STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TROY HUNTER,

APPELLANT

APPELLATE CASE NO. 2013-000227

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting a statement made by the complainant to his mother identifying Appellant as the person who assaulted him since the statement was clearly hearsay and did not meet any of the exceptions to the hearsay rule and since the statement was unduly prejudicial and cumulative?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant for armed robbery and second degree assault and battery. R. 236 – R. 237. His case was called to trial on January 14, 2013 before the Honorable D. Craig Brown, and a jury. R. 1. Steven DeBerry represented Appellant and Matthew Ozment was the assistant solicitor. R. 1.

At the conclusion of the trial on January 16, 2013, the jury found Appellant guilty. R. 227, ll. 11-22. Judge Brown sentenced Appellant to thirty years imprisonment for armed robbery and three years concurrent for second degree assault and battery. R. 234, l. 21 – 235, l. 10.

This appeal follows.

ARGUMENT

The court erred in admitting a statement made by the complainant to his mother identifying Appellant as the person who assaulted him since the statement was clearly hearsay and did not meet any of the exceptions to the hearsay rule and since the statement was unduly prejudicial and cumulative.

Relevant Facts

Around midday on November 30, 2011, Demetrius Holloman[1] and Roderick Titus attended a funeral. At the conclusion of the funeral, Holloman and Titus took a cab to Titus' home on Dixie Street in Florence, where he lived with his mother and children.[2] R. 17, l. 15 – 18, l. 22. Titus testified that he went inside the house to change out of his "church clothes" and that he saw Holloman walk to the side of the residence. Titus claimed that while he was inside the house, he heard a loud noise and his sisters came inside screaming. R. 19, l. 1 – 20, l. 9. Titus said that the loud noise sounded "like a crash" and "could have been" a gunshot. R. 20, ll. 10-16; R. 23, l. 19 – 24, l. 4. Titus testified that he had no direct knowledge of what happened that day and that he never saw Appellant at the residence. The only person Titus remembered seeing that day at his home was Nate Orgbon. R. 21, l. 20 – 22, l. 11.

Nate Orgbon testified that on the afternoon of November 30, 2011, he was "chillin" in the backyard of the Titus' house on Dixie Street when Appellant came into the yard

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[1] Holloman is often referred to by his nickname, Tad or Tad Pole, in the record.

[2] The record established that the backyard of this residence was a local hangout and that law enforcement often had problems with the residence due to the number of people that hung out in the yard. Titus' mother often called the police to report suspicious activity and a man had previously been shot in the backyard. Whenever police would respond to the home, everyone would scatter. R. 125, l. 18 – 127, l. 11.

looking for Holloman. Orgbon claimed that it was not unusual that Appellant was looking for Holloman because "everybody always looking for [Holloman]" and "it ain't no secret" why. After someone in the yard told Appellant where Holloman was, Appellant approached Holloman and the two "started fighting." Orgbon claimed that Appellant "just punched the man" with his fist. After observing the initial punch, Orgbon testified that "that was my cue to leave," so he jumped on his bicycle and left. Orgbon explained that he left because he knew "it was gone escalate maybe" and that "the police was coming." R. 33, l. 25 – 38, l. 25.

Andron Brown, an officer with the Florence Police Department, testified that he responded to Dixie Street on the afternoon of November 30, 2011 in response to an anonymous complaint regarding a gunshot. R. 41, ll. 1-24. After speaking to several witnesses, Brown learned that an altercation had taken place, that Holloman was injured, and that Appellant was the suspect. However, neither Holloman nor Appellant were on scene when Brown arrived. Moreover, Brown, and the four to five other officers that responded to the scene, found no evidence in the yard of shots being fired or of a fight, including no shell casings or blood. R. 42, l. 3 – 44, l. 12; R. 46, l. 24 – 49, l. 5. Holloman did not initially report the incident. R. 52, ll. 2-16.

Idena Titus-Simmons, Roderick Titus's mother, testified that she was inside her home changing clothes after attending the funeral when she heard a "boom" that sounded like "a truck hit a transmitter" or "like a pole because it sounded loud." Her husband, however, thought it sounded like a gunshot. After making sure her children and grandchildren were safe, she told someone to call 911. Titus-Simmons explained that the police came to the house and searched the yard, but she was not sure whether they found

any evidence. She stated that she did not see Appellant at her home that day and that she did not know what caused the loud noise. R. 55, l. 7 – 63, l. 8.

