STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY CARSON RYDER,

APPELLANT

APPELLATE CASE NO. 2013-001916

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the prosecution to introduce extrinsic evidence of three prior statements by three eyewitnesses where each witness unequivocally admitted the contents of the statement in violation of Appellant's state and federal constitutional right to a fair trial?

STATEMENT OF THE CASE

Appellant was indicted for criminal domestic violence, third offense[1] (2012-GS-39-2339) by a Pickens County grand jury on July 23, 2013. R. 185. The case was called to trial on August 26, 2013 before the Honorable J. Michael Baxley. Samuel Tooker represented the state, and Steven Alexander represented Appellant. R. 1. The jury found Appellant guilty as charged. R.170, lines 8-14. Judge Baxley sentenced Appellant to serve thirty months in the Department of Corrections. R. 179, line 24 – R. 180, line 1; R. 187.

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

[1] Criminal domestic violence occurs when an individual causes physical harm or injury to a person's own household member or offers or attempts to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril. S.C. Code Ann. § 16-25-20. Thus, one of the elements of the offense is that the alleged victim is a "household member" of the charged individual. South Carolina defines a household member as a spouse, a former spouse, persons who have a child in common, or a male and female who are cohabiting or formerly have cohabited for purposes of the article concerning criminal domestic violence. S.C. Code Ann. § 16-25-10.

ARGUMENT

The trial court erred in allowing the prosecution to introduce extrinsic evidence of three prior statements by three eyewitnesses where each witness unequivocally admitted the contents of the statement in violation of Appellant's state and federal constitutional right to a fair trial.

Relevant facts

Testimony of Erica Ryder

The prosecution's key witness at Appellant's trial was Erica Ryder, Appellant's wife. R. 11, line 25 – R. 12, line 4. On the evening of February 1, 2012, Erica, Appellant, her son-in-law, Phillip Towe, her daughter, Katelyn Choiniere, and a friend, Ernest "Ernie" Baldwin, Jr., were outside talking and drinking beer. R. 16, line 19 – R. 17, line 3. Shortly after her daughter and son-in-law left, Appellant threw a beer bottle in her direction, but did not hit her with the bottle. Erica was uncertain if Appellant was trying to hit her when he threw the bottle because she was sitting beside the trash can and Appellant may have been throwing the bottle in the trash. R. 17, lines 7-18; R. 23, lines 5-11. After the throwing incident, Erica first called Katelyn and Phillip. Then, she called the police because she was angry with Appellant. During the direct examination, Erica initially stated she did not recall exactly what she said to the 911 operator. R. 13, line 23 – R. 14, line 12; R. 18, lines 16-19. Upon further questioning, Erica admitted she told the 911 operator that Appellant "was on the scene making threats." R. 14, lines 17-21; R. 16, lines 2-4. She also admitted to saying that Phillip and Ernie were holding Appellant down. R. 13, lines 22-24; R. 16, lines 5-8.

Erica testified that Appellant was upset because Erica was calling the police. He approached her to convince her not to call the police. Ernie then stepped between them. R.

19, lines 2-8. By that time, Katelyn and Phillip had returned. Her son-in-law immediately tackled Appellant and threw him to the ground. R. 20, lines 1-6. Erica described Appellant as "upset" and "a little agitated" during this time. R. 64, lines 18-19. Phillip soon released Appellant. R. 20, lines 20-21. Erica testified that she recalled talking to the police on the date of the alleged incident, and that she told the police what happened. R. 17, lines 19-23. Erica agreed that she said that Appellant threw a bottle at her, narrowly missed her, and stated he was going to kill her. R. 18, lines 8-15.

When Erica could not recall specific details, the prosecutor used Erica's statement to law enforcement, which was marked as state's exhibit #3, to refresh her recollection. Erica admitted the statement was hers, and it was even in her handwriting. R. 20, line 23 – R. 21, line 24; R. 181. After she was refreshed with her statement, Erica agreed that her statement included an allegation that Appellant had threatened to kill her and said he was going to get a gun.[2] R. 22, lines 2-8.[3] Although she readily admitted that her handwritten statement insisted that Appellant had threatened to kill her, Erica did not recall telling police that Appellant threatened to kill her. R. 19, lines 11-19. She further admitted that she told police that Appellant attempted to hit her with the beer bottle. R. 22, line 25 – R. 23, line 2.

