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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ROSE,

APPELLANT

APPELLATE CASE NO. 2013-002750

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in admitting telephone calls purportedly made by Appellant while in pre-trial incarceration because Appellant made no "admissions" during the calls as required by the Rules of Evidence in order to be admissible.

STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant for murder on June 11, 2012 (2012-GS-10-3312). R. * (indictment). Appellant was tried before the Honorable Stephanie McDonald and a jury on December 9-12, 2013. Jennifer Shealy and Jessica Baldwin represented the state. Martha Kent Runey and Megan Ehrlich represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 665, lines 19-23. Judge McDonald sentenced Appellant to life imprisonment. Tr. 674, line 14; R. * (sentence sheet).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On January 23, 2012, Appellant went to the deceased's home twice to buy marijuana. Tr. 163, lines 7-8; Tr. 189, lines 6-10; Tr. 191, lines 2-3; Tr. 247, line 11 – Tr. 248, line 4; Tr. 362, line 19 – Tr. 363, line 24; Tr. 557, lines 3-25. Tawana "Nikki" Alston, the deceased's girlfriend, and Antoine "Rick Ross" Aiken, the deceased's cousin, claimed Appellant returned for a third time later that night. Tr. 193, lines 14-18; Tr. 248, lines 5-10. According to Alston and Aiken, Appellant arrived in a gray, silver, or white four-door sedan – later described as a Dodge Neon – with two or three other people. Tr. 194, line 2 – Tr. 196, line 6; Tr. 251, lines 19-24; Tr. 261, lines 13-22.

Aiken claimed Appellant talked to the deceased for five minutes, and then left. Tr. 197, lines 15-17. Alston said Appellant walked out behind her. Tr. 250, lines 20-23. When Alston finished smoking a cigarette and turned around on the porch to re-enter the home, a person dressed in all black wearing a mask pointed a shotgun in her face. Tr. 251, lines 3-14. Another man ran past them shooting into the house. Tr. 252, lines 2-6. Alston claimed she fell over the porch banister, crawled under the porch, and ran across the street for help. Tr. 252, line 18 – Tr. 254, line 21. Initially, Alston told police that Appellant had a gun, but during her testimony, she admitted this was not true. Tr. 264, line 20 - Tr. 266, line 18; Tr. 269, line 21 - Tr. 270, line 23. Additionally, in her second statement to police, Alston identified two other people by name as being involved, but the police developed no evidence to support Alston's contentions. Tr. 274, lines 12-19.

Aiken, who remained in the home when Appellant and Alston walked outside, claimed the deceased got up to lock the door upon Appellant's departure. When the deceased turned a corner in the house, Aiken heard a gunshot and saw a tall masked man

wearing all black. Tr. 198, line 13 - Tr. 199, line 12. Aiken immediately ran out the front door and into the woods. Tr. 200, lines 18-19; Tr. 201, lines 15-17. From the woods, Aiken claimed he heard Appellant yell "it's in the back room" and "hurry up." Tr. 201, line 24 – Tr. 202, line 25. Further, Aiken claimed he saw the tall masked man leave the home and enter the car with Appellant in the driver's seat. Tr. 204, line 9 - Tr. 205, line 4.

Aiken then entered the home where he found the deceased injured. Tr. 205, line 14 – Tr. 206, line 1. Although Aiken called 911 for help, he inexplicably used a false name. Tr. 206, lines 3-16. During Aiken's first interview with police, he did not identify Appellant as being involved. However, after he had returned home and talked to others, he identified Appellant to police in a second statement. At trial, Aiken claimed he did not tell the police about Appellant's alleged involvement because he wanted to exact justice personally. Tr. 210, line 9 – Tr. 211, line 1; Tr. 211, line 14 – Tr. 213, line 10.

Joy Mills, the deceased's daughter, was present in the home during the shooting incident. She was in her bedroom talking on the phone when she heard scuffling and gunshots. Tr. 367, lines 9-14. She then saw two people run past her room and kick in the door of a back bedroom. Tr. 367, line 22 – Tr. 368, line 10. Mills claimed the two people wearing masks then entered her room with two shotguns. She further claimed that she recognized Appellant's voice coming from one of the armed masked men. Tr. 369, line 24 - Tr. 370, line 16. However, Mills' statement to police failed to identify the voice as belonging to Appellant. Tr. 376, lines 21-25.

At his trial, Appellant admitted to visiting the deceased twice on January 23, 2012 to buy marijuana. Tr. 557, lines 3-25. He further admitted that he was unhappy with the price the deceased wanted for the subpar marijuana he was offering. Tr. 560, lines 5-10.

