

State of South Carolina
In The Court of Appeals

Case No. 2013-0001378

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

State of South Carolina, Respondent,

v.

Dwayne Cabbagestalk, Plaintiff,

Initial Brief of Appeal of Plaintiff

Dwayne Cabbagestalk
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Turbeville, S.C. 29162-0252

Plaintiff, pro se

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SC Court of Appeals

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Statement of Issues on Appeal

Whether the trial court erred in refusing to grant a directed verdict to the charge of criminal domestic violence when the State failed to present any substantial evidence beyond a reasonable doubt that appellant committed the offense?

Whether the trial court erred in refusing a directed verdict of acquittal to the charge of criminal domestic violence when the State failed to present any substantial evidence the State's witness (Ms. Debra Perry) was ever at scene of the alleged incident, before or after?

Whether the trial court erred in overruling the defense's objections to allow Debra Perry to testify to what another witness said, (Malik Payne), and how victim looked and what Malik told her. Each objection was for "hearsay", which the trial court overruled each time. The hearsay prejudiced the jury and tainted the trial court with purged testimony?

Whether the trial court erred in refusing to grant a directed verdict of acquittal to the charge of criminal domestic violence, because the trial judge stated that he based some of his decision on the testimony of Debra Perry?

Whether the trial court erred by, during the sentencing, alleged victim told the court that she gave false statements to police officers and that she was not truthful and gave purged testimony. She stated she

felt like she was not the victim, the court agreed and stated the Ms. Payne should charge. However, even knowing the truth, sentencing court gave the defendant the maximum sentence allowed by law?

Statement of the Case

Appellant was convicted of criminal domestic violence after a jury trial was held before the Honorable Thomas A Russo on June 17-18, 2013, in Lexington County, S.C.. A five (5) year sentence was imposed. Erik Drylie, Esquire, and Dayne Phillips, Esquire, were the defense attorneys. Kate W. Usry, Esquire, and Shannon Davis, Esquire, were the assistant solicitors.

The appeal follows.

Argument

Plaintiff avers trial court erred when it overruled the objection(s) of "hearsay" evidence during the testimony of Debra Perry (Grandmother). (Trial Testimony, (TT) 9pg. 96, lines 21-97:7). The State failed to establish, through the testimony of "actual" on scene witnesses, i.e.: Master Deputy Nick Burt, alleged victim Tameshia Perry-Payne, or alleged victims son Milik Payne.

Each witness, when questioned about Debra Perry's presents at the residence (126 Red Pine Rd) did not recall her ever being there before or after alleged incident. (D. Perry, TT 94:23-25; N. Burt, TT 84:6-9; T. Perry-Payne, TT 67:7-13; M. Payne, TT 74:13-14, 19, 21). Debra Perry admits during testimony that, she never gave any officer a "statement", and that Officer Nick Burt never asked her what happened or what her involvement in the case was. (TT 104:15-23). This phantom witness, Debra Perry was never at the site of the supposed incident according to all three witnesses, which supports SCRE, Rule 602: (Lack of Personal knowledge)¹, which would deem her testimony purely "hearsay" which would violate SCRE, Rule 802: (Hearsay Rule)², by this, the jury became tainted which certainly prejudiced their verdict.

Debra Perry (Grandmother), the State's "phantom" witness and alleged spokes-women for her daughter (Tameshia Perry-Payne, alleged victim) who is 37 years

1) A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witnesses' own testimony. U.S. v. Mandel, 591 F.2d 1369, C.A. (Md.) 1979, (n.29) (McCormick on Evidence).

2) Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001).

old according to the State. (TT 127:24-128:1). Debra Perry was never at the residence, neither before or after the alleged incident³ according to the testimony of three witnesses that were actually there. (TT 77:24-25). Based on the unlawful erroneous hearsay testimony of Debra Payne not only was the jury tainted but it also affected the Judge's denial of the defendant's "direct verdict of acquittal". (TT 108:17-109:16).

