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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY JA JUAN SCIPIO, JR.

APPELLANT

APPELLATE CASE NO. 2022-000949

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by allowing Officer Manley to testify about appellant being detained as a result of a burglary call from his grandmother's house, and that a contemporaneous check of NCIC revealed appellant had a warrant for murder out against him in Florence County since this testimony was unduly prejudicial under Rule 403, SCRE, and could it reasonably have been interpreted as evidence of prejudicial prior bad acts under Rule 404(b), SCRE?

2.

Whether the court erred by excluding the transaction sheet from appellant's credit or debit card, Court's exhibit 3, which showed transactions at the Shell Food Mart at 10:32 and 10:33 on July 6, 2019 which were very close in time to the shooting occurring at another location, since this was relevant evidence of the lack of a serious police investigation in this case once appellant became a suspect?

3.

Whether the court erred by allowing Investigator Odom to testify that Orlando Mendez told him appellant entered the residence and began shooting since this was highly prejudicial hearsay testimony?

STATEMENT OF THE CASE

Appellant was indicted at the December 2019 term of the Florence County grand jury for the offense of murder. R. 524. His case was called to trial on June 20, 2022, before the Honorable D. Craig Brown and a jury. Todd Tucker was the assistant solicitor. Steven Krzyston and Patrick Sharpe represented appellant. R. 1.

On June 24, 2022, the jury found appellant guilty. R. 520, ll. 4-6. Judge Brown sentenced appellant to life imprisonment. R. 523, l. 19-22.

This appeal follows.

STANDARD OF REVIEW

Issue one: The circumstances of appellant's arrest:

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, “[a]s a threshold matter, ... determine whether the proffered evidence is relevant.” Clasby, 385 S.C. at 154, 682 S.E.2d at 895; “If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)” to show, *inter alia*, the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...”).

Issue two: Credit card transaction report:

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion

occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Issue three: Hearsay testimony of Orlando Mendez:

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

1.

The court erred by allowing Officer Manley to testify about appellant being detained as a result of a burglary call from his grandmother's house, and that a contemporaneous check of NCIC revealed appellant had a warrant for murder out against him in Florence County since this testimony was unduly prejudicial under Rule 403, SCRE, and could it reasonably have been interpreted as evidence of prejudicial prior bad acts under Rule 404(b), SCRE.

Relevant facts

Stephanie Lucas lived on Tall Oaks Drive in Florence County on July 6, 2019. Her daughters Amya and Stephanie Mendez lived with her there. The father of the Mendez children, Orlando Mendez, came "to visit a lot." R. 23, l. 2 - 24, l. 6.

Lucas remembered that Orlando Mendez and the decedent, Rico Johnson, came over to her house around ten p.m. that evening. R. 26, l. 6 - 34, l. 25. They went into the living room and sat down to watch television. Lucas remembered someone knocked on the front door about fifteen to twenty minutes later. At the door was "Ja Juan," the appellant, according to Lucas. Lucas knew appellant and she said hello to him. She asked him how he was doing. Lucas said she let appellant inside her home to seemingly see Orlando.

However, she contended that "five or six seconds" later, she heard gunshots and she heard her daughter scream. R. 35, l. 7 - 36, l. 19. Lucas went running towards her daughter to find out what happened. She maintained that she saw "Orlando tussling with Ja Juan" at the front door as Ja Juan was leaving. R. 37, l. 15 - 38, l. 19. Lucas's daughter called 911 and EMS arrived to attend to the wounded decedent, Rico Johnson, who was "still on the couch." Rico died a short time later. R. 40, ll. 1-19.

Sergeant William Odom responded to the crime scene on Tall Oaks Drive on July 6, 2019. R. 63, l. 10 - 64, l. 13. Odom remembered talking to Orlando Mendez that evening. Over defense counsel's hearsay objection, Odom testified: "Mr. Mendez advised that Larry Scipio was the one that entered the residence and was firing shots." R. 68, l. 13 - 69, l. 3.