Deloris Titus-Johnson, Roderick Titus' aunt, testified that on the afternoon of November 30, 2011 she was parked outside the front of the Titus' home on Dixie Street talking on her cell phone. She explained that as she was sitting in the car, she saw Appellant and another man pull up to the residence in a burgundy car. Both Appellant and the other man got out of the vehicle and went into the backyard. Titus-Johnson explained that Appellant came to the house every day and that it was normal for him to be there. She testified that she could not see the backyard, but that there were a "bunch of people" back there, at least six or seven. Titus-Johnson claimed that she subsequently heard two gunshots and that after she heard the gunshots, she saw Appellant and the man that he was with walk back to the front yard and leave in the burgundy car. According to Titus-Johnson, the occupants of the yard all left, some walking and some running. Appellant left just like everyone else. R. 65, l. 1 – 72, l. 14.

Demetrius Holloman testified that on November 30, 2011, he went to a funeral with Roderick Titus. He claimed that sometime that morning, Appellant called him and asked him when the funeral would be over and where he would be afterwards. Holloman said that he told Appellant that the funeral was ending and that he was going to the Titus' residence. Holloman and Titus took a cab back to the house on Dixie Street. Holloman explained that when they arrived at the house, Titus went inside, returned with a cigarette for Holloman, and then went back inside the house to take his shoes off and change his clothes. Holloman testified that he went to the front door to get the cigarette and then walked to the side of the

house to get his phone charger that was plugged into the side of the house. R. 75, l. 11 – 77, l. 19.

Holloman claimed that as he was kneeling down to remove the charger from the wall, Appellant came out of nowhere and struck him in the mouth with the butt of a .357 revolver. Holloman said that he fell to the ground and Appellant struck him again on the head with the gun. According to Holloman, Appellant then stood over him with the gun and demanded, "Where is it at?" He claimed that at that point Appellant fired a shot right by his head and then again demanded, "Where is it at?" Appellant then ripped Holloman's pant pocket and took the money that was inside. Holloman testified that Appellant then said, "Say something, I'll kill you" and walked back to the burgundy car. R. 77, l. 20 – 79, l. 22.

Holloman claimed that he had "a thousand dollars cash money" in his pocket that Appellant allegedly stole from him. He explained that his mother had given him three hundred dollars to fix his car so that his children had transportation and that his "girl" had given him seven hundred dollars from her student loan "refund check." R. 80, l. 9 – 81, l. 16.

After Appellant left the scene, Holloman testified that he walked to his mother's house and told her what happened. His mother then "called a ride" and the two went to the hospital. Holloman claimed that he had six teeth knocked out: two on the top and four on the bottom. While at the hospital, he spoke to the police, but he told the police that he did not know who assaulted him. Holloman claimed that he did not tell the police then who assaulted him because he claimed he was afraid of Appellant and feared Appellant would retaliate and kill him. Holloman also failed to tell the police that day that he was allegedly robbed. R. 81, l. 23 – 84, l. 17; R. 90, l. 25 – 92, l. 10.

The hospital referred Holloman to a dental specialist to treat his teeth. The specialist informed Holloman that he would have to undergo surgery to repair his teeth and that it would cost him between fifteen hundred and twenty-five hundred dollars. After learning the cost of the surgery, Holloman went to speak with the Victim's Advocate program to see if the program could assist him in treating his teeth. R. 83, l. 9-19; R. 84, l. 18 – 85, l. 23. He then spoke to the police and allegedly told them the truth about what happened.

Holloman admitted during his testimony that he had a pending charge for distribution of marijuana. He was also impeached with a 2007 conviction for possession of marijuana, second offense. R. 86, l. 19 – 89, l. 11.