Master Deputy / Asst. Investigator Nick Burt (TT 77:24-25) was questioned during his testimony in direct exam by Ms. Davis (State). Officer Burt was asked, "who else was present at the house when you arrived?", His response, "It was the victim (Tameshia Perry-Payne), the defendant, and her four children. (TT 84:6-9). No where in his testimony did this "Asst. Investigator" ever mentioned Debra Perry as being present before or after the alleged crime occurred

During testimony given by Tameshia Perry-Payne in direct exam by Katy Ursy (State) about the presents of Debra Perry being at the residence on December 4th, 2011. Q: "Did you call --- did your mother show up here after this incident, Ms. Perry-Payne?", A: "I don't think so". (TT 67:7-10). State questions Ms. Perry-Payne again about her mothers' presents at the residence, Q: "She didn't show up?", A: "I don't think -- I don't think so". (TT 67:10-11), and again Ms Perry-Payne was asked, Q "Was she there before this happened?", A: "I don't remember". (TT 67:12-13).

Alleged victim's son Malik Payne who was sequestered during his mothers testimony. (TT 35:11-18; 36:4-11). Malik Payne was asked, Q: "Who was at the home

3) "Lay witnesses are not entitled to opine broadly or generally; rather, "lay opinion testimony must be based on personal knowledge". U.S. v. Johnson, 617 F.3d 286, 292, (C.A. 4, 2010), U.S. v. Hassan, WL 406768 C.A.4(N.E.) 2014; FRE, Rule 602.

on December 4th, 2011?" A: "It was me, my mom, Beano (defendant), and my sisters. (TT 74:13-14). Malik was then asked by Ms. Ustry (State) about the presents of Debra Perry, Q: Okay. "Was your Grandmother ever at the house that day?", A: "I don't re-member. I don't recall." (TT 74:19-21). It is quite clear that by all three witnesses' not having a recollection of Ms. Perry being present at the residence, a reasonable, rational person would deduce that she had not been there, that's why they don't remember, because she was absent. To further back this statement, during Malik's direct exam, Q "And how did the police come to arrive at your home?", A "I called my grandmother, and my grandmother called the police". (TT 75:1-2). So it is obvious that Debra Perry was not at the address of the alleged assault.

In the cross-exam of Debra Perry by Mr. Drylie, Ms Perry was atleast 25 miles away from (126 Red Pine Rd, Lexington, S.C.) when she received the call from Malik. (TT 103:16), yet in her testimony she stated that she had arrived at the residence before the police officers. (TT 103:1-4). Yet during direct exam by Ms. Davis (State), Officer Burt, who is an investigator - trained to observe and a finder of fact "never" testified to Debra Perry ever being present at the residence. (TT 128:8-10)

Malik Payne testified to calling his Grandmother (Debra Perry) because his mother was fussing and had gotten into an argument with Dwayne. (TT 75:1-6, 20-21). The fabricated and exaggerated, fictitious testimony by Debra Perry on direct exam by Ms. Ustry gives a wild account of her daughters encounter with the defendant. There is no documentation, photographs, or forensic evidence to substantiate her testimony. (TT 97:1-4; 97:20-25). (TT. 98:8-13)

Debra Perry on direct exam by Ms. Ursy asked, "And what did Malik tell you?" defense council brought an objection of hearsay which was countered by state with "excited utterance", hence the objection was overruled. (TT 96:19-24). Since Debra Perry was never established as ever being there, that was proven by all three witnesses, which leads once again back to, hearsay testimony not being admissible in Court. SCRE, Rule 801(c) and 802. The factual account of Malik's testimony, and the fact that he was there (TT 75:1-6, 20-21) at the residence, verses the account given by Debra Perry, (who no one at the residence ever saw) is contradicting to say the least. Court erred by even letting her testify.

Debra Perry under cross-exam by Mr. Drylie was asked, Q "So did he get a statement from you?", A "Excuse me?", Q "Did he get a statement from you?", A "The officer", Q "yes", A "I don't recall giving them a statement", Q "Did he ask you what happened or your involvement in the case?", A "I don't recall that either." (TT 104:15-23). This once again will show, the reason why Ms Perry does not recall giving a statement either verbally or written to Officer Burt is because, just as Investigator Burt's testimony proves, Ms. Perry was not there. Being a trained expert in investigation and deemed a "Master Deputy by The Lexington County Sheriff's Department, it is not likely that Burt would have missed a witness account, let alone a statement of facts from her.

