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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the State Grand Jury

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

APPELLANT

APPELLATE CASE NO. 2023-001893

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred excluding Mr. Lyles's prior statement to law enforcement where (1) the court incorrectly found Lyles was unavailable pursuant to Rule 804, SCRE and that no exception applied under that Rule and where (2) his statement was admissible under the recorded recollection exception to hearsay pursuant to Rule 803(5)?

STATEMENT OF THE CASE

On June 15, 2021, the state grand jury indicted Michael J. Smith for conspiracy, assault and battery by mob, first degree, and prisoner carrying or concealing a weapon. *R. On December 4-8, 2023, Mr. Smith was tried before the Honorable Ferrell Cothran and a jury. Dec. 4-6, Tr. 1; Dec. 7-8, Tr. 1. Aimee Zmroczek represented Mr. Smith. Prosecuting for the state were assistant attorney general, Barney Giese, and assistant attorney general, Margaret Scott. Dec. 4-6, Tr. 1; Dec. 7-8, Tr. 1.

On December 8, 2023, the jury found Mr. Smith guilty as indicted. Dec. 7-8, Tr. 196, ll. 7-16. Judge Cothran sentenced Mr. Smith to an aggregate term of forty years' imprisonment. Dec. 7-8, Tr. 205, l. 23—206, l. 8.

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 trial court erred excluding Mr. Lyles’s prior statement to law enforcement where (1) the court incorrectly found Lyles was unavailable pursuant to Rule 804, SCRE and that no exception applied under that Rule and where (2) his statement was admissible under the recorded recollection exception to hearsay pursuant to Rule 803(5).

Introductory facts

On April 15, 2018, there was a large-scale incident involving three dorms, F1, F3, and F5 at Lee Correctional Institution, in Lee County that resulted in the death of seven inmates and several more injured inmates. The previous November, Lee Correctional (Lee) received two hundred and fifty-six additional men. The men were moved from McCormick Correctional institution where there had been a massive incident lasting days. In December 2017, there was a man killed at Lee. Dec. 4-6, Tr. 106, l. 20—108, l. 12.

Edward Tisdale, associate warden of operations at Lee, testified the institution was understaffed at the time of the incident. Dec. 4-6, Tr. 109, ll. 5-22. He admitted there should have been five officers working in F1 dorm but there were only two working on April 15, 2018. Dec. 4-6, Tr. 110, ll. 4-16. Tisdale testified that “no locks worked in the F5” dorm. He said “[e]verybody all the way up to the deputy director of operations knew the locks did not work in the F5 unit.” However, he was unaware that there were any locks not working in F1 dorm. Dec. 4-6, Tr. 113, l. 14—114, l. 4; 122, ll. 13-21. Tisdale testified contraband—including cell phones and weapons—was a major problem at Lee. Dec. 4-6, Tr. 120, 4-19; 125, ll. 12-24.

Tisdale said the incident began in dorm F3 around seven in the evening. Dec. 4-6, Tr. 81, ll. 3-17. A man was stabbed in dorm F3. He said the incident caused the men in F3 to refuse to lockdown in their assigned cells for evening count. Tisdale testified their refusal to go into their

assigned cells was a security problem. Staff was unable to get the injured man removed to receive medical help. Dec. 4-6, Tr. 81, l. 16—82, l. 20.

Next, there was an incident in dorm F5. The men in F5 began “breaching the fence” trying to escape. Dec. 4-6, Tr. 86, ll. 4-20. Tisdale said there were twenty to thirty men in the yard that were armed. Dec. 4-6, Tr. 92, l. 2-11. Tisdale testified there were a group of men stabbing another group of men. Those not involved were trying to escape. The men were so scared they climbed over concertina wire injuring themselves. Dec. 4-6, Tr. 90, l. 10—91, l. 14. Some of the men were climbing over the fences some were going to the F1 dorm building. Dec. 4-6, Tr. 92, ll.

Tisdale stated the night “was extremely chaotic, the logistics were a nightmare,” “chaotic is not even the word to describe it. It went completely crazy.” Dec. 4-6, Tr. 94, ll. 9-25. He testified twenty-two people left Lee needing medical attention. Dec. 4-6, Tr. 94, ll. 10-23.

Officer Clive Lopez testified he was working in F1 on the evening of the incident. He admitted that he was unable to lockdown F1 dorm because “there was no institutional control.” Dec. 4-6, Tr. 318, ll. 13-20. Lopez stated, “I didn’t feel safe trying to lock anyone down . . . there were inmates walking around with weapons.” Dec. 4-6, Tr. 318, ll. 20-24. Lopez testified on cross-examination he did not know how to handle the incident. “I don’t think we’re trained to deal with this situation.” Dec. 4-6, Tr. 350, ll. 12-18. Lopez was not present on the B side of F1 when Cornelius McClary was injured. Dec. 4-6, Tr. 335, ll. 12-15.

State’s exhibit 4, recording of surveillance cameras from F1 show the incident.¹

Michael Smith was housed at Lee in dorm F1. Mr. Smith was transferred from Perry Correctional to Lee in October 2017. Dec. 7-8, Tr. 8-9; 12, ll. 16-25. Smith described the atmosphere at Lee as “scary” because it was out of control. Dec. 7-8, Tr. 15, ll. 9-15. Smith said

¹ State’s exhibit 4 is on file with the Court.

on the evening of the incident word traveled to F1 there was a riot in other dorms. Dec. 7-8, Tr. 21, ll. 9-22. He testified there were pictures being shown on contraband cell phones of what was happening in other dorms, and he saw “friends dying.” Dec. 7-8, Tr. 22, ll. 3-24. Smith became very scared because he knew that this group of guys would do the same thing to him. He also knew one correctional officer could not save him. Dec. 7-8, Tr. 23, ll. 1-14; 24, ll. 1-12.

Smith heard his friend Ray Ray yelling and went towards him. When he got there another man, McClary, was with his friend and Ray Ray was bleeding. McClary told him that he was going to kill him next. Smith testified he fought back against McClary to protect Ray Ray and himself. Dec. 7-8, Tr. 31-37.

Smith and a group of other men are seen in a physical altercation with McClary. Dec. 7-8, Tr. 31-37; State’s exhibit 4, (F1 B, LeftPTZ Camera at 22:00:26-22:01:58). State’s exhibit 4, shows Smith stabbing and hitting McClary. The recording also shows Smith backing a big group of men off McClary once McClary is clearly hurt. State’s exhibit 4, (F1 B, LeftPTZCamera at 22:00:26-22:01:58; F1 B, RightPTZ Camera 21:59:46-22:01:32). Ultimately McClary died. Dec. 4-6, Tr. 358, ll. 12-13; 359, ll. 1-20.

Proffered testimony

During the defense case counsel for Mr. Smith proffered testimony of Mr. Lyles an inmate that was present at the F1 dorm incident. Dec. 7-8, Tr. 91-95. The following testimony was given:

THE COURT: Obviously there’s not a jury present. Mr. Smith’s lawyer needs to ask you questions if you could respond to whether you remember them or not. Okay.

MR. LYLES: **I don’t want to talk. I want to part of this.**²

² Counsel submits this is a typographical error in the transcription and Mr. Lyles actually said, I want *no* part of this.

THE COURT: I understand but you've got to at least sit down. I've got to put some things on the record. Okay.

MR. LYLES: Okay.

...

Q: Mr. Lyles, my name is Aimee Zmroczek. We met briefly earlier. I understand you don't want to be here. I just need to ask you a few questions. Okay? Do you recall giving a statement to Agent Shaw, Special Agent Kevin Blake and John Hollingsworth from the South Carolina Attorney General's office on January 31st of 2020?

A: No ma'am.

Q: You don't recall? We just have to record it. So I know you don't want to be here but if you can just speak up for me.

A: No ma'am.

Q: You don't recall?

A: No ma'am.

Q: Okay. Do you recall that they transported you to the Richland County Sheriff's --- Excuse me to the Richland County courthouse from the detention center and had you look at images, sign your name and identify certain individuals?

A: No ma'am.

Q: You don't recall that?

A: No ma'am.

Q: And do you recall in that statement telling Agent Shaw and the others I've mentioned that you provided some background conditions at Lee correctional that included you staying on the east yard for one week. Do you recall that?

A: No ma'am.

Q: Do you recall that when you were assigned to a cell on the west, and then you were assigned to a cell on the west yard, do you recall that?

A: No ma'am.

Q: Do you recall stating that all the doors at Lee Correctional stayed swinging and were never locked?

A: No ma'am.

Q: Do you recall stating that inmates conducted the count for the correctional officers?

A: No ma'am.

Q: Do you recall stating that on April 15, 2018, that you were located in the A side dorm napped approximately two or 3pm until just before 9pm?

A: No ma'am.

Q: Do you recall stating that you woke and traveled to the B side of the F1 dorm?

A: No ma'am.

Q: Do you recall stating that you knew a Blood --- you observed a Blood gang member you knew as Ray Ray holding clothing to his neck because he had been stabbed?

A: No ma'am.

Q: Do you recall gangs conducting Blood calls?

A: No ma'am.

Q: Do you recall hearing people yelling on the ---Stating that you heard people yelling on the walk above the cell you were located in.

A: No ma'am.

Q: Do you recall saying that you observed a machete like shank dropped from the upstairs walkway?

A: No ma'am.

Q: Do you recall stating that you then saw a bloody individual you knew to be a Crip gang member fall down the left side stairs?

A: No ma'am.

Q: And do you recall them reading your Miranda warnings during that time or before this interview?

A: No ma'am.

Q: Okay. Do you recall identifying this individual in your handwriting as Ray Ray saying stabbed in neck?

A: No ma'am.

MS. ZMROCZEK: Your Honor, those would be the extent of the questions that I would ask Mr. Lyles.

THE COURT: Okay. Does the state have anything you want to add?

MR. CONRAD: In terms of questions? The only question I would ask is ...

Q: Sir, do you recall in that same interview that Ms. Zmroczek was referring to, do you recall stating that you heard a ...

MS. ZMROCZEK: I would object to hearsay.

MR. CONRAD: It's proffer.

THE COURT: Okay go ahead.

Q: Do you recall hearing an inmate named Rico who you identify as a Blood leader scream, if you Crips, you got 10 minutes to get out of the building or you die?

A: No sir.

Dec. 7-8, Tr. 91-95 (emphasis added).

After the proffer, counsel for Mr. Smith, argued Mr. Lyles' prior statement to law enforcement was admissible pursuant to Rule 803(5), SCRE. Dec. 7-8, 95, l. 20—96, l. 17. Counsel contended Lyles was not "unavailable," as defined in Rule 804, SCRE, but rather Mr. Lyles was refusing to testify. Dec. 7-8, 96, l. 21—97, l. 23. Counsel asserted Mr. Lyles statement was admissible because Mr. Smith has a constitutional right to present a full and complete defense pursuant to *Kyles v. Whitley*, 514 U.S. 419 (1995).

The trial court found Mr. Lyles was "unavailable" pursuant to Rule 804, SCRE and that there was no exception in Rule 804 applicable to admit this evidence. The court stated, "he got on

the stand and [] didn't remember anything. It's not like he remembered parts and didn't remember parts. So he basically testifies to a lack of memory of the subject matter to the entire statement. He fits [804(a)(3)] exactly." Dec. 7-8, 96, l. 5—99, l. 7.

Discussion

Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules. Rule 802, SCRE; *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001). Our rules of evidence provide for hearsay exceptions where the availability of the declarant is immaterial. Rule 803(5) provides:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.)

Rule 803(5), SCRE (emphasis added).

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Rule 804, SCRE (emphasis added).

The trial court erred finding Mr. Lyles was “unavailable” pursuant to Rule 804(a)(3), SCRE (“unavailability of a witness includes situations where the declarant testifies to a lack of memory of the subject matter of the subject matter of the declarant’s statement). The trial court was singularly focused on the fact there was no exception within Rule 804 that applied to Mr. Lyles prior statement to police. Mr. Lyles was not unavailable pursuant to Rule 804, SCRE where he was refusing to testify to the prior statement likely out of fear as he was still incarcerated at the time of trial. The first words out of Mr. Lyles mouth were “I don’t want to talk.” Dec. 7-8, Tr. 91, ll. 10-11. It is also apparent from the nature of the case that a current inmate housed at a South Carolina Department of Corrections (SCDC) facility would likely not want to testify to the situation at Lee where they might face repercussions during their remaining sentence. The court erred finding Mr. Lyles was unavailable pursuant to Rule 804, SCRE and failing to admit the evidence under the recorded recollections exception to the rule against hearsay, Rule 803, SCRE.

Mr. Lyles prior statement to law enforcement regarding the incident at Lee was admissible under the recorded recollection exception to hearsay. Rule 803(5), SCRE (“[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly . . . the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.”).

Mr. Lyles understandable refusal to testify in Mr. Smith’s case should not preclude Smith from presenting a full defense to his charges. The jury heard testimony of SCDC employees, some witnessed the events of April 15, 2018, some did not. Additionally, the jury saw ample video of the incident without any sound and with suggested context given by SCDC employees. The jury

heard Mr. Smith's testimony of what occurred that evening. However, the jury did not hear testimony of any other individual that was witness to the incident in F1. Mr. Lyles prior statement to law enforcement was central to Mr. Smith's ability to present his case of self-defense and he was precluded from presenting a full and fair defense by the trial court's erroneous exclusion of this evidence.

CONCLUSION

Based on the forgoing argument, Mr. Smith's convictions should be reversed, and the case remanded to Lee County Court of General Sessions for a new trial.


Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2024.