

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of General Sessions**

**Maite Murphy
Circuit Court Judge**

Court of Appeals Case No.: 2019-000687

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SC Court of Appeals

The State Respondent,

v.

Gabrielle Oliva Lashane Davis-Kocsis.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

**Susan Barber Hackett
shackett@sccid.sc.gov
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201
803-734-1330**

**Jason Scott Luck
jluck@garrettlawsc.com
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
843.554.5515**

Attorneys for Appellant

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ARGUMENT IN REPLY

I. The trial court's burglary charge did not include language from State v. Singley, which is the current and correct law of South Carolina.

A trial court must charge the current and correct law of South Carolina. McCourt by McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). Kocsis' proposed jury charge accurately reflected the law of South Carolina as articulated by the Supreme Court in State v. Singley, 392 S.C. 270, 709 S.E.2d 603 (2011). In particular, it makes clear a person in "lawful possession" has custody and control of, and the right and expectation to be safe and secure in, the dwelling in question. (Jury charge memo p. 3). This is language found in Singley that the trial court's charge lacked. See Singley at 277, 709 S.E.2d at 606-7.

II. The State never connected Rosemary Hoffberg with 512 McCrystal Circle.

By the conclusion of the State's case, not a single witness uttered the name "Rosemary Hoffberg". The State's claim that Deputy Vandiver testified to speaking with "Ms. Hoffberg" is incorrect; Vandiver only testified she spoke with "the owner", but never identified, or even described, this person:

I checked quickly for security to make sure that, you know, there wasn't anybody inside the residence that shouldn't be there. The owner of the residence advised me that no one was inside the residence; but I did a quick sweep, called dispatch for an ambulance and separated the witnesses and waited on other officers to arrive to secure the crime scene.

(Tr. Trans. pp. 150-151). While multiple witnesses did testify that 512 McCrystal Circle was "Ms. Rose's" the State introduced no evidence whatsoever that "Ms. Rose" was Rosemary Hoffberg. In order to prove the allegations of the indictment, the State had to provide some evidence of Hoffberg's nickname. Cf. United States v. Farmer, 583 F.3d 131, 139-140 (2nd Cir. 2009) (Allowing a defendant to be identified by a nickname in an

indictment, as long as the prosecution elicited testimony confirming that nickname.). The State did not do so, and the trial court erred in failing to direct an acquittal on the burglary charge.

Contrary to the State's assertion, Kocsis does not claim 512 McCrystal Circle was not a "dwelling" under the burglary statute due to some prior "commotions". (Resp. Brief Arg. I & II). McCrystal Circle lost its status as a "dwelling" under the burglary statute because it was not a structure any person had a right or expectation to be safe and secure in. The witness testimony in this case established this property was not a place where any person had a right or expectation to be safe or secure.

III. South Carolina law mandates at least vacatur of Kocsis's kidnapping convictions.

South Carolina's kidnapping statute states the following:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code § 16-3-910. The plain language of this statute does not state the kidnapping victim and murder victim must be the same person. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Further, South Carolina case law holds a sentence for kidnapping must be vacated if the defendant is convicted of a murder occurring during the commission of the kidnapping. See e.g. Owens v. State, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998). The kidnapping and murder victims need not be the same to seek relief under S.C. Code 16-3-

20. In State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984), the defendant was sentenced to, *inter alia*, ten consecutive terms of life imprisonment, representing four counts of murder, five counts of kidnapping, and one count of safecracking. As defendant was on trial for the killing of four people, one of these kidnapping convictions was for a person who was not a murder victim. The South Carolina Supreme Court vacated Livingston's kidnapping convictions, citing S.C. Code § 16-3-20. The South Carolina Supreme Court also vacated kidnapping sentences under similar facts in State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). As set forth in Kocsis' principal brief, she is entitled to a new trial instructing the jury she may not be convicted for both murder and kidnapping, or at least vacatur of her kidnapping convictions.

IV. The State's arguments for playing the 911 recording are post-hoc justifications for exposing the jury to cumulative, emotional, and unfairly prejudicial material at the trial's outset.

The purpose of playing the 911 recording is apparent to any person who listens¹ to it: to make sure the first thing the jury hears is two highly distraught, highly intoxicated women wailing over their dying "friend". The State introduced it to begin their case with an unfairly prejudicial punch in the jury's emotional gut; it provided no evidence that was not later provided by live, sober witnesses. Unfortunately for Kocsis, it left such an impression on the jury that they asked to hear it again during deliberations. (Tr. Trans p. 524).

The State's justifications for why it introduced the 911 recording are not credible or even valid. It is obvious the State decided before trial it would introduce this recording,

¹ Kocsis would note that it appears the trial court did not listen to this recording before ruling it admissible. (Tr. Trans. pp. 53-55).

as it was the subject of a pretrial suppression hearing. (Tr. Trans. pp. 53-55). The State introduced the 911 recording during the direct examination of its first witness, which is inconsistent with the State's assertion that it used this recording for rehabilitation of witnesses – at this point in trial there was no witness testimony to rehabilitate.² The State's use of the 911 recording in this matter is not rehabilitation, but inadmissible bolstering. See Rule 801(d)(1)(B), SCRE; State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (prior consistent statement not admissible until witness charged with fabrication or improper motive or bias) see also United States v. Bolick, 917 F.2d 135, 138 (4th Cir. 1990) (finding introduction of prior consistent statement before impeachment reversible error: “[W]e note that the requirement that impeachment must precede rehabilitation should surprise no one. For how can one rehabilitate what has not yet been discredited?”); State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001) (explaining that Rule 801(d)(1)(B), SCRE, “only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence,” and not simply a challenge to the witness's credibility); State v. Foster, 354 S.C. 614, 621-622, 582 S.E.2d 426, 430 (2003) (holding prior consistent statements are admissible only pursuant to Rule 801(d)(1)(B), SCRE, which does not include rebutting “simple impeachment”).

² To the extent the recording was introduced to respond to Kocsis' opening statement, the opening statement of trial counsel is not evidence. See e.g. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997).

CONCLUSION

The Circuit Court should be reversed.

Dated: July 2, 2020

s/Susan B. Hackett

Susan Barber Hackett
shackett@sccid.sc.gov
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201
803-734-1330

Jason Scott Luck
jluck@garrettlawsc.com
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
843.554.5515

Attorneys for Appellant

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APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is bschumacher@scag.gov and a copy of the Initial Reply Brief of Appellant has been served on Gabrielle Oliva Lashane Davis Kocsis, #341232, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 2nd day of July, 2020.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT