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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TASHONBY PEDRICK WILSON,

APPELLANT

APPELLATE CASE NO. 2019-000749

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I.

Where a witness was testifying directly from a computer-aided dispatch report (CAD), but the CAD report was not introduced as evidence, whether 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.

II.

Whether the court erred in allowing 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.

III.

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

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. R. 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 during the commission of a violent crime. R. 513, ll. 5-16.

Immediately thereafter, trial counsel filed a motion for new trial which was denied. R. 515. Judge Cooper sentenced appellant to five years' imprisonment for possession of a weapon during a violent crime; twenty years' imprisonment for assault and battery of a high and aggravated nature; and, twenty-seven years' imprisonment for attempted murder, with all sentences to run concurrently. R. 516.

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 gram every day. R. 223, ll. 13-19. Quarles testified that he was earning three thousand dollars a day selling a combination of drugs including crack and heroin. R. 337, ll. 18- 21; R. 344, ll. 15- 17. Quarles admitted that he sold guns and that he disposed of the gun suspected in the shootings. R. 340, ll. 5-7; R. 332, l. 2. Jeffcoat testified that she was addicted to heroin and was buying heroin from appellant daily. R. 347, ll. 13-18. McCrae was also addicted to heroin. R. 366, l. 11. On September 26, 2016, both she and Jeffcoat were suffering from withdrawal. R. 369, l. 9.

The testimony from Seehof, Jeffcoat, and McCrae was generally consistent regarding the timeline on September 26, but it 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. R. 223, ll. 20-25; R. 349, ll. 12-13; R. 368, ll. 22 – 369, l. 5. Jeffcoat and appellant then got into a verbal dispute. R. 349, ll. 3-11; R. 369, ll. 7-12. While in appellant's room, Jeffcoat stole appellant's drugs. R. 224, ll. 16-21; R. 349, l. 10; R. 371, ll. 12-25. The three then drive off and went to Seehof's condominium at Boardwalk Villas. R. 225, ll. 6-8; R. 353, l. 1-6; R. 377, ll. 1-23. Shortly after the three arrived at Seehof's condominium, appellant arrives and enters the unit. R. 228, ll. 24- 229, l. 5; R. 349, l. 10; R. 371, ll. 12-25. While in the condominium, appellant allegedly shoots Jeffcoat in the stomach. R. 230, ll. 12-13; R. 353, ll. 21-23; R. 380, ll. 1-4. Appellant then allegedly shoots McCrae. R. 354, ll.3-8; R. 383, l. 10.

Quarles testified that appellant arrived at his room at the Economy Inn in Columbia driving a Honda. R. 328, l. 25- 329, l. 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. R. 329, ll. 2-7. Quarles testified that appellant returned the gun to him the next day, and Quarles then got rid of the gun. R. 331, l. 2 – 332, l. 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. R. 50, ll. 7-9.

Appellant's Trial Testimony

On September 26, 2016, appellant was living in Room 120 at the Palmetto Inn in Columbia, South Carolina. R. 418, l. 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. R. 414, ll. 19-23. On the morning of September 26th, appellant was preparing to travel to his personal injury lawyer's office in Charleston to pick up a check. R. 416, ll. 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 and she took him to run errands including paying his phone bill, buying food for his children and shoes for his son. R. 424, ll. 10 – 425, l. 3. She then returned appellant to his room at the Palmetto Inn around 4:15 p.m. R. 425, ll. 13 – 17.

When appellant returned to Columbia, he started receiving calls from his customers that were looking to buy drugs. R. 426, ll. 5-12. That afternoon, appellant did not have any drugs so he attempted to reach Quarles to buy drugs that appellant could resell to his customers. However, appellant was never able to get in touch with Quarles. R. 427, ll. 18- 22. On September 26th, Jeffcoat and McCrae were looking to get drugs from appellant that afternoon. R. 428, ll. 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 really "active"; they were fidgeting, not happy, and upset because they did not have enough money to buy the drugs they were craving. R. 429, ll. 18-23. However, appellant did not have any drugs to give them. R. 429, l. 23.

