STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RENO RODREIGUS BLAKELY,

APPELLANT

APPELLATE CASE NO. 2023-000218

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
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

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STATEMENT OF ISSUES ON APPEAL

1.

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2.

Did the trial court err by sentencing Appellant to a consecutive term of five years imprisonment for possession of a weapon during the commission of a violent crime where the court erroneously found the sentence had to be served consecutively to the sentence imposed for the violent crime since pursuant to S.C. Code Ann. § 16-23-490(B) the court had discretion to order the five year sentence be served consecutively or concurrently?

STATEMENT OF THE CASE

A Lancaster County grand jury indicted Appellant on January 19, 2023 for murder and possession of a weapon during the commission of a violent crime, and on September 23, 2021 for possession of a handgun by a person convicted of a crime of violence. R. 742. His case was called to trial on January 30, 2023 before the Honorable R. Lawton McIntosh, and a jury. R. 1. Assistant Solicitors Luck Campbell and Nicole Wine represented the state. Tracy Racine and Russell Racine represented Appellant. R. 1.

On February 2, 2023, the jury found Appellant guilty as indicted. R. 737, l. 17 – 738, l. 3. He was sentenced to forty years for murder, five years consecutive for possession of a weapon during the commission of a violent crime, and five years concurrent for possession of a handgun by a person convicted of a crime of violence.[1] R. 741, ll. 11-19.

This appeal follows.

[1] The assistant solicitor incorrectly informed the judge that the mandatory five year sentence for possession of a weapon during the commission of a violent crime must be served consecutively to the sentence for the underlying violent crime. See R. 740, ll. 6-11. Pursuant to S.C. Code Ann. § 16-23-490(B), "The court may impose this mandatory five-year sentence to run consecutively *or concurrently*." (emphasis added).

STATEMENT OF FACTS

On August 8, 2020, Keisha McDow hosted a party to celebrate her son's nineteenth birthday at her home on Evans Drive in Lancaster. A "good bit of people" were invited, including family, friends, children, and babies. R. 36, l. 14 – 37, l. 7. Guests were arriving all day and night. Everyone eighteen and older was drinking alcohol and many were intoxicated. R. 41, ll. 10-15. They were cooking on the grill, listening to music, and socializing.

At the time, Keisha was dating Antonio "Tony" Mickle. Tony was at the party that evening. Appellant, who was Tony's friend and the father of Tony's nephew, was also at the party. Around eleven o'clock that night, Larry Truesdale arrived at the party with Ethan Dailey, the decedent. R. 333, l. 20 – 334, 18; R. 357, ll. 6-12. Larry lived on Crenson Drive, less than half a mile from Keisha's home and within the same trailer park. R. 98, ll. 3-11; R. 275, ll. 11-15; R. 617, ll. 8-14. Larry and Ethan were close friends and had known each other for over a decade. R. 274, ll. 16-22; R. 332, ll. 12-20.

Sometime after Larry and Ethan arrived at the party, Appellant and Armond "Mon" Brice left to go to the store to buy cigarettes. Appellant drove the pair in Tony's silver Honda Accord. R. 41, ll. 15-23; R. 66, ll. 17-25; R. 103, l. 23 – 104, l. 23. Larry also briefly left the party to go pick up his wife, Lakisha Truesdale, from their home and bring her to the party. R. 388, ll. 11-23. However, Lakisha was not ready when Larry returned home. R. 389, ll. 1-3.

While Larry, Appellant, and Mon were gone, Tony and Ethan started rapping on the porch. As they were rapping, Tony and Ethan "kept getting close to each other" and Ethan whispered "something" to Tony. Ethan then hit Tony and Tony "flew" off the porch. Ethan and Tony started fighting. It was a "drunken fight." Keisha grabbed Tony in an effort to break up the fight. Keisha slipped and the three of them fell to the ground. Ethan was on top of Tony

"beating" Tony. Tony reached for his gun, which was in a holster on his left side. However, Keisha pinned Tony's hand down and he was unable to reach the gun. Keisha's son, Deavion McDow, also helped prevent Tony from getting his gun out of the holster. Eventually, someone was able to pull Ethan off of Tony and the fight ended. R. 43, l. 3 – 46, l. 11; R. 67, l. 16 – 70, l. 2; R. 86, l. 25 – 88, l. 11.

