

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-730

RUTH ANN LAGOY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 23, 2010

APPEAL FROM THE STONE COUNTY
CIRCUIT COURT
[NO. CR-08-2]

HONORABLE JOHN DAN KEMP,
JUDGE

REBRIEFING ORDERED

LARRY D. VAUGHT, Chief Judge

On December 5, 2008, appellant Ruth Lagoy was tried by jury on the charge of battery in the first degree and tampering with physical evidence. She was convicted of the battery after the jury heard evidence from the victim, Donald Daum, that Lagoy raised a gun, shot him in the head, and that he felt the sting of the bullet. During trial, an audio recording of a statement that Lagoy gave to police was introduced into evidence as “State’s Exhibit Seven.” The audio recording was played in open court but not transcribed into the record. In her directed-verdict motion on the battery charge, Lagoy alleged that she acted in self defense as shown by her statement to police. This justification argument is also the primary focus of Lagoy’s pro se points on appeal.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Rules of the

Arkansas Supreme Court and Court of Appeals, Lagoy’s counsel filed a motion to withdraw, arguing that an appeal in this case is wholly without merit. This type of motion must be accompanied by an abstract and brief referring to everything in the record that might arguably support an appeal, including all motions, objections, and requests decided adversely to appellant, and a statement of reasons why none of those rulings would be a meritorious ground for reversal. Ark. Sup. Ct. R. 4-3(k). Lagoy was provided with a copy of her counsel’s brief and was notified of her right to file a list of points on appeal within thirty days, which she has done.

However, we are not able to reach the merits of the case or consider counsel’s motion to withdraw because the abstract is incomplete. It is well-settled law that the record on appeal is confined to that which is abstracted, and failure to abstract a critical matter precludes this court from considering the issue on appeal. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995). In this case, the substance of Lagoy’s tape-recorded, statement is not included in the abstract. As such, we are unable to consider the contents of the tape in order to determine whether Lagoy suffered prejudice in the denial of her directed-verdict motion, as we do not know the specifics of her justification claim.

Although Lagoy’s counsel moved our court for leave not to abstract the audiotape exhibit—asserting Rule 4-2(a)(6) of the Supreme Court Rules, which provides that exhibits need not be abstracted where it is impractical to do so or where our court has waived the requirement—the motion was denied. This denial was predicated on our supreme court’s directive regarding audiotape-abstracting procedure. Our supreme court has held “only if the

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statement is completely incomprehensible should abstracting be deferred.” *Hodge v. State*, 329 Ark. 57, 57–58, 945 S.W.2d 384, 384 (1997).

As such, because the requirement that the audiotape be abstracted was not waived—to the contrary; it was specifically denied—we order rebriefing, allowing Lagoy’s counsel thirty additional days in which to file a substituted brief, abstract, and addendum to cure any and all deficiencies. Ark. Sup. Ct. R. 4-2(b)(3).

Rebriefing ordered.

GRUBER and BROWN, JJ., agree.