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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TIMOTHY J. MCKINNEY,

APPELLANT

APPELLATE CASE NO. 2023-001693

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Stevie Ging to testify that appellant's father, Joe McKinney, told her he was not at home and that he had gone fishing during the Memorial Day weekend when the murder apparently occurred inside of his house since this was inadmissible hearsay that provided an impermissible alibi for appellant's father, who was a suspect, where the father never testified, since this was highly prejudicial to appellant's defense?

STATEMENT OF THE CASE

Appellant was indicted at the August 18, 2021, term of the Spartanburg County grand jury for the offense of murder. His case was called to trial on October 16, 2023, before the Honorable R. Keith Kelly, and a jury. Daniel James MacDonald, IV, and Louei Christopher Nmair, represented appellant. Jennifer Jordan and James Bales were the assistant solicitors. R. 1.

On October 19, 2023, the jury found appellant guilty of murder. R. 478, ll. 19-21. The solicitor then stated the state had filed a notice of intent to seek a sentence of life imprisonment without parole pursuant to S.C. Code § 17-25-45 based on appellant's prior convictions for kidnapping and assault and battery with intent to kill (ABIK). This notice was served on defense counsel MacDonald according to the solicitor. R. 482, l. 18 – 483, l. 24. Judge Kelly then sentenced appellant to life imprisonment. R. 484, ll. 21-25.

This appeal follows.

STANDARD OF REVIEW

“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

The court erred by allowing Stevie Ging to testify that appellant's father, Joe McKinney, told her he was not at home and that he had gone fishing during the Memorial Day weekend when the murder apparently occurred inside of his house since this was inadmissible hearsay that provided an impermissible alibi for appellant's father, who was a suspect, where the father never testified, since this was highly prejudicial to appellant's defense.

Relevant Facts

The decedent, Travis McCall, was killed during the Memorial Day weekend in 2022. He apparently was stabbed and strangled before his body was set on fire in the woods behind the house where appellant lived with his father, Joe McKinney. Appellant had an upstairs bedroom, and Joe McKinney's bedroom was in the basement because it was cooler there.

Stevie Ging was appellant's neighbor. She saw appellant on Memorial Day, May 31, 2022. R. 56. She testified she saw appellant carrying a red gas jug with no cap on it that day. The state contended this jug was used to carry gas from the Scotchman convenience store to the woods behind appellant's house where he allegedly burned the decedent's dead body. Appellant's defense was that the police did a sloppy investigation and never seriously considered appellant's father or appellant's best friend, Rick Westfield, as suspects in the murder.

The solicitor asked Ms. Ging if appellant's father was home during the Memorial Day weekend. Ms. Ging answered that she believed: "He'd gone fishing." R. 59. Ging further testified that she knew appellant's father was not at home that weekend because she had talked to him after the murder, and the father told her he was away fishing that weekend. The judge overruled defense counsel's hearsay objection. R. 59.

Ging testified that Rick Westfield was seen with appellant shortly after she saw appellant walking up the street with the gas jug. There would be other evidence that appellant purchased two-thirds of a gallon of gasoline from the nearby Scotchman convenience store and pumped it into the gas can. R. 60-62.

Robin Ging lived with Stevie, and she remembered the fire next door in the woods behind appellant's home. She remembered hearing an explosion-like sound when the fire started but did not know where the sound originated. She told her nephew to run and investigate the fire. R. 68; R. 75.

Josh Wilson was having a cookout with some friends at the time the fire was spotted. Josh and one of his friends, Lewis Taylor, walked back towards the woods, found the fire, and tried to put it out. Lewis told Josh that he thought someone was playing a joke on them because it appeared that a mannequin was being burned in the fire. When Josh looked for himself, he was not sure that the mannequin was not in fact a person. "I didn't study it. R. 79-82. Wilson told his wife to call 911. He "wanted nothing to do with it." R. 83.

The fire department put out the fire with two water extinguishers, and they discovered that a body was, in fact, in the fire. Bones were exposed, and blood was coming from the face of the dead, burned man's body. R. 89-91. It would be the opinion of the pathologist that the decedent had been strangled and stabbed. He was dead before his body was burned.

Investigator Jonathan Lawson testified that fingerprints taken from the dead body revealed it was the body of Travis McCall. R. 102. The pathologist testified that the decedent was five-foot-nine and he weighed one hundred thirty-eight pounds. R. 109. The cause of death was neck wounds from being stabbed and manually strangled. A sharp knife was likely the murder weapon used. R. 110-111.

There was some evidence in the case that the decedent was mentally disturbed or intellectually disabled, and he was also suicidal. The pathologist, on cross-examination, ruled out suicide as the cause of death before the body was burned by someone else. R. 119-120.

The state introduced surveillance footage from a neighbor's camera, and from the Scotchman convenience store. See States exhibits 1-4. The surveillance tapes showed a man in a yellow shirt, purportedly appellant, walking back and forth in the direction of the smoke coming from the woods. R. 136-138.

Another neighbor, Donald Killough, testified that he saw appellant coming from the basement of his house with a cleaning fluid at about 4:00 p.m. on Memorial Day, May 31, 2021. He testified that he observed appellant pouring the cleaning fluid onto the floor and ground as appellant walked from the basement of his house towards the woods. R. 136-138.

A Scotchman employee, Brittany Lambeth, remembered that Rick Westfield entered the store while she was talking to appellant on Memorial Day. Appellant then went outside and pumped gasoline into his gas can after paying for it inside. R. 150-155.

Marty Owens, another Scotchman employee, remembered appellant and Rick Westfield came to the store between 10:00 p.m. and 12:00 p.m. the night before Memorial Day. She saw them again a few hours later, around 2:00 a.m., with the decedent in tow. Owens offered that the decedent sometimes had "outbursts." He would also hit himself in the head or hit his head on the side of the building. In addition, the decedent talked to himself. However, Owens considered the decedent harmless. R. 156-161.

Rick Westfield testified that he and appellant were best friends. Westfield remembered being with appellant when he purchased gasoline at the Scotchman. Westfield said he was only

at appellant's house on the day of the decedent's disappearance and murder for about two or three minutes. R. 190-191.

Westfield claimed that he had never seen appellant with the decedent. Westfield verified that appellant's father, Joe McKinney, lived in the basement of the house because it was cooler during the summer months. R. 192-193. On cross-examination, Westfield denied that he was in fact the person who harmed the decedent during Memorial Day weekend. R. 196.

Investigator Jon Guest of the Spartanburg County Sheriff's Department testified that the decedent's dead body was wrapped inside of a rug before it was put in the fire. R. 206-207. Guest testified that he received consent to search the house from Joe McKinney. Guest then saw a red gas can just inside of the door to the house. R. 206- 207. Guest also saw blood droplets and drag smears up or down the steps. R. 210-211.

Guest took a DNA swab from appellant. Guest also took a DNA swab from the decedent after his body was removed. However, a DNA sample was not taken from Joe McKinney or from Rick Westfield. Guest also testified that Joe McKinney claimed he had been fishing and he had not been at home at all on Memorial Day. R. 236-237. Again, Joe McKinney did not testify. Guest also offered that he took DNA samples from appellant's bedroom and from the stairs from second level down to the basement. R. 258.

Investigator Sands testified that the K-9 dog alerted on an accelerant near the fire. The accelerant turned out to be gasoline. R. 285-291. In addition, Sands said that a knife was collected from the basement – which was the bedroom of Joe McKinney – as was a belt. A red gas container taken from the front porch of the house. R. 340-341.

The DNA expert, Brian Browning, testified that the decedent's DNA from his blood was found inside of appellant's house. The decedent's DNA was also found on a belt buckle from a

brown belt that the state insinuated belonged to appellant. Some of appellant's DNA contributed to the blood samples taken from the house after the murder. R. 363-367; 369; 377-379; 382-385.

Closing arguments

The solicitor told the jury the decedent's blood and his DNA were found in appellant's upstairs bedroom and that there was a blood trail that went downstairs to the first floor and then into the basement. The trail then went outside of the basement door into the yard. R. 423-424.

The solicitor argued that appellant purchased gasoline shortly before the fire was discovered. The solicitor maintained that the "timeline" showed that appellant was home at the time of the murder and fire but that his father, Joe McKinney, was not home around the time the murder was committed. R. 429-431. The solicitor maintained that the fact other DNA samples were not taken from Joe McKinney or Rick Westfield should not enter into the jurors consideration during deliberations. R. 447-449.

Defense counsel argued that the state's investigation was sloppy, and obvious suspects were ignored in the state's "rush to judgment." R. 452-457.

Discussion

Appellant's defense in this case was that the state's investigation was sloppy and "a rush to judgment" where the police quickly deciding appellant was guilty. Stevie Ging testified that appellant's father, Joe McKinney, was not at home on Memorial Day. She "knew" this because Joe McKinney had told her he was not at home, and that he had gone fishing.

Hearsay "is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." See Rule 801(c), SCRE.

Ging's testimony about appellant's father not being home and him being away fishing was offered by the state to show that Joe McKinney was not at home at the pertinent times on

that Memorial Day weekend, and therefore he could not have committed the murder. This evidence was offered for the truth of the matter asserted – Joe McKinney’s fictitious, rock-solid alibi where the defense was questioning the “sloppy” failure of the police to investigate him as an obvious suspect. Importantly, the knife, the apparent murder weapon, involved in this case was found in the basement area that appellant’s father used as his bedroom. R. 339-341.

In Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013), this Court held that defense counsel was ineffective for failing to object to numerous instances of inadmissible hearsay in that criminal sexual conduct with a minor case. For example, the alleged victim’s father testified that his teenage daughter told him: “Daddy, he [Vail] took everything, he took everything I have.” Vail was the football coach at a small high school the alleged victim attended, and she maintained she was involved in an ongoing sexual relationship with him while she was a student. Vail v. State, 402 S.C. 77, 91, 738 S.E.2d 503, 510-11 (Ct. App. 2013).

Further, the alleged victim’s sister gave testimony that this Court found only served to impermissibly “prove” the alleged victim’s story of a sexual relationship between Coach Vail and the alleged victim. Further, the school principal testified about outside statements that had been made about an improper relationship between Coach Vail and a student. Vail v. State, 402 S.C. 77, 86-87, 738 S.E.2d 503, 508 (Ct. App. 2013).

This Court in Vail stated the fact that some of the hearsay evidence was also introduced through the alleged victim’s testimony itself was not a valid reason for its introduction through other witnesses, nor did it excuse of the failure of defense counsel to object to it. Vail v. State, 402 S.C. 77, 89, 738 S.E.2d 503, 510 (Ct. App. 2013). This Court in Vail v. State granted the defendant a new trial based on the admission of this inadmissible hearsay evidence.

In State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985), our Supreme Court considered evidence of Mitchell's guilt in that criminal sexual conduct case. The victim told the police her assailant was wearing a dark colored jacket or shirt. The police officer who searched Mitchell's home testified he was unable to locate a dark jacket.

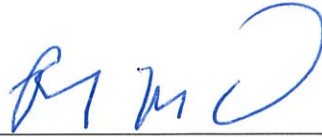
However, the police officer testified, over objection, that Mitchell's wife told him Mitchell owned a dark jacket, but she had washed it and could not locate it. Mitchell's wife did not testify.

The Supreme Court found this testimony was clearly hearsay and not admissible under any exception to the hearsay rule. See State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985). Further, hearsay testimony is also inadmissible because the adverse party is denied the opportunity to cross-examine the declarant. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985) (*citing* State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971)).

In this case, Joe McKinney, appellant's father, also did not testify. The defense was therefore denied an opportunity to cross-examine the father about his contention -- and his claim to Stevie Ging -- that he was away fishing on the weekend of the murder. Here, this hearsay evidence was prejudicial because appellant's theme for his defense was that the authorities made a rush to judgment and did not investigate his father who should have been prime suspect in the murder since the murder weapon, the knife, was found in the same area as his basement bedroom. R. 339-341. Joe McKinney's purported alibi through the hearsay testimony of Stevie Ging improperly let the police off the hook as to the sloppy investigation defense.

CONCLUSION

Based on the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2024.

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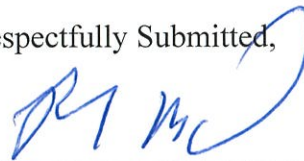
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy J. Mckinney states:

1. He is Chief 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 R. Keith Kelly, which was held on Oct. 16-19, 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 Timothy J. Mckinney.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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APPELLANT

APPELLATE CASE NO. 2023-001693

**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;
- (2) Entire trial transcript;
- (3) State's exhibits 1-4 (surveillance video clips).

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



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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."



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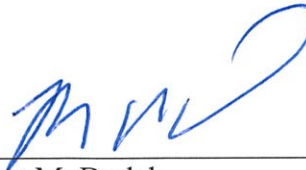
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APPELLANT

APPELLATE CASE NO. 2023-001693

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 Timothy J. McKinney, #287844, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of August, 2024.



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