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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAE'KWON JAHEEM SIMMONS,

APPELLANT.

APPELLATE CASE NO. 2021-000802

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the solicitor to include in his impeachment of defense witness Reginald Young for his accessory before the fact of murder adjudication that the solicitor asserted at Young's family court guilty plea that Young was "egging" appellant on to shoot the decedent, or that Young had admitted "egging" appellant on, since this was improper impeachment, it was unduly prejudicial to appellant, and it should been excluded under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Aiken County grand jury for the offenses of murder and possession of weapon during a violent crime. R. 258. His case was called to trial on April 13, 2021, before the Honorable Courtney Clyburn-Pope, and a jury. Barry Thompson and William Thomas McKellar represented the appellant. Cassie Weathersbee Hall and Samuel Brian Grimes, Jr., were the assistant solicitors. R. 1.

On April 14, 2014, the jury found appellant guilty on both counts. R. 253, ll. 15-25.

Because appellant was seventeen years old at the time his crime was allegedly committed the judge ordered a presentencing report and an Aiken v. Byars, 410 S.C. 434, 765 S.E.2d 572 (2014) sentencing hearing was held on July 13, 2021. At the conclusion of that sentencing hearing Judge Clyburn-Pope sentenced appellant to thirty-eight years imprisonment. R. 257, ll. 13-18.

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).

ARGUMENT

The court erred by allowing the solicitor to include in his impeachment of defense witness Reginald Young for his accessory before the fact of murder adjudication that the solicitor asserted at Young's family court guilty plea that Young was "egging" appellant on to shoot the decedent, or that Young had admitted "egging" appellant on, since this was improper impeachment, it was unduly prejudicial to appellant, and it should been excluded under Rule 403, SCRE.

Relevant facts

The decedent's wife, Jessica Swearingen, testified that on August 6, 2019, at about 5:15 in the afternoon she was walking with the decedent and their ten-year-old daughter down Laurens Street towards downtown Aiken. They had just seen Ms. Swearingen's mother at the nearby Aiken Pruitt Health Facility. R. 11, l. 8 – 13, l. 9.

As they walked past the Off-Da-Chain seafood restaurant and the In and Out convenience store her daughter Savannah pointed to a mailbox behind the seafood restaurant. At the same time Swearingen noticed two teenage males and two teenage females crossing the street. R. 15, l. 11 – 16, l. 4.

Swearingen thought one of these teenagers bumped into her daughter. The decedent turned around and confronted them. Swearingen just kept walking with Savannah down the street. As she was walking away, she heard the decedent "talking" to the teenagers from behind. R. 15, l. 25 – 16, l. 11.

Swearingen recalled that when she glanced back to see what was going on she noticed one of the teenage boys had on a backpack. Swearingen admitted her decedent husband was carrying a gun in the back waistband of his pants. Swearingen claimed, however, that the decedent never pulled this gun on the teenagers during the confrontation. R. 16, l. 16 – 17, l. 25. Swearingen

remembered that the decedent walked up behind them as they continued walking in the opposite direction. Swearingen said when the decedent caught up to them, she heard three gunshots, and the decedent fell to the ground. R. 19, l. 3 – 20, l. 5.

Swearingen also dropped to the ground, and she started giving her decedent husband first-aid. She applied pressure to the gunshot wound at the back bottom of his head. She remembered her hands were covered in blood as she tried to assist him. R. 20, l. 3 – 21, l. 1.

Law enforcement and EMS arrived quickly, and her husband was transported to the Augusta University Hospital. He was put on life support and died in the hospital four days later. R. 22, l. 8 – 25, l. 13.

Swearingen insisted on cross-examination that the decedent never pulled his gun on appellant or the other three teenagers. She confirmed that the decedent had mental health problems and that he was receiving disability benefits from the VA. R. 26, ll. 3-14.

A surveillance tape from the Off Da Chain restaurant which showed the shooting was played for the jury. R. 28, l. 9 – 29, l. 1. That tape, State's Exhibit 3, is on file for this Court to view.

Keith Dill had also been visiting his mother in the Aiken Pruitt Health Building on October 6, 2019, at around 4:25 in the afternoon. R. 36, ll. 3-21. While Dill was driving away after his visit, he noticed some young people walking nearby: "They were standing at the corner of where Hahn Village apartments are. Aiken Housing Authority, I think. And as I passed them, I think I was doing like 34, 35 miles per [hour]. And as I passed them, I was about five, six feet from them, and at the same time when I passed them, one of the young men turned around and commit fire (sic), and fired four times..." R. 37, ll. 3-10.

