

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Orangeburg County  
Court of General Sessions**

**Edgar W. Dickson, Circuit Court Judge**

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**Case No. 2011-GS-38-1833  
Appellate Case No. 2012-213006**

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**STATE OF SOUTH CAROLINA,**

**v.**

**JULIAN C. YOUNG,**

**RESPONDENT.**

**APPELLANT.**

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**INITIAL BRIEF OF APPELLANT**

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**RECEIVED**

**JUL 25 2013**

**SC Court of Appeals**

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STATEMENT OF THE ISSUE ON APPEAL

I.

**Did the trial court err, and thereby violate the Appellant's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot?**

STATEMENT OF THE CASE

The Appellant was indicted by the Orangeburg County Grand Jury for the offense of murder. See, Indictment no. 2011-GS-38-1833. He was represented in the trial court by Virgin Johnson and Corey L. Williams, of the Orangeburg County Bar. The Appellant proceeded to trial by jury on August 14 – 16, 2102. The State was represented at trial by Assistant Solicitors Donald Sorenson and Harrison Bell. At the conclusion of this trial, the Appellant was found guilty as indicted and was sentenced by the Honorable Edgar W. Dickson, presiding circuit court judge, to a term of thirty-five (35) years incarceration.

The Appellant served and filed a timely Notice of Appeal from his judgment and sentence. This appeal follows.

## ARGUMENT

**Did the trial court err, and thereby violate the Appellant's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot?**

At trial, the Appellant made a motion pursuant to *Crawford v. Washington* that any testimony concerning statements attributed to the victim-deceased be excluded. The Appellant argued that admission of testimony concerning these statements, where the victim was not available for cross-examination, would violate his rights pursuant to the confrontation clause of the United States Constitution. The Appellant cited *State v. Gardner*<sup>1</sup> and *Rule 803, SCRE*, in support of his position that the testimony in question would be prejudicial hearsay. The Appellant further argued that the statements in question should not be admitted as dying declarations where there was no reliable evidence from which it could be determined that the victim-deceased actually believed he was dying. Defense Counsel argued that the fact that the victim-deceased, who was known to be a drug dealer, did not want to give his name to the police, was evidence that he was capable of reflective thought at the time. This fact, the Appellant argued, directly evidenced that the victim-deceased was capable of reflective thought at the time the statements were made. Likewise, it was argued that the statements in questions were not spontaneous utterances but rather, were made in response to questioning by a sergeant with the South Carolina State University Police Department; Kendra Williams. Tr. p. 35 l. 11 – p. 38 l. 15. In response to the Appellant's motion, the State argued that *Crawford*, supra, should not apply because the statements were not testimonial in nature. Tr. p. 40 ll. 12-22.

Testimony from Sergeant Williams was presented *in camera*. She testified that when she arrived at the scene the victim-deceased was in the back of an ambulance. Tr. p. 45, ll. 10 – 23.

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<sup>1</sup> The record reflects that Counsel cited to *State v. Gardner*, however, based upon the content of his argument, Appellant asserts that this is a probable reference to *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2012).

He had a gunshot wound to his right chest and another wound on his left side. Tr. p. 46, ll.5 – 11. According to Sgt. Williams, he appeared to be in a lot of pain. She said, “[h]e was frantic, he was rolling back and forth, he was scared, he kept saying, get me to the hospital, I’m going to die. He was, he was scared.” Tr. 46 p. 46, ll. 14 – 19

According to this witness, she asked the victim if he had been robbed and he shook his head, yes. She asked him if he had been in the parking lot of Queen’s Village and he once again nodded, yes. She asked him if he saw who robbed him and he indicated that he did by shaking his head. She then asked him how many people robbed him and he held up four fingers. When she asked, “four ?” he shook his head, yes. Although he supposedly shook his head yes in response to the question about whether he saw the gun that shot him, he shook his head “no” when asked if the gun was black or silver. Tr. p. 47, ll. 2- 13. She testified that the victim was having a really hard time speaking and that he mostly just shook his head to answer questions. She did claim that he said he was in pain and that he was going to die. Tr. p. 47, ll. 11 – 21. On cross-examination, Sgt. Williams acknowledged that she had given a statement to Investigator John Johnson with SLED. She said that she had told him everything that happened, “if I recall.” Tr. p. 49, ll.6 – 14. She admitted that in her statement to SLED

