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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARTHA ELIZABETH HALE,

APPELLANT

APPELLATE CASE NO. 2012-213693

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by refusing to direct a verdict on the greatest charge of assault and battery of a high and aggravated nature since the state failed to prove the victim suffered great bodily harm or that the act was accomplished by a means “likely to produce death or great bodily injury?”

2.

Whether the court erred by admitting the hearsay testimony of Office Tyler Price that other alleged eyewitnesses told him that appellant approached the victim in the street, began a verbal altercation, and hit her with a bat or pipe since this hearsay testimony was highly prejudicial?

3.

Whether the court erred by allowing the solicitor to pit the testimony of defense witness Jessica Hale against that of a police officer since forcing the witness to call a police officer a liar was highly improper and prejudicial?

4.

Whether the court erred by refusing to admit a text message sent to appellant by the alleged victim wherein she apologized for the incident, admitted she lied about the incident, was drunk at the time of the incident, and that she should have never come to appellant’s house that night since this was relevant evidence?

STATEMENT OF THE CASE

Appellant was indicted at the March 20, 2012 term of the Greenville County Grand Jury for the offense of assault and battery of a high and aggravated nature, the greatest offense under the statute, S.C. Code §16-3-600. R. *. Her case was called to trial on November 13, 2012 before the Honorable C. Victor Pyle, Jr., and a jury. Bill Bannister represented appellant. Lisa Bentley was the assistant solicitor. Tr. 1.

On November 14, 2012 the jury convicted appellant of assault and battery of a high and aggravated nature. Tr. 291, ll. 6-9. The judge observed at sentencing “the victim in this case brought on the confrontation after consuming thirteen of more beers and showed up in the defendant’s neighborhood and would not have been injured but for her own conduct.” Supp. Tr. 9, ll. 19-22. At a separate sentencing hearing on December 12, 2012, Judge Pyle imposed a sentence of eight years imprisonment suspended upon service of three years and probation for five years. Supp. Tr. 10, ll. 4-10. The judge said this did not excuse appellant for the confrontation.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to direct a verdict on the greatest charge of assault and battery of a high and aggravated nature since the state failed to prove either element that the victim suffered great bodily harm or that the act was accomplished by means “likely to produce death or great bodily injury” since at most the state produced medical testimony that any head injury has the “potential” to be serious.

Relevant Facts

Ashley Buchanani was out with the alleged twenty-year-old victim, Devin Wilson, on the night of March 26, 2011 going to various bars until about three in the morning. Ashley testified that Wilson was intoxicated. Tr. 33, ll. 2-24. Ashley admitted that Wilson was involved in underage drinking but she claimed the underaged Wilson did not drink anything in front of her that evening. Tr. 37, ll. 5-22.

Wilson testified that she was a full-time mother with three children at the time of the incident. She maintained that there was bad blood between her and appellant because of their “Facebook arguments.” Tr. 42, l. 4 – 42, l. 5. Appellant’s daughter had also dated the father, Justin, of one of Wilson’s children. Wilson admitted she was intoxicated on the night of the incident, and estimated that night that she drank “twelve beers I would say.” Tr. 44, l. 21 – 45, l. 3.

There were two versions of what occurred in this case as will be seen infra. Appellant and her family maintained that the highly intoxicated Wilson came to their house, and began banging on the door because Wilson thought Justin was inside with appellant’s daughter. Appellant, her daughter Jessica, and her husband, Josey, all testified that the

highly intoxicated Wilson was beating on their door and yelling about Justin being there. Appellant was able to close the door and lock Wilson out. Then, the grossly intoxicated Wilson fell down their front steps, and was injured. Tr. 186, l. 23 – 188, l. 22; Tr. 204, l. 17 – 210, l. 9; Tr. 234, l. 6 – 240, l. 13.