Amber Flowers was another Florence County Sheriff's Deputy dispatched to the crime scene on Tall Oaks Drive in the "10:30 p.m. timeframe." R. 99, l. 10 - 106, l. 12. Flowers did not interview Stephanie Mendez, who was fourteen years old at the time of the incident, because she was too emotional at the time. However, Flowers claimed everyone else's "statement was consistent with the same subject." R. 106, ll. 13-16.

The circumstances of appellant's arrest

Prior to trial, the defense moved to exclude the circumstances of appellant's arrest because of its danger "of unfair prejudice under [Rule] 403." Defense counsel argued "the arrest and actual custodial taking of Mr. Scipio served no material purpose with regard to the substance of these allegations." Defense counsel said the state could simply elicit testimony that appellant was taken into custody without incident on July 8, 2019. However, "[t]he circumstances of his arrest" could transcend into inadmissible Rule 404(b) evidence coming before the jury. R. 2, l. 12 - 3, l. 20.

The solicitor maintained that a call came into the Florence County Police Department as a possible burglary call. The police found appellant on the back porch of what turned out to be his grandmother's house. The solicitor argued that it was determined that appellant was in fact the complainant's grandson, but when the police ran appellant's name through NCIC they realized "that he was a suspect in a murder that they had an open warrant for and they took him into custody and notified law enforcement." The solicitor offered, "I can stay away from the burglary aspect, but I think it's relevant. The nature of the call, at least, is what brought the Florence Police

Department there, but certainly I can, you know, get from Officer Manley that there were no charges of burglary. As it turned out, Mr. Scipio's grandmother lived there." R. 3, l. 21 - 4, l. 24.

The solicitor also said this evidence went to flight since appellant was not at home "when he was arrested. He was elsewhere. So again, I think we can go into that for that limited purpose as well." Defense counsel responded that appellant remained in the jurisdiction and that flight was "grasping at straws" by the state to get this evidence before the jury. R. 5, ll. 9-25. The judge ruled that this evidence of how the police came into contact with appellant and that they determined that he was a wanted man on a murder warrant was relevant and not unduly prejudicial. R. 6, ll. 6-22.

Florence County Deputy Leigh Manley was then called as a witness before the jury. R. 237, l. 21 - 238, l. 16. Manley confirmed that he was dispatched to a possible burglary in process at a house between Jarrett Street and Pine Street on July 8, 2019. This was two days after the decedent was shot and killed. R. 238, ll. 17-23. Detective Manley said he found appellant on the back porch. R. 238, l. 24 - 239, l. 5.

Manley said it was later determined that the house belonged to a family member, so appellant was not charged with burglary. However, he offered that when appellant's name was ran through the NCIC, "it came back that he had a warrant for murder with Florence County." The Florence County Sheriff's Office was then informed appellant was in their custody and they sent their personnel to take custody of appellant. The defense renewed its objection to this testimony. R. 239, l. 13 - 240, l. 14.

Discussion

Rule 403, SCRE, provides that “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” Rule 404(b), SCRE, also provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” There was no allegation by the state that this incident was admissible pursuant to any State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923) exception.

The admission of this evidence was respectfully gratuitous. Evidence appellant was arrested on a prior murder warrant after the police were called to a suspected burglary at the home of appellant’s grandmother was not necessary, it was not relevant, and even if it was relevant, its undue prejudice made it inadmissible under Rule 403, SCRE. The jury was left to wonder why appellant’s grandmother called the police when he came to her home on July 8, 2019, two days after the murder. The jury was also left to speculate regarding the nature of the murder warrant that was outstanding against appellant in the NCIC. Since the shooting occurred less than two days earlier, the jury could have easily speculated that appellant was wanted for another murder, or, at a minimum, in the alternative, that the police must have almost immediately determined appellant was guilty of the decedent’s murder in this case if that is what the murder warrant was about. The evidence was the circumstances of appellant’s arrest was gratuitous and inadmissible under Rule 403, SCRE, and Rule 404(b), SCRE.

In State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007), the Supreme Court held that evidence regarding Gillian’s prior burglary of the Dem’s jewelry store should not have been admitted given a correct Rule 403, SCRE, analysis. It was simply not necessary. The Court noted

that the determination of the prejudicial effect of such other bad acts evidence must be based on the entire record and that the result would generally turn on the facts of each case. See, State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990).