- She did not say the victim was frantic;
- She did not say that he had said “get me to the hospital”;
- She did not say that the victim was scared;

Tr. p. 49, l. 3 – p. 50, l. 12.

Sgt. Williams also acknowledged that when she first spoke to the victim he would not tell her his name. Tr. p. 53, l. 24 – p. 54, l. 4. In response to the testimony of Sgt. Williams, Trial Counsel noted that in the statement she gave to SLED, Sgt. Williams reported that the victim said, “get me to the hospital because I’m shot, I’m hurt.”, as opposed to, “I’m going to die” as

she claimed in court. Tr. p. 55, ll. 10 – 14. The Appellant renewed his objections to the admission of this testimony on the ground that it clearly wasn't an excited utterance nor was it a dying declaration. Trial Counsel argued that the statements in question were more prejudicial than probative under Rule 403, SCRE. Tr. p. 54, l. 21 – p. 56, l. 8. The State argued that the fact that the victim was in pain, and wanting to get to the hospital, coupled with the fact that he thought he was about to die, made these statements non-testimonial. The State additionally argued that since the victim did not name the Appellant in any of these statements to Sgt. Williams, the statements were no prejudicial to the Appellant. Tr. p. 56, l. 12 – p. 57, l. 22.

Ultimately, the trial judge acknowledged that he had questions about whether, or not, it would be a dying declaration because the statement this witness gave to SLED after interviewing the victim, did not contain the statement about “*needing to get to the hospital, I’m going to die.*” The judge noted that he had “*an issue with whether or not it’s a dying declaration*” and he declined to decide the admissibility of this testimony on that issue. Tr. p. 58, l. 24 – p. 59, l. 5. The trial court found however, that the statements in questions were excited utterances and ruled that, as such, they were admissible. Tr. p. 59, ll. 5 – 24. Trial Counsel challenged the notion that a nodding of the head could qualify as an excited utterance however, the trial court found non-verbal communication could constitute an excited utterance. Tr. p. 59, ll. 4 – 14. In addition, Trial Counsel noted that Sgt. Williams was not able to say how close in time these statements were made to the shooting. Also, Trial Counsel objected to the position that someone being in pain would qualify as a foundation for a finding that a statement was an excited utterance. Tr. p. 60, l. 15 – p. 61, l. 12.

The State subsequently asked the trial court to rule on whether the statements in questions were testimonial in nature. Tr. p. 61, ll. 13 – 17. The trial court then stated for the record,

Okay. I’m going to let it in, I say it will be non-testimonial and let it in. It’s just part of the excited utterance at the time, whether or not—you know, the purpose of letting an excited utterance in is that he doesn’t have

time for any kind of reflective thought. And so, right now, this is a gentleman that's just been robbed and shot, he's in an ambulance, and I don't think based on the testimony I heard that he had time to have much reflection about what was going on so he could make up a story. Okay? He was just answering questions that were put to him by a police officer trying to get to the bottom of the situation.

Tr. p. 61, l. 18 – p. 62, l. 3.

In response to this ruling, the Appellant asked the Court to note, once again, that the fact that this witness refused to give his name to the officer interviewing him was evidence of reflective thought. Tr. p. 62, l. 9 – 12. The Court responded, “But, I do believe it's an excited utterance.” Tr. p. 62, l.20.

The testimony of Sgt. Williams in the presence of the jury was largely consistent with her testimony *in camera*. In her testimony in camera she indicated that the victim shook his head and indicated yes when she asked him if he had seen the weapon. She said that when she asked him if the weapon was black or silver, he “*kept shaking his head, no.*” Tr. p. 47, ll7 – 13. In her testimony in the presence of the jury, she added that she had asked him if the gun was a revolver and he answered yes. Tr. p. 89, ll. 10 – 11. With this exception, her trial testimony was consistent with her *in camera* testimony on the operative points concerning the circumstances surrounding this shooting. Tr. p. 88, ll. 17 – 21 and Tr. p. 89, ll. 1 – 14.

The Supreme Court of the United States has found that testimonial hearsay against a defendant violates the Confrontation Clause of the United States Constitution if 1) the declarant is unavailable to testify at trial and 2) the accused has had no prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004). As recognized by the Court in *Crawford*, “not all hearsay implicates the Sixth Amendment.” *Id*, 541 U.S. at 51. On the other hand, otherwise admissible hearsay testimony may be rendered inadmissible if it is testimonial in nature. *Id*, 541 U.S. at 68. Thus, if a statement is testimonial in nature, it is not admissible simply because it would otherwise fall under a recognized exception to the hearsay

rule. On the other hand, the fact that a statement is not testimonial, does not render it admissible simply because it does not infringe upon the Sixth Amendment right of confrontation. *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2012). Where non-testimonial hearsay is at issue, the Sixth Amendment is not implicated. *State v. Ladner*, 373 S.C. 103, 113, 644 S.E.2d 684, 689 (2007). In discussing what the standard for determining whether a statement is testimonial should be, the high court stated, “ we leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68. The Court went on to find that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.*, at 68-69. South Carolina has clearly recognized that a statement that would otherwise be admissible under an exception to the hearsay rule is inadmissible if it is testimonial nature. In *State v. Mitchell*, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2009), a prior statement to police which would have been admissible as a statement against penal interest under Rules 804(a)(2) and (b)(3), SCRE, where the declarant refused to testify, was found by the Court of Appeals to violate the confrontation clauses of both the United States Constitution and the South Carolina Constitution. U.S.C.A. Cont. Amend. 6 and 14 and S.C. Cont. art. I, §14.

Our Supreme Court has held that a violation of the Sixth Amendment right to confront witnesses is not per se reversible error. *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006)

On the facts of this case, the statements attributed to the victim-deceased should have been excluded from evidence inasmuch as they were testimonial in nature and the declarant would not be available for cross-examination. The testimony presented during the Appellant’s trial established that drugs were found in the victim’s car. Tr. p. 101, ll. 4-5. Multiple state witnesses would ultimately testify that the victim was a drug dealer. Despite the fact that he was

seriously injured, the fact remains that he made the statements in question while being questioned by a law enforcement officer concerning the circumstances surrounding his shooting. He made those statements under circumstances where an objective witness would reasonably believe that the statement would be available for later use at a trial. *Crawford*, 541 U.S. at 51-52. On these facts, the statements attributed to the victim by Sgt. Williams were testimonial and their introduction violated the confrontation clauses of both United States Constitution and the South Carolina State Constitution. *U.S.C.A. Cont. Amend. 6 and 14 and S.C. Cont. art. I, §14. See also, State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977).

The trial court appears to have concluded that the statements in questions were admissible because the circumstances surrounding these statements met the criterion for the excited utterance exception to the hearsay rule. Assuming *arguendo* that they would, this fact would not render the statements admissible in light of the fact that they were testimonial. As previously noted, otherwise admissible hearsay may be rendered inadmissible if it is testimonial.

Even if this Honorable Court were to conclude that the statements in questions were not testimonial in nature, the Appellant would submit that the circumstances under which they were made did not meet the standard for admission as an excited utterance. Rule 803(2) defines an excited utterance as a,

**[s]tatement relating to a startling event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.**

A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance hearsay exception and the determination in such matters is generally left to the sound discretion of the trial judge. *State v. Burdette*, 335 S.C. 34, 43-44, 515 S.E. 525, 530(1999). The rationale behind the excited utterance exception is that “the startling event suspends the process of reflective thought, reducing the likelihood of fabrication.”

*State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). As argued by the Appellant at trial, the victim-deceased in this case, knowing he had drugs in his car, refused to give his name to Sgt. Williams. Such a ploy clearly evidences reflective thought and therefore, establishes that the statements in question were not made while the victim's state of mind was such that he was incapable of reflective thought and therefore, less likely to fabricate. Hiding your identity in fear of the police is not an action one would expect to see in a person who wasn't expecting to be around to suffer the consequences of their unlawful behavior.

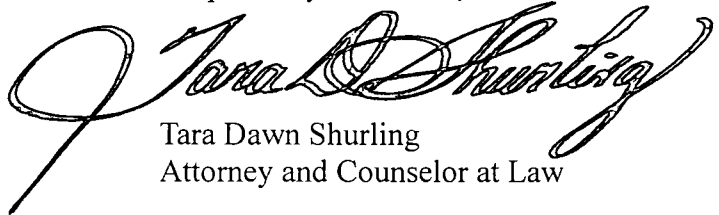
The Appellant would respectfully assert that the admission of the statements attributed to the victim irreparably tainted his ability to receive a fair trial. Absent these statements, there was no other evidence that the victim in this case was robbed prior to his shooting. Given the totality of the evidence presented in this case, while the circumstances may have given rise to suspicion, they did not establish how the victim died. If anything, the testimony of all the other witnesses left as a mystery what happened in the moments preceding the victim's shooting. Based on the testimony of the State's own witnesses, it was equally possible that the deceased pulled a gun on the Appellant and was shot in an ensuing tussle for the weapon. The testimony of Sgt. Williams is all the more dangerous inasmuch as she questioned the injured man in a manner which suggested an answer. After all, her question to the deceased was not, what happened? Her question was, were you robbed? Tr. p. 47, ll. 2-5. It is not unreasonable to suggest that a young man cool enough to refuse to give the police his name after he had been shot, and caught with drugs in his car, might also have been cool enough to seize on the opportunity to shift attention away from himself by answering that question affirmatively. It is also important to note that the statements in question were not blurted out by someone experiencing the immediate effects of a stressful event. He was questioned by the police and his refusal to answer the questions about his identity demonstrates that he was thinking reflectively about his answers.

For all these reasons the Appellant respectfully submits that the trial court erred in admitting the hearsay testimony of Sgt. Williams.

CONCLUSION

Based upon all the above reasons and authorities, the Appellant asks that his judgment and sentence for murder be vacated and that his case be remanded to the Orangeburg County Court of General Sessions for a new trial.

Respectfully submitted,



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**ATTORNEY FOR APPELLANT**

This 24<sup>th</sup> day of July, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Orangeburg County  
Court of General Sessions

Edgar W. Dickson, Circuit Court Judge

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Case No. 2011-GS-38-1833  
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DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL

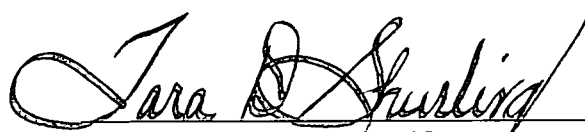
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The Appellant proposes the following be included in the Record on Appeal:

1. Trial Transcript  
pp. 35– 435
2. Indictment

I certify that this designation contains no matter which is irrelevant to this appeal.

July 24, 2013.



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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a copy of the Appellant's Initial Brief and Designation of Matter in the above-entitled case have been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, by depositing in the U.S. Mail, postage prepaid, this 24<sup>th</sup> day of July, 2013.



Tara Dawn Shurling  
Attorney and Counselor at Law

Attorney for Appellant.

SWORN TO BEFORE me this 24<sup>th</sup> day  
of July, 2013.

Sharon H. McColister (L.S.)  
Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

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