Testimony from each of the witnesses, including Debra Perry herself proves that she was never at the residence, at any time, on the night of the alleged incident. The State used Debra Perry to be the voice of the state's case. The State could not gain a conviction without her erroneous and false statements. In comparison to the witnesses' statements of actual fact, only Debra Perry spun such a fantastic story of a horrifying assault and total destruction in the house, yet in State's Exhibits: #10 and #14, and in the rest of the State's evidence is completely

in opposition then Ms. Perry's accounts. By Ms. Perry giving false testimony and committing perjury it prejudiced the jury as well as the trial court itself, according to the statement made by the court, Ms. Debra Perry's testimony had a lot of weight on the court's decision to deny the direct verdict of acquittal in the Petitioners' favor. (TT 108:16-17; 109:6-9).

The Court erred in refusing to grant a directed verdict of acquittal by, violating the defendant's rights of "due process of law", which is guaranteed by the Fourteenth Amendment, requiring that, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as, evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." U.S.C.A. Const. Amend. XIV, Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979), Barron v. Kornegay, WL 1354062, F.Supp. 2d, E.D.N.C., 2012.

By this court's own statement to the victim, the court admits reasonable doubt in this case, proving even further that this directed verdict should not have been denied, and that trial court did bring about this error. (TT 156:9-25; 157:1-4, 18-25; 158:1, 12-14).

"If the evidence is consistent with both innocence and guilt, it cannot support a conviction". U.S. v. Varoz, 740 F.2d. 772, 775 (C.A. 10, 1984); U.S. v. Ortiz, 445 F.2d 1100, 1103 (C.A. 10, 1971).
(TT 157:25; 158:1)

Guilt is only to be found when there is, "a rationally supportable state of near certitude". Evans-Smith v. Taylor, 19 F.3d 899, 906 (C.A. 4, 1994); U.S. v. Crasten, WL 462056, F. Supp. 2d W.D.(Va.), 2013.

A motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is as such to permit the jury to merely conjecture or to speculate as to the accused's guilt". State v. Brown, 267 S.C. 311, 227 S.E. 2d 674, 677 (1976); State v. Palmer, WL 551581, S.E. 2d (S.C. App., 2014), (I. Standard of Review), citing, (State v. Cope, 405 S.C. 317, 334, 748 S.E. 2d 194, 203 (S.C., 2013), State v. Williams, 405 S.C. 263, 272, 747 S.E. 2d 194, 199 (S.C. App., 2013)).

When hearsay evidence is improperly admitted to prejudice of the complaining party, the error is reversible. Hearsay evidence is inadmissible unless an exception applies. SCRE, Rule 801(C), State v. McCleod, 401 S.E. 2d 175, n.6, (S.C., 1991); State v. Washington, 367 S.C. 76, 623 S.E. 2d 836, n.6, (S.C. App., 2005).

"Under exception to rule against hearsay for excited utterance was not harmless, as this testimony almost certainly affected the result of the trial", "given the associate's statement was a crucial piece of evidence". Case involved mostly circumstantial evidence and credibility of many of the witnesses were dismissed." SCRE, Rule 803(2); State v. Davis, 371 S.C. 170, 638 S.E. 2d 62, n.6, (S.C., 2006); State v. Washington, 379 S.C. 123, 665 S.E. 2d 604, n.5-6, (S.C., 2008).

The defendant was, "prejudiced by hearsay testimony of police officer as to defendant's wife's identification of a pocket book used in an armed robbery, and therefore, his conviction had to be reversed". State v. Williams, 285 S.C. 544, 548, 331 S.E. 2d 356, n. 2, 3, 4, (S.C. App., 1985); State v. Dinkins, 339 S.C. 603, 529 S.E. 2d 560, n.6 (FN.1), (S.C. App., 2000).

As shown through all three witness' testimony during direct exam and cross exam by both prosecution and defense, the Plaintiff has shown way beyond a reasonable doubt that, the State never provided or established that their key witness, Debra Perry was at 126 Red Pine Dr, Lexington, S.C. (scene of alleged incident) at any time, day or night of December 4th, 2011. Therefore, anything that Debra Perry testified to, or that she said she saw or heard, is merely hearsay, and according to SCRE, Rule 801(c)(2), hearsay evidence is inadmissible at trial

At sentencing phase of trial, Honorable Thomas A, Russo allowed hearsay testimony to prejudice the jury by overruling defense counsel's objection to hearsay through excited utterance. (TT 96:21-24). By prosecution, never establishing the fact that Ms. Perry was ever at the alleged crime scene, at any time on December 4th, 2011, trial court erred by allowing purgered testimony to sway the jury's verdict.

Trial court further erred by allowing State's witness, Ms. Debra Perry, to falsely testify in front of the jury a, wildly fictitious rendition of what she observed from the scene, (i.e. the physical condition of the alleged victim, and the condition of the house) (TT 97:20-102:11). Clearly this is a farce when compared to the real fact of the case - photographs. (Exhibits #1-#15). Photographs can not lie, they are truth. Had the court paid closer attention to the extremely wide variance of evidence v. testimony, the trial court could have seen purgered testimony and stop the proceedings. It is very apparent that the photograph exhibits that were shown, show no signs of criminal domestic violence.

At the sentencing phase of the trial, Honorable Russo permitted for closing statement to be made by alleged victim Ms. Perry-Payne (TT 156:9). Ms. Perry-Payne admitted to the court that she had brought false allegations, which lines up with the photographs (Exhibit #1-#15). She went on to state that she had given false statements to the police. (TT 156:13-15). The true facts of the case were now placed in the court's hands.

Honorable Russo addressed Ms. Perry-Payne back by stating, "I will be candid with you." (TT 156:18). Honorable Russo continued on by stating such things as: "I don't think your're a victim either". (TT 156:18-19); "disappointed if the state doesn't prosecute for making a false report". (TT 156:20-21); "lied to law enforcement". (TT 156:22); "put officers in jeopardy". (TT 156:23); "put them in danger". (TT 156:23); "you should be prosecuted". (TT 156:24); "I hope they do that". (TT 156:24-25); this is on her head. (TT 157:1). There is more that follows, (TT 156:9-158:19). With the truth now out, and the factual testimony by Ms. Perry-Payne who considered herself not the victim (TT 156:10-11), the victim now in fact is Dwayne Cabbagestalk (defendant).

Eventhough the jury had handed a verdict of guilt and at this time had already been dismissed, trial court had the opportunity in it's discretion to rectify this matter, by at the very least posing the lowest sentence possible. Instead of Judge Russo rectifying the problem, he compounded it by passing down the maximum sentence. (TT 165:13-17)

Would this not meet the elements of "Vendictive Prosecution"?

At the very least, excessive, cruel and unusual punishment, U.S. Const. Amend.

VIII, XIV.

Conclusion

The Appellate's conviction of guilt should be reversed, and a directed verdict of acquittal should immediately be given to Appellate.

Court of Appeals of South Carolina, Justice Pieper state in, State v. Palmer, WL 551581 (S.C. App. 2014), Court of Appeals "reversed the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellate's guilt". Feb. 12, 2014

Respectfully Submitted,

Dwayne Cabbagestalk,

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SWORN to and subscribed before me this

6th day of March, 2014.

Earle White (L.S.)

Notary Public for South Carolina

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State of South Carolina
In The Court of Appeals

Appeal from Lexington Co.
Thomas A. Russo, Circuit Judge

State of South Carolina,

Respondent.

v

Dwayne Cabbagestalk,

Plaintiff,

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Respectfully Submitted,

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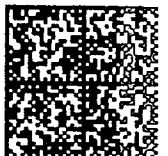
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