ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY R. DARGAN,

APPELLANT

APPELLATE CASE NO. 2014-000851

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to sever appellant's murder trial from co-defendant Helton's accessory before the fact of murder trial, since defense counsel correctly argued the co-defendant would blame him for the crime to exonerate herself, and appellant would "essentially" be prosecuted by both the solicitor and counsel for Helton?

STATEMENT OF THE CASE

Appellant was indicted at the February 7, 2013 term of the Sumter County Grand Jury for the offenses of murder and possession of a weapon during the commission of a violent crime. His co-defendant, Shonta Helton, was indicted for accessory before the fact murder in the same crime. R. 725-726. Their cases were called to trial on April 14, 2014 before the Honorable W. Jeffery Young and a jury. John P. Meadors was the assistant solicitor. Timothy W. Murphy represented appellant Gary Dargan. Shaun Kent represented co-defendant Shonta Helton. R. 1.

On April 17, 2014 the jury found both appellant and Helton guilty on each count. R. 705, ll.1-14. Judge Young sentenced appellant to life imprisonment for murder and five years concurrent for possession of a weapon during a violent crime. Judge Young sentenced co-defendant Helton to thirty-five imprisonment. R. 722, l. 20–723 l. 15.

This appeal follows.

ARGUMENT

The court erred by refusing to sever appellant's murder trial from co-defendant Helton's accessory before the fact of murder trial since defense counsel correctly argued the co-defendant would blame him for the crime to exonerate herself, and appellant would "essentially" be prosecuted by both the solicitor and counsel for Helton.

Severance motion

Prior to trial, defense counsel Murphy moved to sever appellant's case from that of appellant's former girlfriend, co-defendant Shonta Helton. Defense counsel argued that Appellant Dargan and co-defendant Helton were adverse to each other. Defense counsel correctly predicted that the co-defendant would "point the finger" at appellant as part of his defense strategy. Counsel argued: "My client is left in a position where he is in effect facing **two prosecutors**. [Solicitor John Meadors and Shaun Kent, counsel for co-defendant Helton]. I have looked at the case law. And I would submit to the court that the case law supports our position. And it is also our position that **an instruction cannot cure** this fundamental distinction between the two. So I respectfully make this motion." R. 24, l. 12– 5, l 7. (emphasis added). Counsel Kent took no position on the motion for the co-defendant. R. 25, ll. 8-11.

Assistant Solicitor Meadors argued that inconsistent defenses were an insufficient reason to sever the trials. Meadors claimed the facts were "inextricably intertwined" as to both defendants and he argued the state was entitled for "a fair representation to present both." R. 25, ll.14-21. The judge denied the severance motion. Counsel Kent then said for strategic reasons co-defendant Helton did not want a severed trial. R. 25, l. 22–26, l. 5.

Trial testimony

Tajuana Davis had been in the military, and she had traveled the world before she settled in Sumter with her three children. R. 94, l. 9–97, l. 25. She had known Shonta Helton for about a year. R. 99, ll. 24-25. On December 8, 2012, Davis went to a party at the home of Betty Welch. The decedent, Mario Scott, a short man about 5'5" and 135 lbs. was living with Betty at the time. Helton was also at the party. R. 100, l. 4–101, l. 20.

There was evidence of hard drinking at the party, and it was undisputed that Helton was intoxicated. The decedent stayed inside his own room during the party until it became very loud, and he feared police involvement. R. 102, l. 1–103, l. 10.

At some point during the party the women began discussing "what a lady is and a lady isn't." R. 103, ll. 17-22. Davis remembered when Helton said she was a "lady" that her friend Danielle told Helton: "You're everything but a lady." An argument then ensued, and it escalated. The argument got loud and "that's when Mario came from the back room." Mario and Helton apparently shoved each other, which resulted in Helton's wig being knocked sideways on her head. Davis remembered everybody "laughed a little bit about it and Helton became very angry." Betty asked Mario to go home to his mother's house at that point, and Mario started walking down the road towards his mother's house. R. 104, l. 2– 10, l. 19.

Davis testified: "And that's when Shonta, she got on the phone, and, you know, I heard her say, 'Gary, this N put his hands on me. Come over here and kill this N. I'm at Betty's house.' And that's when she started walking down the street behind him." [Mario]." R. 108, l. 13-110, l. 19.

After the party ended because of this altercation, many of the women relocated to the Club Miami across from Shaw Air Force Base. Davis drove her own car, and some of the other women rode together to the club. Helton was not included in the group at this time, and she was last seen walking behind Mario. R. 113, l.11–115, l. 8.

Davis testified they were at the club for fifteen to twenty minutes when Helton arrived alone. Davis recalled that Helton appeared happy at this point, and Helton went "down to the other end of the bar." R. 116, l.25–117, l. 22. A little later appellant also came to the club. Appellant and Helton were seen sitting together at one point. R. 118, l. 22–119, l. 7.

Davis left the club shortly before it closed at about four a.m. Davis remembered that both appellant and Helton were still there when she left. R. 119, l. 13–120, l. 19.

Davis drove Betty Welch home but they noticed there were two or three police cars outside her house, and one unmarked police SUV when they got close. Betty did not want to stop so they continued to Davis' house. R. 120, l. 8–123, l. 14.

Betty Welch remembered that after the altercation over the wig that Helton grabbed a knife from inside Welch's house, and went down the street after Mario. R. 164, l. 3–167, l. 17. When they arrived at the Club Miami her cell phone rang. Welch said Appellant Dargan told her that her boyfriend Mario "was hurt; shot up bad, and I needed to check on him. And we were getting out of the truck, and I just brushed it off." Welch said she did not take the phone call seriously "because I thought he already made it home to his mother's house by that time." R. 172, l. 5-18.

On cross-examination by defense counsel Murphy, Welch said she was aware appellant was a drug dealer. However, appellant and the decedent did not have any "beef

with each other." Welch had never heard Mario say anything bad about appellant, or appellant say anything bad about Mario. R. 182, l. 11–183, l. 6.

Welch said she remembered the intoxicated angry Helton had called appellant after the "wig incident," and said, "Gary come get him . . . come get this motherfucker, he put his hands on me." R. 189, ll. 5-18.

Danielle Morgan Govan also remembered the party at Betty Welch's house on December 8, 2012. The decedent stayed in the back room during much of the party before co-defendant Helton got loud, and the incident with her wig occurred. R. 201, l. 1 – 211, l. 10. Govan remembered that Welch asked the decedent to leave to "defuse the situation." R. 211, ll. 5-16.

Govan testified that Helton was talking on her phone, and telling someone she had been "disrespected . . . somebody hit me, I have been disrespected." R. 212, ll. 2-9.

Govan recalled that the decedent left as requested and he walked down the street. Helton was following the decedent as Govan left Welch's house in her own car. Govan saw the decedent Mario walking near the railroad tracks with "Shonta a little further behind him making her way up the street. He was ahead of her." R. 212, l. 8–213, l. 22.

Kenyardo Bolden was also at the party that night. She also remembered Helton becoming angry over the wig incident, and "grabbing a knife." Helton came "running down the stairs on her cell phone saying 'this N hit me' or whatever." She then saw Helton following the decedent Mario down the street. R. 231, ll. 2-24.

Bolden remembered going to the Club Miami with some of the other women. She recalled receiving a call on her cell phone, and giving Betty Welch the message to "check on your boyfriend he's [been] shot up on Dingle Street." R. 233, ll. 6-22.

Bolden left the club earlier than the others because she "was tired of all the arguing that evening," and she went home. Betty Welch called her the next morning, and told her "Mario was found dead." R. 235, l. 21–236, l. 4.

Robert Bernard Mellette was a key witness in this case. Robert knew appellant, and he saw him two or three times a week. They would call each other often. Robert also knew Mario and co-defendant Helton. R. 266, l. 2–267, l. 17.

On December 8, 2012 at about 11:45 p.m. appellant telephoned Robert, who was asleep at the time. Appellant said, "Man, get up right now. Get up right now. I need you to come on the west side. I need you to come on the west side." Robert obliged and as he was driving toward the west side of town, appellant called him again. Robert thought he was going to pick up appellant but instead appellant instructed him to "go to El Cheapo. I need you to pick Shonta up. He said she was over there arguing with some guys on the west side." R. 268, l. 11–269, l. 14.

When Robert arrived at the El Cheapo convenience store Helton was not there. He called appellant and informed him of that fact. Appellant called Robert back and told him he would get in touch with Helton. Helton then called Robert and "she told me that she was on Dingle Street. So I rode on Dingle Street to pick her up." R. 270, l. 1–271, l. 24.

When he was riding down Dingle Street, Robert saw Helton and the decedent Mario arguing on the side of the street. R. 272, ll. 3-15. Robert screamed out the window and told Shonta to "come on." Mario saw him and he "threw up my hands like that, man, like, don't follow her." Robert said Helton got in his car, and he drove away -- "Mario kept on walking." R. 272, ll. 16-23.

As Robert was driving with Helton he telephoned appellant, and was instructed to bring Helton to Lincoln Street where he was "running a card game." Helton was very drunk "and wild and stuff screaming. Screaming." R. 274, ll. 5-14.

Robert testified as he was making a right turn at the railroad tracks, "a van came flying by me, with some writing on the side of the van. But it was a dark van with some writing on the side on the van." R. 276, ll. 5-25. The van was traveling at a very high speed. R. 277, ll. 1-11.

When Robert got to Lincoln Street to drop off Helton, he saw appellant get out of a van. Robert said he could not say it was the same van that passed him on the railroad tracks. Helton was screaming at appellant: "You let that dude slap me, and you ain't did nothing.' Stuff like that." "She said you let that N slap me and you ain't did nothing." Appellant gave Robert five dollars and told him to take Helton home. Robert called appellant on the way to take Helton house, and told him "she wasn't going home. She was going to her friend Danielle's house." R. 279, l. 8–281, l. 7.

Robert testified, *without objection*, that he got a phone call telling him that Mario "got killed that night." And stating that "Gary [appellant] did that." R. 283, ll. 2-16.

The essence of Robert's testimony then became his assertions that appellant asked him to lie for him. "He [appellant] said they had picked Shonta up for questioning. And he told me that I should say I didn't pick her up on Dingle Street." R. 283, l. 17–284, l. 12.

Robert claimed he told appellant he was going to tell the police the truth because "the only thing I did was pick her up and give her a ride [and] I saw her with Mario." R. 284, l. 5–285, l. 13. On cross-examination by defense counsel, Robert said he knew that

appellant was a drug dealer and he used different cars and vehicles to sell drugs. R. 294, l. 6–295, l. 6.

Robert did not know who owned a van similar to the one had seen appellant in that evening, because, he said, that was the first time he had ever seen appellant in the van. R. 294, l. 2–296, l. 8.

Clifton Roberts testified he regularly bought crack cocaine from appellant. Roberts worked for Wilson Medical Transport in Lake City and he testified he let appellant borrow his "2000 Chrysler Van with Wilson Medical Transport on the side of it on December 8, 2012 in return for some drugs." R. 314, l. 4–318, l. 7. Roberts testified he was asleep when appellant returned the van at about 3 or 4 o'clock in the morning. R. 318, ll. 6–10.

Russell Brannon was an off-duty Sumter police officer on the night of December 8, 2012. He worked from about 10 p.m. until 6 a.m. that morning guarding the Nativity scene at the Trinity Methodist Church on Liberty Street. R. 326, ll. 1–17.

Brannon was sitting in his car reading a book in the parking lot when he heard seven to nine gunshots. R. 326, l. 23–328, l. 3. He drove his vehicle in the direction of the shots and he remembered "dispatch started giving out a call for shots fired." Brannon saw the decedent's body laying face down on Dingle Street near Wright Street. He checked the decedent's body for a pulse but there was no pulse. R. 328, l. 13–332, l. 12. Although the murder weapon was never found, Brannon said from his experience the gunshot sounded like only one weapon was involved. R. 332, l. 16–332, l. 3. .45 caliber shell casings were found at the Dingle and Wright murder scene. R. 340, l. 10–343, l. 15.

The pathologist testified the decedent had been shot twice. He was shot once in the left chest which was the fatal wound and once in the foot. The decedent was 5'5" 135 lbs. R. 392, l. 2–399, l. 1.

Letters from jail.

Debbie Prince knew appellant as a friend for about a month. She remembered appellant called her on December 9, 2012 at about 12:16 a.m. and asked her to pick him up on Lincoln Street. R. 366, l. 16–368, l. 19. Prince testified appellant was waiting outside for her on Lincoln Street and she asked him, "What was wrong. And he said he had received a phone call from his nephew stating that his sister was in a bad car accident." R. 368, l. 20–369, l. 3. Prince said she allowed appellant to borrow her car after he dropped her off at home. R. 369, l. 7–371, l. 21.

Prince identified a letter appellant sent her on January 17, 2014. Defense counsel had objected to publication of these letters on the grounds that they were not relevant, and on the grounds that they were unduly prejudicial. Defense counsel also argued the extreme racially-charged wording of the letters appellant sent to his friends from jail was another reason for their exclusion or redaction. In this letter appellant said the state was trying to make him look bad. Appellant specifically addressed certain parts of Prince's statements to the police and asked her to change them. R. 377, l. 17–383, l. 8. Appellant asked Prince to keep his letters in a safe place. R. 383, l. 9–384, l. 19.

Marcus Mellette, a brother of Robert Bernard Mellette, testified he met the decedent Mario when they were in jail together serving youthful offender act sentences. R. 402, l. 12–403, l. 19. Marcus had known appellant for about 20 years. Marcus was in jail with appellant after appellant was arrested for this murder. "We had several

conversations." Marcus said appellant asked him what the street was saying. I said "the street said you shouldn't have done it." Marcus said he told appellant that the decedent was a very small man that could easily have been handled. Marcus claimed appellant responded, "I knew I was going to kill the N." R. 405, l. 21–409, l. 5.

Marcus identified a letter appellant sent him on December 2, 2013. Appellant complained in this letter that people were lying about him. Appellant also complained that people needed to be careful with the letters he was sending from jail. R. 435, l. 8–439, l. 10.

On cross-examination by Counsel Murphy, Marcus curtly responded that appellant was writing his letter in "code," and "he wanted my brother to come in there and lie for him . . . The letters were for me to try and get my brother to change his story." R. 476, 1. 2–478, l. 3.

On cross-examination by Counsel for co-defendant. Marcus claimed appellant said, "I already knew I was going to kill him." While questioned by Kent, Marcus elaborated at length: "It's pretty clear Gary was trying to get everybody to change his story . . . trying to save his tail . . . Trying to get everybody to do whatever he wants. He was trying to be a master manipulator it sounds like . . . he was trying to -- I think at one point he called you coach . . . he wanted you out there coaching people to say what he wanted them to say." R. 480, l. 2–483, l. 6.

Reco Ham was in federal prison at the time he testified at appellant's trial. Ham testified that on December 8, 2012 appellant left the poker game he was running on Lincoln Street. The person "running" the card game got a "cut of the pot," and appellant allowed Ham to run the poker game until he returned about three a.m. Ham then gave

appellant a "cut of the pot," Ham claimed when appellant returned to Lincoln Street he told him that he thought "he killed somebody." R. 492, l. 14–494, l. 3.

Ham maintained appellant called him the next day "and asked me for some money so he can go on the run." Ham said he told appellant he would assist him but appellant never came for the money. R. 493, l. 15–494, l. 16. Ham identified a letter appellant sent him on December 16, 2013. In this letter appellant talked of his fears of people lying about him, and the police tricking people. R. 495, l. 19–498, l. 25.

Closing argument

In his closing argument, defense counsel Murphy said the state had demonstrated that appellant "is incredible. That's the understatement of the year. I mean, they've clearly demonstrated beyond a reasonable doubt Mr. Dargan is a liar. And they've demonstrated beyond a reasonable doubt that he attempted to fabricate an alibi defense." R. 656, l. 16–657, l. 17.

Counsel Murphy told the jury that appellant was "a drug dealer . . . and a product of the streets. He is not a nice guy." Murphy stressed that was not the jury's concern, and he said when the state's evidence when examined "soberly and dispassionately it did not show the state has proved appellant's guilt beyond a reasonable doubt." R. 656, l. 12 –670, l. 11.

Discussion

Appellant recognizes that severance is not automatically available as a matter of right. State v. Dennis 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). Appellant also understands he must show prejudice from the denial of his motion to sever based upon antagonistic defenses, and the fact that Counsel Kent for co-defendant Helton acted as a

second prosecutor against him. See State v. Holland, 261 S.C. 488 201 S.E.2d 118 (1973). Appellant can show that prejudice.

As seen above, defense counsel Murphy correctly predicted in his pre-trial motion that co-counsel Kent would act in effect as a second prosecutor against appellant along with assistant solicitor Meadors. It is widely known that Kent is an extraordinarily gifted trial lawyer. This highly unusual situation made it impossible for appellant to obtain a fair trial. Had appellant been tried separately without counsel Kent acting as a de facto prosecutor, there is a reasonable opportunity to result of appellant's trial would have been different. See People v. Greenberger, 58 Cal. App. 4th 298, 68 Cal. Rptr 2d. 61, 86 (1997).

Appellant's severance motion was not simply grounded in the fact that his co-defendant would present an antagonistic defense. Rather, it was grounded in the reality that both the state's case and the co-defendant's case would be a vicious attack on him.

Appellant is simply not aware of another joint trial where neither defendant testified, and the codefendant's statements came in against the defendant, which clearly implicated appellant. Further, Kent then effectively used his client's statement against appellant, as did the solicitor conjunction with the state.

Helton told Detective Kelly that decedent Mario pushed her while she was at Betty Welch's house on December 8, 2012. Co-defendant Helton testified *she called appellant* and told him what happened. Appellant, according to Helton, initially refused to come but then told her he was sending *Robert Bernard Mellette to pick her up*. R. 520, l. 8–524, l. 8.

Although Helton denied her own guilt, she corroborated the state's case-in-chief by admitting her phone conversations with appellant on the night the decedent was killed R. 524, l. 9–526, l. 12.

The judge abused his discretion by refusing to sever appellant's case where defense counsel correctly argued to him the prejudice which would occur if the judge allowed appellant to be tried with Helton. Appellant was subject to attacks from, in essence, two prosecutors, and his co-defendant's statement was used against him without an opportunity to confront and cross-examine her. See State v. Nelson 273 S.C. 380, 256 S.E.2d 620 (1978).

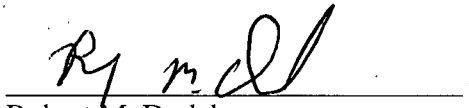
It was an abuse of discretion of the trial judge to place the state's convenience in a joint trial ahead of, what is apparent from this record, appellant's right to a fair trial. See State v. Crowe, 258 S.C. 258, 188 S.E. 2d 379 (1972). Helton's prejudicial statement coming into evidence to corroborate the state's theory of this case simply would not have occurred if appellant had been tried separately, State v. Bellamy, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987),[1] and the state would not have had the advantage of two skilled prosecutors – one for the state and one de facto for his co-defendant -- taking turns against him. Appellant should be granted a new trial.

[1] *Overruled on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

By reason of the forgoing arguments, appellant's convictions should be reversed, and this case remanded to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY R. DARGAN,

APPELLANT

APPELLATE CASE NO. 2014-000851

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gary R. Dargan states:

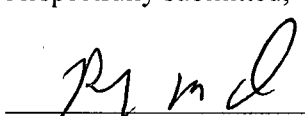
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on April 14-17, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Gary R. Dargan.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of July, 2015.

STATE OF SOUTH CAROLINA

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THE STATE,

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GARY R. DARGAN,

APPELLANT

APPELLATE CASE NO. 2014-000851

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Entire trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 24, 2015

Robert M. Dudek
Chief Appellate Defender

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PO Box 11589
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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.".

July 24, 2022

Robert M. Dudek
Appellate Defender

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APPELLATE CASE NO. 2014-000851

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter 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; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Gary R. Dargan, #247773 at Broad River Correctional Institution, this 24th day of July, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.