Here, the unrelated burglary call at the home of appellant's grandmother, where charges were not pressed, but where appellant was nonetheless arrested because of an outstanding murder arrest warrant was not admissible to show appellant's motive, identity, existence of a common scheme or plan, the absence of mistake or accident, or intent within the meaning of Rule 404(b), SCRE, and State v. Lyle. See, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) (testimony regarding the defendant's prior bad acts denied the defendants a fair trial).

Appellant should be granted a new trial given the prejudicial effect of this other bad acts evidence in this case. Again, it was gratuitous on the state's part to secure the admission of this evidence that invited prejudicial irrelevant speculation on the part of the jury.

2.

The court erred by excluding the transaction sheet from appellant's credit or debit card, Court's exhibit 3, which showed transactions at the Shell Food Mart at 10:32 and 10:33 on July 6, 2019 which were very close in time to the shooting occurring at another location, since this was relevant evidence of the lack of a serious police investigation in this case once appellant became a suspect.

Relevant Facts

On direct examination by the solicitor, Shift Supervisor Sergeant William Price testified that during his investigation Orlando Mendez told him the suspect was known as "Ja Juan." R. 290, l. 10 - 291, l. 13. The suspect was "a black male. He was tall and heavysset. That he had dreads. They weren't very long, but they were dreads. So I had a physical description, as well as a middle and last name." R. 293, ll. 13-22.

As will be seen infra, defense counsel pointed to the lack of police investigation in this case in his closing argument, and he also questioned why Orlando Mendez was never investigated for being the murderer. The solicitor maintained in his reply argument that Mendez was not "a criminal mastermind who engineered this whole thing because he's the one who shot Rico Johnson." R. 513, ll. 2-10.

In camera

Defense counsel Sharpe told the judge outside the presence of the jury that when appellant's property was inspected at the jail, his credit card was found. Significantly, if the police had inspected the credit card, and obtained the transaction report to trace appellant's whereabouts on the day of the murder, they would have discovered appellant had a transaction only fifteen minutes from the "close temporal proximity" of the shooting. Counsel argued that if the police

had done a serious investigation in this case, it could have led to surveillance footage from the Shell gas station convenience store where the transactions occurred, they could have interviewed witnesses there, and “things of that nature.” This was not alibi evidence because the proximity did not make it “impossible” for appellant to have committed the crime, but it was certainly close enough in time to make it less probable that appellant committed the crime. The defense had a right to question Odom about the lack of investigation of this relevant credit card evidence. R. 309, l. 19 - 310, l. 21.

The solicitor objected and argued this was “tantamount to an alibi witness.” “They’re saying if he was fifteen minutes away in temporal, it would have been improbable that he would have been two places at one time. Now, had they provided that to us, we could’ve gone out and we could have measured the distance between walking between there.” The solicitor maintained that whether the alibi standard was “impossible or improbable” of appellant’s ability to have committed the crime that this was essentially an alibi defense of which the state had not been given proper notice. R. 310, l. 22 – 311, l. 25.

Defense counsel responded that the state had a duty to investigate the crime, and they failed to take that duty seriously. This credit card transaction evidence could have been discovered, and investigated, if the police had conducted a proper investigation.¹ R. 312, ll. 1-13.

The judge then asked the solicitor why the Florence County Sheriff’s Department could not have investigated these close-in-time credit card transactions. The solicitor responded that the police could have been investigated this matter. However, he maintained that while the defense should be permitted to ask about the state’s investigation pertaining to appellant’s credit card, it

¹ The defense in this case was that law enforcement quickly decided appellant was the shooter and failed to conduct any further investigation. The solicitor responded to this closing argument that Orlando Mendez was the likely murderer. R. 494, l. 25 – 509, l. 19.

should not be allowed to inquire about any of the specific transactions that occurred that night. R. 312, ll. 19-24. The transactions at issue were at the Shell Food Mart in Florence at 10:52 p.m., 10:53 p.m., and 10:54 p.m. on the night of the murder. July 6, 2019. R. 318, l. 24 - 319, l. 15; Supp. R. 1. The solicitor asserted this evidence raised “the inference at least that he was in two places at one time.” R. 312, l. 25 - 313, l. 8.

The judge then asked if the solicitor wanted a continuance for the rest of the afternoon to investigate the credit card transaction evidence. The solicitor accepted that remedy. R. 313, l. 23-314, l. 21.

However, after a short break, the judge ruled that the defense should have disclosed this credit card document to the prosecution under Rule 5 of the Rules of Criminal Procedure. R. 315, l. 15 - 316, l. 14. The judge also ruled that he would not allow the defense to question the investigator about any specific transactions on the credit card report. The judge would only allow the defense to cross-examine the investigator as to whether he ran a transaction history on the credit card and found any transactions or attempted transactions in close proximity to the time of the shooting. R. 321, l. 10 - 323, l. 21.

Jury in

On cross-examination, after the judge had limited the cross-examination, Price said there was no indication that Orlando Mendez was a suspect in this case. Price said he learned through his investigation that Orlando Mendez “got into a physical altercation with the subject...” R. 328, l. 10 - 329, l. 24.

Defense counsel then asked Price to admit that once the police determined that appellant was the suspect “there wasn’t too much more investigation that you had done after leaving the

scene.” Price claimed there was more investigation done “so I think that would be unfair to say that the investigation was closed at that time.” R. 330, l. 13 - 331, l. 6.

Price admitted that appellant’s credit card was taken from him at the jail upon his arrest. Price would not admit that the transaction report from the credit card could have furthered the police investigation in this case. Price said “depending on what card or transaction card that it is. I don’t know what kind of transaction card that is. Some have detailed information, some don’t...” R. 332, l. 15 - 333, l. 25.

Price was then asked to admit that if the police had investigated the credit card transactions it could have tried to obtain surveillance tapes from the site of the transactions, interviewed witnesses, and furthered the investigation in this case. Price would only say: “[T]here was no indication that there was a transaction card involved during the dice game.² There was no indication there was a transaction card involved during the course of the murder. So I – I think that’s a bit speculative.” R. 334, ll. 1-10.

Discussion

The credit card transaction report, as proffered by the defense, showed three transactions on July 6, 2019, at the Shell Food Mart right in close proximity to the time of the shooting incident. These transactions were at 10:52 p.m., 10:53 p.m., and 10:54 p.m. See Court’s Exhibit #3, R. 524.

² The “dice game” referred to an event that occurred earlier in the day in which appellant allegedly sat on the decedent’s, Rico Johnson’s car after the low stakes dice game was over. Orlando Mendez maintained that the decedent told appellant to “get out of the way, we got to go,” and he nudged appellant, “barely” with his car to make him get out of the way. Orlando claimed appellant became angry and responded: “It’s war now.” Orlando and the decedent then left without incident and went to the store to get something to drink. R. 192, l. 17 - 196, l. 25. Price’s reference to this dice game when asked about appellant’s credit card transaction record, Court’s Exhibit 3, was non-responsive to a serious question.

Deputy Amber Flowers told the solicitor on direct examination that she was dispatched to the Tall Oaks Drive shooting in the “10:30 p.m. timeframe.” R. 100, ll. 10-18.

In addition, on direct examination of Amya Mendez, the solicitor directed her attention to “the 10:15, 10:20 timeframe on July 6, 2019.” R. 431, l. 23 - 432, l. 22. Thus, the state’s own evidence showed that the 10:52 through 10:54 transactions at the Shell Food Mart were in close proximity to the time of the shooting. The failure to investigate these transactions away from the crime scene corroborated appellant’s defense that after appellant became their prime suspect they had no curiosity or intention to investigate this case any further. That failure to investigate was relevant to the jury’s decision of whether the state met its burden of proving appellant guilty beyond a reasonable doubt as defense counsel told the jury in closing. The failure of the state to investigate and present available evidence is a legitimate reason for the jury to acquit. The exclusion of this relevant credit card transactions evidence during the “10:30 p.m. time frame” on the night of the murder was prejudicial to appellant’s defense.

