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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COLETTE COLLINS

APPELLANT

APPELLATE CASE NO. 2018-000449

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting the recording of Appellant's thirty minute conversation with her husband, who later confessed to the murder, while he was incarcerated on unrelated charges at the county jail before Appellant's arrest, where the evidence was not relevant and its probative value, if any, was substantially outweighed by the danger of unfair prejudice in violation of Rules 402 and 403, SCRE, and where it was improper character and impeachment evidence under Rules 404, 608, and 613, SCRE?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on December 14, 2017 for accessory after the fact of murder. R. 346. Her case was called to trial on January 22, 2018 before the Honorable Doyet A. Early, III, and a jury. R. 1. Assistant Solicitors Kimberly Smith and Mary Jones represented the state, and Jeffrey Scott Stephens represented Appellant. R. 2.

On January 24, 2018, the jury found Appellant guilty. R. 335, ll. 22-25. She was sentenced to fifteen years imprisonment. R. 345, ll. 1-3.

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

STATEMENT OF FACTS

Samuel Collins, Appellant's estranged husband, shot and killed John Cherol shortly after midnight on October 28, 2015. Collins met Cherol in May or June 2015. R. 135, ll. 12-17. The two quickly became friends and spent a considerable amount of time together. R. 135, ll. 18-22; R. 233, ll. 10-25; R. 241, l. 21 – 242, l. 11. Collins, who became addicted to narcotic pain medication, including Oxycodone and Oxycontin, after he was injured the previous year, frequently sold pills to Cherol, who likewise suffered from addiction. R. 136, ll. 13-25; R. 156, l. 2 – 157, l. 10; R. 246, l. 15 – 247, l. 14. At the time of his death, Cherol owed Collins nearly a thousand dollars. R. 137, ll. 1-4. Collins had repeatedly pressured Cherol to repay the debt. R. 141, ll. 12-17.

Shortly before the murder, Collins began to suspect Cherol was involved in planning a recent burglary at the Collins residence where gunfire was exchanged. R. 137, l. 5 – 141, l. 3; R. 248, ll. 11-24. Collins confronted Cherol about his possible involvement, but Cherol was "evasive" and merely "beat around the bush." R. 141, l. 18 – 142, l. 2. However, a mutual friend told Collins that Cherol admitted to being involved in the burglary and "had set it up." R. 142, ll. 3-7. It was around this time that Collins became increasingly paranoid and his behavior erratic. R. 234, ll. 10-13; R. 240, l. 23 – 241, l. 6.

On October 27, 2015, the day before the murder, the same mutual friend who told Collins about Cherol's involvement in the burglary, told Collins that Cherol said "he wanted to put two bullets" in Collins and "that he had the gun . . . to do it with." R. 143, ll. 3-7.

That night, after leaving her job as a waitress and having numerous alcoholic beverages, Appellant drove to Cherol's house in the Pinecrest Subdivision in Bluffton. She arrived between 10:30 and 11:30 pm. Appellant had hoped to resolve the tension between Collins and Cherol,

which was "escalating quickly." The "whole situation" made her "nervous" and "scared." R. 248, l. 17 – 250, l. 3. Appellant spoke to Cherol at his home for about thirty to forty-five minutes. She then drove home. R. 250, ll. 13-19. When she got home, Collins was there and awake. He immediately questioned Appellant about her whereabouts. Appellant admitted she had gone to Cherol's house to discuss his possible involvement in the burglary. Collins became angry and upset. He accused Appellant of having an affair with Cherol and demanded she drive him to Cherol's house. R. 144, l. 9 – 146, l. 4; R. 250, l. 20 – 251, l. 20.

Collins told Appellant that he wanted to intimidate and scare Cherol because he was certain Cherol was involved in the burglary. Collins also wanted to ask Cherol about why Appellant was at his house that night. R. 146, ll. 5-9; R. 251, l. 21 – 252, l. 2. However, Collins assured Appellant that he would not hurt Cherol. R. 252, l. 21 – 253, l. 1.

