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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS

The Honorable Thomas W Cooper, Jr., Circuit Court Judge

Appellate Case No. 2019-000749

INITIAL BRIEF OF APPELLANT

The State of South Carolina — Respondent

v.

Tashonby P Wilson. — Appellant

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STATEMENT OF THE CASE

On March 11, 2019 the Lexington County Grand Jury indicted appellant for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Appellant's case was called to trial on April 23, 2019, before the Honorable G. Thomas Cooper, and a jury. Joshua Koger represented Appellant. Bradley Pogue and Luke Pincelli were the assistant solicitors. Tr. p. 1.

On April 26, 2019 the jury reached a verdict on all three indictments as follows: 2019-GS-32-1182 guilty of attempted murder; 2019-GS-32-1184 guilty of the lesser included offense of assault and battery of a high and aggravated nature; and, 2019-GS-32-1188 guilty of possession of a weapon duei9ng the commission of a violent crime. Tr. p. 592 lines 5-16. Immediately thereafter trial counsel filed a motion for new trial which was denied. Tr. p. 599. Judge Cooper sentenced appellant to five years imprisonment for possession of a weapon during a violent crimes; twenty years imprisonment for assault and battery of a high and aggravated nature; and, twenty-seven years for attempted murder with all sentences to run concurrently. Tr. p. 606.

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.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

SUMMARY OF RELEVANT TRIAL TESTIMONY

The case against appellant centers upon the alleged shootings of Ashley Jeffcoat and Brittany McCrae during the evening of September 26, 2016 at the Boardwalk Villas in Lexington County South Carolina.

State's Witnesses

The State's case against appellant rested primarily upon the testimony of four fact witnesses and a hearsay statement given to a 911 operator. The four fact witnesses were: Thomas Seehof a.k.a "Tattoo" ("Seehof'); Job Quarles a.k.a "Q" ("Quarles'); Ashley Jeffcoat ("Jeffcoat'); and, Brittany McCrae ("McCrae'). Each of the four testifying fact witnesses testified to facts occurring during the relevant time period from which the jury could have questioned these witnesses' credibility.

Seehof testified that he was addicted to heroin and was using one and one-half grams every day. Tr. p. 275 lines 13-19. Quarles testified that he was earning three thousand dollars a day selling a combination of drugs including crack and heroin. Tr. p. 389 lines 18- 21; p. 396 lines 15-17. Quarles admitted that he sold guns, Tr. p. 392 lines 5-7 and that he disposed of the gun suspected in the shootings. Tr. p. 384 line2. Jeffcoat testified that she was addicted to heroin and was buying heroin from appellant daily. Tr. p. 399 lines 13-18. McCrae was also addicted to heroin. Tr. p. 418 line 11 and on September 26, 2016 both she and Jeffcoat were both suffering from withdrawal. Tr. p. 421 line 9.

The testimony from Seehof, Jeffcoat and McCrae was generally consistent regarding the timeline on September 26th, but would substantially conflict with appellant's subsequent

testimony. The three state's witnesses alleged that on the 26th, Seehof drove the three of them to appellant's room at the Palmetto Inn in Columbia. Once there all three went into appellant's room. Tr. p. 275 lines 20-25; Tr. p. 401 lines 12-13; and, Tr. p. 420 line 22 – p. 421 line 5. Jeffcoat and appellant then got into a verbal dispute. Tr. p. p. 401 lines 3-11; Tr. p. 421 lines 7-12. While in appellant's room, Jeffcoat stole appellant's drugs. Tr. p. 276 lines 16-21; Tr. 401 line 10; Tr. 423 lines 12-25. The three then drive off and went to Seehof's condominium at Boardwalk Villas, 22 Boardwalk Lane Lexington, South Carolina. Tr. p 277 lines 6-8; Tr. p. 405 line 1-6; Tr. 429 lines 1-23. Shortly after the three arrived at Seehof's condominium appellant arrives and enters the unit. Tr. p. 280 lines 24- p. 281 line 5; Tr. p. 401 line 10; TR 423 lines 12-25. While in the condominium appellant allegedly shoots Jeffcoat in the stomach. Tr. p. 282 lines 12-13; Tr. p. 405 lines 21-23; Tr. p. 432 lines 1-4. Appellant then allegedly shoots McCrae. Tr. p. 406 lines 3-8; Tr. p. 435 line 10.

Quarles testified that appellant arrived at his room at the Economy Inn in Columbia driving a Honda. Tr. p. 380 line 25- 381 line 14. Appellant then allegedly asked Quarles for a gun and Quarles sold him his Smith & Wesson MP 40 handgun for three hundred and fifty dollars. Tr. p. 381 line 2- p. 381 line 7. Quarles testified that appellant returned the gun to him the next day, and Quarles then got rid of the gun. Tr. p. 383 line 2 – 384 line 2. After the shooting at Seehof's condominium a neighbor called 911 and Seehof's nine year old son is heard identifying appellant as the shooter. Tr. p. 102 lines 7-9.

Appellant's Trial Testimony

On September 26, 2016 appellant was living in Room 120 at the Palmetto Inn in Columbia, South Carolina. Tr. p. 470 line 6. In May of 2016 appellant had been in a serious auto accident and because of the injuries he sustained he could no longer perform his job at the Fort Jackson

Pizza Hut. Tr. p. 466 lines 19-23. On the morning of September 26th, appellant was preparing to travel to his personal injury lawyer's office in Charleston in order to pick up a check. Tr. p. 468 line 10- 14. Appellant left Columbia around 8:30 a.m. and retuned from Charleston between 1:30 and 2 p.m. the same day.

Once he returned to Charleston appellant got in contact with the mother of his children. Tr. p. 476 line 10 and she took him to run errands including paying his phone bill, Tr. p. 476 line 14-15; buying food for his children and shoes for his son. Tr. p. 477 lines 1-3. She then returned appellant to his room at the Palmetto Inn around 4:15 p.m. Tr. p. 477 lines 13 – 17.

When appellant returned to Columbia, he started receiving calls from his customers that were looking to buy drugs. Tr. p. 478 lines 5-12. That afternoon appellant did not have any drugs so he attempted to reach Quarles in order to buy drugs that appellant could resell to his customers. However, appellant was never able to get in touch with Quarles. Tr. p 479 lines 18- 22. On September 26th Jeffcoat and McCrae were looking to get drugs from appellant that afternoon. Tr. p. 480 lines 21-24. Jeffcoat and McCrae came to appellant's room three or four times that afternoon looking for drugs. Appellant testified that Jeffcoat and McCrae were real "active"; they were fidgeting, not happy, and upset because they did not have enough money to buy the drugs they were craving. Tr. p. 481 lines 18-23. However appellant do not have any drugs to give them. Tr. p. 481 line 23.

Except for leaving the room around 6 p.m. to have a conversation with Lacy Johnson, appellant never left his motel room. Tr. p. 482 lines 13- p. 483 line 18. Appellant testified that Lacy Johnson stayed in another room at the Palmetto Inn where she cooked crack cocaine for Quarles. After the conversation with Lacy Johnson, appellant returned to his room to relax and smoke marijuana with his roommate Jordan Palmer. Tr. p. 486 line 5- 23. Appellant remained in

the room until he was arrested later that evening by Lieutenant Laintz. Tr. p. 487 lines 10- 13. Appellant testified that he never went to the Boardwalk Villas on September 26, 2016. Tr. p. 498 lines 1-3. Appellant had never ever been to Seehof's condominium at the apartment complex. Tr. p. 489 lines 4- 10. Appellant testified that he never spoke with Quarles on the 26th nor did he ever get a gun from him. Tr. p. 494 lines 10-15.

ARGUMENT

I.

Where a witness was testifying directly from a computer-aided dispatch report (CAD) but the CAD report was not introduced as evidence, the Court erred in ruling that hearsay statements from the CAD report were admissible under the business records exception to the rule against hearsay testimony.

