STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC Court of Appeals

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

IVINGTON DANIEL ALLEN

APPELLANT,

V.

STATE

RESPONDENT.

APPELLATE CASE NO. 2022-000638

PRO SE BRIEF OF APPELLANT

IVINGTON DANIEL ALLEN SCDC#260003
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STATEMENT OF THE CASE

Appellant Ivington Daniel Allen was indicted in Dorchester County for murder, attempted armed robbery and a weapons charge. R. 483-484; R. 487-488; R. 491-492. On April 18, 2022, appellant was tried before the Honorable Maite Murphy and a jury. R. 1. David Osborne and John Rivers, IV, represented the State and Melisa Gay represented appellant. R. 1. The jury convicted appellant. R. 473, 1.20-474, 1.6. Judge Murphy sentenced appellant to life imprisonment for murder and a concurrent thirty years' imprisonment for armed robbery. R. 480, 1.25-481, 1.20. This appeal follows.

ARGUMENT

1. The trial court erred by admitting hearsay statements and testimonies throughout the hearing.

The State's case against appellant for the murder of James Williams ("Williams") rested almost entirely on hearsay admitted as excited utterances to individuals who did not witness the crime or see a suspect. R. 116, l. 12 – 13; R. 246, l. 21 – 24; R. 247, l. 5 – 249, l. 16. Defense counsel objected to the hearsay statements during pretrial motions and throughout the trial. R. 44, l. 22 – 45, l. 22; R. 50, l. 4 – 19. Crawford v. Washington, 541 U.S. 36 (2004) essentially states that evidence will not be used at trial unless the witness is present so reliability can be tested by cross-examination. Contradictory testimonies were given in witness statements to investigators and to the court by Williams' girlfriend; sister; father; mother and aunt.

Detective Contino ("Contino") testified to arriving at the incident scene and first encountering Williams sitting on the couch. Contino testified to obtaining statements from Williams' sister, father, and girlfriend at the incident scene. R. 91, l. 6 – 19. Although no body camera footage from Contino was introduced, the State used him to submit evidence from a body camera worn by another deputy on scene that captured a statement given by Williams as he was being transported to the emergency vehicle. R. 91, l. 2 – 10; R. 99, l. 18 - 21. If Contino was present on scene and came into contact with Williams, any statements rendered to the trial court should have been introduced into evidence from his personal body camera recordings and not that of another officer. The appellant's objection to the submission based on the fact that the footage was not from Contino's own body camera was overruled. R. 97, l. 19 – 98, l. 9. Contino also testified to the Williams' emotional state

and hearing him state that someone named "A-1" shot him. R. 95, 16 – 96, l. 7. Crawford v. Washington.

William's live-in companion, Marlena Boyd ("Boyd"), was the first person to encounter Williams after the alleged incident. Boyd testified that she was awakened by the sound of a loud pop and encountered Williams after he came down the hall. R. 143, l. 7 - 11. The court overruled appellant's objection to hearsay per previous objection. R. 143, l. 12 - 14. Boyd testified that Williams said "A-1" had shot him but he did not know who A-1 was. R. 143, l. 15 – 17. Boyd testified that she awakened Williams' father and went to get Williams' sister, Shanay Williams. R. 143, l. 17 – 21. Boyd initially testified that she had "no idea" of Williams giving further statements regarding the incident but changed her testimony after the State rephrased the question to say that she heard Williams make specific statements to his mother, Gladys Williams. R. 145, l. 2 – 147, l. 18. Boyd testified as to not witnessing the crime. R. 149, l. 17 – 150, l. 21.

James Williams ("James"), the victim's father, testified that he was asleep and woke up when he heard a "shot". R. 104, l. 18 – 105, l. 1. James testified that he then heard Williams coming down the hallway and say that "A-1" had shot him., as well as state a reason for doing so R. 105, l. 2 – l. 19. Appellant's objection to this statement was overruled. R. 105, l. 5 – 7. During cross-examination, defense counsel noted James' testimony differed from the written statement given to authorities on the night of the incident which stated Williams relayed no information to his father regarding who supposedly injured him or why. R. 106, l. 5 – 23; R. 107, l. 4 – 23; R. 109, l. 3 – 10.

The victim's sister, Shanay Williams (Shanay) testified that she was at home when she heard a gunshot; noticed a car leaving the premises; and saw Williams come to the door

and say that he had been shot. R. 115, l. 18 – 116, l. 17. Shanay testified that she was not present during the incident, only knew what Williams told her, and she did not see anyone. R. 121, l. 3 – 222, l. 10. Defense counsel's objection was overruled. R. 116, l. 18 – 21. The State also stated Shanay did not see the appellant commit the alleged crime but that "she knew" he did it R. 64, l. 22 – 65, l. 7.

Williams' mother, Gladys Williams ("Gladys"), testified that she arrived to the scene after the incident but did not stay with Williams the entire time he was there. Gladys testified that Williams told her "A-1" had shot him. R. 153, l. 6 – 15; R. 154, l. 6 – 155, l. 3. Appellant's objection to hearsay statements per previous objections were overruled. R. 154, l. 1-5. During the cross-examination Gladys testified to arriving at the scene after the incident took place and not remaining with Williams the entire time. R. 156, l. 6 – 157, l. 1.

The appellant objected to the State's questioning of Melvin Lamont Allen ("Lamont") in regards to an alleged conversation that occurred between him and Gloria Green. Lamont persistently and continuously denied the conversation took place. R. 172, l. 9 – 173, l. 10. Lamont testified that he had no information regarding what happened the night of the incident. R. 173, l. 22 – 174, l. 4.

Williams' aunt, Gloria Green, ("Green") testified that she knew "A-1". Although Green identified the appellant in court, she was unable to identify him in a photo lineup. R. 178, l. 22 – 179, l. 10; R. 189, l. 5 – 190, l. 5. Appellant's objection to Green testifying on the basis of hearsay was overruled. R. 177, l. 12 -15. Green testified that she spoke with Williams at the scene of the incident and again at the hospital. R. 177, l. 16 – 178, l. 4; R. 180, l. 4 – 11. Green's testimony was the only one that said Williams gave a detailed description of events that occurred during the alleged incident. Green was the only one to testify to a physical

altercation occurring between Williams and the appellant. R. 180, l. 20 – 183, l. 18; R. 184, l. 25 – 184, l. 8;R. 443, l. 8 – 12. No crime scene photos were introduced to depict signs of a struggle and none of the witnesses residing in the house testified to seeing signs of or hearing signs of a physical altercation taking place; yet, the State also implied that a fight occurred during closing arguments. R. 427, l. 17 -18.. Green testified that she did not speak with any officers at the crime scene, hospital, nor in the following days to render a written statement of the alleged comments Williams made to her. R. 187, l. 20 – 188, l. 23. The appellant objected on the grounds of hearsay to Gloria providing testimony regarding an alleged conversation that occurred between Lamont that supposedly revealed comments made by the appellant following the incident. The State moved to utilize extrinsic evidence to impeach Lamont's statement. R. 185, l. 6 -186, l. 20. Green later testified that she could not remember the conversation with Lamont. R. 191, l. 21 – 192, l. 2.

The chief investigating officer, Detective Chaz Easterlin (Detective Easterlin), testified to locating a phone number in Williams' cell phone for a contact listed as A-1 that had no direct connection to the appellant. Detective Easterlin testified to the contact's number being associated with a suspect who was involved in a previous case; aside from acknowledging the individual's name and number from a previous case, the detective performed no further investigation into that individual for the appellant's case. R. 253, l. 16 – 255, l. 15; R. 257, l. 7 – 258, l. 10; R. 260, l. 8 – 15; R. 263, l. 17 – 265, l. 18.