Later, the prosecutor asked again Erica if she denied saying that Appellant threw the bottle attempting to hit her. Erica responded, "That's my statement, but - -." When the prosecutor asked for a "yes or no" answer, Erica stated, "I wrote it." The prosecutor clarified: "So is that a yes, I made the statement?" Erica responded, "I made this statement."

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[2] According to Erica, the gun was a .22 pink rifle that belonged to her nine-year old daughter. R.22, lines 9-14.

[3] The trial judge even allowed the prosecutor to ask Erica leading questions based on her being a hostile witness and/or aligned with an adverse party. R. 28, lines 4-7.

R. 28, lines 10-18. The prosecutor then went through the statement line-by-line with Erica. R. 28, line 19 – R. 29, line 1.

Although Erica's statement to law enforcement included an allegation that Appellant threatened to kill her, and she repeatedly admitted the statement included this, Erica testified that she did "not recall that being said at all." She admitted that she stated that Appellant saying "I have bullets, 'I will take you out.'" She explained that she recalled writing the statement, but she did not recall the incident occurring the way her statement claimed. R. 29, lines 17-24; R. 30, lines 2-9; R.30, lines 16-18; R. 31, lines 2-8; R. 33, lines 22-23; R. 35, line 23 – R. 36, line 3. The exchange occurred as follows:

Q: So you don't recall him saying, and this is what you wrote, so you don't recall writing him saying I have bullets, "I will take you out"?

A. I wrote that, yes.

Q. You wrote that?

A. I wrote that.

Q. Okay. Do you recall writing that?

A. I obviously wrote it, yes. I wrote it.

Q. But you just said a minute ago - -

A. But I don't recall - - -

Q. - - - that you didn't - - -

A. - - - that actually being - - -

Q. - - - recall stating that.

A. - - - stated. I don't.

Q. So you don't recall that?

A. I recall writing it, but that's not how I remember it really happening, no.

R. 30, lines 2-18. She admitted saying that her son-in-law and friend tackled Appellant to the ground and subdued him until the police arrived. R. 30, lines 21-24.

Erica testified she did not recall Appellant say he was going to kill her, and she did not recall Appellant saying he had bullets and would take her out. R. 31, lines 2-11. When the prosecutor asked if she told the officer that Appellant tried to kill her, Erica responded that she "obviously said it" because her statement indicated as much. R. 33, line 19 – R. 34, line 1. Erica admitted telling police that Appellant threatened to run into the house to get a gun to kill her. R. 34, lines 10-15.

On cross-examination, Erica again admitted to having written the statement. R. 48, lines 7-13. She again admitted to having stated that Appellant threatened to kill her and that he had bullets to take her out. R. 48, lines 21-24. She testified that she may have exaggerated what happened because she was angry with Appellant and wanted him out of her house. R. 48, lines 17-20; R. 48, line 25 – R. 49, line 3.

Testimony of Phillip Rowe

Phillip Rowe was hanging out with Erica, Katelyn, Ernie, and Appellant on February 2, 2012. He and Katelyn left to go home. R. 77, line 2 – R. 107, line 18. Erica called Phillip because Appellant was throwing beer cans or beer bottles. R. 76, line 23 – R. 77, line 1. Upon receipt of the call, Phillip returned to the residence. R. 78, lines 19-23. When he arrived, Appellant "kind of came towards [him]." R.78, lines 24-25. Phillip grabbed Appellant and threw him down. Appellant said he was "going to end this" and went toward the house. Phillip grabbed Appellant again. The police arrived minutes later. R. 79, lines 1-5.

During direct examination, the prosecutor showed Phillip his statement to police, which was marked as state's exhibit #5. R. 81, lines 6-10; R. 183. After having his memory refreshed by the statement, Phillip testified that Appellant was going toward the house when Phillip released him. Further, Phillip testified that Appellant said he was going to "get the gun and end this." R. 81, lines 11-17. Phillip agreed that his statement indicated that Appellant ran into the house, but Phillip testified that Appellant never made it inside the house. Phillip stopped Appellant because he wanted to protect Appellant. He surmised that Appellant intended to kill himself if he got a gun. R. 81, line 18 –R. 82, line 11; R. 85, line 18 – R. 86, line 11.