Debra Singleton, Holloman's mother, was the next to testify. She stated that she had given Holloman between two hundred and fifty to three hundred dollars "for a big wheeler for my oldest grandson." This was in contrast to Holloman's testimony in which he claimed his mother had given him three hundred dollars to fix his car. Singleton claimed that on November 30, 2011, she was standing in her kitchen doing the dishes when Holloman called her name. Defense counsel, anticipating testimony containing hearsay, immediately objected. R. 107, l. 17 – 108, l. 6.

Appellant objected to Singleton testifying about any statements Holloman may have made to his mother when he came to her home sometime after the incident took place. Defense counsel argued that Holloman had already taken the stand and testified that after the incident he walked to his mother's house and told her that Appellant had assaulted him. Defense counsel argued, "He's already testified to that. So the statement we're talking about is absolutely hearsay and it's from an available witness that's already testified to the facts.

So this is merely an attempt to bolster his position - - his credibility and it's purely hearsay." R. 108, l. 2 – 109, l. 12.

The solicitor argued that the statement was not hearsay because it was not being offered for the truth of the matter asserted. He argued that defense counsel had placed Holloman's credibility at issue during cross-examination by discussing Holloman's pending charges and prior record and by highlighting the disparities between Holloman's various accounts of the incident given to law enforcement and his testimony. The solicitor claimed that the state sought to admit the statement to corroborate Holloman's testimony and thus the statement "would fall outside the rule of hearsay." R. 109, ll. 14-25.

The court then questioned defense counsel as to why the statement, assuming its hearsay, did not fall into one of the hearsay exceptions, specifically the present sense impression and the excited utterance exceptions. Defense counsel argued that the statement did not fall under either exception because "of the time lines between the event and when he might have come to her house. [The mother] testified she lived somewhere else. She wasn't there. And it wasn't a freshly committed . . . when you look at the case law under present sense impression, you're talking about something that's happening immediately?" Defense counsel further argued that the statement was not an excited utterance because there was no evidence that it was a "knee jerk reaction" and Holloman "didn't want to tell anybody what happened . . . he certainly wasn't excited about it." R. 110, l. 18 – 111, l. 21.

Additionally, defense counsel argued that to allow the mother to testify as to what Holloman told her would be extremely unfair. He stated, "That is way too dangerous of a statement to admit . . . they're just offering it to say that he said it. You know, that goes to the very core of what they're trying to prove, that's not fair." R. 110, ll. 3-8. Defense

counsel added, "I don't understand how it's fair for them to . . . now put the mother up and say the same thing, that's clearly an out of court statement by another witness, that's hearsay." R. 111, ll.17-21.

The court ultimately ruled that the statement was not hearsay because it was not being offered for the truth of the matter asserted. Rather, the court found that the state sought to admit the statement "simply pursuant to the victim's credibility being attacked." The court, however, held that even if it was hearsay, the statement fell under the excited utterance exception and was admissible. The court also acknowledged defense counsel's argument that admitting the statement would be prejudicial and unfair, but still held the statement was admissible. R. 113, l. 24 – 115, l. 8.

Singleton then continued that when Holloman came into the kitchen "[h]e said, momma, and when I turned to look at him, I just see blood everywhere. And I say what happened to you, He say momma that boy hit me. I say what boy. He say Troy [Appellant] hit me in the mouth with a gun." Singleton testified that she took Holloman to the emergency room due to his injuries. At the hospital, a police officer came to speak with Holloman and Singleton was asked to leave the room. She stated that she tried to persuade Holloman to tell the police what happened, but Holloman was allegedly afraid of Appellant and thought Appellant would kill him. Eventually, Holloman told the police what happened. R. 116, l. 10 – 119, l. 22.

Lieutenant Lee Davis of the Florence Police Department testified that he was contacted by a woman from the Victim's Advocate program who informed Davis that Holloman had contacted the program for assistance. The woman told Holloman that he had to cooperate with law enforcement before he could receive assistance from the program.

Davis went to speak with Holloman. Holloman allegedly told Davis that Appellant had assaulted him and hit him in the mouth with a .357 revolver. Davis recorded Holloman's statement and took photographs of his injuries. R. 127, l. 12 – 128, l. 20. In his statement, Holloman claimed only nine hundred dollars was stolen from him as opposed to the one thousand dollars he claimed during his testimony. R. 143, ll. 12-23. After speaking with Holloman, Davis obtained a warrant for Appellant's arrest and Appellant was subsequently arrested December 15, 2011. R. 132, ll. 2-6; R. 133, ll. 23-25.