Appellant ultimately drove Collins to Cherol's neighborhood and dropped him off on a side street. R. 146, l. 18 – 147, l. 1; R. 253, ll. 2-8. Collins got out of the car with a shotgun. R. 254, ll. 8-13; R. 270, ll. 2-22. After circling the neighborhood, Appellant later picked Collins up at the same spot where she had dropped him off. R. 266, ll. 15-24. She never heard any gunshots. R. 267, ll. 19-21; R. 256, ll. 15-18. Moreover, Appellant testified the couple did not talk about what happened. They did not talk on the way home, except when Collins directed Appellant to stop at Cody Brown's house, which was on the way. Collins did not tell her why he wanted to stop there, but once they arrived, Collins got out of the car with the shotgun. When he returned to the car, he no longer had the gun. R. 254, ll. 8-19; R. 270, l. 23 – 272, l. 16.

Appellant emphasized that there was no plan that night. She "just did whatever he [Collins] told [her] to do." R. 268, ll. 21-22. Appellant learned Cherol had been killed the following day while she was at work. R. 256, ll. 19-25. She later confronted Collins and he

admitted he had shot Cherol. However, Collins told Appellant not to talk about the murder with anyone. She testified that Collins was "very threatening and intimidating and didn't want [her] to discuss it, especially with [her] family or the police." Appellant was "very scared" and did not know what to do. She explained, "[I]f he [Collins] was capable of doing something like that to John [Cherol], then I didn't know what was going to happened to myself or my family." R. 257, l. 18 – 258, l. 18.

Collins, who was convicted by a jury of Cherol's murder in October 2017 and sentenced to fifty years imprisonment, testified against Appellant in exchange for a new sentencing hearing. R. 132, l. 24 – 134, l. 5. He admitted to approaching the back of Cherol's house on foot. He testified, "I didn't have it directly in my mind that [I was] going to kill him, I had it in my mind that I'm going there and maybe fire a couple shots possibly at the house. I had shots fired at me, I was angry, maybe I would scare him, and I don't know. I just didn't know at that point, I just was going to approach the house and see, I guess." R. 147, ll. 2-15. As Collins approached the back of the house, he saw Cherol outside. He could not see a second person, but he heard Cherol talking to someone. Collins pumped the shotgun, pointed it at Cherol, and fired. He pumped it again, aimed it away from Cherol, and fired again. He knew he had hit Cherol when he heard the second person, later identified as Joe Rueby, screaming. Collins panicked and returned to the car as fast as he could. R. 148, ll. 1-22.

The car was in the same spot it had been when Collins got out moments before. R. 148, ll. 23-25. Collins claimed when he climbed into the passenger seat, he had the shotgun in his lap. According to Collins, he told Appellant, "I shot him. Let's go." Appellant looked at him "really confused." Collins believed Appellant was "kind of asleep at first when [he] got in the car, because she was drunk." Collins repeated, "I shot him. Let's go." R. 149, ll. 1-13. Appellant

"still acted like she didn't comprehend what was going on" so Collins "put the car in drive . . . grabbed the wheel with [his] left hand and stomped on the gas, and started driving the car out to the street." Appellant eventually took over driving. Collins "directed her to drive [him] to Cody's house, which way to turn to take [him] to his house." R. 149, ll. 14-24. He put the shotgun in the back of the pickup truck outside Cody Brown's house. R. 149, ll. 21-25. It was dark outside so Collins did not know whether Appellant saw him dispose of the firearm. R. 150, ll. 1-3.

Collins was arrested a few days after the murder on unrelated charges. He was incarcerated on November 7, 2015. Appellant came to visit him at the detention center that day. R. 151, ll. 9-20. They had a thirty minute visit, which was recorded. See State Exhibit No. 67 (CD of Jail Call). After the investigation was complete, Collins was charged with murder. Appellant was ultimately charged with accessory after the fact.

ARGUMENT

The trial judge abused his discretion by admitting the recording of Appellant's thirty minute conversation with her husband, who later confessed to the murder, while he was incarcerated on unrelated charges at the county jail before Appellant's arrest, where the evidence was not relevant and its probative value, if any, was substantially outweighed by the danger of unfair prejudice in violation of Rules 402 and 403, SCRE, and where it was improper character and impeachment evidence under Rules 404, 608, and 613, SCRE.

How the Issue was Presented Below

To rebut Appellant's testimony, the state sought to present an audio recording of Appellant's visit with her husband, Samuel Collins, while he was incarcerated on unrelated charges at the Beaufort County Detention Center on November 7, 2015 shortly after the murder. The conversation took place during the early stages of the investigation before Collins was arrested for murder and Appellant was arrested for accessory after the fact. The assistant solicitor claimed the purpose of introducing the recording was to "show that she [Appellant] was not scared, intimidated, that she actually was still very much in love with him [Samuel Collins] and was trying to post bond with him at that time." R. 208, ll. 2-11.

