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Jul 17 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

XAVIER M. POLITE,

APPELLANT

APPELLATE CASE NO. 2023-001026

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this self-defense case, did the trial court err in admitting a police bodycam video of the questioning of the alleged victim under the excited utterance hearsay exception?

STATEMENT OF THE CASE

A Beaufort County grand jury indicted appellant for murder, attempted murder, and a weapons charge and on June 12, 2023, appellant was tried before the Honorable Robert J. Bonds and a jury. R. 1. Mary Jones and Sarah Malone represented the State. R. 2. Juan Tolley and Seth Paulk represented appellant. R. 2. The jury convicted appellant. R. 851-52. Judge Bonds sentenced appellant to a total of thirty-seven years' imprisonment. R. 871-73. This appeal follows.

STANDARD OF REVIEW

The standard of review of this evidentiary issue is abuse of discretion.

ARGUMENT

In this self-defense case, the trial court erred in admitting a police bodycam video of the questioning of the alleged victim under the excited utterance hearsay exception.

Appellant testified he met Channon Preston working at a restaurant in Beaufort County. R. 716. On November 18, 2020, appellant was staying at Preston's house. R. 718-19. They decided to buy marijuana at a place that Preston knew. R. 719-20.

When they first came to the house, Preston told the men at the house—Corey Singleton and Steven Glover—that he was not going to buy drugs because he had just seen a policeman around the corner. R. 720-21. They left. R. 720-21. As they were driving away, they saw the policeman leave. R. 721. They decided they could return and buy marijuana. R. 721.

When they got back to the drug dealers' house, appellant saw a car in the driveway with its doors open and engine running. R. 721. Appellant got out of the car and approached the house to knock. R. 721. Preston got out of their car and yelled that a man had a gun. R. 721.

Appellant looked to his left and saw a gun pointed at him. R. 721. He dropped behind the car and heard shots. R. 721. He then heard shots coming from Preston's direction behind him. R. 721.

Appellant testified he had never been in a situation like that and was scared. R. 723. He returned fire in self-defense. R. 723. Appellant got back in their white minivan and they fled, going back to Preston's house. R. 723-24.

The first officer on the scene saw a small group of people standing near the driveway and the body of Steven Glover lying on the ground. R. 216. The officer noticed that the car parked in the yard of the house had been shot several times. R. 216. Corey Singleton was sitting on the

ground. R. 217. Singleton left a gun on the front porch of the neighbor who called 911. R. 209-10.

An officer went with Singleton inside the house to retrieve Singleton's cell phone. R. 235. Singleton told the officer he had a video surveillance camera system at his house and that he could access it through his cell phone. R. 236. The police watched a clip of the surveillance video. R. 236.

The video surveillance was not continuous and only recorded when a motion sensor tripped. R. 259-60. The cameras would create a clip and send it to Singleton's cell phone. R. 259-60. Later, after Singleton consulted with a lawyer, Singleton sent five additional surveillance clips to the police. R. 261. R. 277. The clips were not continuous. R.. 273. The police did not get clips directly from the surveillance company and relied on Singleton to give them the clips. R. 273-74. R. 276. The police admitted they did not know if other clips from that day were on Singleton's phone. R. 277. The clips sent by Singleton to the police did not show the shooting. R. 277.

The clips were admitted as one video as State's Exhibit 102. On the video, a dark Nissan can be seen parked as a white minivan pulls up to the house. Singleton walks outside from the house. Glover is lying dead on the ground beside the Nissan. Two men are outside of the white van. Singleton runs around the house. In the next clip the men are in the van and the van stops. The driver gets out. The video skips to the next clip showing the van driving away. State's Ex. 102.

Corey Singleton died from a drug overdose at some point well after the shooting. R. 234. The State sought to admit three videos from a police officer who questioned Singleton. Appellant moved pretrial to suppress the videos as hearsay. R. 99-107. Appellant argued neither

present sense impression nor excited utterance applied. R. 99-107. Judge Bonds excluded the two later videos, but ruled the first video taken was admissible. R. 136-37. The trial judge said Singleton was “out of it. R. 136. The video was played for the jury as State’s Ex. 3.

In the video, Singleton says he saw the men come to the house in the white van, leave, and then return. When they returned, Glover was in the front seat of his car parked in the yard. Singleton said that when the men pulled back up to the house, they started shooting. State’s Ex. 3.

The court erred in admitting the video. The statement was hearsay. It was made outside of court and was offered for the truth of the matter asserted. Rule 801(c), SCRE. The State offered the statement to prove its theory that appellant and Preston intended to rob Singleton and Glover and to disprove self-defense.

The statement was not admissible as an excited utterance because Singleton was not still under the “stress of excitement caused by” the shooting. Rule 803(2), SCRE. Singleton is calm, seated on the ground, and responds intelligently to the officer’s questions. While he appears sad, his answers show that he was not “out of it” as the trial judge found. State v. Washington, 424 S.C. 374, 399, 818 S.E.2d 459, 472 (Ct. App. 2018) aff’d in part, rev’d in part 431 S.C. 394, 848 S.E.2d 779 (2020). The excitement must be to the point where it suspends reflective thought, “reducing the likelihood of fabrication.” Id. at 403-04, 818 S.E.2d at 474. In Washington, the Court found that a statement made just 20-25 minutes after a shooting was not an excited utterance. Singleton’s answers show that he was capable of reflective thought because he pointed out that he had a surveillance camera on his house. The trial court erred in admitting this video and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

s/David Alexander
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of July, 2024.

STATE OF SOUTH CAROLINA
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Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

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XAVIER M. POLITE,

APPELLANT

APPELLATE CASE NO. 2023-001026

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Xavier M. Polite states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Robert J. Bonds, which was held on June 9-16, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Xavier M. Polite.

Respectfully Submitted,

s/David Alexander
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of July, 2024.

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Honorable Robert J. Bonds, Circuit Court Judge

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Trial transcript
- (3) State's Ex. 3 (body cam video) (to be transported)
- (4) State's Ex. 102 (surveillance video) (to be transported)

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

s/David Alexander
David Alexander
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

This 17th day of July, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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.”

s/David Alexander
David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Xavier M. Polite, #23-173, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 17th day of July, 2024.

s/David Alexander
David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

From: [Alexander, David](#)
To: [SC - BROWN MELODY](#)
Subject: State v. Xavier Polite
Date: Wednesday, July 17, 2024 8:40:00 PM
Attachments: [2023-001026 State v. Xavier Polite Anders Brief of Appellant.pdf](#)

Melody,

Attached please find for service the Anders brief of appellant in the above-captioned case.

Best,

David