Testimony of Katelyn Choiniere

Like the other witnesses, Katelyn testified that she, Erica, Ernie, Phillip, and Appellant were hanging out. She was not drinking because she was pregnant, but others were. R. 88, lines 5-15. She and Phillip left, but quickly returned because Phillip received a phone call from Erica. R. 88, lines 19-21. When the two arrived at the home, she saw Ernie holding Appellant down. Then, Ernie let Appellant up. Appellant "said something about, I'm just going to end this now and walk[ed] towards the house." Then, Phillip and Ernie tackled Appellant. R. 89, lines 17-25. Although Katelyn stated she did not know what Appellant meant when he said he was going to "end this now," she assumed he was going to harm himself. R. 90, lines 8-17. She further stated that Appellant did not threaten to get a gun; rather, "that was assumed." After Appellant said he was "going to end this now," Erica said there were guns in the house. R. 90, lines 18-23. In response, Ernie and Phillip stopped Appellant again. R. 91, lines 6-12.

The prosecutor presented Katelyn with her statement to police, which was marked as state's exhibit #6. She readily admitted to writing the statement. R. 91, lines 17-24; R. 184. The judge permitted the prosecutor to use leading questions pursuant to Rule 611(c), SCRE. R. 92, lines 19-20. She agreed that in her statement, she said that she returned to Erica's house after receiving a phone call that Appellant was acting threatening toward Erica. R. 92, line 25 – R. 93, line 5. She explained that she did not receive the phone call – Phillip did. R. 93, lines 6-11. She further admitted that in her statement, she said that Appellant was yelling and tried to go after Erica. However, she did not recall that occurring at the time of the trial. R.93, lines 21-24. She agreed that the events would have been fresher in her mind when she wrote the statement and, as a result, the statement "would probably be more accurate." R. 94, lines 10-20. She agreed that her statement said that Ernie and Phillip restrained Appellant while Erica called 911. R. 94, lines 21-23. Katelyn further admitted that in her statement, she said that Appellant was going to run inside the house to obtain a gun, threatening to use it on himself or Erica. R. 95, lines 5-13. Although Appellant never said those exact words, Katelyn perceived that Appellant was a threat to himself or Erica. R. 95, lines 10-24.[4]

[4] After Katelyn testified, Judge Baxley had her taken into custody to be tried at a later date for contempt. The day before Appellant's trial, Katelyn had appeared at Phillip Towe's guilty plea to criminal domestic violence. Although Katelyn told police that Towe injured her, she told the court that she had injured herself and lied to the police. Judge Baxley stated that during Appellant's trial, Katelyn had "in some respects recanted" her statement to police. He found that either she was dishonest in her testimony or dishonest in her statement. R. 110, line 6 – R. 111, line 9.

Testimony of Keith Gilstrap

Keith Gilstrap, a deputy with the Pickens County Sheriff's Office testified that he responded to the incident location on February 1, 2012. R. 113, lines 10-12. The prosecutor showed to Gilstrap state's exhibits 3 through 6, which were copies of four statements taken by Gilstrap. R.113, lines 24-25. When the prosecutor moved to admit the statement and publish it to the jury, Appellant objected. Specifically, Appellant objected that Erica "acknowledged writing this statement in her testimony." He expounded that Erica did not deny writing it. R. 115, lines 6-22. The prosecutor responded by paraphrasing the language of Rule 613(b), SCRE concerning the introduction of extrinsic evidence of prior inconsistent statements. The prosecutor argued that Erica "did equivocate" when she was given an opportunity to admit or deny her statement. The prosecutor offered, but failed to specify, that he believed "specifically with a couple of lines in that statement she equivocated saying I don't recall saying that." R. 115, line 25 – R. 116, line 11. The judge overruled Appellant's objection and permitted the introduction of the statement pursuant to Rule 613, SCRE. R. 116, lines 12-14. When the prosecution expressed a desire to introduce the statements of Phillip Towe and Katelyn Choiniere, Appellant expressed the same objection.[5] Nevertheless, the court overruled the objections as to those statements as well. R. 117, lines 9-15; R. 118, lines 6-10. Thus, the statements of Erica, Phillip, and Katelyn were admitted into evidence and published to the jury. R. 181, R. 183, R. 184.