Appellant objected to the admission of the recording based on numerous grounds, including (1) the lack of relevance, (2) Rule 403, SCRE, arguing any probative value of the recording was substantially outweighed by the danger of unfair prejudice, and (3) as improper impeachment evidence. R. 280, l. 13 – 281, l. 13. As to relevance, defense counsel emphasized that during the jail visit Appellant and Collins never discussed the murder of John Cherol or the circumstances surrounding the murder. Specifically, he argued, "There's no discussion of this

case, the facts of this case, any of the facts regarding the killing of John Cherol in the recording." R. 280, l. 18 – 281, l. 2.

Citing Rule 403, SCRE, defense counsel asserted "any minor relevance" the evidence may have was outweighed by "the danger of unfair prejudice." He emphasized the foul language used by Appellant and her estranged husband during the conversation as well as "obscene comments about law enforcement officers" that were made by the pair. R. 281, ll. 3-13. Counsel later maintained the conversation between Appellant and Collins during the recording about the execution of a search warrant at the couple's house in which drugs were found was further proof of unfair prejudice. R. 284, ll. 14-20.

Lastly, defense counsel argued the recording was improper impeachment evidence because it was not evidence of character or bias nor was it evidence of a prior inconsistent statement. He emphasized that Appellant admitted during her testimony that she visited Collins at the detention center after his arrest and discussed the possibility of him posting bond. She further admitted that she loved and still cared for Collins at the time. Therefore, defense counsel concluded there were no prior inconsistent statements that could be used to impeach Appellant and extrinsic evidence, in the form of the recording, was inadmissible. R. 281, l. 14 – 282, l. 4.

In response, the assistant solicitor maintained that Appellant, by testifying, "brought her character in to play." She also contended the recording was evidence of prior inconsistent statements made by Appellant. The solicitor claimed Appellant testified that she did not help Collins attempt to post bond, but during the recorded conversation Appellant said she was "going to try to get him out." R. 283, ll. 5-10. Finally, the solicitor argued the recording showed Appellant was not scared of Collins, that she loved him, and "her demeanor at the time." R. 283, l. 21 – 284, l. 5.

After listening to the recording, the trial judge ultimately held the recording was admissible. He found the evidence relevant and that its relevance outweighed any prejudicial effect under Rule 403, SCRE. As far as the use of profanity, the judge maintained it "was their [Collins and Appellant's] everyday language" and "if you are going to talk like that obviously people will hear it." The judge further found that the credibility of the witnesses was a "key issue" in the case and that the recording would assist the jurors in determining "who they believe." R. 290, l. 8 – 291, l. 17.

Appellant properly renewed her objection to the admission of the recording, which was marked as State's Exhibit No. 67 and is on file with this Court, when it was entered into evidence and played for the jury. R. 293, l. 21 – 294, l. 7.

Discussion

The trial judge abused his discretion by admitting the recording of Appellant's thirty minute conversation with her husband while he was incarcerated on unrelated charges at the Beaufort County Detention Center before Appellant's arrest because the evidence had absolutely no relevance since the murder and the circumstances surrounding the murder were never discussed, and the probative value of the recording, if any, was substantially outweighed by the danger of unfair prejudice in violation of Rules 402 and 403, SCRE. The evidence was also improper character and impeachment evidence under Rules 404, 608, and 613, SCRE. The state sought to admit the evidence solely to impinge Appellant's character, particularly where Appellant and Collins repeatedly used profanity during the conversation, made obscene comments about law enforcement, and revealed that drugs were found in the couple's house during the execution of a search warrant. This inflammatory evidence should have been excluded.

Rules 402 and 403, SCRE

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE.

The recording of Appellant's conversation with her husband while he was incarcerated on unrelated charges shortly after the murder had absolutely no relevance to whether Appellant knew Collins had committed murder, and intentionally helped him escape from arrest, conviction, or punishment. See S.C. Code Ann. § 16-1-55. The couple never discussed the murder or the circumstances surrounding the murder during the entire thirty minute conversation. The focus of the conversation was largely on the possibility of Collins posting bond on his unrelated charges, the couple's financial situation, including the sale of a boat, the couple's son, the execution of a search warrant at the family's house, where a large quantity of the drugs were seized, and Collins' then condition or circumstances given that he was incarcerated, including the fact that he was having withdrawal symptoms from narcotic pain medication. See State's Exhibit No. 67.

