

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

RECEIVED

AUG 06 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ZACHARY BULLOCK,

APPELLANT

APPELLATE CASE NO. 2013-002229

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a detective to testify about inadmissible hearsay statements implicating Appellant made by two co-defendants when both co-defendants testified against Appellant at trial, the trial testimony was consistent with the prior statements, the hearsay testimony improperly bolstered the testimony of the co-defendants and the credibility of these two co-defendant witnesses was a critical factor for the jury to determine?

STATEMENT OF THE CASE

In October of 2012, the Horry County Grand Jury indicted Bullock for burglary first degree, indictment #2012-GS-26-4334. On October 7, 2013, Bullock proceeded to jury trial before the Honorable Steven H. John. John M. Hilliard represented Bullock at trial. J. Stephen Grooms prosecuted the case. The jury returned a verdict of guilty and Judge John sentenced Bullock to fifteen (15) years in prison. A timely notice of intent to appeal was served on October 15, 2013. This appeal follows.

STATEMENT OF FACTS

On January 12, 2012, Joseph Skipper's house was burglarized during the day while Mr. Skipper was at work. The burglar threw a brick through a sliding glass door and entered the house. (Tr. p. 62, lines 1-19). According to Mr. Skipper three televisions, a laptop computer, an iPad and a .45 caliber Glock handgun were stolen from inside the house. (Tr. p. 72, lines 3-14). There were no eye-witnesses to the burglary. None of the stolen items were ever recovered and there was no forensic evidence found at the scene.

Police later arrested Appellant, De'Aisha Denton and Emmanuel "Manny" Foriest. Appellant was Mr. Skipper's neighbor. Denton and Foriest both gave statements to the police implicating themselves and Appellant in the burglary. At trial the State's evidence against Appellant was based on the testimony of the two co-defendants.

ARGUMENT

The trial judge erred in allowing a detective to testify about inadmissible hearsay statements implicating Appellant made by two co-defendants when both co-defendants testified against Appellant at trial, the trial testimony was consistent with the prior statements, the hearsay testimony improperly bolstered the testimony of the co-defendants and the credibility of these two co-defendant witnesses was a critical factor for the jury to determine.

The jury found Appellant guilty of burglary first degree. The two co-defendants, Denton and Foriest testified against Appellant at trial. After the co-defendants testified, the State called Detective Scott Bogart of the Horry County Police Department as a witness. The prosecutor asked Detective Bogart, "And what did De'Aisha Denton tell you?" (Tr. p. 167, line 10). Appellant objected. (Tr. p. 167, line 11). Outside the presence of the jury Appellant noted his objection based on the fact, "That he [the detective] is attempting to bolster the testimony of a witness who has testified by eliciting hearsay from an additional witness that her story is consistent today with the story that she's told in the past." (Tr. p. 167, lines 18-21). The judge cautioned the prosecutor about framing questions in such a way that the detective's answers indicate that he believed Denton was truthful, believable or credible. (Tr. p. 168, lines 12-21). The State then proposed asking the detective if the statements made by the co-defendants were consistent with their trial testimony. (Tr. p. 168, line 22 – p. 169, lines 1-2). The judge properly ruled, "I'm not going to allow you to ask that particular question. I am gonna allow you to ask, you know, what he did, what information he received, whom he received the information, what he did what (sic) that information, but I'm not gonna allow you to indicate to the jury that this witness believes the truthfulness of them." (Tr. p. 169, lines 3-8).

In the presence of the jury the prosecutor asked Detective Bogart, "Detective Bogart, I believe we left off with you were assigned this case and you were able to talk to Ms. Denton. Could you please tell the Court what steps were taken in you investigation and how we arrived here today?" (Tr. p. 170, lines 7-10). The investigator responded:

Yes, sir. Prior to going out to speak with Ms. Denton, the 18th of January, I had already received information from patrol officers that she was willing to cooperate with me. So, I went out to the jail with another detective, excuse me, detective and met with Ms. Denton. I read her the Miranda Warning, she indicated that she understood her rights and that she did not want an attorney present and that she was willing to cooperate with us because she didn't want to be in any more trouble than she had to be. It was her first offense and she was willing to help us out. So, I asked her if she was willing to drive us to the location of the burglary. That was the first step is to show credibility, her statement was to have her show us where the burglary took place.