Pursuant to Rule 401, SCRE, relevant evidence is “evidence having any tendency to make the assistance of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The transaction report from appellant’s credit or debit card would have showed three transactions at the Shell Food Mart that were close in time to what the state’s witnesses testified was the time of the shooting. This evidence was relevant to show a failure by the state to conduct a proper or thorough investigation once appellant became the suspect and was arrested. The state’s concern that this credit card transaction evidence could also be viewed as alibi evidence given their close proximity to the time of the shooting. The fact this evidence *also* made it less probable that appellant was the shooter, as the solicitor asserted, was not a proper reason to exclude it.

In State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986), Schmidt was tried for criminal sexual conduct with a minor in the first degree. Our Supreme Court agreed that the exclusion of evidence that there were hard feelings between the accusing child's family and the Schmidt family was error, and prejudicial to Schmidt's defense. Schmidt argued in his defense that the charges stemmed from a vendetta against him because of an extramarital affair he had with the child's mother.

The Supreme Court in Schmidt noted that the Sixth Amendment guaranteed the defendant a right to cross-examination of adverse witnesses and the right to present a defense. The Supreme Court therefore granted Schmidt a new trial.

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), our Supreme Court held that evidence of the victim's emotional trauma was relevant to show her lack of consent where Alexander testified he offered the alleged victim fifty dollars to have sex with him and she agreed to those terms. Alexander maintained that the alleged victim became angry with him while they were having sex, she hit him, and he therefore refused to pay her the fifty dollars. Alexander said he called the alleged victim a "road whore" and he slapped her back. Under these circumstances, the court found this trauma evidence was relevant to showing a lack of consent.³

In State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) our Supreme Court reversed Mizzell's conviction because he was not allowed to cross-examine adverse witness Steele about the possible sentence he could receive if he was convicted of the crimes charged. The court noted that the defendant had a right under the Sixth Amendment to cross-examine adverse witnesses, to confront them to show their interest, bias, or their partiality. Steele's sentencing exposure was

³ In Alexander, the Court found while this evidence was relevant, it should have been excluded because it was unduly prejudicial. The Court adopted the language of Federal Rule 403 in the opinion. Alexander was a 1991 case prior to our rules of evidence becoming effective in 1995.

relevant to his bias and motive to misrepresent. See, also, State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012)(Trial court improperly limited the defense's cross-examination by not allowing it to inquire about a mandatory minimum sentence a witness faced if convicted was prejudicial error).

Our supreme court has determined that right to cross-examine adverse witnesses on any relevant matter in South Carolina is very broad. See State v. Brewington, 267 S.C. 97, 100-10, 226 S.E.2d 249, 250 (1976)("[A]nything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony"). Counsel wanted to show through the credit card transaction report that there were three transactions at a Shell Food Mart that were very close in time to when the shooting was thought to have occurred. The defense asserted that once the police decided appellant was "their man," that they failed to investigate any further. These three transactions were effective, relevant evidence that tellingly made the lack of investigation point to the jury, and they showed that Investigator Price, respectfully, was being less than candid in asserting this credit card evidence was not material.

In his closing argument, defense counsel continued to hit on the state's lack of investigation. Counsel noted Orlando Mendez was cleared as a suspect on "faith" because law enforcement did not investigate anything pertaining to Mendez. R. 495, ll. 11-22; 501, l. 5 - 506, l. 24. The exclusion of the credit card transaction evidence was prejudicial error as argued above, and appellant should be granted a new trial. See State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

The court erred by allowing Investigator Odom to testify that Orlando Mendez told him appellant entered the residence and began shooting since this was highly prejudicial hearsay testimony.

Relevant facts

As seen, Sergeant Odom was the shift supervisor on July 6, 2019, and he went to Tall Oaks Drive to investigate the shooting dispatch. R. 63, l. 10 - 68, l. 12. Odom testified once he secured the scene, Orlando Mendez came up to talk to him. When the solicitor asked Sergeant Odom what Orlando Mendez told him about the shooting, defense counsel objected on the grounds of hearsay. This objection was overruled. R. 68, ll. 20-25. Sergeant Odom then answered, “Mr. Mendez advised that Larry Scipio was the one who entered the residence and was firing shots.”

