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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2022-001441

The State, ...Respondent,

v.

Deshawn Chazz Hurley,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

Question I

The trial court abused its discretion by failing to require the State to produce a copy of the Greenwood Police Department "Gang Book," that was disclosed for the first time during pre-trial motions, when the "Gang Book" was material to both guilt-or-innocence and sentencing.

The State alleges Mr. Hurley charactered the purpose of the hearing, arguing, "The Point of hearing, as the trial court stated several times, was to determine whether Investigator Blackwell would be qualified as an expert in gang investigations and whether the State would be allowed to introduce evidence that Hurley, Hill, and Reid were members of a gang." Brief of Respondent, p. 7. Although the hearing began as a motion to suppress Investigator Blackwell's testimony, the hearing also included a separate motion to disclose the gang book. Although Investigator Blackwell did not have a copy of the Gang Book with him at the courthouse, he could have obtained a copy from his office in the Police Department in an adjacent building. The trial court denied the motion to produce the Gang Book. R. 117, 132-38, 194. The trial court unquestionably had the authority to require the prosecution to produce a copy of the Gang Book. *See, e.g., State v. Hughes*, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) (trial court had the authority and discretion to require production of notes used by expert witness to refresh her memory prior to trial). Mr. Reid, Mr. Hill, and Mr. Hurley have a due process right for the State to disclose materials necessary for preparation of a defense. *See, e.g*., *Kyles v. Whitley*, 514 U.S. 419, (1995), *Brady v. Maryland*, 373 U.S. 83, (1963**),** *Roviaro v. U.S.*, 353 U.S. 53 (1957), and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *see also*, R. 649-50. Rule 5, SCRCrimP, is our state's mechanism for the prosecution complying with its due process obligation. Rule

5(1)(1)(C) specifically requires the State to disclose materials "which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial."

The State argues Mr. Hurley was not prejudiced because the gang book was not material, the trial judge never reviewed the gang book, and there is not a reasonable probability of a different outcome. Brief of Respondent, p. 9. The State is wrong. Although the trial judge never saw the gang book, he heard testimony about the gang book and considered that testimony in sentencing. Brady, of course, applies to sentencing. Also, the State never addressed Mr. Hurley's argument that the gang book was discoverable under Rule 5, SCRCrimP.

Because the trial court erred by failing to require the State to produce the Gang Book, this Court should order a new trial and require disclosure. Alternatively, this Court should order a new sentencing hearing.

Question II

The trial court erred by failing to suppress evidence disclosed by the State for the first time in the eleven days leading up to this date-certain jury trial (scheduled on April 14, 2022) and after the jury trial started, when the discovery disclosed the State's theory of the case for the first time and was necessary in order to prepare a defense.

The State argues Mr. Hurley did not identify the late produced evidence. Breif of Respondent, p. 10. To the Contrary, Mr. Hurley and his codefendants moved to exclude all evidence, supporting the State's retaliation theory, produced by the State, on or after August 4, 2022. E.g., R. 204. 255, 288, 645-47, 651. *See also*, Brief of Appellant, pp. 13-14.

The State also argues that the evidence "was taken from the defendants' own social medial pages." Brief of Respondent, p. 11. This Court rejected a seminal argument in *State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009) (reversing convictions because accused was prejudiced by prosecution's failure to produce evidence in response to Rule 5 motion). *See also,* Rule 5(1)(1)(C), SCRCrimP, *supra.*

In the case at bar, Mr. Reid, Mr. Hill, and Mr. Hurley were prejudiced by the State's failure to comply in a timely manner with its due process and Rule 5 obligations. The delayed disclosure prevented the accused from investigating the facts and circumstances of Mr. Adams killing Mr. Parker in order to confront the evidence of motive presented by the prosecution. Specifically, Mr. Hurley did not have an opportunity to use the Gang Book to refute the connections drawn by Investigator Blackwell. This Court should reverse the trial court and order a new trial.

Question III

The trial court erred by failing to suppress GSR evidence when the State's own GSR expert testified during an in camera hearing that her testimony would not assist the jurors and could be misinterpreted by the prosecution. Furthermore, this Court erred by refusing to strike the GSR expert's testimony after her trial testimony was the same as her in camera testimony.

The State argues Mr. Hurley was not prejudiced by the admission of the GSR evidence because the "GSR evidence was not offered against Hurley." Brief of Respondent, p. 13. The Court must reject this argument. The State tried the three co-defendants together, including on a charge of conspiracy. All evidence, accordingly, was admitted against all three codefendants.

