

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2010-151386

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Appellant.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

PETITION FOR REHEARING

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SC Court of Appeals

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Johnnie Gaskins, Opinion No. 2013-UP-304 (S.C. Ct. App. Filed July 3, 2013)*. Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Appellant would respectfully submit that the opinion of this Court either overlooks or misapprehends a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, this Court's opinion indicates that the photographs in question were probative in that they showed, "the actions of one of the victims during the shooting" as corroborated by the State's expert through the photographs in question. This portion of the Court's decision overlooks or misapprehends two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 – p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the

operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Appellant respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Appellant. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Appellant constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Appellant in his Brief, ***“There can be no justice in a trial by jurors inflamed by passion...”*** *Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971) (footnote 12) (quoting *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). The Appellant respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Appellant. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury’s reaction to the victim and eyewitness testimony.

For all the reasons set forth above, the Appellant respectfully requests that this Honorable Court grant rehearing on this issue.

Issue 2

The Appellant respectfully seeks rehearing on the question of whether the lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone, which arguably had also not been adequately disclosed to the defense prior to trial. The Appellant acknowledges that the grant of a mistrial is a severe remedy and that the judgments of the trial judge will seldom be disturbed in the exercise of his discretion concerning a Motion for a Mistrial. On the facts of this case however, the Appellant respectfully urges this Court to rehear this issue in the face of evidence that the testimony in question irreparably damaged the Appellant's ability to receive a fair trial and therefore, that the trial court abused its discretion in refusing to grant a mistrial in order to preserve the Appellant's rights to due process of law.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "***He [Adams] was like the guy that we put out, shot me, was shooting.***" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated. As noted in the Brief of Appellant, at first blush, it might seem that the dying declaration was not prejudicial to the Appellant since

there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the Appellant submits that this declaration was prejudicial to the Appellant, where he was the only patron the State claimed was actually **“put out”** of the Club.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. McCulloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. McCulloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, **Blackie (phonetic), was that you out there shooting?** I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?

Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. (Emphasis added). Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as “**Black.**” ROA at p. 172, ll. 12-23. Thus, the testimony in dispute would clearly have been taken by the jury to imply that someone close enough to the Appellant to have his personal cell phone number believed him capable of this shooting.

The Appellant asks that his Honorable Court grant rehearing on this crucial issue where the jury in Appellant’s case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both invited the jury to infer that the Appellant was that person.

The Appellant’s central defense was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. As noted in the Brief of Appellant, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial, and so memorable to the jury, is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter. Given the evidence introduced in this case, the jury most certainly would have recognized the possibility that the security staff and Club employees were distracted when the shooting began, however the introduction of

these improper statements strengthened the likelihood that the jury would resolve any doubts they had concerning the identity of the shooter in favor of a finding of guilt based on inferences drawn from this witness's testimony. The Appellant would respectfully submit that, absent the objectionable testimony in question, the evidence against the Appellant was far from conclusive. Once heard, this testimony irreparably damaged the Appellant's ability to receive a fair trial. The Appellant respectfully submits that the nature of the testimony in issue was such that the prejudice to the Appellant could not be cured by instruction. For all the reasons set forth herein, the Appellant respectfully asks this Court to rehear his position that the lower court abused its discretion in denying the Appellant's Motion for a Mistrial. He asks that this Court reconsider his position that the introduction of the evidence in question now requires that he be granted a new trial.

Issue III

The Appellant also asks that this Court grant rehearing on his allegation that the trial judge's abrupt and improper response to an objection made by defense counsel violating the Appellant's right to due process of law. The Appellant would respectfully submit that the decision of this Honorable Court indicates that the Court may have misapprehended the record below on this important issue. This Court found that the remarks of the trial judge, on a whole, were not directed to either side.

The record below clearly demonstrates that just as defense counsel began to raise an objection, the judge yelled, "***Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case.***" ROA at p. 242, ll. 7-17. The harsh or angry tone of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as

the judge felt it necessary to address the matter *in the jury room*, as well as on the record.

After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad. ***Somebody said, well, you scared me.*** I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. (Emphasis added)

The Appellant would respectfully submit that the tone of the Court's remarks is evidenced not only by the trial judge's decision to enter the jury room to address the incident, but also by his admission on the record that one of the jurors actually informed the judge that he had ***scared*** them. It is clear from the record that the outburst from the bench was prompted by the objection being made by defense counsel. The Appellant respectfully submits that the record therefore establishes that the initial remarks from the bench just before the recess, and the comments made to the jury *in the jury room*, were not addressed to both sides as is found by the decision issued in this case. The Appellant would submit that this Honorable Court may have misapprehended the record concerning the remarks of the trial court to this jury. The language referenced above documents what the trial judge told the parties he had said to the jury when he entered the jury room during the recess. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the

civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel. And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15.

Thus, while the *curative charge* issued by the trial judge references both sides, the initial outburst itself, as well as the remarks the trial judge admitted making to the jury in the jury room, were obviously directed at defense counsel.

Likewise, the Appellant would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, "*it was theater.*" The Appellant would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Appellant by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense counsel chose the latter, and the proceedings continued in a calmer manner. The Appellant would urge this Honorable Court to reconsider its finding that this comment, made by defense counsel in an effort to make the best out of a bad situation, evidences the fact that defense counsel was not dealt with in an overly harsh manner. The Appellant has submitted that the failure of defense counsel to make an objection relating to this incident should be excused where the tone and tenor of the trial judge's comments made it clear that any objection would have been futile. *State v. Pace*, 316 S.C.71, 74, 447 S.E.2d 186,187 (1994). He would now

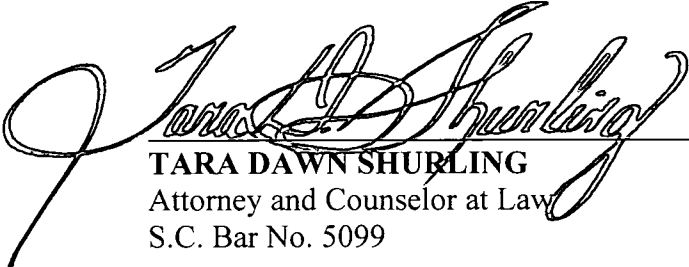
respectfully ask this Honorable Court to recognize that a responsive remark made by defense counsel in an effort to clear the air with the judge he still had to deal with for the remainder of his client's murder trial should not be viewed as conclusive evidence that the incident was not taken very seriously by defense counsel

The opinion of this Court states that the Appellant ***“contends that a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties.”*** With all due respect, the Appellant would ask this Court to recognize that it is the South Carolina Code of Judicial Conduct which sets that standard for judicial behavior. *Canon 3 of Rule 501, SCRAP*. Section B(4) of that Canon states that, ***“a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.”*** *Canons 3 of Rule 501, Section B(3), SCRAP*. Likewise, it is well established in precedents from our Supreme Court ***“that a trial judge must act with absolute impartiality in the performance of judicial duties.”*** State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). . The Appellant respectfully asks for this Court to grant rehearing on this important issue. Inasmuch as the judge’s reaction was improper and the Appellant was prejudiced, the Appellant asks this Honorable Court to reconsider his prayer for a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds above, the Appellant, Johnnie Walker Gaskins, asks that this Court rehear his direct appeal and grant him a new trial.


Respectfully submitted,



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ATTORNEY FOR APPELLANT

This  day of July, 2013.

STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

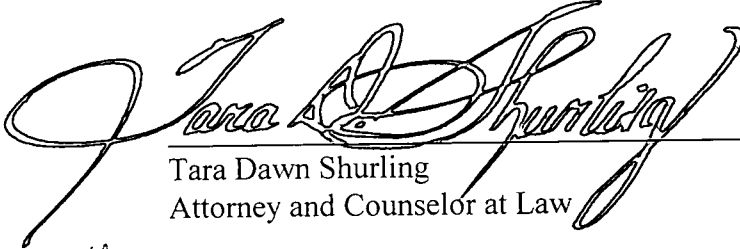
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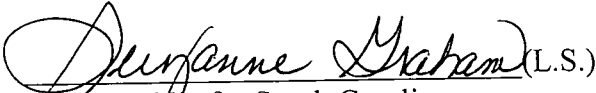
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 18th day of July, 2013.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 18th day
of July, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/2023

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