2. The trial court abused its discretion by allowing the testimony of forensic pathologist Susan Erin Presnell to be introduced into evidence as that of an expert witness.

When admitting scientific evidence under Rule 702, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying

science is reliable." *State v. Council*, 515 S.E.2d 508 (S.C. 1999). Forensic specialist, Dr. Susan Erin Presnell ("Dr. Presnell") was called as an expert witness for the State. R. 267, l. 13 – 268, l. 21. Dr. Presnell performed the autopsy on the victim and testified to keeping her report simple. Dr. Presnell continuously referenced the gunshot wound being the primary contributing factor in the victim's death and rendered the manner of death as homicide based upon her opinion of facts and matters regarding the presence of the victim's injuries and preexisting medical conditions. R. 269, l. 5 – 274, l. 22; R. 391, l. 23 - 392, l. 6; R. 398, l. 20 – 399, l. 23.

Appellant called Dr. Jamie Downs ("Dr. Downs")as an expert witness to testify about his review of the autopsy report submitted by Dr. Presnell. R. 358, l. 5 – 378, l. 3. Dr. Downs testified that it was essential for him to use all documents (i.e. medical reports prior to the initial incident; medical reports from the night of the incident; medical reports from the night of the Williams' actual death; and the toxicology report from the autopsy exam) to conduct his review. R. 367, l. 3 – 379, l. 9. Dr. Downs testified that his review of the autopsy report prepared by Dr. Presnell concluded she did not seem to take all of Williams' medical factors into consideration and disregarded medical evidence provided within the toxicology report and medical summary reports from the hospital. R. 374, l. 8 – 375, l. 4; R. 376, l. 24 – 378, l. 3. Dr. Downs' review of all necessary documents led him to conclude Williams experienced a cardiac primary issue. R. 367, l. 9 – 14. Dr. Downs opined that Williams died from polypharmacy and a drug overdose R. 365, l. 12 – 376, l. 2. Dr. Downs testified to the drug overdose being a superseding event and stated would have ruled Williams' death as an accident instead of a homicide because it "medically trumps the gunshot wound." R, 375, l. 10 – 18.

Following Dr. Downs' testimony, the State contacted Dr. Presnell to return to the court for a reply R. 388, l. 8 – 22. Dr. Presnell testified to the presence of high opiate levels and the victim's cirrhosis of the liver contributing to his body not being able to metabolize the opiates as well but she was keeping the autopsy report simple. R. 390, l. 1 - 408, l. 7. Dr. Presnell's admission of "keeping things simple" denotes she did not devote the adequate time needed to fully evaluate the medical documents and Williams' medical history to render an expert opinion for the autopsy report that was filed. R. 270, l. 25 – 273, l. 8. Dr. Downs testified that the explanation of peritonitis given by Dr. Presnell in her testimony was inaccurate and provided a clearer explanation. R. 272, l. 24 – 274, l. 22; R. 372, l. 17 – 374, l. 7. Thus the testimony given by Dr. Presnell revealed the autopsy report she developed on Williams was unreliable and prejudiced.

3. The trial court erred in not rendering a directed verdict due to no substantial evidence being presented.

The trial court denied the appellant's request for a directed verdict. R. 347, l. 21 – 349, l. 22. There was no substantial evidence to support the allegations or the charges brought against the appellant to submit the case to the jury. State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). There was no weapon; no ballistics, fingerprints or D.N.A; and no eyewitnesses placing the appellant at the scene of the crime. R. 83, l. 1 – 7; R. 86, l. 20 – 23; R. 102, l. 7 - 10; R. 94, l. 16 - 21. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

A case should be submitted to the jury when evidence is circumstantial "if there is substantial evidence which reasonably tends to prove the guilt of the accused or from

which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); State v. Williams, 321 S. C. 327, 332, 468 S. E.2d 626, 629 (1996). "The jury weighs the evidence but when there is absence of evidence, it becomes the duty of the trial judge to direct a verdict...."State v. Schrock, 283 S.C. 129, 134, 322S. E. 2d 450, 452-53 (184).

The State based its case primarily on the tracking of cell phone activity from a device that the State's prosecutor and expert witness testified did not ping at the scene of the crime. R. 51, l. 6 – 20; R. 84, l. 7 – 11; R. 335, l. 2 – 347, l. 11 . The defense challenged the inclusion of the cell phone records based upon questionable authenticity due to Verizon acknowledging that the original records were no longer available and the accuracy of the current files being presented could not be verified. R. 52, l. 3- 6; R. 348, l. 17 – 349, l. 1. The State stated the records bared substantial resemblance to those created by Verizon. R. 52, l. 7 – 12. The State further deemed the records were accurate and not modified based upon a screenshot of the zip files and the visible modification date information. R. 53, l. 8 - 15. It is fact that computer files can be copied, modified, and reproduced. The State used what was said to be an excerpt from the full file to present the jury. R. 223, l. 14 – 23. The State's submission of a screenshot image of file properties of the file initially sent to Detective Easterlin does not prove the validity of the actual documents presented to the courts nor that they originated from the zip file given in the screenshot. The State used an excerpt of an Excel spreadsheet to present evidence regarding the subscriber and service activation dates for the cell phone of focus during the investigation. R. 224, l. 13 – l. 24. The spreadsheet (State's Exhibit 21) presented to the jury identified the appellant's wife, Andreana Allen, as the subscriber and it depicted values for the activation and

disconnection dates of the *"phone "* in question. R. 224, l. 20 – 225, l. 7. The prosecutor specifically stated, "Okay, What is the effective date of these—of this *"phone"* being activated." R. 225, l. 3 – 4. During her testimony, the appellant's wife testified that she had recently changed her phone number. R. 197, l. 17 – 198, l. 7. The State never presented any information regarding the activation period of the *"phone number"* in question. Detective Easterlin testified that his full interview (State Exhibit 22) with the appellant may have included information that acted in his favor but the State had drawn certain clips (State Exhibit 23) they deemed as high points that were valuable to the investigation or to probable cause. R. 35, l. 12 - 36, l. 9. During the interrogation video with Detective Easterlin the appellant said he was trying to get the phone activated and could not do so. The appellant finds the State's use of this spreadsheet exhibit, which contained select information, and the manner in which it was presented to the court may have created prejudice against the appellant. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). Unlike information presented on a detailed billing statement, the Excel excerpt only presented the court with *"partial"* information regarding the account and it was misrepresented when being presented. The appellant would not have been able to make changes on the account if he was not the subscriber or an authorized user, thus acknowledging why he was unable to get it activated. If evidence is admissible, it must be balanced against "the danger of unfair prejudice, confusion of the issues, or misleading the jury." SCRE, Rule 403. The State's practice of extracting and presenting select information as evidence that only benefited their favor for proving probable cause and guilt may have created unfair prejudice towards the appellant and

confused the issues while misleading the jury. Presenting accurate, unbiased information to the jury may have led to a different verdict being rendered. The items presented as evidence by the State merely raised suspicion that the appellant committed the alleged crimes. Detective Easterlin's testimony of not fully investigating all possible leads clearly showed elements of confirmation bias existing during the investigation. R. 253, l. 22 - 260, l. 14. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. *State v. Cherry,*361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004).

4. The trial court erred in denying the appellant's wife to invoke her spousal immunity.

The appellant made multiple motions to exclude the testimony of his wife, Andreana Allen, on the grounds of spousal immunity privilege. The motion was denied each time. R. 62, l 7 – 64, l. 19; R. 194, l. 20 – 195, l. 24. The appellant's wife also reiterated her desire to invoke spousal immunity. R. 195, l. 8 – 23; R. 196, l. 13 – 22. The spousal privilege provides that in criminal cases married persons cannot be compelled to testify against their spouses concerning any communication made between them during their marriage. S. C. Code Ann. § 19-11-30 (Supp. 1995). *State v. Copeland,* 321 S. C. 318, 468 S. E.2d 620 (S.C., 1996). The South Carolina Supreme Court has held that the right to exercise the privilege against disclosing marital communications is solely that of the witness/spouse from whom the privileged information is being sought. *State v. Motes,* 264 S. C. 317, 215 S.E.2d 190 (1975).

S.C. Code 19-11-30 provides;

> In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or

hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage. (Emphasis added). Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on child abuse or neglect, the death of a child, or criminal sexual conduct involving a minor.

5. The trial court erred in denying the appellate Baston Motion.

Criminal defendants are guaranteed the right to trial by a "jury of their peers". The appellate raised the Baston Motion and requested an explanation for the striking of a black male. R. 26, l. 18 – 23; R. 27, l. 14 – 22. The States response was, "He was arrested twice. My take on all this was, if you had handcuffs on him (indiscernible), I was going to strike him." R. 26, l. 25 -27, l. 2. The State acknowledged striking two additional white jurors due to having prior arrests as well. R. 27, l. 3 – 13.

S.C. Code Ann. §§ 14-7-810 identifies the rules regarding disqualification, exemptions, and excuse from service as jurors. It states, "In addition to any other provision of law, no person is qualified to serve as a juror in any court in this State if:
(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

The State's explanation of excusing the jurors due to them having a previous "arrest" and being in handcuffs demonstrated prejudice against the potential jurors and the appellate. R. 26, l. 25 – 27, l. 2. The unheard or undocumented "indiscernible" part of the

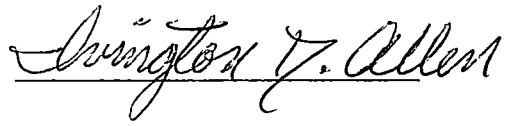
comment leaves question as to the full explanation that was given. Having been arrested does not automatically taint the jurors' ability to render an impartial and unbiased judgment in matters heard before them. Inclusion of these individuals may have led to a different verdict due to more perspectives being taken into consideration during deliberations .

6. The trial judge abused discretion regarding decision for a mistrial.

The trial judge declared a mistrial based upon an act of misconduct regarding the defense counsel's communication with the court in regards to their expert witness Dr. Jamie Downs. R. 285, l. 3 – 309, l. 4. The prosecutor intervened the decision to "suggest an alternative". R. 309, l. 5 – 310, l. 2. Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives. Rule 26.3. The appellant was specifically asked if he wished for Dr. Downs' to be able to testify and if he was comfortable with Dr. Downs' testimony coming in. R. 310, l. 3 – 21. The appellant was not asked to if he wished for the trial to continue at that time or given the opportunity to suggest alternatives. R. 310, l. 22 – 311, l. 8. Thus, the trial court acted precipitately and failed to solicit both parties' views on the necessity of the mistrial and the feasibility of any alternative action. *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990); *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990). The trial judge's initial declaration of a mistrial should not have been reversed at the sole request of the prosecutor and clearer communication should have been developed with the appellant regarding available options that were afforded to him.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and remanded for a new trial.



Ivington Daniel Allen
Appellant

This 24th day of July, 2023

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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RESPONDENT.

APPELLATE CASE NO. 2022-000638

AFFIDAVIT OF SERVICE

I, Ivington Daniel Allen, hereby served a true copy of the Pro-Se Appellant Brief by placing a true copy in the United States mail as addressed below.

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APPELLATE CASE NO. 2022-000638

Dear Honorable Patricia A. Howard of the S.C. Supreme Court,

Enclosed please find an original copy of the Appellant Pro-Se Brief for appellate case number 2022-000638. Also enclosed is a request for a clocked and stamp dated return copy.

Respectfully Submitted,

Ivington D. Allen

Ivington Daniel Allen

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