Wilson's story was that she was looking for Justin, and she asked one of appellant's neighbors for a pair of tennis shoes because her high heels were uncomfortable. Wilson was given a pair of tennis shoes to wear. Tr. 47, l. 22 – 50, l. 19.

Wilson claimed that appellant's husband was talking on the phone outside, and that appellant and her husband both started yelling and cursing at her. Tr. 51, l. 24 – 54, l. 5. Wilson maintained that appellant was carrying an object that "looked like a baseball bat," and he started hitting her in her side, and in her hands. Wilson claimed she tried to cover her head while appellant beat her.¹ Tr. 54, ll. 8-16.

Wilson's father, Jim Wilson, was a Greenville County Sheriff's Deputy. He was working on the night of the incident, March 26, 2011. However, when he got off work around two or two-thirty in the morning he said his wife was nervous because Devin was not home. Mr. Wilson admitted that his daughter had taken his truck that evening without his permission. Tr. 163, l. 19 – 165, l. 16.

Mr. Wilson then went to Loom Street looking for Devin because he knew Justin lived there at one time, and she had other friends in the area. Tr. 165, ll. 8-16. Mr. Wilson

¹ Wilson acknowledged she later signed an "affidavit of non-prosecution" stating that she wished to withdraw her complaint against appellant, and stating she would not cooperate with the police. R. p. *. The state introduced this affidavit, and Wilson testified that appellant's attorney prepared it. Wilson testified that she only signed it because appellant's son had severe medical problems. Wilson said she was telling the truth to the jury at the trial. Tr. 58, l. 22 – 62, l. 8.

was able to locate Devin, and someone told him she had been injured. Mr. Wilson was taken inside a house where "I found my daughter laying on the floor ... she appeared to be having a seizure to me ... she was having difficulty breathing and she had blood coming from the top of her head." Tr. 166, l. 2- 167, l. 11.

Mr. Wilson testified that his daughter was taken to the hospital, and his wife stayed with her there. Mr. Wilson maintained that Devin "did not move very well for about three or four weeks." "She had difficulty in moving, chronic headaches. Just constantly having headaches." Tr. 169, ll. 11-20.

With these two sharply diverse versions of how Wilson came to be injured, the state called emergency room physician, Dr. Daniel Kommel, who treated Wilson at Greenville Memorial Hospital on the night of March 26, 2011. Tr. 92, l. 4 – 93, l. 17. Dr. Kommel testified Wilson complained she had been assaulted, and "presented complaining of left arm pain and some mid back pain." Tr. 93, ll. 18-22. "I do recall seeing contusions and a couple abrasions." Tr. 93, ll. 23-25. Dr. Kommel testified on direct:

Q. What was Miss Wilson's final diagnoses or diagnoses?

A. I would have to look at the chart again, but I believe it was abrasions and cervical strain, concussion. I don't remember after that. There were three or four.

Q. Okay.

A. There was another physician that actually discharged her.

Q. Okay. But did you examine Miss Wilson?

A. I did.

Q. And you made some diagnosis on her?

A. Uh-huh. (Affirmative).

Q. And those included concussions, sprains, contusions, and abrasions?

A. Uh-huh. (Affirmative).
Correct.

Tr. 94, l. 18 – 95, l. 7.

Wilson denied she ever lost consciousness, and he noted “left arm pain and mid back, no chest pain. No shortness of breath. No abdominal pain.” Dr. Kommel opined these injuries were consistent with someone having being assaulted. Tr. 96, ll. 5-11.

Dr. Kommel admitted that the records showed Wilson was intoxicated but he did not recall her being hostile towards medical personnel: Tr. 96, l. 21 – 97, l. 15.

The judge questioned Dr. Kommel about the extent of the decedent’s injuries:

THE COURT: You’ve examined many patients and made some determination as their degree of, degree of seriousness of their injury?

THE WITNESS: Correct.

THE COURT: Is that correct?

THE WITNESS: Correct.

THE COURT: The injuries, if any that you observed from Miss Wilson, were they such that her injury was likely to produce death or great bodily injury?

