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A05-427

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Robert Diablo Kendell,

Appellant.

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

MIKE HATCH
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ATTORNEYS FOR RESPONDENT

APPELLANT

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To: the Minnesota Supreme Court

Argument

1). The trial court committed Prejudicial Error when it refused Kendell's Motion to preclude the alleged statement "I'm going to hell."

A). On September 3, 2004, the trial Court ruled to allow the statement "I'm going to hell". (T. at 328, 329) Kendell, argued that it was not an admission, and that it's probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, and misleading. (T. 327, 328)

The statement was misinterpreted, and very prejudicial. In Jackson v. State, 447 N.W. 2d 430 (Minn. 1989) the court of appeals indicated that, while it's a statement, it's not, an admission and that it turns into a character trait that's being used and would be improper to be used against him.

2). The trial court committed

Prejudicial Error when it allowed the 911 tape to be played more than once.

A). On October 13, 2004, the trial Court ruled to allow the 911 tape to be played with an admonishment to the jury to, "listen caretully, because this may be the only time you're going to hear these 911 calls." (T. at 1748)

On October 20, 2004, the trial Court ruled after hearing arguements from both sides, that the jury would receive instructions ~~tomro~~ that they would have to rely on thier recollection in regards to the 911 tape. (T. at 2875)

On October 21, 2004, the trial Court went back on it's ruling and decided to allow the 911 tape to be replayed during summations. (T. at 2881, 2882)

The trial Court had detterred to two case laws State v. Koushar, 470 N.W. 2d 509, and State v.

Tossen, 282 N.W. 2d 496 Supreme Court, 1979. The Court quoted the dissent from, Justice Simonett, which stated, "In this instance, with the credibility of the two main actors critical, to permit the complaining witness to appear live in the jury room by video alone with the jurors with no one present to at least remind the jurors of another side to the case was prejudicial error." (T. at 2873, 2874)

Kendell's, argument is that the trial Court erred in allowing the 911 tape to be played before the jury again (T. at 2898-2907). The replaying of the 911 tape was akin to the cases the trial Court cited, Tossen, and, Koushar, which it indicated part of the concern of going back into the jury room is it's like having the victim right back in the jury room when they're deliberating. The

replaying of the 911 tape was like the State putting Ms. C[redacted] back in front of the jury.

Kendell's argument is that the 911 tape was given undue weight by the jury, as we see the jury requested "to get the transcript from the 911 call." (T. at 3093)

Conclusion

For the reasons stated above, ~~Ked~~ Kendell requests that this Court grant him a new trial.

Date: September 03, 2005

Respectfully Submitted,
Robert Kendell
Robert Kendell