(Tr. p. 170, lines 11-23). Appellant objected and the judge struck the testimony in regard to credibility stating, "All right. I'm going to strike that and the witness is cautioned again not to indicate believability or credibility, that's the job of the jury." (Tr. p. 171, lines 3-5).

The detective then testified that they interviewed Denton before she took them to the location of the burglary and "... we were able to verify the facts in the case that they had - the burglary had been set up by Mr. Bullock and they had gone there with the specific intention, the crux of the burglary was namely the gun and we verified the property that was stolen and how it was accomplished." (Tr. p. 171, lines 17-21). The prosecutor then asked Detective Bogart. "Who did Ms. Denton implicate in her statement?" (Tr. p. 171, lines 22-23). Appellant objected. (Tr. p. 171, line 24). The judge overruled the objection stating, "I'm gonna allow the Detective to state what Ms. Denton told him, again, without any additional comments." (Tr. p. 172, lines 1-2). When asked again who Denton implicated in her statement, the detective testified, "She implicated herself, Emmanuel Foriest, and the

Defendant Zachary Bullock.” (Tr. p. 172, lines 6-7). Denton’s statement to the detective was consistent with her trial testimony. The judge erred in allowing the detective to testify as to what Denton told him. The testimony is inadmissible hearsay that improperly bolstered Denton’s trial testimony.

Later, despite the trial judge’s earlier ruling, the prosecutor asked the detective, “What were you – what did you determine from talking to Mr. Foriest as far as to the case itself about the credibility of Mr. Foriest?” (Tr. p. 174, lines 5-7). Appellant objected and the trial judge instructed the prosecutor to rephrase the question. (Tr. p. 174, lines 9-10). The following questioning then took place:

Q: Were you able to talk to Mr. Foriest on the 19th?

A: Yes.

Q: Was he forthcoming involving this case?

A: Yes, he was.

Q: And who did he implicate?

A: He implicated himself, he also implicated De’Asiha Denton and the Defendant Zachary Bullock.

Q: What did he tell you about a gun?

A: He told me that the whole purpose of the burglary was to go and break into Mr. Skipper’s residence ****High Brass Covey, with the main intention he had of being the pistol. He told me that ---

(Tr. p. 174, lines 13-24). Appellant renewed his objection from earlier in regard to Denton’s testimony. (Tr. p. 174, line 25). The judge ruled, “All right, sir. I’m gonna allow him to testify as to what the witness or what Mr. Foriest told him but not any other comments. Go ahead.” (Tr. p. 175, lines 2-4). The detective then testified, “Mr. Foriest told me that De’Aisha Denton drove the vehicle and that he and Mr. Bullock were dropped off down the

street and they then went, disappeared from her observation – I’m sorry he told me that they went and actually committed the burglary which I’ve already indicated what was taken. Upon, after finishing the burglary, they called her or he called her and they met back up with her on the street and got in the car and drove away.” (Tr. p. 175, lines 6-13). Foriest’s statement to the detective was consistent with Foriest’s trial testimony. The detective’s testimony as to what Foriest told him, excluding any statements against Foriest’s own interest, is inadmissible hearsay. The inadmissible hearsay from the detective improperly bolstered Foriest’s trial testimony. The judge erred in allowing the detective to testify as to what both Denton and Foriest told him.

The detective’s testimony about what Denton and Foriest told him is hearsay that does not meet an exception to the hearsay rule. In Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994), decided before the adoption of Rule 801(d)(1)(B), SCRE, the South Carolina Supreme Court wrote:

The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). We have recognized three exceptions to the rule against hearsay that allows prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id.* at 367, 401 S.E.2d at 143. Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the “existence of [the] relation of [the witness] to the cause.” Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

None of the three exceptions discussed in Jolly render the hearsay testimony by the detective admissible. The testimony by the detective meets the definition of hearsay found in Rules 801 and 802, SCRE and the testimony meets no other hearsay exception.

The testimony from the detective concerns prior consistent statements made by Denton and Foriest. Rule 801(d)(1)(B), SCRE, provides that a prior statement by a witness is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

The testimony from the detective about what Denton and Foriest told him is not admissible pursuant to Rule 801(d)(1)(B) for two reasons. First, there was no express or implied charge against Denton or Foriest of recent fabrication or improper influence or motive. Second, the statements were made **after** any improper motive arose.

Rule 801(d)(1)(B), SCRE, provides that a prior statement by a witness is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. In State v. Foster, 354 S.C. 614, 622-23, 582 S.E.2d 426, 430 (2003) the South Carolina Supreme Court wrote:

Likewise, in the instant case, Michelle's statement was inadmissible because there was no express or implied charge against Michelle of recent fabrication or improper influence or motive. Foster's questions did not rise to the level of charging fabrication, but instead amounted to calling her credibility into question, i.e., simple impeachment. Thus, because the requirements of Rule 801(d)(1)(B) were not met in the instant case, the written consistent statement was inadmissible hearsay, and the trial court erred in allowing the statement. Id. This error served only to **improperly** bolster Michelle's testimony. See Tome v. United States, 513 U.S. 150, 157-58, 115 S.Ct. 696, 130 L.Ed.2d

574 (1995) (discussing federal Rule 801(d)(1)(B) and stating that the purpose of the rule is to rebut an alleged fabrication or motive, not to “bolster[] the veracity of the story told.”)(emphasis in original)(footnotes omitted).

The admission of the prior consistent statements in the present case did not rebut an improper motive. Instead, the admission of the prior consistent statements improperly bolstered the credibility of the witnesses. In State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001), the South Carolina Supreme Court discussed Rule 801(d)(1)(B) writing:

The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with “recent fabrication” or “improper influence or motive.” Cf. Tome v. United States, 513 U.S. 150, 157, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) (“Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.... The rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.”).

The hearsay statements were inadmissible pursuant to Rule 801(d)(1)(B) because there was no express or implied charge against Denton or Foriest of recent fabrication or improper influence or motive.

Another requirement for admission of a prior consistent statement pursuant to Rule 801(d)(1)(B) is that the statement must have been made before any alleged fabrication, or before any alleged improper influence or motive arose. The statements in the present case are also not admissible pursuant to Rule 801(d)(1)(B) because the statements were made **after** any improper motive arose. Denton and Foriest provided their statements to the detective implicating Appellant **after** they were arrested for burglary. In State v. Fulton, 333 S.C. 359, 364, 509 S.E.2d 819, 821 (Ct.App.1998), the South Carolina Court of Appeals wrote:


Thus, under our Rules of Evidence, enacted in 1995, a prior consistent statement made by a witness before a motive to fabricate arose is admissible to rebut an express or implied charge of recent fabrication or improper motive. Pursuant to Rule 801, the prior consistent statement is nonhearsay and comes in as substantive evidence, i.e., it is admissible for the truth of the matter asserted. *See* Note to Rule 801(d)(1)(B), SCRE. In this case, Fulton wrote the letter to the victim proclaiming his innocence at some point after his arrest and detention. At that point, Fulton clearly had an obvious motive to fabricate his exculpatory claim he had no knowledge of the robbery. Therefore, the statement is not admissible under Rule (d)(1)(B). Fulton concedes this point on appeal and agrees his statement is not admissible as substantive evidence under Rule 801(d)(1)(B) because it was written after his improper motive arose.

The trial judge erred in allowing the detective to testify about what Denton and Foriest told him. The admission of the improper hearsay testimony was not harmless. The testimony by the detective corroborated and improperly bolstered the testimony of the two key State's witnesses. The State's evidence against Appellant was based entirely on the testimony of the two co-defendants. Their credibility was a critical issue to be determined by the jury. As the Court noted in Saltz, "Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.' Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)." 346 S.C. at 124, 551 S.E.2d at 246.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of August, 2014.

STATE OF SOUTH CAROLINA

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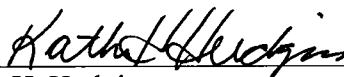
ZACHARY BULLOCK,

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APPELLATE CASE NO. 2013-002229

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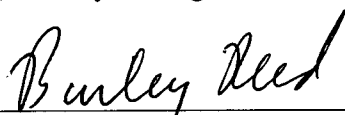
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021