At the time of the shooting, Gill saw a family of three, including a young girl "a lady, and a man" walking down the sidewalk. The man grabbed his neck and fell to the ground. Gill pulled his car over and dialed 911. R. 37, ll. 10-24.

Dill said after the shots were fired "the kids" . . . "they all ran together towards the Aiken Housing Authority Apartments." R. 39, ll. 3-13. Dill described the three people who were walking together as "a Caucasian guy, little girl, and [what] looks like his wife or someone." R. 41, ll. 11-20. The young people were Black.

Millie Cummings was visiting her niece in Hahn Village on the afternoon of August 6, 2019. As she was leaving the Village, Cummings noticed a teenager she knew as "Dae" arguing with the decedent, "Mr. Larry." R. 47, l. 8 – 48, l. 22.

Cummings remembered the decedent walked away from the young men. He walked with his wife and his daughter in the other direction down the street. R. 49, l. 5 – 50, l. 1. Cummings testified the decedent was "exchanging words" with the teenagers, and "I seen Dae Dae shoot." R. 50, ll. 2-8. Cummings said that she did not see a handgun in the decedent's hands or on his person. R. 50, l. 9 – 52, l. 17. Cummings also offered that while she witnessed the argument between the decedent and the young men: "I didn't see the pushing. I just seen the arguing." R. 54, l. 8 – 61, l. 17.

Dixie Busby was an Aiken police officer on June 6, 2019. R. 84, ll. 11-15. Busby responded to the scene of the shooting, and she saw the decedent lying on his back on the ground. His wife was trying to stop the bleeding to the wound on the back of the decedent's neck. However, Busby testified that the decedent "was lifeless."[1] R. 85, ll. 9-19.

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[1] Dr. Kelly Rose testified as the pathologist that the decedent was shot "very high up" on the back of his neck which killed him. R. 103, l. 11 – 104, l. 5. The bullet entered from behind the decedent.

Busby recalled that a gun was located in the back of the decedent's waistband, and she offered that the decedent was lying on top of the gun.[2] R. 87, ll. 6-23. The decedent did not have a concealed weapons permit for the gun he was carrying. R. 135, l. 25 – 136, l. 9.

Reginald Young's testimony

An in-camera hearing was held immediately prior to the testimony of Reginald Young. R. 136, l. 22 – 146, l. 16. Young was the fourteen-year-old teenager who was with appellant at the time of the fatal incident. He was fifteen-years-old by the time of appellant's trial. R. 165, l. 4 – 166, l. 6.

The defense argued that Reginald Young's adjudication, following his guilty plea for accessory before the fact of murder, should not be allowed to impeach him under Rule 403, SCRE, analysis. R. 147, l. 1 – 151, l. 23. The solicitor said in addition to impeaching appellant with his being found delinquent as an accessory before the fact of murder he also wanted to question appellant about the facts of this case which led to his guilty plea if self-defense or voluntary manslaughter were an issue. R. 149, l. 2 – 154, l. 14.

The defense continued to argue that questioning Reggie Young about his adjudication or the reasons for his guilty plea was more prejudicial than probative and that conceded that while the judge may allow the adjudication for impeachment purposes it would violate Rule 403, SCRE, and create confusion for the facts of the guilty plea to be discussed. The defense argued if any of this was allowed that a limiting instruction should be given since the impeachment evidence only

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R. 106, ll. 24-25. Law enforcement estimated that the decedent was shot from about forty-eight yards away from the shooter. R. 124, ll. 15-21.

[2] Dr. Kelly Rose testified as the pathologist that the decedent was shot "very high up" on the back of his neck which killed him. R. 103, l. 11 – 104, l. 5. The bullet entered from behind the decedent. R. 106, ll. 24-25. Law enforcement estimated that the decedent was shot from about forty-eight yards away from the shooter. R. 124, ll. 15-21.

went to Young's credibility, and not appellant's culpability for the underlying offense. R. 153, l. 1 – 160, l. 14.

The judge noted that juvenile adjudications were admissible under Rule 609, SCRE. She also ruled the state would be allowed to question Young with regard to the facts of his guilty plea. R. 159, l. 21 – 160, l. 3. The judge told defense counsel to get her the limiting instruction to charge to the jury later in the trial. R. 160, ll. 2-3.

The fifteen-year-old Reginald then testified before the jury. R. 165, l. 4 – 166, l. 6. Reginald remembered on the day of the shooting there were two teenage girls with him and appellant. He had only known the girls for about thirty minutes before the shooting occurred. R. 167, ll. 5-19.

Reginald said that none of them knew the decedent before they encountered him on the sidewalk that day. R. 168, ll. 16-18. Reginald testified that the decedent was acting in a very aggressive manner towards them, and the decedent pulled a gun on them during a heated exchange. R. 171, l. 10 – 175, l. 13. Reginald recalled the decedent yelling at them: "Why you looking at my fucking wife?" R. 176, l. 15 – 177, l. 6. Reginald recalled responding, "Are you talking to me?" and he told the decedent no one was looking at his wife. "He pulled a gun out and I threw my hands up in the air, and he told me to get my black, ghetto ass on." R. 177, l. 2 – 178, l. 5.

The decedent continued threatening them and Reginald told him: "I don't want no problems with you. I don't want no problems with you." R. 177, l. 2 – 178, l. 19.

Reginald was arrested after the shooting. He was put in the juvenile custody wing of the Aiken County Jail because he was only fourteen years old. Two days after the shooting Reginald said he pled guilty to being an accessory before the fact of murder in order to avoid being "waived

up to general sessions court." R. 179, l. 1 – 180, l. 21. He was presently an inmate at DJJ but he offered that he would be released in three months. R. 180, l. 16 – 181, l. 9.

On cross-examination by the solicitor Reginald admitted that he pled guilty to being an accessory before the fact of murder. He also acknowledged that he talked to the judge during the guilty plea proceeding. R. 183, l. 12 – 188, l. 4. The solicitor then asked Reginald to admit that he told the family court judge he was "egging" appellant on during the incident. Reginald denied he admitted "egging" appellant on that to the family court judge. It was apparent defense counsel also objected to this line of questioning during a bench conference based upon their in-camera hearing.[3] The judge ruled that Reginald could not only be impeached under Rule 609, SCRE, with his being found delinquent after pleading guilty to accessory before the fact of murder -- but that the facts of the guilty plea were also proper impeachment. R. 189, ll. 3-10. After a bench conference the following occurred between the solicitor and Reginald:

> Q. He's egging him on, do it, do it. That's what the solicitor told the judge, right?
>
> A. I don't know because when I got locked up, they had -- the officers that locked me up exact question was, "do you know (inaudible)?" I don't remember signing anything, writing anything down. That didn't come out my mouth, so I never did it. I never said ---
>
> Q. All right. I'm not asking you about when you got locked up. I'm talking about at your guilty plea in court, the solicitor told that to the judge, and you pled guilty on those facts.
>
> A. My lawyer never told me that was what was said or none of that. I just -- she was telling me about the charges.

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3 There was no break between arguments on the admissibility of the testimony and Reginald Young's testimony about "egging" appellant on to shoot the decedent. Further, defense counsel's objection to this testimony during Young's testimony before the jury, although not necessary, was apparent from the record. This legal issue was preserved for appellate review.

Q. I'm telling you -- I'm talking to you about what happened in court, the solicitor said that.

A. And I'm telling you that my lawyer told me about the charges, not what the solicitor was saying, all that. She was talking to me about what was going on with my charges. How can I get lesser charges? I didn't know what was written or -- because I never said anything. When I got in the interrogation room, never said anything, never signed anything. When I was in court, never -- I didn't say anything about I said do it or none of that.

Q. I'm having a little difficulty, because you're a straight A student. And I'm not asking a confusing question. The solicitor said that and you pled guilty on those facts.

A. I don't remember the solicitor saying that. That's all I'm saying.

Q. Okay. Would you like to look at the transcript?

A. No, sir. *I believe whatever you're saying is on that paper.*

Q. You believe what I'm saying, right?

A. I believe what you -- whatever you're saying, asking me on that paper because you're reading it. I just telling you that I don't remember saying anything like that. I don't remember anything like that being said. I never wrote anything down, never came out my mouth. That's what I'm trying to get you to understand.

R. 189, l. 11 – 190, l. 25. (Emphasis added).

As seen, Reginald did not dispute that the transcript of his guilty plea the solicitor was referring to was accurate. R. 191, l. 23 – 194, l. 19. Defense Counsel Thompson objected that the solicitor's question had been repeatedly asked and answered. There was also no prior inconsistent statement to impeach Reginald on which was another reason this was improper, and it was also irrelevant. Finally, the solicitor was badgering the witness at this point. R. 194, l. 21 – 197, l. 8.

The judge overruled all of these objections other than relevance, and she sustained the objection with the relevance objection with the understanding that the solicitor "is moving on from that line of questioning." R. 198, ll. 1-6.

Discussion

Rule 609(d), states "Evidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult." State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978), was cited at trial during the discussion of this rule. Defense counsel asked that the facts of appellant's adjudication for accessory before the fact of murder not be admitted given their unduly prejudicial effect under Rule 403, SCRE.

Rule 609(a)(1), states that -- subject to a Rule 403, SCRE, analysis -- evidence that a witness other than the accused has been convicted of a crime shall be admissible if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted. The judge here admitted the adjudication but she noted defense counsel's concern under the rule and State v. Moore, 337 S.C. 104, 522 S.E.2d 354 (Ct. App. 1999), that a co-defendant's or an alleged accomplice's guilty plea could only be admitted as it pertained to the credibility of the co-defendant provided a limiting instruction was given. The defense strongly objected to the evidence of Reginald's guilty plea being used as substantive evidence of appellant's guilt – which it was.

The solicitor in this case did what the rule and State v. Moore, 337 S.C. 104, 522 S.E.2d 354 (Ct. App. 1999) specifically prohibited. The solicitor placed before the jury that Reginald Young either admitted or the state took the position at his guilty plea that the evidence showed Reginald was "egging the defendant on" to shoot the decedent. This was extraordinarily prejudicial since the jury was ultimately instructed on voluntary manslaughter which is the killing of another human being in a "heat of passion" upon a "sufficient legal provocation. See State v. Knoten, 347 S.C. 296, 302-03, 555 S.E.2d 391, 394-95 (2001); State v. Cole, 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

However, as discussed at trial, even if the person's passions had been sufficiently aroused by a legally adequate provocation, if those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of a normal reasonable person would have cooled, the killing remained murder and not manslaughter. See State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000). Voluntary manslaughter by its nature does not allow for thought or reflection before the person acting in the sudden heat of passion reacted with deadly force. Evidence that "accomplice" Reginald Young was "egging" appellant on to shoot the decedent was evidence of reflection prior to appellant shooting the decedent. This virtually destroyed the verdict possibility of voluntary manslaughter in this case, and the extreme prejudice from this line of questioning regarding Reginald Young's guilty plea in family court cannot be underestimated.

Under Rule 609, SCRE, impeachment with a prior conviction is admissible to impeach the declarant's testimony. However, the witness or the attorneys are not allowed to explain the facts of the impeachable offense to supposedly diminish or increase the significance of the underlying conviction. In State v. Joseph, 328 S.C. 352, 361, 491 S.E.2d 275, 279-80 (Ct. App. 1997), this Court explained, "[T]he details of the crime of which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible; the witness has "already been afforded [the] opportunity to defend himself against that charge and his [conviction] is conclusive." State v. Gregg, 230 S.C. 222, 225, 95 S.E.2d 255, 257 (1956); State v. Corn, 215 S.C. 166, 172-73, 54 S.E.2d 559, 561 (1949).

As seen, the jury in this case had to decide whether the crime was murder, voluntary manslaughter, or whether appellant was not guilty. The inadmissible testimony and the solicitor's questioning about Young allegedly having admitted to law enforcement or the guilty plea judge that he was "egging" appellant on to shoot the decedent was devastating to appellant's opportunity

to be convicted of the lesser-included offense of voluntary manslaughter. See State v. Moore, 337 S.C. 104, 522 S.E.2d 354, n. 2 (Ct. App. 1999) *citing* cases holding this use of a co-defendant's or an accomplice's guilty plea as substantive evidence of the defendant's guilt is improper. See, also, State v. Hill, 409 S.C. 50, 56, 760 S.E.2d 802, 805-06 (2014)("Traditionally, our courts have held that the guilty pleas or the acquittal of a codefendant are irrelevant to the defendant's guilt or innocence.").

This was a very tragic case in which Reginald Young testified that the decedent pulled a gun and pointed it at them while the decedent was using racially provocative and threatening language.[4] The threat of an imminent deadly assault with a gun requires that voluntary manslaughter instruction be given in a murder case, State v. Jackson, 301 S.C. 41, 389 S.E.2d 650 (1990); State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), as it was here. Pointing a gun at a defendant, as here, was a sufficient legal provocation to require a voluntary manslaughter instruction. See State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

The error in this case was very prejudicial, and it certainly was not harmless since the solicitor improperly used Reginald Young's guilty plea to put evidence before the jury that Young was allegedly egging appellant on to shoot the decedent where it was essentially uncontested that appellant shot and killed the decedent. "When he [Reginald] was under oath in court, when it was his day in court, he didn't have any objection to it being that he was egging him on. Today, it's a different story." R. 224, ll. 17-20.

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4 The solicitor told the jury that Reginald's testimony was calculated to try and assist appellant, "his buddy" during the trial. R. 223, l. 19 – 224, l. 20.

While the court gave a limiting instruction about the use of the *adjudication* it was simply insufficient given the magnitude of the objectionable substantive evidence that was admitted. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed and this case remanded to the Aiken County Court of General Sessions for a new trial.

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This 16th day of May, 2023.

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."

May 15, 2023

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