Not only did the evidence lack any relevance, any probative value the recording may have had was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. As discussed, during their conversation, Appellant and Collins repeatedly used profanity, made obscene comments about law enforcement, and revealed that drugs were found in the couple's house during the execution of a search warrant. All of these circumstances were prejudicial to

Appellant and likely inflamed the jury and led them to convict Appellant on an improper basis. The sole purpose of the evidence was to attempt to demonstrate Appellant's bad character. As such, it should have been excluded.

Rule 404, SCRE

"Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." State v. Brown, 344 S.C. 70, 73, 543 S.E.2d 552, 554 (2001). Rule 404(a), SCRE, states the general rule that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The recorded conversation between Appellant and her husband was not admissible under Rule 404(a) because it was improper character evidence that the state sought to admit to prove Appellant acted in conformity therewith on the morning of the murder and during the subsequent days or weeks.

Rule 608, SCRE

"Rule 608(a) permits the credibility of a witness to be impeached in the form of opinion or reputation testimony, but only for 'truthfulness or untruthfulness.'" State v. Grace, 350 S.C. 19, 26, 564 S.E.2d 331, 334 (Ct. App. 2002). Rule 608(b) provides when specific acts evidence may be used to impeach a witness's testimony. Id. It reads in relevant part:

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, **may not be proved by extrinsic evidence.** They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Rule 608(b), SCRE (emphasis added).

The recording of Appellant's conversation with her husband was not admissible under subsection (a) because it was not in the form of opinion or reputation testimony. It was also not admissible under subsection (b) because under the rule specific instances of conduct of a witness may not be proved by extrinsic evidence. The recording undoubtedly constitutes extrinsic evidence.

Rule 608(c) allows for the admission of evidence of bias. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). It states:

> **(c) Evidence of Bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

The recorded conversation between Appellant and her husband should have been excluded under subsection (c) because it did not demonstrate any evidence of bias, prejudice, or motive to misrepresent. Again, the couple's conversation concerned largely the possibility of Collins posting bond on his unrelated charges, the couple's financial situation, including the sale of a boat, the couple's son, the execution of a search warrant at the family's house, where a large quantity of the drugs were seized, and Collins' then condition or circumstances given that he was incarcerated, including the fact that he was having withdrawal symptoms from narcotic pain medication. No part of this discussion could be used as evidence of bias, prejudice, or motive to misrepresent. Therefore, the recording was also not admissible under subsection (c) and should have been excluded.

Rule 613, SCRE

Rule 613, SCRE governs the admission of extrinsic evidence of a prior inconsistent statement. It reads in relevant part:

> (a) **Examining Witness Concerning Prior Statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the

statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. **If a witness does not admit that he had made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.**

Rule 613, SCRE (emphasis added)

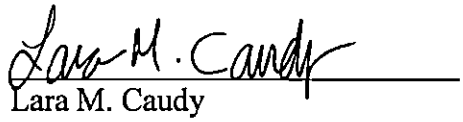
The recording of Appellant's conversation with her husband was not admissible pursuant to Rule 613 because Appellant never made any prior inconsistent statements during the recorded conversation. Appellant testified that she visited Collins on November 7, 2015 while he was in jail. She admitted that the two talked about Collins' bond and that Collins asked her to contact his family to assist in posting bond. However, Appellant was not actually attempting to help him post bond. She merely told Collins she would do so. R. 273, l. 11 – 274, l. 4. The recorded conversation corroborates Appellant's testimony. See State's Exhibit No. 67. Appellant further admitted that she loved Collins at that time, which is consistent with the statements she made during the recording. R. 258, ll. 20-23; R. 274, ll. 5-6. Because there were not prior inconsistent statements made by Appellant during the recording, it was not admissible under Rule 613 and should have been excluded.

Based on the foregoing argument, the trial judge erred by admitting the recorded conversation between Appellant and Collins pursuant to Rules 402, 403, 404, 608, and 613, SCRE. Appellant respectfully requests this Court reverse her conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse her conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of March, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

March 11, 2019

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