[5] Appellant agreed to the introduction of Ernest Baldwin's statement. R. 117, line 25.

Testimony of Anthony Raines

Anthony Raines, another officer with Pickens County Sheriff's Department, arrived on the scene. R. 120, lines 8-17. Raines found Appellant being held down by Phillip and Ernie just inside the house. R. 123, lines 1-9. Raines placed Appellant in handcuffs and secured him in a police car. R. 123, lines 18-24. Raines interviewed Erica regarding the incident. Although Raines could not recall her exact words, Raines claimed that Erica said Appellant had thrown a beer bottle at her and then ran into the house. Erica said Appellant was going to get a gun. Erica said "something about he's got bullets, he's going to take me out." Erica claimed to Raines that Appellant had been tackled to prevent him from getting the guns. R. 126, line 22 – R. 127, line 9. Thereafter, Raines arrested Appellant. R. 127, lines 23-25.

Solicitor's Closing Argument

During his closing argument, the assistant solicitor read the statements of Erica, Philip, and Katelyn to the jury. R. 141, lines 11 – 21; R. 142, line 5- R. 143, line 14. Although the assistant solicitor pointed to inconsistencies between the witnesses' statements and their testimony, he neglected to include that each witness admitted to giving the statements to law enforcement and admitted to the contents of those statements. Instead, the prosecutor misled the jurors regarding how the witnesses testified. He claimed the witnesses "seem[ed] to not be able to remember anything. Nothing." R. 138, lines 7-9. He further claimed that when he questioned the witnesses regarding their statements to police that the witnesses said, "Well, I don't know." R. 138, lines 10-16. In direct contradiction of the record, the prosecutor told the jury that when he gave the witnesses their statements to review to refresh their recollections, the witnesses responded, "No, I still don't remember. I

don't even remember writing it. I can't even remember writing that." R. 138, lines 17-22.[6] Despite the clear testimony of each witness admitting to the contents of their statements, the solicitor argued to the jury that the witnesses could not remember writing the statements "because they're not telling the truth." R.138, lines 23-24.

Thereafter, the prosecutor juxtaposed what he claimed was testimony of the witnesses of their inability to remember with what "they do remember," which was that the incident "was clearly an accident when he was tossing that beer bottle in the trash can." During this argument, he again misled the jury that the witnesses stated, "I don't remember giving a written statement to law enforcement." R. 139, lines 4-10.

Discussion

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when

> the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998) (finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as

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[6] During his closing argument, the defense counsel explained that the solicitor submitted that the witnesses "denied even writing these statements or remembered even writing them." However, defense counsel "heard the testimony a little differently. . .You decide for yourself, but they all admitted writing the statements." R. 149, line 25 – R. 150, line 4.

substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

This Court observed that "[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003) (citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). This Court explained that "[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, this Court held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, this Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), this Court held that a prior inconsistent statement by a witness who said his prior statement was "'accurate,'" that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), this Court held the trial court properly admitted a prior inconsistent statement by a witness who testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

The trial court erred in admitting the statements of Erica, Phillip, and Katelyn into evidence pursuant to Rule 613(b), SCRE because the witnesses unequivocally admitted to making the statements and to the contents of those statements. When the witnesses testified differently than their statements, the prosecutor presented the statements to the witnesses, who repeatedly admitted to making the statements and to their contents. The prosecutor used the statements to show the inconsistencies in order to impeach the witnesses. This was the proper way to impeach the witnesses. Due to their unequivocal admissions, extrinsic evidence of the statements was not admissible. The trial judge's erroneous ruling was exploited by the prosecutor reading the statements to the jury in his closing argument. In fact, the prosecutor relied upon the contents of the statements, which were admitted by the witnesses, to make his case. He repeatedly asked the jury to believe the contents of the statements in order to find Appellant guilty.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of November, 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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 24, 2014

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THE STATE,

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APPELLANT

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 Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of November, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of November, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .