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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAYMOND MARTINEZ,

APPELLANT

APPELLATE CASE NO. 2023-001201

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to charge the jury on appellant's jury instruction on prudent considerations when considering the testimony of an accomplice, Court's Exhibit #5, since the charge contained correct information that was not within the ordinary understanding of the jurors, and it was not a charge on the facts as the solicitor claimed?

STATEMENT OF THE CASE

Appellant was indicted at the September 22, 2020 term of the Greenville County grand jury for the offenses of murder, armed robbery, burglary in the first degree, criminal conspiracy, possession of a weapon during the commission of a violent crime, and petit larceny. R. *. His case was called to trial together with that of co-defendant, Robert Belcher, on July 17, 2023, before the Honorable Perry H. Gravely, and a jury. Christopher Grubbs and Kaitlyn Diaz represented appellant. Kenneth Gibson represented co-defendant Belcher. The assistant solicitors were Elizabeth Gray and Jay Jennings-Gresham. Tr. 1.

On July 20, 2023, the jury found appellant and co-defendant Belcher guilty on all counts. Tr. 666, l. 25 – Tr. 668, l. 4. Judge Gravely sentenced appellant and co-defendant Belcher to concurrent forty-five years prison terms for murder, thirty years imprisonment for armed robbery, twenty years imprisonment for burglary in the first degree, five years imprisonment for possession of a weapon during a violent crime, and time served for conspiracy and petit larceny. Tr. 683, ll. 5-17.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "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." Id.

ARGUMENT

The court erred by refusing to charge the jury on appellant's jury instruction on prudent considerations when considering the testimony of an accomplice, Court's Exhibit #5, since the charge contained correct information that was not within the ordinary understanding of the jurors, and it was not a charge on the facts as the solicitor claimed.

Introduction

This is a circumstantial evidence case. Appellant was indicted with co-defendant, Robert Belcher in this burglary, armed robbery, and murder case. Several witnesses had a personal stake or a direct liberty stake in their testimony for the state. These included Kirk Porter and Keyla Mansell, who were both accomplices to whomever were the burglars – which the state asserted were the same men as murdered the decedent inside his apartment. There were no eyewitnesses to the fatal shooting.

Relevant Facts

Cedric McKinney was the decedent's roommate in December 2017. The decedent was known as "Twin." Twin was a drug dealer and he had gone to prison for drug convictions. McKinney became his roommate when he was recently released. McKinney was forty years-old and he worked at PL Developments in Greenville. Tr. 100, l. 9 – Tr. 102, l. 17.

McKinney remembered on New Years Eve in 2017 that he last saw the decedent at about 5:30 p.m. A New Years Eve celebration was planned for that evening in several apartments within the complex. Tr. 103, l. 22 – Tr. 104, l. 19. There was going to be a party at McKinney's aunt's apartment and both of his cousins were having celebrations in their apartments, as well. Tr. 104, ll. 20-24.

McKinney was at one of the early New Years Eve parties when he was asked to go get the decedent because his girlfriend, Shelvis, was ready to be picked up for a party. Tr. 107, ll. 6-15. McKinney remembered returning to his apartment and opening the door. He saw the decedent laying on the floor. Their apartment had been ransacked. McKinney could not tell whether the decedent was still alive, and he screamed for his friend, Tiffany to call 9-1-1. McKinney immediately thought a robber had come to their apartment and that the intruder shot his roommate. Tr. 108, l. 20 – Tr. 109, l. 20.

An unusual looking change jar that McKinney kept in his room was missing. This contained the change that McKinney would drop in it along with his dollar bills and scratch-off lottery tickets. Tr. 116, l. 21 – Tr. 117, l. 21. McKinney guessed that there was between $75 to $100 in change in the jar. Tr. 121, ll. 8-11.

Tiffany Gambrell was the woman who called 9-1-1 after the decedent was found shot inside McKinney's apartment. Tiffany's sister, Shelvis, and the decedent were engaged to be married. They had been a couple for well over a decade and they had two children together. Tr. 129, l. 5 – Tr. 130, l. 15.

Tiffany remembered hearing McKinney yelling her name at about 7:55 p.m. that New Year's Eve evening. The decedent had been shot and she called 9-1-1. Tr. 134, l. 24 – Tr. 136, l. 10.

Chad Maltby was a police investigator with the Greenville County Sherriff's Office on the night of the New Year's Eve shooting. Tr. 143, l. 9 – Tr. 145, l. 23. Maltby said he learned that someone who was later identified as appellant was seen on the Ingles grocery store surveillance tape around 8:00 p.m. that night. He was putting change into a Coinstar machine. Maltby said the

container on the surveillance tape seemed very similar to the one described as stolen from the decedent's apartment. The Coinstar receipt was for $71.72. Tr. 166, l. 24 – Tr. 171, l. 11.

Maltby testified that he eventually obtained arrest warrants for "Kirk Porter, Raymond Martinez, Robert Belcher, and Keyla Mansell." Tr. 207, ll. 9-24. Keyla Mansell pled guilty before the trial of appellant and co-defendant Belcher. Tr. 185, ll. 2-5. Maltby confirmed to the solicitor that he obtained these arrest warrants after it was revealed that the Coinstar machines had been utilized with "Mr. Porter." Tr. 207, ll. 9-11.

A Mercedes became the car of suspicion on the night of the New Year's burglary and murder. Maltby testified that appellant entered the Ingles grocery store at around 8:21 p.m. that night. Tr. 227, ll. 18-24. The Mercedes is seen leaving the area of the apartment complex at 7:04 p.m. and returning at 7:36 p.m. The Mercedes left the area again at 7:39 p.m. and returned at 8:01 p.m. Tr. 234, l. 13 – Tr. 235, l. 21.

Maltby said that the police learned that the robbery of the decedent was "Kiki Mansell's idea." and he admitted that there was no forensic evidence against appellant in this case. Tr. 238, l. 3 – Tr. 240, l. 22. Maltby testified that he learned directly from Kirk Porter that the idea and the planning for the robbery came from Kiki Mansell. Tr. 240, ll. 19-24.

Barbara Haun was an area manager for Ingles grocery stores. She confirmed that the Coinstar machine on Poinsett Avenue was used at 8:26 p.m. on New Years Eve, and that one of the men present put the coin container into a trash can after using the Coinstar machine. Tr. 281, l. 8 – Tr. 286, l. 8. The man in the video -- that the state alleged was appellant -- was paid $71.72 for the change. Tr. 288, l. 13 – Tr. 289, l. 15.

Sherry McBee testified co-defendant Belcher was her boyfriend on New Year's Eve of 2017. McBee claimed Belcher was acting strangely that night and later became very emotional.

Tr. 317, ll. 1-21. McBee said that she learned the following day on Facebook that the decedent had been killed. Tr. 319, ll. 14-17. McBee gave bizarre testimony in which she claimed to have a "spiritual connection" with Belcher. She maintained that one night Belcher was crying and he told her "I did something bad." Tr. 320, ll. 5-21. McBee testified that Belcher asked her if he killed someone would she tell on him. Tr. 321, ll. 8-21.

McBee at first asserted that she kicked Belcher out of her apartment because she thought he was sleeping with one of her best friends, and he not paying his portion of the bills. Tr. 374, ll. 5-21. McBee later acknowledged on cross-examination that her spiritual advisor told her that co-defendant Belcher was a "baby gator." Tr. 376, ll. 12-14. This meant, according to McBee, that Belcher was "blood thirsty." McBee offered that a "baby gator" was a spiritual term reserved for people like Belcher. Tr. 376, ll. 12-23.

Kirk Porter

Kirk Porter testified as state's witness. He had a long criminal record. He had been convicted of burglary in the second degree and conspiracy, another burglary in the third-degree charge, as well as a disturbing school's conviction. Porter was charged with murder in this case and he was incarcerated at the time he testified for the state. Tr. 386, l. 16 – Tr. 387, l. 22.

Porter had pled guilty to voluntary manslaughter before trial for his involvement in this case. In exchange, the murder charge, as well as unrelated charges against Porter were dismissed. Tr. 387, ll. 12-22. Obviously unbeknown to the trial jury was that Porter received a prison term of thirteen years when he was later sentenced. This Court can take judicial notice that Porter is eligible for parole in less than five years from this initial brief on February 11, 2029. See, South Carolina Department of Corrections Inmate Search Report.

Porter testified that he knew appellant as "Ratchet." He had known him for about six years at the time of this incident. Porter said that the Mercedes involved in this case was his car, but it belonged to his girlfriend, Francesca. Tr. 392, l.8 – Tr. 393, l.12.

Porter remembered that on New Years Eve 2017 that Keyla Mansell told him she knew where they could do "a lick." Cocaine and money were supposed to be at the target apartment. Porter maintained that he was with Kiki Mansell, Belcher, and appellant that night.. Tr. 395, ll. 2-14. Porter claimed that Belcher and appellant were armed. Tr. 398, ll. 6-24.

Porter described how he drove the Mercedes to a church and parked. He maintained that appellant and Belcher got out of the vehicle and walked to the apartment complex. Porter claimed that when they returned, they did not have any drugs or money with them. They only brought back a container with change in it. Tr. 400, l. 14 – Tr. 404, l. 24.

Porter said that neither man said anything about what happened, and he did not ask them. Tr. 405, ll. 2-25. Porter stated that he drove to the Ingles on Poinsett Avenue, and that appellant went into the Ingles with him to use the Coinstar machine. Porter claimed appellant told him the Coinstar machine was not working. Tr. 406, l. 5 – Tr. 409, l. 1.

Porter said that after he dropped appellant off that evening, he went to meet his girlfriend at a hotel. Tr. 409, ll. 2-17. Porter testified that everyone involved in the burglary that night had been drinking and smoking marijuana. [1] Tr. 409, ll. 20-25.

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[1] The state, through Porter, presented testimony that Belcher tried to use Porter to exonerate him. Porter said he did not send the solicitor's office an "affidavit" stating he wished to recant his story against Belcher. Tr. 420, l. 9 – Tr. 422, l. 4. Porter maintained that his signature on the document was forged. Tr. 422, ll. 2-18.

Porter said that he learned the next day that someone had gotten killed during the burglary and robbery. Porter maintained that he had thought "all along" that the robbery he had planned with Mansell had nothing to do with the death of the decedent. Tr. 437, ll. 7-15; Tr. 440, ll. 13-22.

On cross-examination by appellant's defense counsel Grubbs, Porter admitted that his testimony was "somewhat" different than what he had earlier told the police. Tr. 463, l. 16 – Tr. 467, l. 19. Porter eventually admitted on cross-examination that he had lied to the police throughout the investigation. Tr. 467, ll. 18-19.

Other testimony

Candice Holsey was thirty-four years old, and she was involved in a romantic relationship with appellant at the time of the New Year's Eve 2017 incident. Tr. 493, l. 12 – Tr. 495, l. 23. Candice remembered that appellant left with Porter that evening to go to a New Year's Eve party, but she did not feel well and returned home. Candice said that when she returned home, appellant was there alone. This was at about 11:00 p.m. on New Year's Eve 2017. Tr. 499, ll. 1-13. On cross-examination, Candice repeated that she got home before midnight that New Year's Eve evening and that appellant was there when she returned. [2] Tr. 502, ll. 7-17.

The state called Dan Kelley to explain the phone records evidence for the suspects on the night of December 31, 2017, from 6:56 p.m. to 8:04 p.m. None of this cell phone evidence implicated appellant. Tr. 549, ll. 8-10.

Request to charge

Co-defendant Belcher and appellant both requested an instruction on accomplice testimony. Tr. 560, l. 1 – Tr. 562, l. 8. The solicitor claimed that although this instruction was

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[2] The Mercedes that Kirk Porter drove was later found with a license tag registered to Candice Holsey, appellant's girlfriend, on it. There was no evidence about how Porter got Candice's license plate. Tr. 504, l. 7 – Tr. 505, l. 24.

common in the federal court system, she objected to the instruction as an improper comment on the facts. Tr. 560, ll. 7-17.

The judge said that he had reviewed the request to charge, as well as cases attached to it. He said that he understood this instruction was routine in federal court, that he thought the instruction was improper in state court. He therefore refused to charge the accomplice instruction. Tr. 562, ll. 9-23.

The request to charge, Court's Exhibit #5, states that there had been testimony from an accomplice in this case who said, "He or she participated in the commission of this crime." The name of the accomplice in the model instruction was not included, and the name "Kirk Porter" being included in the request to charge here was seemingly only for the court's purposes only:

> "You have heard testimony of an accomplice, someone who said that he or she participated in the commission of a crime.
>
> Testimony of an accomplice should be received with great care and caution.
>
> You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation of the government in the sentencing in his own case. You should not convict the defendant on the uncollaborated testimony of an accomplice, unless you believe that testimony beyond a reasonable doubt."

R. p. *.

This request to charge, Court's Exhibit #5, with the pattern jury instruction attachments and case law attachments is at R. p. *.

The judge refused to give this requested charge on accomplice testimony, and it only gave a very general charge on witness credibility -- how the particular witness looked on the stand, and whether they had a particular bias or interest in the outcome. Tr. 632, l. 12 – Tr. 633, l. 3.

Discussion

This was a purely circumstantial evidence case. The state's best evidence all came from the accomplice, Porter, who was allowed to plead to voluntary manslaughter where his murder charge was dropped in exchange for his testimony for the state. Porter claimed that appellant and Belcher where designed to commit the burglary and robbery of the decedent. He maintained that he went with appellant to the Ingles grocery store on Poinsett Avenue afterwards to use the Coinstar machine after the decedent's change jar was stolen. Appellant was apparently seen on the surveillance tape at the Ingles grocery store that evening. This was not direct evidence that appellant committed the murder or that he was guilty of murder as a matter of accomplice liability - - the hand of one is the hand of all.

In Cool v. United States, 409 U.S. 100, 103-104 (1972), a witness pled guilty to a crime for which the defendant was charged but exonerated the defendant. The United States Supreme Court held that the trial court erred in instructing the jury that it must ignore the testimony unless it believed it was true beyond a reasonable doubt.

However, the Court indicated it would have been permissible for the trial court to have simply instructed the jury to view accomplice testimony with caution. That is essentially all appellant requested in this case - - that the accomplice testimony be viewed with caution.

As the court noted in State v. Anthony, 242 Kan. 493, 499-501, 479 P.2d 37, 33-34 (1988), the majority rule is that an accomplice instruction is required when the accomplice testimony is against the defendant. See United States v. Rosa, 560 Fed.2d 149, 156 (3d Cir.), *cert denied* 434 U.S. 862 (1977). In State v. Anthony, the Supreme Court of Kansas adopted the minority view that a cautionary instruction on accomplice testimony was proper in all circumstances where an accomplice testified. The court reasoned "such testimony on behalf of the defendants is becoming

more prevalent all of the time, particularly by spouses or convicted friends of the accused who have nothing to lose by taking the blame." State v. Anthony, 242 Kan. 493, 502, 479 P.2d 37, 44 (1988).

In this case, the accomplice testimony of Porter was obviously against appellant and not in his favor. However, appellant respectfully submits that giving the accomplice instruction appellant requested here upon request - - regardless of whether the context favors or disfavors the prosecution or the defense - - ensures an evenhanded application of the accomplice jury instruction where the reasons for accomplice testimony partiality are not within the ordinary understanding of jurors. See Clifford S. Fishman Defense Witness as "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction? 96 JCRLC 1 (2005 Northwestern University, School of Law).

The accomplice request to charge at trial was supported by the Pattern Jury Instructions for Federal Criminal Cases District of South Carolina by Eric William Ruschky. R. p. *. The request to charge was taken verbatim from this Pattern Jury Instruction and the name of the accomplice, Porter, would not be specifically charged since it was unnecessary.

Defense counsel also attached United States v. Safley 408 F.2d 603 (1969), as authority for this jury instruction. The judge in Safley instructed the jury that:

> "Ordinarily, it is assumed that a witness will speak the truth, but this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which he testifies, or the character of the testimony given, or by the evidence to the contrary of the testimony given."

United State v. Safley 408 F.2d at 605.

The court in Safley held that this jury instruction was improper. The court explained that this instruction also contradicted the rule that an accomplice's testimony should be received with

caution. The court cited United States v. Johnson 371 F.2d 800, 804 (3rd Cir. 1967), for that proposition. See United States v. Safley 408 F.2d at 605.

In United States v. Howard 590 F.2d 564 (4th Cir. 1979), the court approved of a jury instruction on considering whether an accomplice was testifying truthfully or falsely where there was evidence that "deals" were struck between witnesses and the government. United States v. Howard 590 F.2d at 569-570. Defense counsel's request to charge packet also cited to Caminetti v. United States, 242 U.S. 470, 495 (1916), wherein the Supreme Court noted that while the general practice is to caution jurors about accomplice testimony that it was not reversible error in that case to refuse to give the requested instruction.

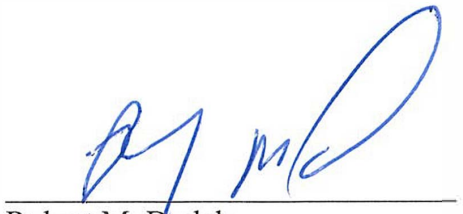
The instruction in this case differed from jury instruction cases considered by our Supreme Court which disapproved of highly prejudicial and speculative "consciousness of guilt" instructions such as in State v. Grant, 275 S.C. 404, 275 S.E.2d 169 (1980) where our Supreme Court held it was improper to charge the jury on flight. Our Supreme Court held in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) that a jury instruction on suicide attempts being probative of consciousness of guilt would also be improper. In addition, that Court has held that charges on the facts such as in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) on the testimony of the victim need not be corroborated are also impermissible. See, also, State v. Witherspoon, 418 S.C. 641, 795 S.E.2d 685 (2016)(it was prejudicial error to charge that the victim's testimony was not required to be corroborated).

Here, conversely, defense counsel correctly urged that the requested jury instruction was common in federal criminal trials and given accomplice testimony in this case the instruction was needed and warranted. This was an entirely circumstantial evidence case against appellant where the accomplice testimony was critical. The instruction was not a charge on the facts based upon

the fact that accomplice Porter had the world to gain by testifying for the state against appellant, and after the trial Porter collected his short prison stay in return for his testimony.

CONCLUSION

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



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This 17th day of April, 2024.