THE WITNESS: From my past recollection I would say there’s always *a potential* for that.

THE COURT: Okay.

THE WITNESS: But based on what I found on her test, be it x-ray or any of that kind of nature, ancillary testing, *I did not find any life threatening problems that night.*

THE COURT: Doctor, I need to ask you this.

With respect to the injuries that you observed, were they such that could cause a substantial risk of death or cause serious permanent disfigurement or produce a loss of impairment of the function of a bodily member or an organ?

THE WITNESS: Of any of the injuries that were noted to potentially a close head injury, concussion, which are very similar processes, *always have the potential* to have longer lasting effects than just the evening of the event or the day of the event.

Tr. 98, l. 16 – 99, l. 15. (emphasis added).

The following occurred on recross-examination of Dr. Kommel:

Q. Do you actually know what caused the injuries?

A. No, sir.

Q. So, you took her with the injuries that were there and you saw her?

A. Correct.

Q. Those were *not great bodily injuries*?

A. *Not to my best estimation.*

Q. And they did not cause *any permanent impairment* to your knowledge?

A. *Not to my knowledge*, but I only saw her that evening.

Q. Not to your knowledge they didn't?

A. Correct.

Tr. 100, ll. 5-16. (emphasis added).

Police Officer Tyler Price said he obtained an arrest warrant for appellant for the crime of assault and battery of a high and aggravated nature “due to the victim’s injuries and the weapon that was used to inflict those injuries.” Tr. 156, ll. 15-19.

Directed Verdict Motion

Defense counsel Bannister moved for a directed verdict arguing that pursuant to S.C. Code §16-3-600(c)(1) the alleged victim had the absence of great bodily injury “as described in that statute there.” Defense counsel noted the lack of testimony of a substantial risk of death or serious injury or permanent disfigurement. Defense counsel asked the judge withdraw the greatest charge “from the jury’s consideration.” Tr. 182, ll. 5-20.

The solicitor began her response by telling the judge the state was not opposed to instructions on lesser-included offenses. She argued that Wilson’s father testified she was “bed-ridden for three to four weeks, that she needed help going to the bathroom, bathing herself, preparing her meals. We would argue that she did suffer great bodily injury, **but that if for whatever reason --**” At this point the trial judge cut the solicitor off, and stated that he was denying the directed verdict motion on the greater charge. Tr. 182, l. 22 – 183, l. 17. (emphasis added).

Discussion

It strongly appeared the solicitor did all but concede that this case should go to the jury only on a lesser-included offense. If the judge had not interrupted her, she may have concluded that concession. The indictment alleged that Wilson “suffered great bodily injury where the act was accomplished by means likely to produce death or great bodily injury . . . in violation of Section 16-3-600...” R. *.

S.C. Code §16-3-600 defines “‘great bodily injury’ as an injury which causes a **substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a body member or organ.**” (emphasis added). Defense counsel correctly argued that the state had failed to prove the elements of

the statute. Dr. Kommel when questioned by the trial judge stated that there was “always a potential for that,” meaning that in any case such an injury could produce death or great bodily harm.” He also said “I did not find any life threatening problems that night.” Tr. 98, l. 22 – 99, l. 15. He also testified in his estimation there were not great bodily injuries to the victim nor did they cause permanent impairment that he observed. Further, there was no other evidence in the record to meet this “**substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a body member or organ**” standard. Tr. 98, l. 15 – 100, l. 16. (emphasis added).

The evidence in this case did not rise to the level of being sufficient to support appellant’s conviction for assault and battery of a high and aggravated nature under the definition provided in the statute. Cf. State v. Palmer, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014)²; State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2014).