Larry returned to the party, after checking on his wife, right as the fight concluded. Everyone was "upset." Ethan was pacing around saying, "They gone and jumped me, they gone and jumped me." R. 335, ll. 4-15. Tony told Larry, "Get him [Ethan] away from here, man, just go on and take him." R. 335, ll. 19-23. Larry drove Ethan back to his trailer on Crenson Drive. R. 336, l. 1. Ethan "had bruises all over his face and knots." According to Larry, it looked like Ethan had been "jumped." R. 336, ll. 4-9.

When Larry and Ethan returned to Larry's trailer, Larry's wife, Lakisha, and Gary Roddey, a friend, were outside. The group stood in the middle of Larry's front yard and talked about the party. Ethan told them what happened and what led up to the fight. R. 336, l. 17 – 337, l. 12.

Meanwhile, back at Keisha's house, Tony was "mad." He was ranting and raving. Tony accused Keisha of "messing" with Ethan and said he "could kill" Ethan. Keisha and her mother were eventually able to calm Tony down and Tony began rapping again. R. 46, l. 12 – 48, l. 11; R. 70, ll. 3-15. After Tony calmed down, Appellant and Mon returned from the store. Tony pulled Appellant to the side and presumably told Appellant what happened. Appellant and Tony then started yelling. Appellant allegedly said, "Where he at? What y'all fight for?" Appellant and Tony then left in Tony's car. R. 49, l. 1 – 50, l. 12; R. 71, ll. 3-25; R. 105, l. 14 – 107, l. 17.

They returned about fifteen to twenty minutes later. When they came back, they were not alone. Three or four cars pulled up and parked at the top of Keisha's driveway. Appellant and Tony arrived in Tony's silver Honda. Tony's mother, Shirley Mickle, and his sister, Angie Mickle, were in one car, and Tony's nephews, Kendarius Mickle and Damarkus Nivens, were in another car.[2] The group was "mad" and "things" were "heated." R. 50, l. 18 – 51, l. 24; R. 72, l. 14 – 73, l. 11.

Keisha McDow and her mother spoke to Shirley and Angie. Deavion McDow talked to Tony's nephews. Deavion tried "to get them to understand" that the altercation between Tony and Ethan was "over with." "The nephews" repeatedly asked Deavion where Ethan was. Deavion told them Ethan was gone and he did not know where Ethan went. Deavion tried to "get them to go back where they came from" and "avoid the whole problem that was going on." R. 73, l. 12 – 74, l. 9.

Meanwhile, Appellant and Tony were allegedly arguing. According to Deavion, Appellant asked Tony, "What happen, man? Why you let this man [Ethan] do you like that . . . you wanna go find him? I know where he be at . . . I know where he be at . . . We just going to find him. . . . I just wanna talk to him. We just going to holler at him and see what goes on. Why y'all fighting . . . " R. 74, ll. 10-23.

There were differing accounts of who was armed at the time. Keisha saw Tony and both his nephews each with a gun. However, she did not see Appellant with a gun. R. 54, l. 7 – 55, l. 3. Deavion saw one of Tony's nephews with a long black rifle. He also claimed he saw Appellant with a gun. However, during his statement to the police, Deavion said he did not

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[2] Kendarius Mickle and Demarkus Nivens are Angie Mickle's sons. Kendarius is also Appellant's son. R. 531, ll. 3-11.

know if Appellant had a gun. R. 76, l. 4 – 77, l. 7; R. 94, ll. 11-25; R. 96, ll. 8-20. Armond "Mon" Brice said he saw Tony and one of Tony's nephews with a gun. R. 110, ll. 1-10.

Shortly after they arrived, the group, including Shirley, Angie, Tony, Appellant, and Tony's nephews, left Keisha's trailer. Keisha and Deavion both testified that all four cars left at the same time. The first of the four vehicles made a right turn. However, the other three cars drove straight down Evans Drive toward Larry Truesdale's trailer. R. 53, ll. 12-22; R. 77, l. 8 – 78, l. 7. Mon immediately called Larry to "warn" him because Mon allegedly heard Appellant say Ethan was at Larry's house. However, Larry did not answer his phone. Mon then started running toward Larry's trailer. About three minutes later, when he was halfway through the trailer park, Mon heard gunshots. R. 109, l. 10 – 111, l. 12. Keisha and Deavion also heard multiple gunshots. The gunshots came from the direction of Larry's trailer. R. 55, ll. 4-6; R. 78, ll. 11-25.

Ethan, Larry's wife, Lakisha, and Gary Roddey were still standing outside in the front yard talking. Larry had gone inside his trailer to get a beer. Lakisha saw three cars pull up at the end of their driveway and park in a straight line in the roadway. According to Lakisha, Appellant and a younger man got out of the first car, which was a Honda Accord, and started walking toward Ethan, Lakisha, and Gary. The men were asking, "Where's he at? Where's he at?" Lakisha claimed she recognized Appellant's voice. A third person got out of one of the other cars and said, "There he is." Around the same time, Ethan stepped forward and responded, "Here I am." R. 298, l. 3 – 301, l. 21.

Lakisha claimed she saw Appellant "trying to reach for something." However, she did not see what Appellant was reaching for and she never saw Appellant with a gun. R. 302, l. 18 – 303, l. 3. Lakisha saw the younger man, who was standing near Appellant, with a long gun. R.

284, ll. 3-11. She "knew something was about to happen." She "thought they were about to jump on him [Ethan] again" so she started walking into the trailer to get Larry. As Lakisha was walking into the house, she saw "fire coming from the [long] gun" and she heard a gunshot. After a short pause, she heard three to five more gunshots. R. 280, l. 17 – 285, l. 20.

As Lakisha was rushing into their trailer, Larry was walking out onto the porch. Larry saw two men in his yard. He claimed Appellant was one of the two men. However, Larry did not recognize the other man. Larry claimed both Appellant and the other man had handguns hiding behind their backs. Ethan walked toward the men with his "arms out" saying, "Hey, it's me. Yeah, I'm the one that was fighting." Larry demanded the men get out of his yard. He told them he was calling the police. The men were not fazed and "raised guns up and shot" Ethan. R. 337, l. 10 – 339, l. 12. Larry heard three to five shots but he did not see who fired because he ran back into the house. R. 342, ll. 20-23; R. 379, l. 15 – 380, l. 25. He claimed he did not see Tony, but he heard Tony's voice "on the side of the road." R. 343, ll. 10-16. Larry could not tell if Tony had a gun because it was dark in the roadway. R. 375, ll. 11-21. While Larry never saw a long gun that night, he "heard it." It made a "big noise" like "an assault rifle." R. 376, l. 7 – 378, l. 19. Unlike Lakisha, Larry claimed he heard the pistol discharge first followed by one loud "pow" from the assault rifle. R. 378, l. 20 – 379, l. 14.

Gary Roddey, who was outside with Ethan and Lakisha, saw a single light colored car pull up. He heard multiple voices yelling, "Where's he at?" and then someone say, "There he is." Ethan started walking in the direction of the voices with his arms out saying, "Here I go." Gary "took off to get Larry" because he thought the visitors were going to "jump" Ethan again. Gary quickly went inside the trailer and did not see any guns or anyone firing guns. However, he did hear "a cluster of gunshots." Gary gave Larry his phone and Larry called 911. Gary did not

recognize of any of the voices that night. He did not know any of the men. R. 403, l. 4 – 410, l. 9.

Larry called 911 from Gary's phone. While he later claimed he saw and heard Appellant outside his home before Ethan was shot, the only person Larry named while speaking with dispatch was Tony. R. 384, l. 8 – 386, l. 16. After speaking with Keisha and Deavion McDow, law enforcement began searching for Tony. Officers responded to Shirley Mickle's house on Sawgrass Lane where Tony lived during the early morning hours after the shooting. While conducting a protective sweep of the residence, police found Tony in an upstairs bedroom. R. 319, l. 1 – 325, l. 20; R. 522, l. 18 – 525, l. 18. Shirley Mickle, Angie Mickle, Kendarius Mickle, Damarkus Nivens, and Appellant were also at the home when police arrived. R. 324, ll. 3-7; R. 526, ll. 6-123.

Law enforcement then obtained a search warrant for the property on Sawgrass Lane. There were numerous vehicles parked outside. R. 221, ll. 14-22. Of significance, investigators found a 9mm cartridge case in the side door panel of the driver's door of a silver Honda Accord parked behind the house, a box of 9mm TulAmmo ammunition in the glove box of a gray Honda parked in the driveway, three empty boxes and a full box of .233 ammunition in a bag in Kendarius's bedroom upstairs, and a bag containing the clothing and shoes Tony was wearing that night in a closet off the kitchen. R. 222, l. 2 – 223, l. 23; R. 636, ll. 18-23.

Ethan was pronounced dead at the scene. He suffered four through and through gunshot wounds: one to the right chest, one to the left chest, one to the right abdomen, and one to the left abdomen. R. 238, ll. 2-20. The pathologist opined the wounds were caused by "some kind of handgun" and not a "high velocity" firearm or "automatic rifle." R. 260, l. 4 – 261, l. 5.

Crime scene investigators found and collected five TulAmmo 9mm Lugar cartridge cases and a single .223 Remington caliber cartridge case at the scene as well as three fired bullets. R. 131, l. 7 – 134, l. 2; R. 181, l. 6 – 187, l. 21. The firearms examiner testified that 9mm Lugar ammunition is fired by a pistol while .223 Remington caliber ammunition is typically fired by a semiautomatic rifle, which is a "long gun." R. 498, l. 7 – 499, l. 24. The examiner concluded that the five TulAmmo 9mm Lugar cartridge cases recovered at the scene and the Remington 9mm Lugar cartridge case found in the car at the Mickle residence were all fired by the same weapon. R. 501, l. 4 – 503, l. 13. She further concluded that the three fired bullets found at the scene were most consistent with bullets loaded into 9mm Lugar caliber cartridges and that all three were fired by the same firearm. R. 504, l. 9 – 506, l. 1.

Appellant was originally charged with accessory before the fact of murder, but the charge was later amended to murder. R. 530, ll. 4-15. Tony Mickle, Kendarius Mickle, and Damarkus Nivens were also charged with murder. R. 530, l. 16 – 531, l. 2. Shirley Mickle and Angie Mickle were charged with accessory after the fact of murder. R. 532, l. 25 – 533, l. 3. Keisha McDow was charged with obstruction of justice and misprison of a felony. R. 60, ll. 18-22. Appellant was the first of the group to be tried. The jury ultimately found him guilty as indicted.

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews only errors of law." State v. Barnes, 421 S.C. 47, 53, 804 S.E.2d 301, 305 (Ct. App. 2017) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The admission of evidence is within the discretion of the trial court." Id. (citing State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support." Id. at 54, 804 S.E.2d at 305 (citing State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

ARGUMENT

1.

The trial court abused its discretion by excluding the statement made by Antonio "Tony" Mickle, Appellant's codefendant, during his recorded interview with police that Appellant did not have a gun during the shooting, since the statement, which was made in conjunction with Tony's admission that he (Tony) had a 9 mm gun and fired his gun five times, was admissible pursuant to Rule 804(b)(3), SCRE, as a statement against penal interest.

Relevant Facts

Appellant sought to admit Antonio "Tony" Mickle's statement to Investigator Sean Leonard on August 9, 2020 that he (Tony) shot the decedent and that Appellant did not have a gun. Defense counsel argued Tony's statement was admissible pursuant to Rule 804(b)(3), SCRE, as a statement against interest.

The trial court stated that it met with counsel in chambers and they discussed the issue at length. Citing to State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (2017) and State v. McDonald, 343 S.C. 319 (2000), the trial court found Tony's statement that Appellant did not have a gun did not meet the threshold level of trustworthiness to be admissible. Specifically, the court stated, "In this case, it was pointed out clearly to me or in the testimony, that all of these alleged codefendants are interrelated with one another. Father, son, grandson, I don't have all the particulars there but they are either familiar or closely related, therefore, I don't find the statement has the guarantees of trustworthiness because of what the affected family member would want or the close relationship that's important in this case would have to try to exculpate someone else. I don't think the statement has those guarantees, therefore, it doesn't meet that threshold under 804(b)(3) from the get-go." R. 638, l. 19 – 640, l. 8.

After citing specific language in Williamson v. United States, 512 U.S. 594 (1994) and State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (2017), the court further ruled that the parts of Tony's statement "that are clearly inculpatory," such as "I did it," were admissible, but the part where Tony said "this gentleman [Appellant] did not do it" was not admissible since it was not plainly self-inculpatory. R. 640, l. 8 – 642, l. 6.

After putting its ruling on the record, the trial court allowed defense counsel to "argue against" what he found. R. 642, ll. 7-14. Counsel argued that the cases the parties discussed indicate the trustworthiness requirement of Rule 804(b)(3) goes to whether a statement was actually made, not whether the content of the statement is true. Counsel maintained that in this case, there is no question the statements were made since Tony's statements the defense sought to admit were made during Tony's recorded interview with police. However, counsel further argued that the content of the statements was also trustworthy since it was corroborated by witness testimony and the forensic evidence. R. 645, l. 12 – 647, l. 15. He also emphasized that the only codefendant Appellant was related to was his son, Kendarius Mickle. R. 643, l. 24 – 644, l. 9.

In support of his argument, defense counsel cited to U.S. v. Paguio, 114 F.3d 928 (1997). In Paguio, the Ninth Circuit Court of Appeals held "it was reversible error to offer a codefendant's statement in which he inculpated himself but not the part that exculpated his son." Counsel explained, "This was the prosecution for a federal bank loan where the father said, "I did this. My son didn't have anything to do with it.' It was over a falsified loan application. And what the Court held was when the father made the statement, 'I did it. My son didn't have anything to do with it,' that was sufficiently reliable because he inculpated himself, that that

statement in its entirety, including the part exculpating his son, should be admissible." R. 647, l. 20 – 648, l. 10.

The trial court further found Tony Mickle was an unavailable witness. Rather than having Tony assert his own Fifth Amendment right to remain silent, the court questioned Tony's attorney who maintained Tony would invoke the Fifth Amendment if called to testify. The court determined this was "sufficient to make him unavailable." R. 648, l. 16 – 649, l. 20.

After the court found part of Tony's statement was admissible pursuant to Rule 804(b)(3), the state decided to call Investigator Sean Leonard, who interviewed Tony, and admit the statements during its case in chief. Preserving his objection to the court's ruling, Appellant "agreed" to this "procedure." R. 651, l. 11 – 652, l. 4.

Investigator Sean Leonard testified that he interviewed Antonio "Tony" Mickle during the early morning hours of August 9, 2020. Tony was transported to the Lancaster County Sheriff's Department after he was located at his mother's residence on Sawgrass Lane. Leonard read Tony his Miranda rights. At some point during the interview, Tony admitted to pulling out a gun. Leonard testified:

> He said, " I pulled mine [my gun] out."
>
> I asked, "How many times did you fire?"
>
> He said, "Five times."
>
> He was asked what kind of gun he had.
>
> He said, "A nine."
>
> I asked where that nine was now?
>
> He said home. "Should be at my mom's. I don't know, she had it. Should be in my room under my bed."

And he said he acted alone.

R. 654, ll. 11-25.

Leonard explained that law enforcement searched the residence on Sawgrass Lane, but did not find any weapons. Specifically, they did not find a gun under Tony's bed. Leonard also maintained that Tony's statement that he acted alone was not true as the investigation showed more than one person participated in the murder. R. 655, ll. 3-16. Lastly, Leonard testified that earlier in the interview *before* Tony's confession, Tony was in the interview alone. According to Leonard, Tony did not know he was being audio and video recorded. While he was in the room alone, Tony said, "I ain't pull the trigger." R. 655, l. 17 – 656, l. 24.

Discussion

The trial court abused its discretion by excluding the statement made by Tony Mickle, Appellant's codefendant, during his recorded interview with police that Appellant did not have a gun during the shooting, since the statement, which was made in conjunction with Tony's admission that he (Tony) had a 9 mm gun and fired his gun five times, was admissible pursuant to Rule 804(b)(3), SCRE, as a statement against penal interest.

Rule 804(b)(3), SCRE, provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In State v. McDonald, 343 S.C. 319, 323, 540 S.E.2d 464, 466 (2000), our Supreme Court held that "to bring evidence within this exception, the defendant must show that the proffered statements were made by an unavailable declarant, that the statements exposed the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements. The Court emphasized that "the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statement's contents, but rather to the making of the statement." Id. at 324, 540 S.E.2d at 466.

In this case, Tony Mickle was clearly an unavailable declarant given he invoked his Fifth Amendment right to remain silent. The trial court correctly found this was "sufficient" to make Tony unavailable pursuant to the rule. Additionally, there was no dispute Tony made the statements Appellant sought to admit. The statements occurred during Tony's recorded interview with Investigator Sean Leonard on August 9, 2020. Despite citing McDonald, the trial court incorrectly concluded that the "corroboration requirement" concerned the truth of the statement's content rather than whether the statement was actually made.

