RECEIVED
Feb 05 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONE B. ELLIS TREMAYNE BLAKELY,

APPELLANT

APPELLATE CASE NO. 2023-000721

INITIAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT

I.

The trial court reversibly erred by admitting hearsay statements of Byrd from a phone call with his uncle under the excited utterance exception despite evidence indicating reflective thought where Byrd implicated Appellant in a recent assault after already having left the alleged incident site, and where Byrd requested his uncle to come get him and to bring him a firearm 7

II.

The trial court reversibly erred by admitting three autopsy photographs in Appellant's trial for murder and second-degree assault and battery by mob 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

State v. Alexander, 303 S.C. 377, 401 S.E.2d at 1496 (1991) 11

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1254, 158 L.Ed.2d 177 (2004) 8

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 7, 10

State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) 11

State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) 10

State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) 8, 9

State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) 8

State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) 10

State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010) 11

State v. Kelley, 319 S.C. 173, 460 S.E.2d 370 (1995) 11, 12

State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) 10, 11, 13

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) 8

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 7

State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) 11

State v. Prather, 429 S.C. 583, 840 S.E.2d 551 (2020) 8, 9

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010) 11

State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953) 11, 13

State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008) 7, 8

Rules

Rule 401, SCRE 11

Rule 402, SCRE 11

Rule 403 SCRE 11, 12, 13

Rule 801(c), SCRE 7, 8

Rule 802, SCRE 7, 8, 9

Rule 803(2), SCRE 7

Other Authorities

31A C.J.S. Evidence § 359 (1996) 8

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court reversibly erred by admitting hearsay statements of Byrd from a phone call with his uncle under the excited utterance exception despite evidence indicating reflective thought where Byrd implicated Appellant in a recent assault after already having left the alleged incident site, and where Byrd requested his uncle to come get him and to bring him a firearm?

II.

Whether the trial court reversibly erred by admitting three autopsy photographs in Appellant's trial for murder and second-degree assault and battery by mob?

STATEMENT OF THE CASE

Appellant Antone B. Ellis Tremayne Blakely was indicted by the Laurens County grand jury for second-degree assault and battery by mob, kidnapping, criminal conspiracy, armed robbery, possession of a weapon during the commission of a violent crime, and murder. The charges stemmed from his alleged involvement in events occurring on the night of January 22, 2021. Tr. 18, ll. 12—Tr. 21, ln. 3; Tr. * (Indictments).

An immunity hearing was held on February 6, 2023, before the Honorable Donald L. Hocker from April 18th through 21st, 2023. Appellant was represented by Matt Ozment, while the State was represented by David Stumbo and Josh Thomas. Tr. II 1. The trial court denied Appellant's motion for immunity from prosecution, and his case proceeded to jury trial from April 18th through 21st, 2023. Tr. 1; Tr. * (Order).

The jury found Appellant guilty of murder, kidnapping, possession of a weapon during commission of a violent crime, criminal conspiracy, and third-degree assault and battery by mob as a lesser included offense.[1] Tr. 711, ln. 14—Tr. 712, ln. 4. The trial court imposed the following sentences: forty (40) years for murder; twenty-five (25) years for kidnapping; five (5) years for criminal conspiracy; five (5) years for possession of a weapon during commission of a violent crime; and time served for third-degree assault and battery by mob. Appellant was given 820 days credit for time served. Tr. 720, ll. 6-15; Tr. * (Sentence sheets).

---

[1] The trial court granted Appellant's directed verdict motion on the charge of armed robbery. Tr. 540, ll. 1-15.

STATEMENT OF THE FACTS

On January 22, 2021, Jarius Byrd (Byrd) stayed in the apartment of Shameia Workman (Workman) within the Spring Street apartment projects in Laurens, South Carolina. The mother of Appellant's child lived in the apartment next door to Workman, and he was regularly present. Tr. 595, ln. 19—Tr. 597, ln. 6. Workman had left sometime between 4:00 pm to 5:00 pm to go to a birthday party at another apartment nearby, but was called by Nikki West later that night to come back because Byrd had been beaten up. Tr. 598, ln. 2—Tr. 599, ln. 22. While Workman was gone, Byrd had been beaten by Marcus Grant (Marcus) in his bedroom while getting ready for work. According to Marcus, it was because Byrd was a confidential informant in a case against him about a decade prior which led to his incarceration. On the way to Club Epic in Mauldin, he stopped the car with his brother Warren Grant, and his cousin Travis Evans. He got out of the car alone, went into Byrd's room inside the apartment, and beat Byrd while he was on the bed. He then left and continued to the club. Tr. 95, ln. 12—Tr. 96, ln. 25; Tr. 557, ln. 20—Tr. 559, ln. 24; Tr. 562, ln. 21—Tr. 563, ln. 18; Tr. 567, ln. 11—Tr. 571, ln. 6. Further, according to Marcus, Appellant was not present either in the room or at the apartment when Byrd was beaten. Tr. 576, ll. 1-6.

Upon Workman's return to her apartment, she spoke with Byrd outside.[2] He appeared to have been in a fight. Workman went inside her apartment and saw people playing cards. When nobody would tell her what occurred, she kicked everyone out. However, Appellant was outside at the time, and she allowed him to come inside. Tr. 601, ln. 12—Tr. 603, ln. 7; Tr. 617, ll. 9-14.

---

[2] According to testimony, "lots" of people were outside on both sides of the street that night. Tr. 129, ll. 16-17; Tr. 133, ln. 6—Tr. 134, ln. 4; Tr. 602, ll. 11-12.

Meanwhile, Byrd had walked across the street to the apartment of his cousin Markee Brown (Brown), while calling his uncle David Little (Little). Byrd told Little that Appellant, Marcus, Shykorie Grant[3] (Shykorie), and one other purportedly came into Byrd's bedroom, locked the door, and held Byrd at gunpoint while he was beaten.[4] He asked Little to come and get him, and to bring him something to protect himself, which Little knew meant to bring guns. Tr. 117, ln. 15—Tr. 118, ln. 23; Tr. 127, ll. 1-11. Little arrived in his corvette approximately 10 to 15 minutes later with his wife and parked in front of Brown's apartment. Little opened the trunk, and showed Byrd the three firearms therein: a .22 caliber revolver; a .357 revolver; and an AK-47. After speaking with Little for 10 to 20 minutes on the sidewalk, Byrd selected the .22 caliber revolver despite Little's suggestion that he take the AK-47.[5] When cautioned not to go back to the apartment, Byrd told Little that he "ain't no punk." Tr. 120, ll. 7-24; Tr. 121, ln. 20; Tr. 125, ln. 17—129, ln. 25.

Workman had already walked from her apartment across the street as well. About five to ten minutes after Workman had kicked people out of her apartment, Little left in his car with his wife. Tr. 604, ll. 3-22. At approximately 9:00 pm, Byrd walked back toward Workman's

---

[3] Although they share the same last name, Marcus Grant and Shykorie Grant are not related. Tr. 557, ll. 4-8.

[4] Shykorie also purportedly stopped at Brown's apartment to buy candy and a soda shortly after the alleged assault, but before Byrd came across the street. Brown indicated Shykorie told him that his cousin got jumped by people including Swann, Appellant, and Marcus. Tr. 259, ln. 17—Tr. 260, ln. 8. Jaquetrice Putnam, Byrd's girlfriend at the time, also indicated that she spoke with Shykorie a couple days after the incident, and Shykorie relayed a similar version of events to her, but Appellant was not named as one of the assailants. Tr. 246, ll. 13-22; Tr. 250, ln. 8—Tr. 256, ln. 4.

[5] Although Little admittedly was not allowed to possess firearms, he was not charged. Tr. 131, ll. 10-11; Tr. 477, ll. 15-25. Little made this suggestion when he allegedly saw Appellant standing on Workman's apartment porch with a gun in his waistband.

apartment with Workman following behind. Once on the porch and standing in the doorway, Byrd pulled the gun from his waistband and told Appellant, "Say that shit again." Workman was surprised at this, and Appellant was just as shocked. Workman saw Appellant reach for something as well, and ran off the porch; a second later she heard two to three shots. Tr. 261, ll. 9-20; Tr. 411, ln. 15—Tr. 412, ln. 1; Tr. 605, ln. 10—Tr. 607, ln. 10; Tr. 608, ll. 3-8. She ran to the side, fell by a dumpster, and saw Byrd do the same behind her. Workman then got back up and continued to run while hearing more shots fired. Tr. 607, ln. 16—Tr. 610, ln. 15. However, while Byrd was still laying on the street, Deandre Hakeem Lee (Lee) stood over him and fired two shots. Tr. 475, ln. 6— 476, ln. 14. Notably, Appellant was neither seen coming outside to the front of the apartment, nor shooting a firearm outside. Tr. 273, ll. 8-19.

Police were called and arrived soon after. Tr. 69, ln. 19—Tr. 71, ln. 16. Byrd was taken by EMS to the hospital where he succumbed to his wounds—he was shot in his lower right chest, his left buttock, and his right big toe, in addition to a graze on his right leg. Tr. 75, ln. 11—Tr. 76, ln. 20; Tr. 297, ln. 8—Tr. 304, ln. 6; Tr. 315, ln. 14—Tr. 316, ln. 6.

An agent from the South Carolina Law Enforcement Division (SLED) processed the scene outside, and recovered multiple shell casings in both 9mm and .40 caliber. Tr. 158, ll. 1-16; 20-25. Two handguns—a Taurus 9mm with Appellant's DNA on it, and a Glock 22 in .40 caliber—were also recovered next to a fence nearby.[6] Tr. 181, ln. 24—Tr. 182, ln. 17; Tr. 209, ll. 5-19. Appellant and others were eventually charged in the case. Tr. 483, ln. 4—Tr. 485, ln. 17.

---

[6] None of the 30 shell casings collected and submitted to SLED were examined because the State did not request analysis of them. Therefore it was not determined whether any were fired by either of the two handguns collected. Tr. 513, ln. 25—Tr. 515, ln. 15; Tr. 516, ll. 12-17.

Appellant's case proceeded to jury trial from April 18th through 21st, 2023. Tr. 1; Tr. * (Order). He was found guilty of murder, kidnapping, possession of a weapon during commission of a violent crime, criminal conspiracy, and third-degree assault and battery by mob. Tr. 711, ln. 14—Tr. 712, ln. 4. The trial court imposed an overall prison term of forty (40) years, and 820 days credit was given for time served. Tr. 720, ll. 6-15; Tr. * (Sentence sheets).

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by admitting hearsay statements of Byrd from a phone call with his uncle under the excited utterance exception despite evidence indicating reflective thought where Byrd implicated Appellant in a recent assault after already having left the alleged incident site, and where Byrd requested his uncle to come get him and to bring him a firearm.

The trial court erred by permitting the hearsay statement of Byrd to Little regarding Appellant's alleged participation in the assault. By the time the call was made, Byrd had left the apartment, and had the mental wherewithal to form a plan of action: he called Little specifically asking to come pick him up, but also to bring "protection," which Little knew to mean firearms. Thus, Byrd's hearsay statement itself reveals that his thought process for reflective thought was not suspended, and the trial court erred in admitting it under the excited utterance exception.

"In criminal cases, the appellate court sits to review errors of law only." State v. Washington, 379 S.C. 120, 123, 665 S.E.2d 602, 604 (2008) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "A ruling on the admissibility of the evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." Id. 379 S.C. 123-24, 665 S.E.2d at 604 (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id.

"'Hearsay' is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is inadmissible. Rule 802, SCRE. An exception to the rule against hearsay is an excited utterance. An excited utterance is defined under the South Carolina Rules of Evidence as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

"Three elements must be met in order for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008) (citing State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007)). Importantly, "[t]he rationale underlying the excited utterance exception is that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006) (quoting State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999) abrogated in part by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1254, 158 L.Ed.2d 177 (2004)). "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered." State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 566 (2020) (citing Ladner, 373 S.C. at 119-20, 644 S.E.2d at 693). Further, "the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence." State v. Davis, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (quoting 31A C.J.S. Evidence § 359 (1996)).

In the case at bar, Byrd's statement undoubtedly qualifies as hearsay. It was an out of court statement offered by the government for the truth of the matter asserted. Tr. 117, ln. 15—Tr. 118, ln. 23; Tr. 127, ll. 1-11. As such it is inadmissible unless an exception properly applies. See Rules 801 and 802, SCRE. Yet, when the three elements required for invocation of the excited utterance exception are applied to the present facts, the statement fails to clear the hurdle of the second element: it was not "made while the declarant was under the stress of excitement." Washington, 379 S.C. at 124, 665 S.E.2d at 604.

Here, the evidence shows that Byrd made the statement to Little while in full capacity of processing reflective thought. Even if Byrd was indeed assaulted—by Marcus alone or others—he was able to collect himself and his thoughts enough to: (1) leave the premises where he was purportedly assaulted; (2) find his cellular phone; (3) dial Mr. Little; (4) inform Little of his desire to leave and request a ride to carry out such a plan; and (5) request that Little bring him a firearm. Under such factual circumstances, Byrd's statement reflects the process of rational, reflective thought, and the "intrinsic reliability" justifying the exception is not present. Davis, 371 S.C. at 178, 638 S.E.2d at 62; Prather, 429 S.C. at 611, 840 S.E.2d at 566. Accordingly, the trial court erred in admitting Byrd's hearsay statement. Rule 802, SCRE.

II. The trial court reversibly erred by admitting three autopsy photographs in Appellant's trial for murder and second-degree assault and battery by mob.

Appellant asserts the trial court reversibly erred by permitting the State to use three close-up black and white photographs depicting Byrd's gunshots wounds. Despite the State's claim that the photographs were necessary to refute self-defense, the information contained in the photographs were neither relevant nor necessary to any disputed issue at trial. Moreover, any probative information pertaining to Byrd's gunshot wounds was previously gleaned from the pathologist's testimony on the matter. As such, the trial court erred by admitting them over Appellant's objections on the basis that they were less gruesome due to being black and white, that the State was limited "down to three photographs," and that there was "enough probative value to outweigh any sort of prejudicial effect." Tr. 380, ln. 12-1-Tr. 387, ln. 6; Tr. 388, ll. 5—Tr. 389, ln. 15; Tr. * (State's exhibit # 130A); Tr. * (State's exhibit # 132A); Tr. * (State's exhibit # 134A). Rather, they were irrelevant or unnecessary to substantiate material facts or conditions. As a result, their probative value was substantially outweighed by prejudicial effect.

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180 (1986). "The relevancy and materiality of a photograph is left to the sound discretion of the trial judge." State v. Edwards, 194 S.C. 410, 10 S.E.2d 587, 588 (1940).

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be

excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence). Stated differently, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded *if they are irrelevant or not necessary to substantiate material facts or conditions*." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Moreover, "[i]n the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." Kornahrens, 290 S.C. at 288-89, 350 S.E.2d at 185 (emphasis in original) (citing Waitus, 224 S.C. at 12, 77 S.E.2d at 256).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting Alexander v. State, 303 S.C. 377, 382, 401 S.E.2d 146 (1991)).

In the present case, the information contained in the photographs were neither relevant nor necessary to the disputed issues at Appellant's trial. First and foremost, Appellant never refuted the fact that Byrd was shot and killed on January 22, 2021. Tr. 66, ll. 12-17. Additionally, the State never contended that Appellant followed Byrd outside or shot his firearm outside where the extreme majority of shots came from—at least thirty spent shell casings of 9mm and .40 caliber were found outside, and none inside. Tr. 273, ll. 8-19; Tr. 513, ln. 25—Tr. 515, ln. 15; Tr. 516, ll. 12-17. In fact, Det. Sellers even acknowledged that it was Lee—not Appellant—who stood over Byrd and fired a gun in his direction two times after Byrd fell on the street. Tr. 475, ln. 6— 476, ln. 14. Thus, contrary to the State's argument and the trial court's ruling, the close-up photographs were irrelevant to whether Byrd was killed in self-defense—especially the pictures of his big toe, and his side—and any probative value in them was significantly outweighed by their unduly prejudicial effect. See Rule 403, SCRE; see also Kelley, 319 S.C. at 177, 460 S.E.2d at 370.

Moreover, the State already established any relevant aspects of the information contained in the photographs through prior testimony. Dr. Grace Dukes (Dr. Dukes) testified as the pathologist in the case. Tr. 292. Specifically, she already informed the jury of the injuries Byrd sustained, including their locations, their directions, and that two projectiles were recovered from Byrd's body. Tr. 297, ln. 8—Tr. 304, ln. 6. Thus, close-up pictures of the gunshot wounds were unnecessary—especially where included a metal medical tool shoved into Byrd's side near the bullet hole. Tr. * (State's exhibit # 130A). Any potentially useful information contained in the photographs was gleaned from Dr. Dukes prior testimony. As such, admission of the close-up black and white photographs of Byrd's wounds to his side, buttocks, and big toe was error because, "[i]n the *guilt* phase of a trial, photographs of the murder victims should be excluded

where the facts they are intended to show have been fully established by competent testimony." Kornahrens, 290 S.C. at 288-89, 350 S.E.2d at 185 (emphasis in original) (citing Waitus, 224 S.C. at 12, 77 S.E.2d at 256); see also Rule 403, SCRE.

CONCLUSION

For the foregoing reasons, Appellant Antone B. Ellis Tremayne Blakely respectfully requests reversal of his convictions, and remand for new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2024.