ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAHEED HAYES,

APPELLANT

APPELLATE CASE NO. 2014-001837

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to allow cross-examination of a witness, who had been diagnosed with schizophrenia, concerning the witness smoking marijuana immediately prior to giving a statement inculpating Appellant to police and the witness admitting to a psychiatrist that marijuana made him delusional?

STATEMENT OF THE CASE

On January 31, 2013, a Marion County grand jury indicted Appellant and three others for murder, discharging a firearm into a dwelling, possession of a weapon during the commission of a violent crime, and four counts of attempted murder (2013-GS-33-00097). R. 546 - 548. The state, represented by Ed Clements, called Appellant and one co-defendant, Blaton Wakeem Smith, to trial on August 6, 2014 before the Honorable D. Craig Brown and a jury. Joshua Bailey represented Smith, and Steven DeBerry represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 542, line 1 – R. 543, line 1. The jury found Smith guilty on all counts, except the jury found he was not guilty of discharging a firearm into a dwelling. R. 543, line 5 – R. 544, line 15. Judge Brown sentenced Appellant to life imprisonment for murder, five years' imprisonment for possession of a weapon during the commission of a violent crime, ten years' imprisonment for discharging a firearm into a dwelling, and thirty years' imprisonment on each count of attempted murder. He ordered the sentences to be served consecutively for a total of life plus one hundred and thirty-five years. Judge Brown imposed identical sentences for Smith, except as to the discharging a firearm charge. R. 545, lines 7-22; R. 549 - 555.

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

STATEMENT OF THE FACTS

On the evening of April 12, 2012, Gavin Graves, Derrick "Eyebrows" Wilson, Christopher "Juice Man" Kollock, Darrell "Goo" Davis, and Christian "Murder" Drawhorn were playing cards, drinking beer, smoking marijuana, and looking at Facebook in Graves's single-wide trailer. R. 264, line 1 – R. 265, line 9; R. 266, lines 11-20; R. 271, lines 12-19; R. 292, line 25 – R. 293, line 7; R. 307, line 12 – R. 308, line 21; R. 309, lines 10-23; R. 311, line 23 – R. 312, line 1. Graves ran an illegal gambling and drug operations out of the trailer.[1] R. 265, lines 17-20. Over the course of the evening, several of Graves's clients stopped to purchase drugs. R. 265, lines 10-13; R. 266, lines 8-10; R. 287, lines 17-24; R. 292, lines 1-5; R. 298, line 23 – R. 299, line 10; R. 312, lines 2-8; R. 334, lines 11-25. One gentleman even stopped to sell stolen underwear and socks. R. 299, lines 11-23; R. 334, lines 6-10.

Shortly after midnight, they heard a soft knock at the back door; however, Davis found no one at the door when he checked. R. 271, line 20 – R. 272, line 5. Within minutes, gunshots were being fired at the trailer. R. 272, lines 5-25; R. 313, line 24 – R. 315, line 22. When the shooting stopped, Kollock ran out the back door and around the house, but returned. R. 273, lines 18-22; R. 316, lines 1-13. The group realized that Drawhorn had been shot. R. 273, line 24; R. 316, line 13 – R. 317, line 7. Graves and Wilson called for help and the group, along with Drawhorn, went outside to await emergency assistance. R. 274, line 5 – R. 276, line 17; R. 317, line 9 – R. 318, line 22. Although an ambulance transported Drawhorn to the hospital, he later died as a result of a

[1] During the investigation, the police found marijuana and crack cocaine in the trailer. R. 153, line 25 – R. 154, line 18; R. 279, line 19 – R. 280, line 19.

gunshot wound. R. 67, lines 19-20; R. 276, lines 18-19; R. 261, lines 1-2; R. 318, line 23 – R. 319, line 17.

Law enforcement's investigation of the crimes was flawed from the beginning. The responding officers testified inconsistently regarding the number of people present, the number of cars present, who interviewed whom, the scope of the crime scene, the delegation of duties, whether there was blood in the house, and which officers went into the trailer and when. R. 22, lines 10-17; R. 23, lines 11-13; R. 25, lines 24-25; R. 26, lines 10-14; R. 28, lines 14-20; R. 291, lines 9-14; R. 30, lines 2-5; R. 31, lines 3-4; R. 32, lines 19-21; R. 33, lines 17-19; R. 49, lines 12-15; R. 62, lines 15-24; R. 67, lines 10-13; R. 72, lines 5-9; R. 74, lines 19-23; R. 81, lines 3-5; R. 81, line 22 – R. 82, line 2; R. 108, lines 13-18; R. 147, line 21 – R. 148, line 8; R. 198, lines 18-24; R. 207, lines 4-24.

One officer, Marion Richardson, claimed he saw shell casings in the roadway, but he stated repeatedly that he did not go near the shell casings. R. 39, line 16 – R. 50, line 15; R. 56, lines 16-17. However, the other law enforcement officers present testified that Richardson not only went near the shell casings, but that he moved the shell casings. R. 23, lines 17-24; R. 68, line 22 – R. 69, line 25; R. 80, lines 10-21; R. 83, lines 11-21; R. 95, line 1 – R. 96, line 1; R. 96, lines 5-25; R. 109, line 18 – R. 111, line 17; R. 151, lines 13-24. Investigator Martin Bell was the lead detective on the case and, therefore, in charge of collecting notes, preparing reports, order tests, and conducting interviews. R. 107, lines 11-18; R. 201, lines 16-19; R. 207, lines 10-13. However, Bell never testified, despite his presence in the courtroom during the entirety of the trial. R. 508, line 21 – R. 509, line 15.

ARGUMENT

The trial judge erred in refusing to allow cross-examination of a witness, who had been diagnosed with schizophrenia, concerning the witness smoking marijuana immediately prior to giving a statement inculpating Appellant to police and the witness admitting to a psychiatrist that marijuana made him delusional.

Relevant facts

The individuals inside the trailer were unable to provide any information regarding the possible shooter because they did not see or hear anything. The flawed investigation revealed no physical evidence connecting anyone to the crime. The police never recovered the guns used in the shooting and gathered no useful physical evidence. R. 140, line 1 – R. 141, line 16; R. 142, lines 5-10; R. 241, line 7 – R. 243, line 25. Thus, the state's entire case boiled down to the testimony of two cooperating witnesses – Jamie "Lil' Boosie" Williams and Willie "Boo Boo" Bethea. Williams and Bethea were charged with the same offenses as Appellant and Smith. R. 547 - 555.

Williams claimed that on April 12, 2012, he, Smith, Bethea, and Appellant were riding down Highway 501 when they saw Wilson's white SUV parked behind a trailer. According to Williams, Smith was the driver, Bethea was in the front passenger seat, Appellant was in the back passenger seat, and Williams was in the back seat behind the driver. R. 344, line 7 – R. 347, line 25. Williams claimed the group passed the trailer, then turned around to pass by again. Smith slowed down in front of the trailer. Williams and Appellant then fired shots toward the trailer. R. 349, line 2 – R. 350, line 25. Williams claimed that he sat on the window portion of the car door in order to shoot over the car. R. 351, lines 18-25. He claimed Appellant shot directly toward the trailer from the car's

window. R. 351, lines 1-15. However, Williams' testimony that they turned around would place the car in a different direction and place Williams on the side with the trailer. Williams could not explain this anomaly in his testimony. R. 369, line 17 – R. 370, line 21; R. 371, lines 12-19.

According to Bethea, the group drove directly to the trailer and stopped in front of it. He denied turning around after seeing Wilson's SUV. R. 399, lines 16-21; R. 404, lines 2-8; R. 406, lines 5-13. Bethea claimed Williams and Appellant shot toward the trailer. R. 406, lines 19-21. Weeks after the shooting, Bethea learned the police were looking for him. His mother convinced him to turn himself in to the police. R. 399, line 16 – R. 422, line 9. Bethea told the police "everything that happened." He told the police "the same thing then" that he told the jury during the trial. The prosecutor made this improper bolstering point twice – that Bethea told the police the same story on the day of his arrest that he told the jury. R. 422, line 10 – R. 424, line 12.

On cross-examination, Bethea admitted he had been diagnosed with schizophrenia, but he was not familiar with the term psychosis. In fact, he understood his diagnosis, but stated he did not "really know what it means." However, he had received mental health treatment, including being institutionalized. R. 449, line 13 – R. 450, line 9. When asked if he recalled telling doctors that people were jealous of his lifestyle, he responded, "I don't know what was going on during that time." R. 450, lines 23-25. The state then objected to the line of questioning as irrelevant. R. 451, lines 2 – 3.

During a proffer, it was revealed that Bethea "made statements in the past to two doctors about visual hallucinations when he smokes marijuana." R. 454, lines 2-3; R. 455, lines 3 – 5. Further, "when he went for his psychiatric evaluation in connection with

this case, he told that physician that he smoked marijuana [thirty] minutes before he got arrested." R. 454, lines 8 – 11. The trial judge refused to allow this cross-examination, finding "[i]t doesn't go to his ability to tell the truth." R. 455, lines 18 – 22.

During his closing argument, the prosecutor admitted the investigation was flawed and that the state had presented very little evidence, other than testimony. R. 477, line 7 – R. 480, line 11. According to the prosecutor, the case "boil[ed] down" to Williams and Bethea. He told the jury, "I'll admit to you right now if you don't believe them, the state doesn't have much of a case, but I'm going to tell you they're believable. They're credible. Just as I know that y'all know they were credible." R. 483, lines 8-13. Just a few paragraphs later, the prosecutor again told the jurors that Williams was "telling the truth." R. 485, lines 4-6. And yet again, the prosecutor argued to the jury, "I submit to you, ladies and gentlemen, Jamie [Williams] was telling the truth." R. 486, lines 20-21. In fact, the prosecutor told the jury "I think he told the truth absolutely clear, you know, getting it off his conscience and putting himself there and putting himself in and owning up to what he did." R. 488, lines 18-20. Near the end of his closing, the prosecutor told the jurors they could believe Williams and Bethea:

> So don't get caught up in that smoke. Weigh it. Compare it. All these pieces of the puzzle fit together and you can believe Jamie and you can believe Boo Boo. I'm sure they're hoping - - you know, we've all been told all our lives the truth will set you free. The truth is your friend. You've got to be truthful. And if you're truthful, good things happen to you. You know, no deals have been made. They testified to that. Nothing has been offered, but they know. They're not stupid. They know the best thing they can do is tell the truth and hope for the best, and they told the truth. They told the truth.

R. 493, lines 5-15.[2]

Discussion

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. U.S. Const. Amend. VI. The Confrontation Clause "requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (citing State v. Cooper, 291 S.C. 351, 354, 353 S.E.2d 451, 453 (1987)). Although the Sixth Amendment encompasses various trial rights – notice, compulsory process, the orderly introduction of evidence – the primary interest secured is the right to cross-examination. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (2004), aff'd on other grounds, State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). "The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser." State v. Cheeseboro, 346 S.C. 526, 544, 552 S.E.2d 300, 309 (2001) (emphasis added).

In State v. Turner, 373 S.C. 121, 131, 644 S.E.2d 693, 698 (2007), the South Carolina Supreme Court held a trial court's limitation on the cross examination of a witness was reasonable "[b]ecause the victim was taking her medication at the time of the

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[2] There was no objection to the prosecutor's closing argument. However, the argument runs afoul of state and federal constitutional law prohibiting vouching for a witness' credibility by a prosecutor. A prosecutor's closing argument must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004); see also Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007); Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002); Gilchrist v. State, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002); State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events." Notably, the Court did not hold that a witness's schizophrenia diagnosis and compliance with a medication regimen was never relevant on cross-examination. Instead, the Court relied upon the trial judge's determination that due to the witness's compliance with her medication, "there would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility." Id. at 130, 644 S.E.2d at 698. Further, the Court explained the "gist" of what the defendant sought to elicit was elicited because the judge permitted questioning regarding the witness's use of medication and what happened when the witness did not take her medicine as directed. Id. at 131, 544 S.E.2d at 698.

Although there was no challenge to Bethea's competency as a witness, the rules and case law concerning competency of witnesses provide insight and guidance regarding cross-examination of a witness who suffers from a mental illness as that mental illness bears on the witness's ability to perceive accurately and convey that perception accurately. According to South Carolina's Rules of Evidence, "[e]very person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(a), SCRE. Thus, there is a presumption of competency. The policy supporting such a presumption is the function of cross examination so that bias, prejudice or other defects in a witness's testimony, and as a result, the witness's credibility, will be revealed and weighed by the jury. State v. Needs, 333 S.C. 134, 142, 508 S.E.2d 857, 861 (1998). "The purpose of Rule 601(b) is to provide a minimum standard for the competency of a witness." Needs, 333 S.C. at 143, 508 S.E.2d at 861.

Although there is a presumption of competency, the Rules also provide "[a] person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury ..., or (2) the proposed witness is incapable of understand the duty of a witness to tell the truth." Rule 601(b), SCRE. The Court adopted a four-part test to test for competency: "in order to be competent to testify a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." Id. (citing Commonwealth v. Goldblum, 447 A.2d 234, 239 (Pa. 1982)); see also TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 627-628, 503 S.E.2d 471, 480 (1998) (holding that "[a] witness has to be capable of expressing himself and has to understand the obligation to tell the truth to be qualified to testify"). Questions of competency require a careful examination of the witness, including age, capacity, and moral and legal accountability. State v. Pitts, 256 S.C. 420, 430, 182 S.E.2d 738, 743 (1971).

A witness's struggle with mental illness requires an examination for competency. The South Carolina Supreme Court has held "[a] witness's mental illness is not enough to rebut the presumption" of competency. Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005). However, the Court affirmed a finding of incompetence of a witness where the witness's psychiatrist testified she did not believe the witness "would be a reliable witness because he suffering from major depression and the stress of testifying would render him unable to speak." The psychiatrist said the witness could not speak in stressful situations and would say anything to get out of the stressful situation. TNS Mills, Inc., 331 S.C. at 480, 503 S.E.2d at 628.

Although the Court decided Abbott v. Columbia Mills Co., 110 S.C. 298, 96 S.E. 556 (1918) before the promulgation of the Rules of Evidence, the principles announced remain good law and provide guidance for the instant matter. The Court held the fact that a witness "had been adjudged a lunatic" did not incapacitate her as a witness. Id. at 298, 96 S.E. at 556. However, if at the time of the examination, the witness is "so under the influence of his malady as to be deprived of that share of understanding which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong," then the witness is not competent to testify. Id. (internal citations omitted). The Court explained the question is whether the witness can "distinguish between right and wrong, to appreciate the nature and obligation of an oath, to remember events correctly, and to answer questions intelligently." Id. (internal citations omitted).

Although having a mental illness is not enough to rebut the presumption of competency, the type of mental illness and its manifestations may disqualify a witness if the mental illness affects the ability of the witness to perceive the event with a substantial degree of accuracy or affects the person's ability to recall and/or communicate those perceptions during testimony. Similarly, here, Appellant had the right to cross-examine Bethea on his use of drugs prior to giving a statement to police and the effect of those drugs on his brain in light of his mental illness. Unlike the witness in Turner, there was no evidence that Bethea was complying with a medicine regimen to control his schizophrenia; in fact, the evidence was that Bethea engaged in criminal conduct that caused his delusions – smoking marijuana. Also, unlike the witness in Turner, there was evidence that Bethea's delusions were relevant to his ability to truthfully recall the events because his statement to law enforcement, which were given closer in time to the

criminal acts and on which Bethea and the prosecution relied, were tainted by Bethea's use of marijuana and his consequent delusions. The prosecution's entire case depended upon whether the jury believed Bethea and Williams as the prosecutor freely admitted in his closing and evidenced by the prosecutor's improper vouching. Williams' testimony was susceptible to impeachment because he gave multiple conflicting statements to police and his trial testimony was internally inconsistent based upon his claim that the car was turned in the opposite direction when the shooting occurred. However, Bethea's statement and testimony were identical; thus, his testimony was not subject to impeachment based on inconsistencies.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

November 18, 2015

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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 Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2015.

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