James Lawhan, the oral surgeon who examined Holloman, testified that Holloman had three fractured teeth – one on the bottom and two on the top – and two missing teeth, both on the bottom. In total, Holloman had five teeth that were either knocked out or damaged beyond repair as opposed to the six teeth that Holloman claimed he was missing as a result of this incident. R. 169, l. 4 – 170, l. 25. Lawham recommended that the three teeth that were fractured be completely removed. R. 174, l. 15 – 175, l. 24. However, Lawham did not perform any surgery on Holloman. R.. 176, l. 24 – 177, l. 1.

The defense put the state to its burden of proof and presented no witnesses. During jury deliberations, the jury sent a note asking, "What happens when there is a split decision on a charge?" As a result, the judge issued an Allen charge. R. 221, l. 6 – 226, l. 16; See Allen v. United States, 164 U.S. 492 (1896).

Discussion

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "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." Rule 802, SCRE.

An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. "The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006) (citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)).

Despite the state's argument at trial, Holloman's statement to his mother was hearsay because it was being offered to prove the truth of the matter asserted. That is, the state sought to admit the statement to bolster Holloman's testimony and prove that Appellant was the one who robbed and assaulted him. Because the statement was being used by the state to prove its case, i.e. that "Troy [Appellant] hit me in my mouth with a gun," the statement is hearsay. See R. 116, ll. 14-19. As defense counsel argued at trial, the statement "goes to the very core of what [the state is] trying to prove." R. 110, ll. 3-8.

Furthermore, not only is the statement hearsay, but there is insufficient evidence that Holloman's statement was an excited utterance. There was no evidence presented at trial that Holloman was in an excited state when he made the statement to his mother. Holloman's statement was not spontaneous, but was given in response to his mother's questioning. The evidence showed that Holloman was extremely hesitant about revealing the identity of the man who allegedly attacked him. As defense counsel noted, "he didn't want to tell anybody what happened . . . he certainly wasn't excited about it." R. 111, ll. 10-14. Additionally, a considerable time period had passed between when Holloman was allegedly assaulted and when he allegedly made the statement to his mother. His mother

was not on scene. Holloman's testimony was that after the incident, he walked to his mother's residence. There was sufficient time during the walk to his mother's home for Holloman to reflect on the incident and fabricate what happened.

In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." This Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." Id. This Court also noted that the statements did not amount to an excited utterance because there was "a great deal of time for reflection" before the victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413.

In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), this Court held the admission of the victim's statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. This Court further held the stepmother's testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim's story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

This Court should likewise find that an ample period of time had passed between when Holloman was allegedly assaulted and when he allegedly made the statement to his mother, which provided Holloman sufficient time to reflect on the incident, and that the mother's testimony was improper bolstering. The state was attempting to bolster

Holloman's trial testimony since he had previously told the police that he did not know who assaulted him.

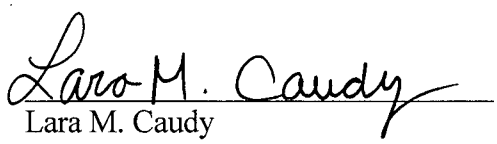
Additionally, under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." As defense counsel argued at trial, "it's already been testified to by the declarant [Holloman]." Therefore, it was merely cumulative to Holloman's testimony and should have been excluded as improper corroboration. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Not only was it cumulative, but it was also unduly prejudicial and "unfair." See R. 110, ll. 3-8; R. 111, ll. 17-21. The statement went to the very core of what the state was trying to prove. The jury was obviously on the fence between an acquittal and a conviction as evidenced by the fact that the judge had to issue an Allen charge before the jury reached its verdict. See R. 221, l. 6 – 226, l. 16. Wrongfully admitting Holloman's hearsay statement likely tipped the jury in favor of a conviction.

CONCLUSION

Based on the foregoing argument, Appellant's convictions should be vacated and this case remanded to the Florence County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 5, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of May, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.