There was no direct evidence or *substantial circumstantial evidence* introduced by the state to satisfy the elements of the statute. In light most favorable to the state, meaning the victim’s story is believed as it must be at the directed verdict stage, the victim did not suffer great bodily injury because all the physician could testify to was there was a “potential” of a risk of death or serious injury. The victim did not suffer permanent disfigurement or protracted loss or impairment of the function of a body member or organ.” See State v. Pearson, ____ S.C. ____, 764 S.E.2d 706 (Ct. App. 2014); State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011); State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). This Court should therefore issue an order of acquittal.

² Certiorari granted September 24, 2014.

The court erred by admitting the hearsay testimony of Office Tyler Price that other alleged eyewitnesses told him that appellant approached the victim in the street, began a verbal altercation, and hit her with a bat or pipe since this hearsay testimony was highly prejudicial.

Relevant Facts

As seen, there were two very divergent lines of testimony as to what occurred in this case. Appellant and her family members testified that the highly intoxicated Wilson came to their house drunk looking for her boyfriend, pounded on their door, and was cursing and yelling. Appellant was able to close the door, and the intoxicated Wilson fell down the steps injuring herself.

When Officer Tyler Price was testifying on direct-examination the solicitor asked Price if appellant's statement of what occurred was consistent with what the other eyewitnesses told him. Price answered that appellant's statement was not consistent. When the solicitor asked Price what the other eyewitnesses told him defense counsel objected: "That's just plain hearsay." The solicitor claimed: "I would argue that it was for police investigative purposes." The judge overruled the objection. Tr. 152, l. 14 – 153, l. 5.

The following then occurred after the judge overruled the defense's hearsay objection:

Q. How did the other people tell you that she received her injuries?

A. **The witnesses stated** the – *Mrs. Hale approached the victim in the street and began a verbal altercation, and that at that point had a weapon and they were not certain if it was*

some kind of a bat or pipe and began hitting the victim with that.

Q. Did anyone indicate whether the, the victim, Devin Wilson, had any type of weapon?

A. No.

Q. Did anyone indicate that she had struck the defendant?

A. No.

Q. Did anyone indicate that she had struck or physically assaulted anyone that evening?

A. No.

Tr. 153, ll. 6-20. (Emphasis added).

Discussion

Defense counsel properly objected that this was “just plain hearsay” or rank hearsay. Rule 801(c), SCRE defines “hearsay” as “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.”

Price’s testimony of what the alleged eyewitnesses told him about appellant approaching Wilson in the street, beginning a verbal altercation, and then hitting her with a bat or a pipe was offered to prove that the jury should believe Wilson’s testimony and not appellant’s regarding what happened. Appellant did not have the opportunity to cross-examine these alleged eyewitnesses, and this hearsay evidence was highly prejudicial. See Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013).

The hearsay testimony was particularly prejudicial given what should have been the alleged victim’s shaky credibility given her grossly intoxicated state, her breaking the law of night of incident, and her other bad act of taking her father’s truck without his permission.

See State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Perhaps the state feared the jury may correctly have concluded that Wilson was given the benefit of all doubt because her father was a respectable police officer in the community but this rank hearsay evidence was “gilding the lily” in an all-out attempt to convict appellant. In the alternative, this Court grant appellant a new trial if it does not issue an order of acquittal.

The court erred by allowing the solicitor to pit the testimony of defense witness Jessica Hale against that of a police officer since forcing the witness to call a police officer a liar was highly improper and prejudicial.

Relevant Facts

Appellant's daughter, Jessica Hale, testified that Wilson came to their house highly intoxicated, and was told that her boyfriend Justin was not there. Wilson tried to push open the door and asked if her boyfriend was there with appellant's "whorey ass daughter." Jessica remembered that Wilson was told again that Justin was not there. Unsatisfied with the answer, Wilson stayed on their front porch screaming and cussing for several minutes. She finally turned to leave, and "fell down every single one of our steps..." Tr. 188, ll. 4-22.

On cross-examination Jessica confirmed that her testimony was that the police only spoke with her mother that night, and not the other potential witnesses in her house. The following occurred on cross-examination of Jessica:

Q. And your – it's your testimony that the police did not ask to speak to anyone else in your home?

A. No, ma'am.

Q. *And that if the police officer testified to that fact he'd be lying?*

A. *Yes.*

MR. BANNISTER: Your honor, I object to that. You can't ask one witness to comment on the credibility of another witness.

THE COURT: Overruled.
Go ahead.

Q. So, it's your testimony again that the police did not try to speak to anyone else?

A. He did not. No, he didn't.

Tr. 193, l. 20 – 194, l. 8. (emphasis added).

Discussion

In State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994), the Supreme Court reversed a conviction because the solicitor was allowed to improperly pit the defendant's testimony against that of the police officer. Here, there is no doubt that the solicitor was pitting witnesses in her successful attempt to force Jessica to call the police liars to the jury. This was highly prejudicial and fundamentally unfair. See also, State v. Brown, 297 S.C. 27, 374 S.E.2d 669 (1988).

Witnesses are called to court because the court is entitled to every person's evidence. A witness should not be forced to engage in the indignity of calling another witness a liar. That is particularly true of police officers who are supposed to be the neutral enforcers of the laws passed by the representatives of the people. Appellant should be granted a new trial.

The court erred by refusing to admit a text message sent to appellant by the alleged victim wherein she apologized for the incident, admitted she lied about the incident, was drunk at the time of the incident, and also admitted that she should have never come to appellant's house that night since this was relevant evidence.

Relevant Facts

Defense counsel proffered text messages that Devin Wilson sent to appellant. Wilson admitted on June 16, 2012 she had a cell phone number that the solicitor did not contest was Wilson's phone number. Defense counsel showed Wilson the text messages she sent to appellant that day which stated that she tried to get the police to drop the charges against appellant but her parents told her she could go to jail for filing a false police report. Two other messages said that Wilson was sorry she "lied on you", that she was drunk on the night of the incident, and that she should have never gone to appellant's house. Wilson viewed the text messages, and denied she sent them. Tr. 88, ll. 2-24.

Defense counsel also proffered the text messages through appellant's testimony. Tr. 256, l. 24 – 258, l. 5. Defendant's Exhibit 1 (four text messages). R. *.

On cross-examination appellant told the solicitor that she received these text messages from Devin Wilson, and that she did not alter them in any way. Tr. 258, l. 12 – 262, l. 18.

Discussion

The trial court erred by excluding the proffered text messages sent from Devin Wilson to appellant on June 26, 2012. Wilson claimed at trial that appellant came after her

with a bat like object in the street. These text messages were admissible as prior inconsistent statements under Rule 613(b), SCRE.

Wilson apologized for her behavior and stated she wanted to drop the charges but she feared being prosecuted for filing a false police report. She also admitted she should have never come to appellant's house that evening. All of this totally contradicted her trial testimony above. R.* (four text messages).

The solicitor did not contest the fact that these messages were sent from Wilson's phone. She raised speculation that appellant could have altered the messages. That objection went to the weight and not to the admissibility of this evidence. Wilson was apprised of the date when the messages were sent, she viewed their content, and she denied that she sent them.

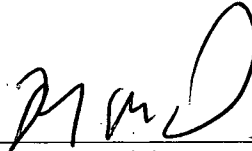
Wilson's credibility was obviously critical in this case. Since Wilson was clearly apprised of when the text messages were sent, and the record shows she read them and denied writing the statements, the judge erred by refusing to admit the proffered text messages impeaching Wilson into evidence. See State v. Bixby, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010).

The scope of cross-examination in South Carolina is broad, and anything tending to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony. See State v. Jones, 343, S.C. 562, 570, 541 S.E.2d 813, 817 (2001); State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). The wrongful exclusion of this impeachment evidence entitles appellant to a new trial.

CONCLUSION

By reason of argument one, an order of acquittal should be issued. In the alternative, Arguments two, three, and four, appellant's convictions should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2014.