Discussion

Rule 801(c) states that hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Mendez’s statement to Sergeant Odom was hearsay because it was an out-of-court statement told to Odom and it was offered to prove the truth of the matter asserted – that appellant shot the decedent.

Further, there was no allegation that it was admissible under any hearsay exception, and it was not. It did not qualify for admissibility as a prior consistent statement because there was no charge of recent fabrication or of any improper motive or reason to misrepresent. Cf. State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001). See Burns v. Clayton, 237 S.C. 316, 336–37, 117 S.E.2d 300, 310 (1960) (“Where the credit of a witness has been impeached by proof or imputation that he has made declarations inconsistent with what he has sworn to, an exception to

the hearsay rule permits proof of his declarations, consistent with what he has sworn to, made on other occasions prior to the existence of his relation to the cause.”). A prior consistent statement is offered for purposes of rehabilitation only under Rule 801(d)1(B), SCRE, See, State v. Fulton, 333 S.C. 359, 374, 509 S.E.2d 819, 826 (Ct. App. 1998).

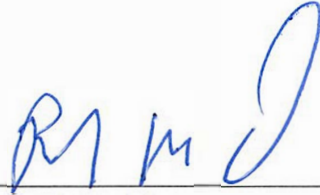
There was also no allegation, no foundation, or any evidence Mendez’s accusation that appellant was the shooter that he made to Sergeant Odom was an excited utterance under Rule 803(2), SCRE. An “excited utterance” is a statement “relating to a startling event or condition made while the declarant was under distress or excitement caused by the event or condition.” There was not even the barest foundation laid for admission of Orlando Mendez’s accusation that appellant shot the decedent to be admissible as an excited utterance. See State v. Brock, 335 S.C. 267, 272-73, 516 S.E.2d 212, 215 (Ct. App. 1999). The statement that qualified as an excited utterance in State v. Brock was made by a five-year-old child immediately after the incident where there was evidence the child was scared and he acted as if something bad was occurring. See, also, State v. Hill, 331 S.C. 94, 99-100, 501 S.E.2d 122, 125 (1998).

Sergeant Odom’s statement that Mendez told him the appellant was the shooter was rank hearsay. It is prejudicial because the defense in its closing hammered the state’s failure to investigate Orlando Mendez as being the shooter, and not appellant. Yet the repetition of Mendez’s version of what occurred through Odom had the impermissible spurious effect of making it appear more credible. In short, Orlando Mendez testified appellant was the shooter, and Odom’s testimony that Mendez told him appellant was the shooter on the night of the shooting had the improper effect of making Mendez’s testimony appear more reliable. That is the danger of an inadmissible prior consistent statement. This is respectfully the same effect that Forensic Interviews can have, although they are allowed by statute in certain child sex cases.

This hearsay testimony from Odom was prejudicial. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Florence County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of February, 2024.

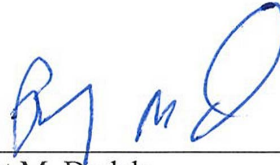
CERTIFICATE OF COUNSEL

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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SC Court of Appeals



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
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February 15, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

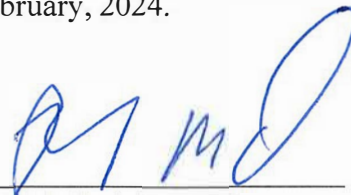
LARRY JA JUAN SCIPIO, JR.

APPELLANT

APPELLATE CASE NO. 2022-000949

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 15th day of February, 2024.



Robert M. Dudek
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ATTORNEY FOR APPELLANT

From: [Pollard, Shelby](#)
To: tommyevansjr@scag.gov; [Brandy Rankin](#)
Cc: [Dudek, Robert](#)
Subject: 2022-000949 The State v. Larry Ja Juan Scipio, Jr. - Final Brief of Appellant
Date: Thursday, February 15, 2024 1:06:00 PM
Attachments: [Cover Ltr to AG 2.15.24 FBOA.pdf](#)
[2022-000949 The State v. Larry Ju Juan Scipio, Jr. - Final Brief of Appellant.pdf](#)

Good Afternoon,

Please find attached for service in the above-referenced case the Final Brief of Appellant. This will be filed today, February 15, 2024, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard

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