed Appellant on their daughter's property. Mr. Guthrie got into his vehicle for a second time, drove up the road, and approached Appellant. Mrs. Guthrie remained in the couple's front yard. R. 174, l. 19 – 177, l. 12 ;R. 220, l. 3 – 221, l. 13.

Appellant told Mr. Guthrie, who had gotten out of his vehicle, that he was "walking laps" around the neighborhood for exercise and that he mistakenly believed the property still belonged to J.L. Banks. R. 222, ll. 1-3; R. 333, ll. 22-24; R. 310, l. 16 – 312, l. 4. The Guthries' daughter had only recently purchased the property from Mr. Banks about four months before the incident. R. 273, ll. 4-12. In an effort to avoid any further confrontation, Appellant began to walk away from Mr. Guthrie down the public road. R.

312, ll 5-15. Mr. Guthrie got back into his car and continued to pursue Appellant. R. 312, l. 18 – 313, l. 18. Upon exiting his car for a second time a little farther down the road, Appellant and Mr. Guthrie got into a physical fight. There were conflicting accounts as to who started the altercation.

Appellant testified that Mr. Guthrie approached him “real angry” and kicked him in the stomach and then hit him in the face. Appellant attempted to retreat, but there was a barbed wire fence behind him and he could not back up any farther. Appellant stated that Mr. Guthrie then charged at him and the two fell to the ground and ended up wrestling around in a ditch. Appellant hit Mr. Guthrie two times in the face. Both of their shirts got torn. The fight eventually ended and Appellant walked away back down the public road towards his home. R. 314, l. 10 – 316, l. 6.

Mr. Guthrie testified that Appellant grabbed him and “whirl[ed]” him behind some trees and then shoved him in a ditch. Guthrie claimed that when he was lying in the ditch, Appellant put his knee on Mr. Guthrie’s chest and kicked him in the forehead. According to Guthrie, Appellant then began to beat him. Mr. Guthrie never testified that he hit or struck Appellant. R. 226, l. 12 – 227, l. 25.

Mrs. Guthrie did not actually see the physical altercation. She testified that she saw her husband and Appellant go behind the trees, but then lost sight of them. According to Mrs. Guthrie, she knew they were fighting because she could hear it. It sounded like “very hard pounding.” Eventually, Appellant and her husband emerged from behind the trees and her husband’s face was “hurt real bad.” R. 179, l. 24 – 181, l. 10.

The Guthries' daughter, Diane Milton, who had also observed Appellant trespassing on her property, testified that she saw her father and Appellant talking on her property. Milton claimed that when she went outside to find out what was going on, she saw Appellant shove her father into a ditch. Due to the depth of the ditch, Milton testified that she could not see her father after he fell, but that she saw Appellant get on top him. According to Milton, at that point all she could see was "punches flailing" and Appellant "getting the best of [her] dad." R. 255, l. 1 – 260, l. 1.

There were no other witnesses who saw the encounter. While the Guthries were unaware of it, at the time of the confrontation because they were new to the area, Appellant had lived in the neighborhood for over thirty years and was born and raised in a home just down the street. R. 200, l. 24 – 201, l. 7; R. 300, l. 21 – 302, l. 7; R. 305, ll. 8-14; R. 308, ll. 21-25. Appellant testified that he often walked for exercise as a form of therapy because he was a recovering heroin addict. He stated that he frequently changed routes so he would not become bored. R. 307, l. 20 – 308, l. 25.

Mr. Guthrie suffered from post-traumatic stress disorder (PTSD) due to his service in the military during the Vietnam War. R. 188, ll. 10-12. His wife testified that Mr. Guthrie suffers from anxiety and is on guard and vigilant all the time. R. 189, ll. 12-18. His wife also testified that Mr. Guthrie loses his temper and can get agitated or angry due to his PTSD. R. 209, ll. 15-25.

The judge charged the jury with self-defense based on Appellant's testimony. R. 378, l. 1 – 380, l. 10.

Motion for a Continuance

The case was first called to trial on Wednesday, February 27, 2013. R. 5, l. 1. However, Judge Welmaker granted a mistrial after the first witness, Mrs. Guthrie, testified on cross-examination about Appellant's "past repeat offending record" in front of the jury. R. 98, ll. 12-19. The case was immediately retried the next day on Thursday, February 28, 2013.

After the mistrial was granted on February 27, 2013, a discussion began on the record as to when the case would be retried. The state's position was to immediately restart the trial the next day. The solicitor argued that Appellant's case was of higher priority than the other cases on the docket for that week and that the full jury panel was available to return in the morning. R. 103, l. 18 – 105, l. 17. Defense counsel responded:

Quite candidly, one of my first concerns with that, obviously, I felt like I was prepared today. I feel like I can be prepared tomorrow. But I guess for lack of a better way of putting it, the witness has had a free dry-run of her testimony, of the questions, of what's going to be asked. Now, she'll have that at a later date also, but ***I will not have access to a transcript of her testimony here today, which I think would be tremendously important at a later trial.*** So I feel like ***there would be a prejudice to us to start this tomorrow.*** I'm ready. I'll admit that. But I believe ***there will be a prejudice to us with this witness having already been cross-examined and I won't have the opportunity to use a transcript if there are discrepancies.*** Now, I would intend to do that.

R. 105, l. 21 – 106, l. 10.

The court stated that if, during the retrial, defense counsel determined there was something impeachable, the court would send the jury out and permit defense counsel to listen to the tapes and impeach the witness with the tapes. R. 106, ll. 14-18. Defense counsel responded, "[O]bviously, I'll abide by the court's ruling. That is not as good as

having it in black and white in front of me. I wish I could say my memory is that good.”

R. 106, ll. 19-22. Defense counsel requested a continuance until a later term when the transcript would be available. R. 107, ll. 18-21. The court ultimately denied Appellant’s motion for a continuance and stated further that if defense counsel wanted to return early in the morning the next day the court reporter would accommodate him and allow him to listen to the tapes before the start of the retrial. R. 107, l. 22 – 108, l. 9.

At the beginning of Appellant’s second trial the following day, defense counsel renewed its motion for a continuance. Defense counsel argued:

I take the position that that is a prior statement just like the statement made to the police officers or any other statement made by the witness, that ***I should have an appropriate and complete opportunity to use that statement from an impeachment standpoint. I believe that my ability to do that can only be done with a continuance*** and the opportunity to review more than an hour of testimony, to locate questions of concern. If the statements come up during testimony today that I believe are in conflict, it will be difficult to, number one, pinpoint it. And number two, once we do, to locate that statement to verify that it was or was not different from a previous statement. ***I believe the only way to allow Mr. Nix to have a complete and fair and impartial trial is to have the opportunity to review this prior sworn statement by this witness in an effort to be able to use it as impeachment.***

R. 144, ll. 5-22.

The court again denied the motion for a continuance finding no “harm done” and noted for the record that the court reporter created flash drives of the testimony which both the state and the defense had an opportunity to review from 5:30 pm after the mistrial until 10:00 am at the start of the retrial. R. 144, l. 23 – 145, l. 21. The court also repeated that at any time during the witness’s testimony the defense wanted to replay the tapes it would be allowed to do so. R. 145, ll. 9-21.

Discussion

The trial court erred in denying Appellant's motion for a continuance since Appellant was entitled to adequate time to obtain the transcript of the first trial in order to have a proper and complete opportunity to impeach a key witness in the case. Appellant was prejudiced because he was denied the right to adequately confront and cross-examine Mrs. Guthrie during his second trial.

As defense counsel argued at trial, access to a tape recording of the testimony at the first trial was insufficient to provide Appellant with meaningful opportunity to effectively impeach the witness. Access to a written transcript would have been much more beneficial to assist Appellant in spotting inconsistencies in the witness' testimony.

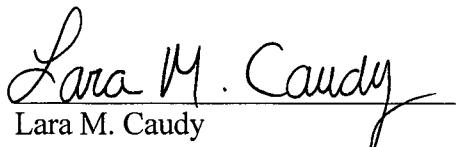
In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), our Supreme Court held the trial court abused its discretion in denying McMillian's motion for a continuance so he could obtain a transcript of his first trial "where the lack of such a transcript prejudiced his ability to effectively cross-examine the witnesses against him." Id. at 24, 561 S.E.2d 605-606.

This Court should likewise find that the trial court abused its discretion in this case by denying Appellant's motion for a continuance to obtain a transcript of Mrs. Guthrie's testimony because such a denial prejudiced his ability to effectively cross-examine Mrs. Guthrie during the retrial and impeach her with any inconsistent statements.

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed and this case remanded to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

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SC Court of Appeals

Counsel for Russell Edward Nix states:

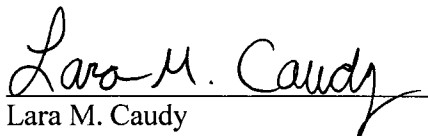
1 She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge G. Edward Welmaker, which was held on February 28 – March 1, 2013, 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 Russell Edward Nix.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

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APPELLANT

APPELLATE CASE NO. 2013-000522

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

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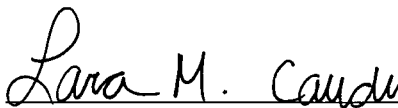
SC Court of Appeals

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

- (1) True-billed indictment;
- (2) Entire mistrial transcript dated February 27, 2013;
- (3) Entire trial transcript dated February 28 – March 1, 2013.

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

November 26th, 2013



Lara M. Caudy
Appellate Defender

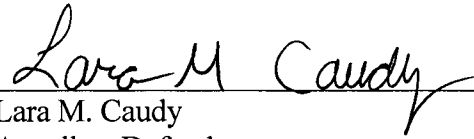
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Attorney for Appellant

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."

November 26, 2013



Lara M. Caudy
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STATE OF SOUTH CAROLINA

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Appeal from Pickens County

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THE STATE,

RESPONDENT,

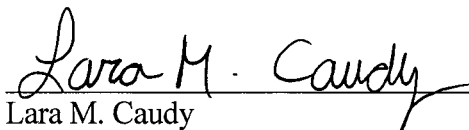
V.

RUSSELL EDWARD NIX,

APPELLANT

CERTIFICATE OF SERVICE

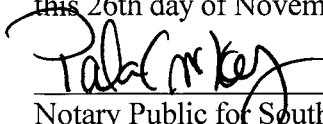
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Russell Edward Nix, #354546 at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 26th day of November, 2013.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.