Appellant left the deceased's residence, accompanied by Clarence Hush and Brandon Cantrell. Tr. 561, lines 3-17. Appellant arrived at his home, watched television, and then went to bed. Tr. 564, lines 5-8. He emphatically and unequivocally denied shooting the deceased. Tr. 577, line 20 – Tr. 578, line 1.

ARGUMENT

The trial judge erred in admitting telephone calls purportedly made by Appellant while in pre-trial incarceration because Appellant made no "admissions" during the calls as required by the Rules of Evidence in order to be admissible.

Relevant facts

During the course of the trial, defense counsel learned the prosecution intended to offer into evidence during its case-in-chief recordings of phone calls purportedly made by Appellant during his pre-trial incarceration. Defense counsel objected based on Rule 804(b)(3) of the South Carolina Rules of Evidence. Specifically, defense counsel argued the statements allegedly made by Appellant were not statements against interest, that the recording was unclear regarding the subject matter, and the recipient of the call was unclear. The phone call concerned Appellant's attempt to contact his girlfriend about a phone the two shared and Appellant's concern that his girlfriend had left the phone in a car, which was seized by the police. Tr. 314, line 22 – Tr. 315, line 14. A phone had been found in the seized car, but the police were unable to establish the ownership of the phone. Tr. 316, lines 5-7. The prosecutors countered that the "jail call" tied Appellant to the car, which was seized by the police and fit the description of the car driven by the suspects to and from the murder. Tr. 317, lines 4-12. The judge took the matter under advisement to determine if the statement was "so far contrary to the defendant's pecuniary interest other than the fact that he references DNA that it would come within [Rule] 804(b)(3)[, SCRE]." Tr. 318, lines 1-10.

Then, the prosecutor cited Rule 801(d)(2), SCRE to support admission of the jail call.. Tr. 319, lines 22-25. The judge was particularly concerned with the reference to DNA

on the jail call. Defense counsel explained that Appellant said "they've taken that girl's car, they think they're going to find my DNA in that car." Clearly, Appellant was not concerned that his DNA would be found in the car; rather, he was speculating as to why the police had seized the car. Tr. 321, lines 1-3. Again, the judge took the matter under advisement to conduct additional research on the issues presented. Tr. 320, lines 1-17.

After the prosecution presented additional evidence, the judge revisited the issue of the jail call. Defense counsel renewed the objection to the jail call. Specifically, defense counsel noted that in the call Appellant did not state that he thought his DNA was in the car; rather, Appellant speculated that the purpose of police seizing the car was to search for DNA. Concerning the phone, defense counsel explained that Appellant's statements were not admissions. In fact, Appellant stated that the phone that he was using was in the car, but never stated that the phone he was using on the night of the murder was in the car or that he was the person who placed the phone in the car. Tr. 536, line 6 – Tr. 537, line 11.

The prosecutor countered that the jail call was an admission by a party opponent. According to the prosecutor, "He states not only is he concerned that DNA may be in the car that the police recovered, but he is also concerned about a phone that he was using, his phone. And then he backs off and says well the phone I was using." Tr. 537, lines 13-18. The prosecutor described the seized car as "a silver or gray, depending on how you describe it, Neon." Then, the prosecutor attempted to connect the seized car with the one used in the murder by stating that "[w]itnesses described a silver or gray sedan or silver or gray Neon coming to the scene." Further, the prosecutor noted that "[o]ne witness described the defendant getting into that car and leaving after the shooting in that same car." Tr. 537, line 19 – Tr. 538, line 2.

In ruling on the motion, Judge McDonald noted that the caption for Rule 801(d)(2), SCRE is "admission by a party opponent," "but what the rule actually says is the statement is offered against a party and is – and this subject is Subsection A – the parties own statement in either an individual or represented capacity." After concluding the statement was Petitioner's own statement, the judge ruled the jail call was admissible pursuant to Rule 801(d)(2)(a). Tr. 538, lines 3-12.

Antoine Aiken, who was present at the home when the deceased was shot, claimed that Appellant arrived at the deceased's home for a third time on January 23, 2012. Appellant was in a "four-door, midsized sedan." Tr. 194, lines 7-9. Later, he described the car as "either a gray or white Neon." Tr. 195, lines 19-22. After the shooting, Aiken claimed Appellant got into the driver's side of the car. Tr. 204, line 23 – Tr. 205, line 4. Tawana Alston was also present at the home when the deceased was shot. She claimed that Appellant left the house as she walked onto the porch to smoke. Tr. 250, lines 6-23. She saw Appellant get into a "gray - - a silver Neon, four-door" just as someone placed a gun in her face. Tr. 251, lines 3-24; Tr. 261, line 13-22. Notably, neither Aiken nor Alston identified the car seized near Appellant's home as the car involved in the murder.

Although James Perkins, a Charleston County Sherriff's Office detective, was not present when Appellant was arrested, he testified that a gray Dodge Neon was located in front of Appellant's home.[1] Tr. 403, lines 6-21. Perkins admitted the car belonged to

[1] Brandon Cantrell, who lived near Appellant and Appellant's girlfriend, identified a photograph of the seized car as belonging to Appellant's girlfriend. Tr. 324, line 24 – App. 325, line 1. The testimony revealed Cantrell was simply wrong in his testimony that the seized car belonged to Appellant's girlfriend. At least two police officers and Appellant testified that the car belonged to Everlina Bickman. Tr. 419, lines 17-25; Tr. 444, line 24 – Tr. 445, line 4; Tr. 566, lines 12-16.

Everlina Bickman, who was friends with Appellant's girlfriend, Amber Wiley. Tr. 419, lines 17-25. The police searched the Dodge Neon found near Appellant's home for evidence, but found none connecting Appellant to the car or connecting the car to the murder. Tr. 443, line 9 – Tr. 446, line 14; Tr. 451, line 15 – Tr. 457, line 25; Tr. 511, line 11 – Tr. 513, line 5. In the Dodge Neon, the police found two cell phones in the front passenger interior door compartment. Tr. 466, lines 14-23.

At the conclusion of the state's case-in-chief, the prosecution played the three-minute jail call purportedly made by Petitioner. Defense counsel renewed the objection, which was overruled. Tr. 542, line 22 –Tr. 543, line 21.

Appellant testified in his defense. Appellant explained that on January 24, 2012, he and his girlfriend attended an eviction hearing because they were being evicted. Tr. 564, lines 18-20. After the hearing, the two returned home. Tr. 565, lines 8-9. Thereafter, Appellant stayed home while his girlfriend met with her probation agent. Neither Appellant nor his girlfriend had a car; therefore, his girlfriend got a ride from her friend, Everlina "Lena" Bickman, who drove a silver Dodge Neon. Tr. 565, line 9 – Tr. 566, line 16. While the police were arresting Appellant on January 24, 2012, his girlfriend and Bickman returned in Bickman's car. When the police saw Bickman's car, they seized it. Tr. 572, lines 9-11. After Appellant arrived at the jail, he tried to reach his girlfriend by phone. Tr. 575, lines 14-15. Appellant explained to the jury that when he referred to the phone he shared as being in the car seized by the police on the jail call, he was referring to the phone he shared with his girlfriend and his belief that she had left the phone in the car when it was seized by police. Tr. 576, line 13 - Tr. 577, line 16. Appellant denied ever being inside the silver Dodge Neon. Tr. 604, lines 14-18.

During her closing argument, the prosecutor repeatedly used the seized Dodge Neon, which had no connection to the murder or to Petitioner, and Petitioner's jail call in an effort to bolster the state's case. One of the first things the prosecutor mentioned to the jury was that Aiken told the 911 operator that the perpetrators left in a gray car, and there was no way for Aiken to know Petitioner was associated with a gray car. Tr. 631, lines 5-14. Again, the solicitor tried to connect the two by recounting Aiken's testimony that he claimed he saw Petitioner "in the driver's seat of a gray Neon, the same description that Brandon Cantrell gives of his girlfriend's car." Tr. 641, lines 20-22. The prosecutor attacked the defense argument regarding the car: "And ladies and gentlemen, I don't know if [defense counsel] or [Petitioner] want us to believe that of all the coincidences in the world that there just happens to be a gray four-door Neon parked outside his trailer. Come on." Tr. 647, lines 2-5.

Then, the solicitor used the jail call. In the call, Appellant asked how his girlfriend, Amber Wiley, sounded when the unidentified person on the other end of the call spoke to Amber the previous day. Appellant noted that Amber has not answered his calls and he "guess[es] they're thinking I ain't never going to get out." The solicitor used that statement argue: "Well, they would because they know what you have done." When Appellant stated he only wanted to speak to Amber, the solicitor argued "He's wondering are they talking, are they telling." She then quoted Appellant as saying the following, "They took that girl's car and saying I got DNA in there I guess, and my phone is inside that shit; well, not my phone but the phone I was using inside there." The solicitor claimed this statement put Appellant inside the car: "[Defense counsel] said they can't tell you whose phone was

inside the car. [Petitioner] told us, the phone he was using is inside the car." The solicitor then played the tape. Tr. 647, line 12 – Tr. 648, line 10.

Discussion

South Carolina imposes a system of rules to afford litigants and criminal defendants a fair judicial system. The Rules of Evidence govern how the parties present evidence and the admissibility of evidence in general. The Rules of Evidence have been designed to eliminate the introduction of unreliable evidence. One of the most unreliable forms of evidence is hearsay. The Rules strictly forbid the introduction of hearsay unless certain exceptions apply due to the clear unreliability of such evidence. See Rule 802, SCRE. 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. However, the Rules provide that admissions by a party-opponent are not hearsay. Rule 801(d)(2), SCRE. In addition to being an admission by a party-opponent, the statement must be offered against a party and is the party's own statement in either an individual or a representative capacity. Rule 801(d)(2)(A), SCRE.

In a concurring opinion in City of Easley v. Portman, 327 S.C. 593, 607, 490 S.E.2d 613, 620-621 (Ct. App. 1997)(Anderson, J. concurring), the Honorable Ralph King Anderson explained the difference between a confession and an admission, and in doing so provided a definition of "admission" helpful to the analysis of Rule 801(d)(2)(A), SCRE.[2] Looking to Black's Law Dictionary, Judge Anderson defined admission as "'statements by a party ... of the existence of a fact which is relevant to the cause of his adversary.'" Id. at

[2] The case concerned a statement or admission against interest, which is governed by Rule 804(b)(3), SCRE. However, the analysis is helpful at least as far as the definition of "admission" is concerned for determining the contours of Rule 801(d)(2)(A), SCRE.

607, 490 S.E.2d at 621 (quoting Black's Law Dictionary 296 (1990)). Further, Black's defined an admission as "acknowledgment of a fact or facts tending to prove guilt which falls short of an acknowledgment of all essential elements of the crime.'" Id. (quoting Black's Law Dictionary 297 (1990)). He went on to describe an admission as "the avowal or acknowledgement of a fact or circumstances from which guilt may be inferred, only tending to prove the offense charged, but not amounting to a confession of guilt." Id. (citing Pressley v. State, 39 S.E.2d 478 (Ga. 1946)).

Very little law exists in South Carolina analyzing Rule 801(d)(2)(A), SCRE. However, at least two cases from our Supreme Court address the applicability of Rule 801(d)(2)(A), SCRE to criminal cases and shed some light on the issue presented.

In State v. Needs, 333 S.C. 134, 150, 508 S.E.2d 857, 865 (1998), the South Carolina Supreme Court held a defendant's statement to a second person that his mother owed a lot of people money and that killing his stepfather would allow his mother to collect $260,000 from his stepfather's life insurance policies, of which his mother was going to loan him $100,000 to start a business, was an admission by a party-opponent under Rule 801(d)(2), SCRE. In arriving at this conclusion, the Court noted that although the prosecution is not required to prove motive in a homicide prosecution, the prosecution may introduce evidence that a defendant carried an insurance police on a victim's life where there is some showing that the defendant would derive some benefit from the proceeds of the policy based on South Carolina's case law. Id. The South Carolina Supreme Court noted in a footnote that a statement by a defendant to a third person in reference to the deceased, "If I don't kill this n[...] tonight he will be on my list," was admissible under Rule

801(d)(2)(A) as an admission by a party opponent. State v. Gilchrist, 342 S.C. 369, 373 n.3, 536 S.E.2d 868, 870 n.3 (2000).

Appellant made no admissions during his phone call to an unknown person while awaiting trial. Appellant's statement that he "guessed" the police seized Bickman's car in hopes of finding Appellant's DNA in the car was in no way a statement of the existence of a fact which is relevant to his prosecution. His belief or speculation as to the contours of the investigation revealed no fact relevant to his prosecution. Appellant never stated he was worried that his DNA would be found in the car or that he had been in the car. Instead, his statement was clear that he was merely speculating as to why the police wanted to seize and search the car. The statement simply did not concern the existence of a fact relevant to the case or controversy. Instead, the admission of the jail call allowed the prosecution to twist and contort the call to suggest that Appellant was concerned or worried about his DNA being found in the car, when the actual call did not support such an argument or inference. Appellant's statement during the call that the phone he had been using was inside the car did not state a fact relevant to the prosecution. The evidence revealed that Appellant's girlfriend had been in the car immediately before the police seized it. The evidence further revealed that Appellant and his girlfriend shared a phone. Thus, due to their sharing a phone and the girlfriend's presence in the car immediately prior to the seizure, it was unsurprising that the phone would be inside the car. Again, the jail call allowed the prosecutor to distort Appellant's words during closing argument by stating that Appellant had identified the phone in the car as belonging to him and stating that he was worried about the presence of the phone in the car tying him to the car, which fit the description of the car used in the

homicide. A careful review of the jail call reveals Appellant made no admissions and the call was inadmissible hearsay as it did not fall within Rule 801(d)(2)(A), SCRE.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2014.