Except for leaving the room around 6 p.m. to have a conversation with Lacy Johnson, appellant never left his motel room. R. 430, l. 13- 431, l. 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. R. 434, l. 5- 23. Appellant remained in the room until he was arrested later that evening by Lieutenant Laintz. R. 435, ll. 10- 13. Appellant testified that he never went to the Boardwalk Villas on September 26, 2016. R. 446, ll. 1-3. Appellant had never ever been to Seehof's condominium at the apartment complex. R. 437, ll. 4-

10. Appellant testified that he neither spoke with Quarles on the 26th nor did he ever get a gun from him. R. 442, ll. 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. R. 44, ll. 10- 23. Then Chief Rodgers started reading from the CAD report generated on the evening of September 26, 2016. R. 47, ll. 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. R. 48, ll. 14-16. Trial court asked defense counsel to repeat exactly what his was the objection. R. 48, 100 ll. 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.* R. 48, ll. 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.* R. 49, ll. 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*. R. 49, ll. 9-19. Defense counsel then asked that his objection be noted. R. 49, ll. 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" R. 50, ll. 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. R. 27, ll. 13-15. The state advised the court that Seehof's eight-year-old is heard, on the 911 call identifying appellant as the shooter. R. 26, ll. 14- 21. The solicitor advised that he intended to offer the 911 hearsay statements as an excited utterances which therefore were exceptions to the hearsay rule. R. 26, ll. 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. R. 27, ll. 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.

R. 27, ll. 16-21.

The court then advised defense counsel that *he would note his objection; however, you can protect the record in that regard.* R. 27, ll. 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. R. 50, ll. 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.* R. 50, ll. 18-19. The CD was then admitted into evidence as State's Exhibit #1 subject to appellant's objections. R. 51, ll. 1-5.

The solicitor called Emily Ward as the state's next witness. Ms. Ward lived on Boardwalk Lane and near Seehof's condominium. R. 53, l. 8. Ward was able to identify State's Exhibit #1 as a copy of the 911 call that she made. R. 54, ll. 1- 15. Ward then testified regarding some of the events leading up to her calling 911. R. 59, l. 2- 60, l. 22. The court then granted the solicitor's request to publish State's Exhibit #1. R. 60, l. 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. R. 25, l. 24 – 26, l. 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 or Jeffcoat. Her only first-hand knowledge of the events on the evening of September 26 was her hearing gunshots; her hearing someone banging on her front door; and seeing a *young lady slumped* outside her door. R. 59, l. 4 – 60, l. 20. Her repeating of the boy's statements identifying the shooter were hearsay, as they were offered 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 26, 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. R. 199, l. 12 – 200, l. 4. Detective Andaloro accessed the videos from Securus Technologies, which is the 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. R. 202, ll. 3- 25.

During a pre-trial hearing, defense counsel objected to the state's intended introduction of the video calls. R. 15, ll. 8 – 12. During all three video calls, defendant is seen wearing his detention center jumpsuit. R. 15, l. 12. Specifically, trial counsel stated that the probative value of the calls was outweighed by the prejudice of the jury seeing appellant in an orange jumpsuit. R. 15, ll. 19-21. Defense counsel argued that the video of appellant wearing a detention center jumpsuit would *taint him throughout the trial.* R. 16, ll. 3-4.

Defense counsel suggested that the prejudice could be mitigated if the state were to play only the audio section of these calls. R. 15, ll. 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.*

R. 17, l. 24 – 18, l. 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 ...*

R. 18, l. 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. R. 18, ll. 15 -16. The court agreed to note the objection throughout the anticipated testimony. R. 18, ll. 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 "over the objection of defense counsel." R. 199, l. 25.

Discussion

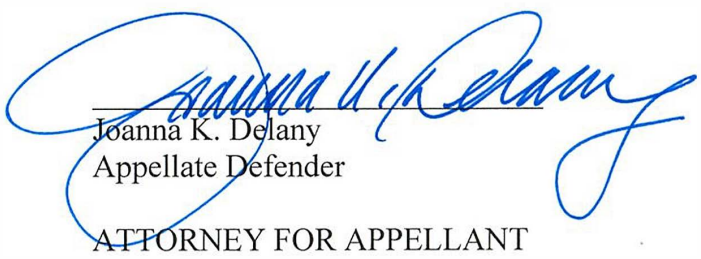
Allowing the jury to witness appellant in his detention center jumpsuit infringed appellant's right to a fair trial under both the United States Constitution, Amendment XIV, and Article 1, Section 3 of the South Carolina Constitution. To protect a criminal defendant's presumption of innocence, *courts 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. R. 17, ll. 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.



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This 13th day of June, 2023.

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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."

June 13, 2023

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