Moreover, Tony's statement that Appellant did not have a gun made in conjunction with his statements that he (Tony) had a 9 mm gun and he fired his gun five times exposed Tony to criminal liability and should have been admitted. If Appellant did not have a gun, then Tony must have been the culprit with the gun, thus the statement was against Tony's penal interest.

The statements held inadmissible by this Court in State v. Young, 420 S.C. 608, 803 S.E.2d 888 (2017) and State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (2017), were statements that *inculpated* a codefendant as opposed to the unavailable declarant. However, in this case, the statement Appellant sought to admit exculpated Appellant and inculpated Tony and therefore should have been admitted pursuant to Rule 804(b)(3).

Respectfully, this Court should hold the trial court abused its discretion by excluding Tony's statement that Appellant did not have a gun, reverse Appellant's convictions, and remand for a new trial.

2.

The trial court erred by sentencing Appellant to a consecutive term of five years imprisonment for possession of a weapon during the commission of a violent crime where the court erroneously found the sentence had to be served consecutively to the sentence imposed for the violent crime since pursuant to S.C. Code Ann. § 16-23-490(B) the court had discretion to order the five year sentence be served consecutively or concurrently.

Relevant Facts

During sentencing, the assistant solicitor told the court that the mandatory five year sentence for possession of a weapon during the commission of a violent crime had to be served consecutively to the sentence imposed for murder if the sentence imposed for murder was not life without parole or death. Defense counsel did not object or correct the solicitor's misstatement of law. R 740, ll. 6-11. The court ultimately sentenced Appellant to forty years for murder, five years consecutive for possession of a weapon during the commission of a violent crime, and five years concurrent for possession of a handgun by a person convicted of a crime of violence. R. 741, ll. 11-19.

Notably, because the court found the five year sentence for the weapons offense had to run consecutive pursuant to statutory law to the sentence imposed for murder, it did not exercise its discretion in determining whether to run the five year sentence concurrently or consecutively to the forty year sentence imposed for murder. See R. 741, ll. 11-19. Defense counsel did not object to the sentence imposed.

Discussion

The trial court erred by sentencing Appellant to a consecutive term of five years imprisonment for possession of a weapon during the commission of a violent crime where the

court erroneously found the sentence had to run consecutively to the sentence imposed for the violent crime, in this case, murder, since pursuant to S.C. Code Ann. § 16-23-490(B) the court had discretion to order the five year sentence be served consecutively or concurrently.

Section 16-23-490 states in relevant part:

> (A) If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.
>
> (B) Service of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. **The court may impose this mandatory five-year sentence to run consecutively *or concurrently*.**

(emphasis added).

Accordingly, pursuant to subsection (B), the trial court had discretion to impose the five year sentence for the weapons offense to run consecutively *or concurrently*. The court erred by finding the sentence had to run consecutive. See R. 740, l. 11.

While this sentencing error is not preserved for appellate review since defense counsel did not object to the sentence when imposed, in the interest of judicial economy, this Court should hold the trial court erred in finding the five year sentence had to run consecutive pursuant to statute, vacate Appellant's five year sentence, and remand for resentencing on the weapons offense. See State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999) (remanding for resentencing where the sentence imposed was excessive even though no challenge was made to the sentence at trial); State v. Vick 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) (vacating a sentence for kidnapping in the interest of judicial economy where such sentence was precluded by S.C. Code Ann. § 16-3-910 because the defendant received a concurrent sentence under the

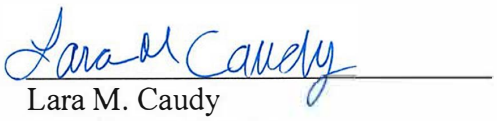
murder statute even though no challenge was made to the sentence at trial); State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) (vacating the defendant's sentence of life without parole for first degree burglary pursuant to Graham v. Florida, 560 U.S. 48 (2010), which forbids the imposition of a LWOP sentence for a nonhomicide crime committed by a juvenile, even though no challenge was made to the sentence at trial).

Respectfully, this Court should hold the trial court erred in finding the five year sentence for possession of a weapon during the commission of a violent crime had to run consecutive pursuant to statute, vacate Appellant's sentence, and remand for resentencing.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, Appellant requests this Court vacate his sentence and remand for resentencing.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of July, 2024.

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APPELLANT

APPELLATE CASE NO. 2023-000218

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 in the above referenced case has been served upon Tommy Evans, Jr., Esquire, at his primary email address listed in the Attorney Information System (AIS), this 25th day of July, 2024.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT