

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

RECEIVED

SEP 24 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GOWNDELL DEON CADES,

APPELLANT

APPELLATE CASE NO. 2013-002327

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting, over objection as being cumulative, all 88 color photos taken by the arson investigator at the scene of the mobile home fire?

STATEMENT OF THE CASE

On March 28, 2013, the Florence County Grand Jury indicted Cades for arson third degree, indictment #2013-GS-21-00485. On October 21, 2013, Cades proceeded to jury trial before the Honorable D. Craig Brown. Karen Parrott represented Cades at trial. Todd Tucker prosecuted the case. The jury returned a verdict of guilty. Judge Brown sentenced Cades to fifteen (15) years in prison. A timely notice of intent to appeal was served on October 23, 2013. This appeal follows.

ARGUMENT

The trial judge erred in admitting, over objection as being cumulative, all 88 color photos taken by an investigator at the scene of the mobile home fire.

The jury found Cades guilty of setting a fire in his girlfriend's mobile home. Investigator Pat O'Hara, an arson investigator with the Florence County Sheriff's Office, investigated the fire and testified at trial. Investigator O'Hara was not qualified as an arson expert. At trial the State moved to admit in evidence 88 color photos taken by Investigator O'Hara of the scene of the mobile home fire. (Tr. p. 107, line 2 – 25). Appellant objected stating, "Your Honor, objection on the basis of cumulative." (Tr. p. 108, lines 2-3). Appellant objected to the 88 photos earlier stating, "And, Your Honor, that would be my point because I understand from Mr. Tucker that he and Investigator O'Hara have gone through these pictures and I have gone through these pictures with my client, but in all honesty, Your Honor, some of those pictures I do believe to be cumulative. Now, Mr. O'Hara or Investigator O'Hara says that he's going to be able to lay a foundation for each one showing something a little bit different." (Tr. p. 83, lines 2-9). Counsel argued that some of the photos showed the same thing. (Tr. p. 83, lines 11-18).

The prosecutor told the judge, "And obviously, Your Honor, the State's position is until Officer O'Hara testified, we don't know – I think that's a bit premature. Obviously, Investigator O'Hara took them for a reason and I think we ought to let the jury hear why and how it furthers his investigation." (Tr. p. 108, lines 4-8). The trial judge admitted all 88 color photos without requiring the State to explain why all 88 were necessary. The judge stated, "I'll admit the photographs subject to defense counsel's objection. They are admitted." (Tr. p. 108, lines 9-10). The trial judge erred in admitted all 88 color photos.

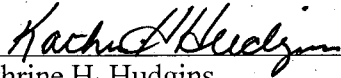
Rule 403, SCRE states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The failure to exercise discretion, however, is itself an abuse of discretion. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1997). See also Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)(“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)(“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”).

In the present case the judge failed to exercise his discretion and determine the probative value, if any, of admitting all 88 color photos. Any probative value of admitting all 88 color photos was substantially outweighed by the danger of undue prejudice, due to the sheer volume of photos of the burned motor home, and the needless presentation of cumulative evidence.

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2014.

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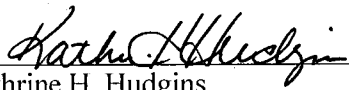
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gowndell D. Cades 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 D. Craig Brown, which was held on October 22, 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 Gowndell D. Cades.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2014.

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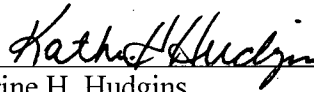
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentencing sheet;
- (2) Trial transcript;
- (3) State's Exhibit #3 – 88 color photos – to be transported.

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

October 24th, 2014



Kathrine H. Hudgins
Appellate Defender

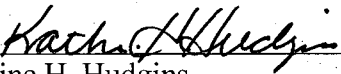
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 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."

October 24, 2014



Kathrine H. Hudgins
Appellate Defender

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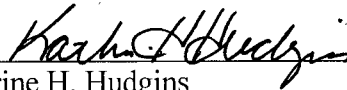
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CERTIFICATE OF SERVICE

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 Gowndell D. Cades, #197569 at Kershaw Correctional Institution, this 24th day of October, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of October, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021.