STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARL RAFEL GADDIS, JR.

APPELLANT

APPELLATE CASE NO. 2021-000826

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err when he allowed the state to recall a witness and introduce a new audio and visual recording of Appellant based upon the state's argument that the version previously introduced by the state was of insufficient audio quality for the jury to hear what Appellant said as those words formed the basis of the state's theory of the case and assisted the state in defeating Appellant's claim of self-defense?

STATEMENT OF THE CASE

On July 24, 2019, an Horry County grand jury indicted Appellant for two counts of possession of a Schedule I-V drug (2019-GS-26-3362), possession of marijuana with intent to distribute, unlawful carrying of a pistol, possession of a weapon during the commission of a violent crime, and murder. R. 434 (indictments). On July 19-22, 2021, the state, represented by Cara Walker and Josh Holford, called the case to trial before the Honorable D. Craig Brown. R. 1. Johnny Gardner represented Appellant. R. 1. The jury found Appellant guilty on all counts. R. 421, l. 6 – R. 422, l. 12. Judge Brown sentenced Appellant to six months for each count of possession of a Schedule I-V drug, to one year imprisonment for unlawful carrying of a pistol, to five years imprisonment for PWID marijuana, to five years imprisonment for possession of a stolen pistol, and to life imprisonment without the possibility of parole for murder. R. 429, l. 4 – R. 430, l. 5. Judge Brown imposed no sentence for the offense of possession of a weapon during the commission of a violent crime based upon S.C. Code Ann. § 16-23-490(a). R. 430, ll. 6-13.

On July 28, 2021, Appellant served his notice of appeal. This brief 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.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial judge erred when he allowed the state to recall a witness and introduce a new audio and visual recording of Appellant based upon the state's argument that the version previously introduced by the state was of insufficient audio quality for the jury to hear what Appellant said as those words formed the basis of the state's theory of the case and assisted the state in defeating Appellant's claim of self-defense.

Relevant facts

Shannon Toole retired from the Myrtle Beach Police Department on July 1, 2020. R. 123, ll. 17-24. However, on June 7, 2018, he was in the traffic division of the police department. R. 124, ll. 1-8. During the evening of June 7, 2018, he was "working a fatal motor vehicle collision" when he heard a call over the radio regarding "a shooting on the Boulevard." R. 124, ll. 16-20. After finishing his investigation of the fatal car crash, Toole drove toward the shooting location. R. 124, ll. 21-25. Toole had received via email photographs of two individuals who were wanted in connection with the shooting. R. 125, ll. 2-8. While traveling, he saw two individuals who resembled the suspects walking across an intersection into a parking lot. R. 125, ll. 9-17. Toole notified his fellow officers of his belief that the individuals involved in the shooting were in the specific parking lot. R. 127, ll. 1-4.

After other officers arrived and arrested Applicant, Toole placed Applicant in the back of his police car. R. 129, ll. 11-17. Toole's car was equipped with a video camera that captured Applicant while he sat alone in the car. R. 130, l. 17 – R. 131, l. 7. During the trial, the trial judge admitted two videos, one was redacted, into evidence showing Applicant while he was in the car. R. 132, ll. 1-25; State's Exhibits #64, #65. Trial counsel did not object to the recordings. R. 132, l. 24. Thereafter, the state played the redacted version for the jury. R. 133,

ll. 2-8; State's Exhibit #65. The video captured Applicant talking to himself. R. 133, ll. 13-15. Trial counsel asked no questions of Toole. R. 137, l. 11.

