STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ASHLEY PRICE TINDALL, III,

APPELLANT.

APPELLATE CASE NO. 2017-000808

RETURN TO MOTION TO REMAND FOR RECONSTRUCTION OF THE RECORD

Undersigned counsel makes this return opposing the State's motion to remand for reconstruction of the record in the above-captioned case because State's exhibit #7, which is on file with this Court, is the redacted 911 call played to the jury and nothing in the trial record preserved for appeal by trial counsel indicates otherwise.

Procedural History

On September 12, 2016, the Charleston County Grand Jury returned indictments against Appellant Ashley Tindall for assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. R. 554. Appellant proceeded to a jury trial before the Honorable Roger L. Couch on March 20, 2017. During the first trial the State made a pre-trial motion *in limine* to admit evidence of a fight, between Appellant and Bob

Escoffier, that occurred prior to the charged incident, and the 911 call made by Bob's wife, Teresa Escoffier. The State argued it was all admissible as part of the *res gestae*. R. 6, l. 5 – 9, l. 16; R. 11, l. 7 – 12, l. 16; R. 15, ll. 4-23. Defense counsel conceded that some evidence regarding the prior fight, for which Appellant was not on trial, was proper to provide context to the charged incident. However, he argued that the prosecution should be limited in the amount of detail it could elicit.

Defense counsel argued the entire 911 call should be excluded because it was not necessary to provide context of the *res gestae* and its probative value was outweighed by its unduly prejudicial effect. Counsel noted the 911 call was placed by someone, Teresa, who did not see the charged incident as it occurred. Rather, Teresa was relaying information she received from other individuals. R. 9, l. 22 – 10, l. 25; R. 12, l. 18 – 15, l. 1. The trial judge ruled the call was admissible and the *res gestae* exception applied "because of the continuous nature of the event" and "the closeness in space." The trial judge found the 911 call served to identify Appellant and the probative value outweighed the prejudicial effect. R. 15, l. 24 – 16, l. 16.

The State subsequently entered the tape into evidence and published it to the jury. R. 17, ll. 15-25. Defense counsel objected again, arguing the solicitor and he agreed on certain redactions prior to trial and that what the solicitor had just played for the jury was not the agreed upon version. R. 18, l. 22-19, l. 19. After discussion, it appeared before trial the solicitor and defense counsel had discussed redactions and the solicitor sent the defense a redacted copy of the 911 call. Upon receiving the redacted copy, defense counsel asked for additional redactions. It was defense counsel's understanding his requested redactions were in addition to those redactions the solicitor had already made. However, the solicitor only redacted the defense's second request for deletions from the tape. R. 19, l. 5-20, l. 7; 22, ll. 1-6; 24-28. Regardless, the 911 call played for the jury was only minimally redacted causing defense counsel to move for a

mistrial. Ultimately, the trial judge declared a mistrial "mainly *because of a problem in the communication of counsel.*" R. 34, ll. 19-20. (emphasis added)

Following the mistrial, when the new trial began on March 21, 2017, the trial judge stated his earlier pre-trial rulings would stand. R. 41, l. 10-13. The State put on the record that the parties had agreed to certain redactions to the tape but that the defense was not stipulating to the admission of the call. Defense counsel confirmed that he would renew his objections to the admission of the call when it was offered. R. 60, l. 12 – 61, l. 11.

When the solicitor moved to admit the redacted recording of the 911 call during the testimony of Teresa Escoffier, the defense objected, arguing the entire 911 call should be excluded because its contents included hearsay, improper character evidence, and it was prejudicial and confusing. Defense counsel further renewed his argument from the day prior that the call was not admissible under the *res gestae* theory. R. 106, l. 18 – 108, l. 24. Counsel argued any description of events taking place outside of Teresa's presence were inadmissible hearsay and references to Appellant's owning lots of guns and being "crazy" were inadmissible character evidence. R. 108, l. 25 – 109, l. 9.

The State argued the 911 call provided context for the incident and provided evidence of the weapons offense. R. 109, ll. 11-22. Regarding hearsay, she argued its contents were admissible as "excited utterance, present sense impression and business record." R. 110, ll. 8-12. Defense counsel reiterated his argument that Teresa was relaying an account of events on the 911 call that she admittedly did not perceive herself. R. 110, ll. 14-18; R. 111, l. 19 – 112, l. 10. The trial judge agreed with the prosecution's responsive argument that the rule did not require the speaker to have perceived the event. R. 112, l. 11 – 113, l. 7. Thus, he ruled that the 911 call was admissible "under… those three hearsay exceptions, and as a regularly kept record." R. 113, ll. 7-10. He further ruled the probative value outweighed any prejudice, finding that the call

evidenced the speaker's concern and "identifies who was involved and where they were, and the risk they posed." R. 113, 13-22.