Additionally, the State never addressed the trial court's gatekeeping function under

Rule 702, SCRE, *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), and *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009)

Because admission of Lt. Nates' GSR testimony was an error of law, this Court should order a new trial.

Question IV

The trial court erred by failing to grant a mistrial when the Solicitor, disregarding the trial judge's limiting instructions, asked Investigator Matt Blackwell whether he had seen a post on Xayvion Hill's social media that gave him a concern about "retaliation" for Jitavius Adams killing Jakevius Parker.

The State acknowledges the Investigator Blackwell's testimony about retaliation violated the trial judge's limitations on the testimony. Rather, the State argues Mr. Hurley cannot show prejudice because the trial judge instructed the jurors to disregard the testimony. Brief of Respondent, p. 13. The State, however, never addressed the Mr. Hurley's argument that it is not possible to "unring the bell." *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998).

The State also did not address Mr. Hurley's argument that that prejudice can result from the manner in which a solicitor asks a question. *See, e.g*., *State v. Reyes*, 432 S.C. 394, 853 S.E.2d 334 (2020) (solicitor's use of first-person pronoun "we" when questioning child complainant about telling truth improperly bolstered complainant's testimony); *State v. Anderson*, 181 S.C. 527, 188 S.E. 186, 192 (1936) ("asking of questions by a Solicitor, a quasi judicial officer, which has the effect of attacking the reputation of a defendant whose reputation has not been put in issue, constitutes prejudicial error"). Brief of Appellant, pp. 16-19.

Because the jurors could have believed that Investigator Blackwell had information establishing the retaliation motion, it is impossible to say that the error was harmless

beyond a reasonable doubt and did not affect the jurors' verdict. This Court should order a new trial.

Question V

The trial court erred by failing to define the meaning of "substantial circumstantial evidence."

The State argues:

> Hurley claims the trial court erred by "failing to define the meaning of 'substantial circumstantial evidence. Brief of Appellant at 19. His argument is apparently premised on the fact that the trial court did not read the Dictionary.com definition of the word "substantial" when charging the jury. The trial court correctly explained circumstantial evidence to the jury and was not required to give any additional definitions.

Brief of Respondent, p. 18. The State misses the point. Mr. Hurley and his co-defendants asked the trial judge to provide a definition of "substantial circumstantial evidence" at the directed verdict stage because of conflicting decisions by our appellate courts. This Court, therefore, must disregard the State's entire argument jury instructions.

Question VI

The trial court erred by not directing a verdict of acquittal when the State failed to present substantial circumstantial evidence of the charged offenses.

As seen in Question V above, Mr. Hurley argued for a particular definition of circumstantial evidence. The trial judge refused to define the term. The State's case against Mr. Hurley was almost entirely circumstantial on the issues of identify and criminal intent. Once this Court appropriately defines "substantial circumstantial evidence," the need to enter a directed verdict of acquittal becomes apparent.

Because there is no substantial circumstantial evidence that Mr. Reid, Mr. Hill, and Mr. Hurley were at the location of the shootings, the trial court erred by failing to direct a verdict of acquittal on all charges for all three accused. This Court should reverse the trial

court and order a new trial. See, e.g, *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009), *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004).

Question VII

This Court should order a new trial based on the cumulative error doctrine?

The State argues, "Mr. Hurley failed to demonstrate error, much less cumulative error." Brief of Respondent, p. 22. Mr. Hurley stands on his Brief of Appellant, pp. 26-28.

Question VIII

The trial court erred as a matter of law by enhancing the Chazz Hurley's based on their membership in a gang, when that fact was neither found by the jurors nor proven beyond a reasonable doubt.

The State argues, "An appellate court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive." Brief of Respondent, p. 23. Mr. Hurley is not asking this Court to review the sentence and impose a different sentence. Rather Mr. Hurley asks this Court to correct the trial judge's erroneous consideration of gang affiliation during sentencing and remand for a new sentencing hearing. Our state's appellate courts have jurisdiction to correct errors during sentencing. See, e.g., *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023); *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001); *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010); *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002).

CONCLUSION

For the reasons set forth in the Brief of Appellant and this reply, this Court should reverse the trial court and enter a directed verdict of acquittal. Alternatively, this Court should reverse the trial court and order a new trial. Alternatively, this Court should reverse the trial court and order a new sentencing hearing.

Respectfully Submitted,

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Rule 211(b), SCACR Certification

I certify this Brief complies with Rule 211(b), SCACR.

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