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**Jul 25 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ROBERT L. BAILEY,

APPELLANT

APPELLATE CASE NO. 2022-000239

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FINAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in refusing to sever Appellant's trial from the trial of two other co-defendants when the denial of severance prevented Appellant from questioning co-defendant Smith about statements he made to the police about where he was on the night of the shootings and establishing that Smith eventually admitted to being present at the time of the shootings?

## STATEMENT OF THE CASE

In August of 2006, the Orangeburg County Grand Jury indicted Appellant, Robert L. Bailey, for four counts of murder, burglary first degree and attempted murder, indictments #2018-GS-38-01285-01289, 01292 (R. pp. 2402-2413). After pre-trial hearings before the Honorable Edgar W. Dickson on January 27, 2022, and February 3, 2022, Appellant proceeded to jury trial before Judge Dickson on February 7-23, 2022. Appellant was tried with co-defendants Antly Scott and Luther Smith. Mark A. Leiendecker and Ashley D. Chisholm represented Appellant at trial. Aimee J. Zmroczek and Richard E. Lackey represented co-defendant Scott. Ola A. Johnson represented co-defendant Smith. David L. Osborne and Chelsea A. Glover prosecuted the case. The jury returned verdicts of guilty as charged. Judge Dickson sentenced each of the defendants to life in prison on the murder charges and burglary first degree and thirty (30) years concurrent for the attempted murder charge. Appellant Bailey served a notice of intent to appeal. This appeal follows.

### **STANDARD OF REVIEW**

“A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown.” State v. Beekman, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016) (quoting State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996)).

## FACTS

Christopher “Preddy” Wright sold drugs out of a house he shared with Krystal Hutto in Holly Hill. (R. p. 505, lines 20-25; p. 508, lines 6-13). On July 14, 2015, the day before the shootings, Appellant, nicknamed “Pocket,” called Wright about swapping an engine and a dirt bike for two motorcycles. (R. p. 522, lines 2-23; p. 526, lines 7-13). Wright had known Appellant for about 20 years. (R. p. 519, lines 15-16). Wright testified that a man with burn scars had a truck to transport the dirt bike and after the swap this man took Wright from Appellant’s house back to Wright’s house in Holly Hill. (R. p. 532, lines 6-16; p. 535, line 9 – p. 536, lines 1-23). The burned man was identified as Derrick Coleman.

Coleman testified at trial that he agreed to help Appellant transport a dirt bike in exchange for some weed. (R. p. 1712, lines 1-13). Coleman testified that he transported the dirt bike and Wright to Wright’s house and then returned to Appellant’s house to collect his weed. (R. p. 1727, lines 18-22). After Coleman got the weed he went to his friends, Mark and Samantha’s trailer and hung out with them and the two co-defendants, Mark’s brother Luther Joseph Smith and Antly Scott, nicknamed “Jackie Man.” (R. p. 1717, line 23 -p. 1718, lines 1-19). According to Coleman, he, Smith and “Jackie Man” decided to go out and buy either cocaine or crystal meth. (R. p. 1719, lines 1-23). Coleman testified that “Jackie Man” suggested that they go to Appellant’s house first. (R. p. 1722, lines 19-25). Once at Appellant’s house, “Jackie Man” went inside and then came back to report that there were no drugs at Appellant’s house but “Jackie Man” knew where he could get some. (R. p. 1726, lines 1-14).

According to Coleman, “Jackie Man” gave him turn by turn directions to a location and then told Coleman to pullover. (R. p. 1726, line 15 – p. 1727, lines 1-25). Coleman claimed that he stayed in his truck while Smith and “Jackie Man” got out and were gone for about 30-45

minutes. (R. p. 1729, lines 1-25). Coleman testified that Smith and “Jackie Man” ran back to the truck and “Jackie Man” screamed to “Go! Go! Go! Go!” (R. p. 1731, lines 14-25). Coleman panicked and eventually pulled over to allow Smith to drive. (R. p. 1734, line 17 – p. 1735, lines 1-2). Coleman testified that they drove to a boat landing where “Jackie Man” got out, burned something and then threw two objects into the water. (R. p. 1742, line 2 – p. 1743, lines 1-3). According to Coleman, when he demanded to know what was going on, “Jackie Man” said, “I just killed five fucking people, quit giving me shit.” (R. p. 1743, lines 22-23). Coleman testified that the three of them returned to Mark and Samantha’s trailer where “Jackie Man” pulled out crystal meth and cocaine and they all got high. (R. p. 1746, line 21 – p. 1747, 1748, line 1).