Facts

Nikki Rodgers, Lexington County Communications Chief, was the State's first witness. Chief Rodgers testified to the agencies' computer-aided dispatch system and how the agency generates and maintains CAD reports. Tr. p. 96 lines 10- 23. Then Chief Rodgers started reading from the CAD report generated on the evening of September 26, 2016. Tr. p. 99 lines 5-24. Defense counsel objected to the witness continuing to read from the CAD report by asserting that the proper foundation had not been laid. Tr. p. 100 lines 14-16. Trial court asked defense counsel to repeat exactly what his was the objection. Tr. p. 100 17-20. Trial counsel responded: *Your Honor, improper -- she was -- she was about to name the person named in the report, and the proper foundation had not been allowed for her to have done that.* Tr. p. 100 lines 21-24. In response the solicitor argued: *that the witness has demonstrated that she has -- keeps this in the ordinary course of business. She has care and custody of such records.* Tr. p. 101 lines 5-8.

The court allowed the introduction of the report as a business record and found that the proper foundation had been laid under Rule 803 (6) SCRE. The judge added that the witness could read from the entirety of the report *as long as we're not talking about subjective opinions and judgments*. Tr. p. 101 lines 9-19. Defense counsel then asked that his objection be noted. Tr. p. 101 lines 20-21. Following the court's ruling the solicitor neglected to offer the CAD report into evidence. Chief Rodgers then read the following statement straight from the CAD report: *"Caller*

is at the very end of the Subdivision. Shooter is Wilson, Tashiby (verbatim). Left in a small, black Toyota" Tr. p. 102 lines 3- 9.

Discussion

Rule 801(c) SCRE defines hearsay as *a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.* Rule 802 SCRE provides that *[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute*. The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014). Chief Rodgers did not witness the shooting and her knowledge of the incident was limited to the information contained in the CAD report. Thus Chief Rodgers' testimony from the CAD report that "the shooter is Tashiby (sic) Wilson" was hearsay because it was an out of court statement that the State offered as proof that appellant shot McCrae and Jeffcoat.

The court held that the testimony from the CAD report fit within an exception to the rule against hearsay, namely the business records exception. This exception to the rule against hearsay is found in Rule 803(6) SCRE which provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this

> subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Appellant concedes that the physical copy of the CAD report from which Chief Rodgers read into evidence may have met the requirements of the business records exception. However, the exception only applies to the actual record and it does not permit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence. Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 72, 773 S.E.2d 607, 614 (Ct. App. 2015). Therefore since Chief Rogers' statement that Wilson is the shooter was hearsay; and since the source of the statement was a writing or memorandum that was not introduced into evidence; the court erred when it allowed Chief Rogers to read from the CAD report.

II.

The trial court erred when it allowed the state to publish an audio recording of a 911 call when the state offered no foundation to support that the hearsay statements contained in the call were admissible under one of the exceptions to the Hearsay Rule.

Facts

During a pre-trial conference, defense counsel advised the court that he planned to object to the introduction of the hearsay testimony contained in the 911 call. Tr. p. 73 lines 13-15. The State advised the court that Seehof's eight year old is heard, on the 911 call, identifying appellant as the shooter. Tr. p. 72 lines 14- 21. The solicitor advised that he intended to offer the 911 hearsay statements as an excited utterances and therefore were exceptions to the hearsay rule. Tr. p. 72 lines 1-4. In support the solicitor asserted the hearsay statements were uttered by an eight year-old boy who was at the incident location; they were made soon after the shooting; and the boy was excited since he was sitting on the sofa next to the girl that had been shot. Tr. p. 73 lines 6-12. In response the court stated:

> I will note that, as long as the foundation is laid, as Mr. Pogue has indicated it will be, that is, as to the time and the sequence and things like that to acknowledge it that will, apparently, will come in under Rule 803(2) and so if that foundation is laid, then I'll let it in.

Tr. p 73 lines 16-21.

The court then advised defense counsel that *he would note his objection; however, you can protect the record in that regard*. Tr. p. 73 lines 23-24.

The 911 call from the CAD report was copied onto a CD. Immediately after Chief Rodgers testified from the CAD report, the solicitor handed Chief Rodgers a disc and asked he whether she could identify it. Tr. p. 102 lines 14 -17. Chief Rodgers responded: *This is*

a copy of the 911 call from this CAD event, and I know that because it's got my initials and date on it. Tr. p. 102 lines 18-19. The CD was then admitted into evidence as State's Exhibit 1 subject to appellant's objections. Tr. p 103 lines 1-5.

The solicitor called Emily Ward as the State's next witness. Ms. Ward lived at 48 Boardwalk Lane and near Seehof's condominium. Tr. p. 105 line 8. Ward was able to identify State's Exhibit 1 as a copy of the 911 call that she made. Tr. p. 106 lines 1- 15. Ward then testified regarding some of the events leading up to her calling 911. Tr. p. 111 line 2- p. 112 line 22. The court then granted the solicitor's request to publish State's Exhibit 1. Tr. p. 112 line 23-25.

Discussion

The solicitor's assertion during the pre-trial hearing that the hearsay statements contained in the 911 call (State's Exhibit 1) would be offered as excited utterances and thus excepted from the hearsay rule, amounted to a *motion in limine* regarding the admissibility of the hearsay statements. Tr. p. 71 line 24 through p. 72 line 4. There is no record in the transcript that the trial court conducted an in-camera review of State's Exhibit 1 prior to its publication before the jury. The trial court's decision regarding the admissibility of the hearsay statements was clearly conditional upon the state laying the proper foundation. However, even if Judge Cooper unconditionally stated *in limine* that the hearsay statements fit the definition of an excited utterance under Rule 803(2) SCRE that would not have been a final ruling. *A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial.* State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). Therefore the state was still

required, during its case-in-chief, to lay a proper foundation that the proposed testimony met the definition of an excited utterance.

As the proponent of the 911 call testimony, the State had the burden to provide the foundation upon which to claim that the hearsay statements contained in the call were excepted from the hearsay rule. State v Davis, 371 S.C. 170, 638 S.E.2d 57 (2006). A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Nonetheless, the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence. Id. 371 S.C. at 178-79, 638 S.E.2d at 62.

Witness statements that amount to spontaneous and excited utterances are excepted from the rule against hearsay testimony. Rule 803 (2) SCRE defines an excited utterance as *a statement relating to a startling event or condition made while the declarant was under stress of excited caused by the event or condition*. The rationale for excluding excited utterances from the rule against hearsay testimony is because of the *special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication.* State v. Heath, 433 S.C. 506, 515-16, 860 S.E.2d 673, 678 (Ct. App. 2021). In order to provide a proper foundation for admitting State's Exhibit 1, the state was required to show that: (1) the statement related to a startling event or condition; (2) the statement was made while the child was under the stress of excitement; and (3) the stress of excitement was caused by the startling event or condition. State v. Sledge, 428 S.C. 40, 50, 832 S.E.2d 633, 638 (Ct. App. 2019).

Ward was called as the State's second witness. Ward did not testify that she saw anyone shoot either McCrae and or Jeffcoat. Her only first-hand knowledge of the events on the evening of September 26th was her hearing gunshots; her hearing someone banging on her front door; and, seeing a *young lady slumped* outside her door. Tr. p. 111 line 4 – p. 112 line 20. Her repeating of the boy's statements identifying the shooter testimony of were hearsay as they were offered in order to support the State's contention that appellant was the shooter. Up to the point when State's Exhibit 1 was published to the jury, Ward's testimony may have provided a foundation that the statements she made to the 911 operator would have met Rule 803(2) SCRE. However prior to the publication of State Exhibit 1, neither Ward nor any other witness provided any testimony regarding the emotional state that Seehof's son was in that evening. By neglecting to offer any evidence of the boy's emotional state, the solicitor failed to lay the requisite foundation for the admission of an excited utterance. Therefore the trial court erred in allowing the solicitor to publish State's Exhibit 1.

The identification of appellant through hearsay statements contained in both the CAD report and the 911 call were highly prejudicial. As noted above the state was able to impeach the testimony of the four witnesses that professed to have firsthand knowledge of the events of September 26th, namely Jeffcoat, McCrae, Seehof and Quarles. Defense counsel had no opportunity to impeach or cross examine the declarant regarding his statements that appellant was the shooter.

III.

The trial court erred in allowing the state to publish video recordings of three jail calls between the appellant a third party which showed the appellant wearing a Lexington County Detention Center jumpsuit.

Facts

The State's Exhibit 138 was comprised of three audio video calls between appellant and his brother. The videos were introduced through the testimony of Detective Joseph Andaloro. Tr. p. 251 line 12 – p. 252 line 4. Detective Andaloro accessed the videos from a Securus Technologies, which is third-party provider for video conferencing with inmates at the Lexington County Detention Center. The three videos were published and Detective Andaloro identified the two participants shown on the video calls as being the appellant and Everette Wannamaker Tr. p. 254 lines 3- 25.

During a pre-trial hearing defense counsel objected to the State's intended introduction of the video calls. Tr. p. 61 lines 8 – 12. During all three video calls defendant is seen wearing his detention center jumpsuit. Tr. p. 61 line 12. Specifically trial counsel stated that the probative value of the calls was out-weighed by the prejudice of the jury seeing appellant in an orange jump suit. Tr. p. 61 lines 19-21. Defense counsel argued that the video of appellant wearing a detention center jump suit would t*aint him throughout the trial*. Tr. p. 62 lines 3-4.

Defense counsel suggested that the prejudice could be mitigated if the State were to play only the audio section of these calls. Tr. p. 61 line 22 24. In response the court stated:

I suppose they could, but frankly, the video does more than just record the -- the (sic) words themselves. It records the same thing that a jury would be able to see from a witness in court: The demeanor of the witness, the actions of the witness, the tone, and the inflection, all of those things which enter into a hearer's consideration as to the credibility to be given to the testimony.

Tr. p. 63 line 24 – 64 line 5.

The judge stated that he would allow the videos stating:

I'll allow the video. I know that you're concerned about it, but I don't think that the fact that it shows him in a prison suit when -- when (sic) a jury is going to be told at some point in time that he was arrested and taken into custody --that that – that that's going to taint the proceedings as well …

Tr. p. 64 lines 6-11.

Immediately after the trial court announced its preliminary decision that it would allow the publication of the video recordings, defense counsel renewed his objection to the expected testimony; and asked that he be allowed a continuing objection throughout the anticipated evidence. Tr. p. 64 lines 15 -16. The court agreed to note the objection throughout the anticipated testimony. Tr. p. 64 lines 17-19. Although defense counsel did not make a contemporaneous objection when the state moved to enter its Exhibit 138, the court admitted the exhibit was "over the objection of defense counsel." Tr. p. 251 line 25.

Discussion

Allowing the jury to witness appellant in his detention center jump suit infringed appellant's right to a fair trial under both the XIV Amendment to the United States Constitution and article 1, section 3 of the South Carolina Constitution. To protect a criminal defendant's presumption of innocence, *courts must be alert to factors that may*

undermine the fairness of the fact finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 1693 (1976). Allowing the jury to witness a criminal defendant in prison clothing presents an unacceptable risk that a jury's verdict would be influenced by impermissible factors. Id. 425 U.S. at 505, 96 S. Ct. at 1693. In South Carolina it is generally improper for a criminal defendant to appear before the jury dressed in readily identifiable prison clothing. Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001).

Courts must therefore balance the State's interest in allowing the jury to view a defendant in prison clothing against the risk of prejudice to the defendant. Id. Estelle 425 U.S. at 504, 96 S. Ct. at 1693. By suggesting that the State play only the audio portion of the calls, trial counsel appeared to recognize the State's interest in allowing the jury to **hear** the telephone conversations. The trial court acknowledged the possibility of the jury hearing only the audio portion. Tr. p. 63 lines 24-25. However, the trial court erred in determining that the State's interest in allowing the jury to evaluate appellant's demeanor during these calls outweighed any possible prejudice to appellant's due process rights.

CONCLUSION

For the reasons set forth above, appellant asks that his convictions be reversed and his case be remanded for a new trial.

s/ James Falk
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This 7th day of October, 2022