During the direct examination of Teresa Escoffier, the call was played for the jury. R. 114, l. 19. The solicitor asked Teresa, "And you just heard in there, it says, and he has a gun." R. 114, ll. 23-24. After the recording was paused the solicitor asked Teresa about Appellant threatening her daughter during the earlier incident. R. 115, ll. 16-17.

Before the jury deliberated the judge gave it these final instructions, "I understand there is a method by which you could play any recordings that are in evidence back there, . . . if you want to listen to recordings, you have the right to do so." R. 534, ll. 20-24.

At the conclusion of trial, Appellant was convicted of both counts. Appellate counsel timely filed an Initial Brief, the Record on Appeal, a Transportation Order for the 911 call, which was State's exhibit #7, and a Final Brief with this Court. It was only after the parties were notified that oral argument was scheduled, the State, for the first time, alleged State's exhibit #7, the 911 call, was not what the jury heard at trial.

Appellant opposes the State's motion to remand for reconstruction of the record

The State acknowledged in their motion to remand "[t]he 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." Motion at 1-2. (emphasis added) However, later the State claimed the trial judge granted a mistrial, during the first trial, based on the content of the 911 call played for the jury. Motion at 3. The State also alleged that because State's exhibit #7, the 911 call, contained statements that Appellant specifically objected to during his first trial that it must not be the redacted 911 call played during the second trial. The record does not support that assertion. Defense counsel made the same objections, as he did during the mistrial, after State's exhibit #7 was played at trial. Additionally, during Teresa's

testimony she responded to questions referencing objectionable statements from the call.

The admitted exhibit speaks for itself. The trial judge listened to State's exhibit #7 and admitted it over defense counsel's objection. On appeal State's exhibit #7 was requested by Appellant and the Charleston County Clerk of Court transported it. There is no other State's exhibit #7 on file with the Charleston County Clerk of Court. The record does not reflect any portions of the 911 call that were allegedly not played for the jury. However, the record does make clear that the jury heard statements regarding Appellant having lots of guns, being "crazy," statements about the prior fight between Appellant and Bob Escoffier, and threats made by Appellant to Bob's daughter. Also, it is clear from the record that State's exhibit #7 was sent back to the jury and it had the ability to play the entire recording.

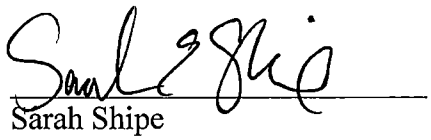
The State's allegation, on appeal, that the jury did not hear certain portions of the call and, therefore, this Court should now remand for a reconstruction hearing is tantamount to a party, on appeal, asking for a remand claiming arguments made during a bench conference or in chambers, which were not put on the record, should be considered on appeal. It is the responsibility of trial counsel to make the record below and the solicitor here failed to put on the record where the call was allegedly redacted or stopped and started in order to omit portions of the call. Furthermore, none of the documents, which reflect alleged redactions, submitted with the State's motion were made part of the record at trial and are not properly before this Court on appeal.

The cases cited by the State in its motion to remand pertain to missing or destroyed transcripts or occurred under prior appellate rules involving "settling the record," and therefore, do not apply to this case where trial counsel failed to put on the record what portions of the 911 call were redacted. The State's request for a remand to reconstruct State's Exhibit #7, if granted, potentially opens the appellate process for constant motions to remand whenever a party alleges

an ambiguity in the record, where that party had an obligation to protect the record at the trial level for appeal. It also comes at the considerable expense of the orderly processing of appeals pursuant to established rules of preserving the record for appeal at trial.

WHEREFORE, Appellant requests that the State's motion be denied.

Respectfully submitted,



Sarah Shipe
Appellate Defender

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
NOV 14 2019
SC Court of Appeals

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ASHLEY PRICE TINDALL, III

APPELLANT.

CERTIFICATE OF SERVICE

I certify that a copy of the Return to Motion to Remand for Reconstruction of the Record in the above-referenced case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of November, 2019.

Sarah Shipe
Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2019.

Lindsay M. Matthews (L.S.)
Notary Public for South Carolina
My Commission Expires: October 22, 2019.