Wright testified that on July 14, 2015, the day of the swap involving Appellant and Coleman, his two daughters, Tamara Perry and Shamekia Sanders and his son, Dreamzz Nelson were visiting him at the Holly Hill house. (R. p. 509, lines 17-22; p. 525, lines 6-10). On the evening of July 14<sup>th</sup> Wright spent the night with his girlfriend, T’Carra Woods, at a home they had just rented in Summerton. (R. p. 507, lines 10-25). The next morning Wright returned to the Holly Hill house to find Jerome Butler lying in the yard, the front door open, the house ransacked and Wright’s green Mercedes was missing. (R. p. 550, lines 1-24). Wright called 911. (R. p. 557, lines 17-25).

Deputy Damien Clinton was one of the first officers from the Orangeburg County Sheriff’s Department to arrive at the Holly Hill house. The officer testified that the man in the yard was nonresponsive. (R. p. 481, lines 3-20). Once inside the house he found a nonresponsive female and at first what he believed to be three nonresponsive children in a bedroom, two female and one male. (R. p. 484, line 25 – p. 485, lines 1-21). He then realized that the male child was still alive and EMS took over. (R. p. 486, lines 1-22). The dead man in the yard was identified as Jerome

Butler. The dead woman inside the house was identified as Krystal Hutto. The two dead girls were identified as Tamara Perry and Shamekia Sanders, Wright's daughters. They all died as a result of gunshot wounds.

Wright's son, Dreamzz Nelson, survived a gunshot wound to the head and testified at trial, identifying Appellant, "Pocket" as a shooter. During an interview with Dr. Allison Foster Dreamzz did not reveal that Appellant was a shooter. (R. p. 782, lines 13-23). Dreamzz admitted in an earlier interview with prosecutors that he told them he saw a white girl, a burned up man and a black man in the bedroom but then claimed at trial it was just "Pocket." (R. p. 804, line 24 – p. 805, lines 1-11). Dreamzz knew "Pocket" because his grandmother lived behind "Pocket." (R. p. 765, line 22 – p. 766, lines 1-16).

During a pre-trial hearing on January 27, 2022, Lieutenant James Shumpert with the Orangeburg County Sheriff's Office testified that he interviewed co-defendant Smith on September 14, 2016, when Smith stated that he was at his brother's trailer on the night of the shootings. (R. p. 75, line 24 – p. 76, lines 1-25). Smith also testified at the pre-trial hearing. (R. pp. 92-104). Lieutenant Shumpert testified that he interviewed Smith again on September 30, 2016, and this time Smith admitted being in Coleman's truck when it went to Holly Hill on the night of the shootings but claimed he did not go inside and was passed out in the truck. (R. p. 153, lines 1-25). Lieutenant Shumpert testified that he interviewed Smith again on October 4, 2016, when Smith then admitted getting out of the truck and going in the house in Holly Hill on the night of the shootings. (R. pp. 172-182).

During a pre-trial hearing on February 3, 2022, Investigator Everette Culpepper testified that he interviewed Smith on October 4, 2016, when Smith then admitted being at the Holly Hill house on the night of the shootings. (R. pp. 226-239). Smith implicated Scott – "Jackie Man,"

Coleman, and Appellant. Smith stated that he rode to the Holly Hill house with Coleman and “Jackie Man.” (R. p. 233, line 20 – p. 234, lines 1-2). Smith stated that Appellant and an unknown person were at the Holly Hill House when they arrived. (R. p. 235, lines 6-11). Smith claimed that Appellant shot Krystal Hutto and the girls and “Jackie Man” shot Jerome Butler and the boy, Dreamzz. (R. p. 235, line 15 – p. 236, p. 237, p.238, lines 1-5). These statements were not introduced at trial.

## ARGUMENT

**The trial judge erred in refusing to sever Appellant’s trial from the trial of two other co-defendants when the denial of severance prevented Appellant from questioning co-defendant Smith about statements he made to the police about where he was on the night of the shootings and establishing that Smith eventually admitted to being present at the time of the shootings.**

During the January 27, 2022, pre-trial hearing counsel for Appellant argued that the Bruton<sup>1</sup> problems could be solved by severance. (R. p. 108, line 15 – p. 109, 110, line 1; pp. 114-117). Counsel for Appellant then moved for severance. (R. pp. 185-190, lines 1-6). During a second pre-trial hearing on February 3, 2022, the prosecutor told the trial judge, “But what I would ask is keep all three in until Monday morning. And then on Monday morning, we will pick between Luther and Bailey or Luther and Scott.” (R. p. 222, lines 15-18). On February 7, 2022, the State proceeded with the joint trial of all three - Appellant Bailey, Antly Scott and Luther Smith.

The State’s evidence against Appellant was based primarily on the testimony of Dreamzz Nelson. The State’s evidence against Antly Scott was based primarily on the testimony of Derrick Coleman that Scott – “Jackie Man” – stated that he killed five people at the Holly Hill house. (R. p. 1743, lines 22-23). The State’s evidence against Smith was based primarily on Coleman’s testimony, a statement made by Smith during transport and testimony from a jailhouse smitch.

At trial Officer Ashley Frazier testified that she was assigned to transport Luther Smith from the Lexington County Detention Center to court in Orangeburg February 7-10, 2022. (R. p. 1410, lines 15-18). The officer testified Smith initiated conversation during transport and said that “He just wanted the drugs.” (R. p. 1410, lines 19-21; p. 1420, line 21). The officer further testified that, “He continued to speak by saying that drugs made him do bad things and say things that he

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<sup>1</sup> 391 U.S. 123 (1968).

did not mean.” (R. p. 1420, line 25 – p. 1421, lines 1-2). The officer finally testified that, “He stated, Ashley, I would not have killed those kids. If I did, I would have offed myself a long time ago.” (R. p. 1421, lines 7-9).

Derrick Stone testified at trial that he was incarcerated in the same cell at the Orangeburg County Detention Center with Smith. (R. p. 1951, line 24 – p. 1952, lines 1-21). According to Stone, Smith admitted going to the Holly Hill house for a robbery and provided additional details about the scene. (R. p. 1955, line 3 – p. 1956, lines 1-10).

None of the three co-defendants testified at trial. The jury returned verdicts of guilty for all co-defendants and all three were sentenced to life in prison. The trial judge erred in refusing to sever Appellant’s trial from the trial of his co-defendants.

In State v. Barnes, 421 S.C. 47, 51–52, 804 S.E.2d 301, 304 (Ct. App. 2017), the South Carolina Court of Appeals wrote:

Codefendants in a murder case are not automatically entitled to separate trials. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). They are entitled to a severance “only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt.” State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). See also Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001); see also Zafiro v. United States, 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (“[I]t is well-settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.”). We will only reverse the denial of a severance motion when it is reasonably probable the defendant would have received a more favorable outcome had he been tried separately. Hughes, 346 S.C. at 559, 552 S.E.2d at 317.

Based on Derrick Coleman’s testimony at trial that he drove Scott – “Jackie Man” – and Smith to the Holly Hill house and they both went in, a potential defense for Appellant is that “Jackie Man” and Smith were the shooters, and Appellant was not present at the Holly Hill house at the time of the shootings. In order to develop this defense, Appellant needed to be able to question Smith about the fact that he initially denied being at the Holly Hill house on the night of

the shootings. (R. p. 75, line 24 – p. 76, lines 1-25). Additionally, Appellant needed to be able to establish that Smith later, claimed he was passed out in Coleman’s truck and then finally admitted going inside the Holly Hill house at the time of the shootings. (R. pp. 226-239).

The trial judge’s refusal to sever Appellant’s trial from the trial of his co-defendants prevented the jury from making a reliable judgment about Appellant’s guilt when Appellant was prevented from questioning Smith in order to establish that Smith was one of the shooters, not Appellant. While Smith claimed Appellant and “Jackie-Man” were the shooters, Appellant should have been allowed to explore Smith’s motive to name Appellant in order to minimize his own involvement in the shootings.


Addressing severance motions in State v. Dennis, 337 S.C. 275, 281–82, 523 S.E.2d 173, 176 (1999), the South Carolina Supreme Court wrote:

The trial judge, however, must act cautiously in allowing a joint trial. The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant’s constitutional right to confront witnesses against him. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. State v. Holland, 261 S.C. at 494, 201 S.E.2d at 121.

The trial judge in the present case failed to act cautiously in allowing the joint trial. It is reasonably probable that Appellant would have received a more favorable outcome if he had been tried separately. The trial judge erred in denying the severance motion.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand the case for a new trial.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 25<sup>th</sup> day of July, 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."

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This 25<sup>th</sup> day of July, 2023.