The following day, the state requested to recall Toole as a witness to introduce a new version of State's Exhibit #65. R. 138, l. 21 – R. 140, l. 8. According to the state, the version played for the jury "was nearly impossible to hear what [Applicant] was saying." R. 139, ll. 5-7. The state argued "this [was] merely a technical issue." R. 139, ll. 7-8. The state claimed that the new version would allow the jury to "clearly hear [Applicant] saying he took the life because he was disrespectful." R. 139, ll. 11-13. During the overnight break, the state "re-burn[ed] that audio file using a separate program on the computer." R. 139, ll. 13-17. The state "believe[d] that [the new version] would aid the jury in actually being able to hear what was going on in the back of the car, and that the tape that [was] in evidence right now [was] extremely difficult to hear." R. 139, ll. 19-23.

Trial counsel objected, explaining the "new video" "was reworked ... in the middle of trial." R. 140, l. 23 – R. 141, l. 2. Trial counsel noted the case had been pending for three years, which gave the state plenty of time to sort out any alleged technical problems with its evidence. R. 141, ll. 1-2. Trial counsel also noted that he did not cross-examine Toole; thus, there was no new evidence uncovered on cross-examination that necessitated recalling Toole as a witness. R. 142, ll. 1-12.

The trial judge acknowledged that the audio on the exhibit played during Toole's testimony was very difficult to understand. R. 186, l. 24 – R. 187, l. 4. Relying upon State v. White, 416 S.C. 135, 784 S.E.2d 695 (Ct. App. 2016) and Rule 611, SCRE, the judge granted the state's request to recall Toole and admit the new version of the recording of Applicant in Toole's police car. R. 187, l. 12 – R. 188, l. 18.

Thereafter, the state recalled Toole as a witness. R. 222, l. 20. Toole testified that State's Exhibit #94 was "a version where the sound track [was] clearer." R. 223, ll. 13-17. Toole claimed, however, that he had not done anything to "enhance" the audio. R. 224, ll. 5-8. Yet, the audio was "very clear now." R. 224, ll. 9-11. Nevertheless, he claimed State's Exhibit #94 was "as clear as [his] original in-car footage ... when [he] originally watched it." R. 224, ll. 21-25. When asked by trial counsel "what changed between when [he] could hear it and understand it, and then [the day prior] when [he] played it for [the jury] in the courtroom," Toole answered, "The only thing I could figure would be the equipment involved in replaying the audio." R. 225, ll. 23-24.

Discussion

The trial judge's reliance upon State v. White, 416 S.C. 135, 784 S.E.2d 695 (Ct. App. 2016) was misplaced. During White's trial, "the state sought to admit into evidence a video of the victim's forensic interview, but the parties and the trial court were unable to clearly hear the audio of the interview." State v. White, 416 S.C. 135, 137, 784 S.E.2d 695, 696 (Ct. App. 2016). Therefore, "a court reporter prepared a transcript of the audio for the jury to use while watching the video." Id. On appeal, White challenged the judge allow the jury to use the transcript. Id. The Court of Appeals explained that under statutory law, an audio and visual recording of the forensic interview was admissible in order to give "the jurors direct access – audio and visual – to the victim's statements to enable the jurors to more accurately evaluate the victim's credibility." Id. Thus, the Court concluded, "there [was] an important difference between using a transcript to assist the jury in listening to the statement and using the transcript to replace an inaudible statement. Id.

The Court of Appeals held the trial court did not abuse its discretion in allowing the jurors to use the transcript. Id. at 138, 784 S.E.2d at 696. However, the Court limited its decision to those involving forensic interviews as specifically authorized by the governing statute. Id. The Court explained that "[b]ecause the trial court focused on the purposes of the statute and fashioned a solution to the audio problem consistent with those purposes," the trial court did not abuse its discretion. Id.

The trial court's reliance on White was misplaced because the Court of Appeals specifically limited the decision to those involving the admissibility of forensic interviews conducted in accordance with the governing statutory law. The video at issue here did not involve a forensic interview and no statutory law governs the admissibility of dash cam videos or the videos of defendants generally.

Under the South Carolina Rules of Evidence, "[a] witness may be re-examined as to the same matters to which he testified only in the discretion of the court." Rule 611(d), SCRE. The right to and scope of recross examination is within the sound discretion of the trial court. Liberty Mutual Ins. Co. v. Gould, 266 S.C. 521, 224 S.E.2d 715 (1976). "[A] trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant." State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000). "Absent the introduction of any new matter on re-direct examination, the rule is that recross-examination is not required. Without something new, a party has the last word with his own witness." United States v. Fleschner, 98 F.3d 155, 157 (4th Cir.1996).

The trial judge erred in allow the state to recall Toole as a witness. As trial counsel noted, there was no new matter to address with Toole as trial counsel did not even cross examine

him. The sole purpose, as admitted by the state, was to allow the state to buttress its weak case with improved audio of Appellant in the police car. The state had three years to "iron out the wrinkles," including any technical wrinkles, in its case. Yet, the state did not. Only when the state realized the audio of the video it played for the jury did not support its theme as presented in its opening did the state demand a "do over." The judge abused his discretion by allowing the state the opportunity to recall Toole and introduce an improved video.

Allowing the state to introduce State's Exhibit #94 harmed Appellant because what Appellant allegedly said while he sat in Toole's car formed the basis of the state's theme and provided the state with an argument to defeat Appellant's self-defense claim. In its opening statement, the state told the jurors that "what happened that night was drugs, guns, and disrespect." R. 70, ll. 18-19. The state claimed Appellant "felt disrespected" by the deceased. R. 71, l. 24. According to the state, "Disrespect doesn't mean to end a life for me." R. 71, l. 25 – R. 72, l. 1.

The state continued to rely on this new video in its closing argument to the jury. The first comments to the jury by the state concerned the new video: "He's placed into the back of a police car. You all know. There is video back there. There is the in-car video just capturing [Appellant] alone with his thoughts and having a conversation …." R. 389, ll. 18-21. The state argued that what Appellant said in those moments was "the truth." R. 390, ll. 2-4. Reminding the jurors that they would have the video in the jury room, the state asked the jurors to "take as much time [as] you need or want to review it again." R. 390, ll. 4-7.

The state argued Appellant admitted on the video to killing the deceased because he was "disrespected." R. 391, ll. 2-5. To refute Appellant's argument that he shot in self-defense, the

state asked the jurors to "watch that video" and asks if Appellant shot because he feared for his life or if he shot because he was "disrespected." R. 397, ll. 1-7.

During the deliberations, the jury asked for speakers to listen to some evidence. R. 416, ll. 21-23; R. 433. The judge advised that the jurors could listen to State's Exhibit #94 in the courtroom. R. 417, ll. 1-14. The jurors returned to the courtroom where they listened to State's Exhibit #94 yet again. R. 417, l. 19 – R. 418, l. 5. An hour later, the jurors informed the judge that the jury was "unable to come to a conclusion at this time." R. 418, ll. 11-13; R. 433. The judge excused the jurors for the evening. R. 418, ll. 22-25. The jurors returned the following day and resumed deliberations. R. 419, l. 17 – R. 420, l. 5. Within an hour, the jury returned with its guilty verdicts. R. 420, ll. 22-23. Clearly, the new version of the video of Appellant in the police car influenced the jury's decision as it requested to watch and hear the video during its deliberations and delivered its verdicts after previously declaring it was unable to reach a unanimous decision.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions for murder and possession of a weapon during the commission of a violent crime and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of March, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Earl Rafel Gaddis, Jr. states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and she was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge D. Craig Brown, which was held on July 19-22, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Earl Rafel Gaddis, Jr.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of March, 2022.

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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. Entire trial transcript;
2. State's Exhibits #10, #11, #12, #13 (photos);
3. State's Exhibits #63, #64, #65, #94 (DVDs);
4. Court's Exhibits #5, #6 (jury notes);
5. Indictments; and
6. Sentence sheets.

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

Susan B. Hackett

Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330
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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."

Susan B. Hackett

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This 28th day of March, 2022.