

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2017-000808

THE STATE,

Respondent,

vs.

ASHLEY PRICE TINDALL, III,

Appellant.

**MOTION TO REMAND FOR
RECONSTRUCTION OF THE RECORD**

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In September 2016, Appellant was indicted for one count of assault and battery of a high and aggravated nature and one count possession of a weapon during the commission of a violent crime. (R. 554-57). Appellant proceeded to a jury trial before the Honorable Roger L. Couch on March 20, 2017. At trial the State moved for a pretrial ruling on the admissibility of a 911 call made by State’ witness Teresa Escoffier. (R. 6-7). Appellant conceded the 911 call was relevant to provide context to overall chain of events, but moved to exclude portions of the tape (R. 9-10). The trial judge ruled that the tape was admissible under a *Res Gestae* theory. (R. 15-16). The State subsequently entered the tape into evidence and published it to the jury. (R. 18). Appellant objected to the contents of the tape and moved for a mistrial after an un-redacted version of the tape was played for the jury. (R. 19). The trial judge declared a mistrial because of a

miscommunication between the trial attorneys regarding what material was to be played for the jury and what material was to be redacted. (R. 34).

A second trial subsequently began on March 21, 2017. At the second trial, the State put the following exchange occurred between the State, the trial judge, and counsel for Appellant regarding the status of the 911 tape:

Assistant Solicitor Osborne: And, your honor, there was a lot of discussion regarding the 911 call. I just wanted to bring it to the Court's attention. Yesterday we went late into the evening. We went through the 911 call painstakingly, going through every minute of it, making certain clips, redacting certain portions. An exact copy of that was given to the Defense, which we intend to play at trial.

The Court: has it been marked for identification?

Assistant Solicitor Osborne: It has been marked for identification. It's my understanding that the Defense is not stipulating to the admitting that 911 call in evidence.

The Court: He's objected to it, so...

Assistant Solicitor Osborne: But if it is admitted, then they do agree to the redactions that were made.

The Court: Is that a correct statement of where we are?

Assistant Public Defender Loignon: That is correct, Your Honor. I would also ask that if the Court finds it appropriate to have the State proffer that 911 call outside of the presence of the jury so that I can make further objections.

(R. 60-61, lines 12-9). The State authenticated State's Exhibit #7 as a redacted copy of the 911 tape through 911 call center employee, Angela Casey. (R. 96-97). Casey testified that State's Exhibit #7 was a redacted version of the original call that contained selected clips of the call. (R. 96). The State proffered State's Exhibit #7 outside the presence of the jury (R. 107). Counsel for Appellant objected to the entirety of the tape as well as specific portions of the tape. (R. 107-09). The trial judge overruled Appellant's objection and admitted the redacted tape (R. 113-14). After the trial judge's ruling, Appellant did not lodge any further objections to the 911 tape or

otherwise indicated that an un-redacted version had been played to the jury. At the conclusion of trial, Appellant was convicted of both counts. Appellant timely filed a notice of appeal and an Initial Brief with this Court. Appellant's case is scheduled for oral argument on November 6, 2019.

Motion to Remand to the Trial Court for Reconstruction of State's Exhibit #7

In preparing for oral argument in the present case, the State through its undersigned counsel, reached out to former Assistant Solicitor Alexandra Ginsburg and Assistant Solicitor David Osborne. In discussing Appellant's first issue raised on appeal, Ginsburg disclosed that the statements alleged to have been played to the jury in the Final Brief of Appellant were, in fact, redacted and not heard by the jury (Final Brief of Appellant 10-11). Counsel for the State attempted to confirm Ginsburg's assertions by listening to the exhibit on file with this Court on October 30, 2019 and October 31, 2019. Counsel for the State discovered that State's Exhibit #7 is located inside a disk sleeve that bears the notation "redacted 911" and bears a red evidence sticker that says "State's Exhibit #7." However, the audio file on State's Exhibit #7 does not contain individual clips as indicated in the record, but appears to be one continuous un-redacted audio file.

The disk on file at the Court of Appeals contains most of, if not all of the material that Appellant alleges in his final brief. However, the State believes the disk on file with this Court is not the correct redacted copy that was played for the jury at Appellant's trial. The State asserts that the State's Exhibit #7 on file with this Court is not the correct copy because it contains statements that Appellant specifically objected to during his first trial. (R. 29-30). Because those statements were played for the jury during Appellant's first trial, the trial judge granted a mistrial. (R. 34). Therefore it does not make sense, that a copy of the tape that includes the same

offending statements would have been admitted into evidence during Appellant's second trial after the State proffered its contents and Appellant had an opportunity to object.

Counsel for the State has attempted to locate the correct copy of State's Exhibit #7. Counsel has spoken to Ginsburg and received a sworn affidavit regard her memory of Appellant's trial. (see Exhibit A, sworn Affidavit of Alexandra Jordan Ginsburg). Counsel for the State has also called trial counsel Michael Loignon twice and co-counsel, Martha Runey three times to attempt to locate Appellant's copy of State's Exhibit #7. Counsel for the State is still waiting for return calls from Appellant's trial counsel. The State has also contacted Kami Ruple of the Charleston County Clerk of Court's office to determine if there are other copies of the tape on file with the Clerk of Court. Ruple contacted counsel for the State on November 4, 2019 and disclosed that the Clerk of Court does not have any additional copies of State's Exhibit #7. The State has also contacted the Ninth Circuit Solicitor's office and requested that they look for any additional copies of State's Exhibit #7. As of today's date, the Solicitor's office is still looking for their file on Appellant's case.

On appeal, Appellant asserts, among other allegations of error, that the trial judge erred in admitted the redacted 911 call. Appellant contends the statements made by Teresa Escoffier and others on the tape constitute impermissible hearsay, improper character evidence, and are unfairly prejudicial to Appellant. Because the statements made on State's Exhibit #7 are relevant to this Court's consideration of whether the trial court committed reversible error in admitting the tape, the State believes it is necessary for the matter to be remanded to the trial court to allow the trial judge to attempt to determine which portions of State's Exhibit #7 were redacted and which portions were played for the jury. The State believes it will be difficult for this Court to determine if State's Exhibit # 7 was properly admitted into evidence unless this Court is able to

analyze the correct copy of State’s Exhibit #7 that was actually played for the jury in Appellant’s trial. See China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) (“The issues on appeal must . . . be determined on the basis of the record as settled by the trial court.”); Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (“Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (remanding a case to the circuit court for reconstruction of the trial record). Such a remand would ensure this Court can be provided the most complete and accurate record on appeal to aid this Court in rendering a decision on the issues raised by Appellant. The State is not requesting a continuation of the previously scheduled oral argument. The State is ready and willing to argue the issues raised by Appellant based on the current record on appeal. However, the State requests this Court to hold its final decision on Appellant’s appeal in abeyance until the trial judge can hold a reconstruction hearing.

WHEREFORE, Respondent prays that this Court will remand the matter to the trial court to allow the trial judge to determine what portions of State’s Exhibit #7 were played for the jury; hold this appeal in abeyance pending a ruling on Respondent’s motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

By: _____
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November 4, 2019

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Motion to Remand for Reconstruction of the Record on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Sarah E. Shipe Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 4th day of November, 2019.

SALLY ELLISON
Legal Assistant

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November 4, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: State v. Ashley Price Tindall – Appellate Case No. 2017-000808

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Remand for Reconstruction of the Record along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Scott Matthews
Assistant Attorney General
Bar No. 101464

JSM/ab
Enclosures

cc: Sarah E. Shipe, Esquire
Victim Services