THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM KERSHAW COUNTY

DEANDREA G. BENJAMIN, Circuit Court Judge

Case no. 2014-002652

The State of South Carolina..... Respondent

v.

Willie Thomas Starnes.....Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting hearsay statements of the victim pursuant to the excited utterance exception to the hearsay rule?
2. Did the trial court err in admitting hearsay statements of the victim pursuant to the dying declaration exception to the hearsay rule?

STATEMENT OF THE CASE

Willie T. Starnes, the Appellant ("Starnes"), was indicted for murder in violation of S.C. Code Ann. § 16-3-10 and armed robbery in violation of S.C. Code Ann. § 16-11-330 (a) for an incident that occurred on August 24, 2013 in Kershaw County.

The case was tried from August 25, 2014 through August 28, 2014 before a jury. Following deliberations, the jury returned guilty verdicts on both indictments.

This appeal follows.

STATEMENT OF FACTS

At trial, the State offered several witnesses. The first two witnesses called were relatives of the alleged victim, Alan Robinson ("Robinson.") Both of these witnesses testified to statements purportedly made by the victim to them after the incident that led to the charges against Starnes.

First, William L. Pate testified that he and his wife were leaving their home at about 5:30 PM to attend an auction. As they did so, they noticed something lying on the side of the road, and as they approached, they discovered it was Mr. Pate's uncle, Robinson. (R. p. 31 lines 5-15).

Mr. Pate further testified that as he approached Robinson, Robinson was excited and agitated. (R. p. 34 lines 20-21). Further, he testified that he was excited and agitated because of something that recently happened, stating that "[w]hat he [Robinson] told me was, he said, They hit my Moped. Somebody got out and knocked me off my Moped, hit me in the face. But why did they have to go down and turn around and come back and run over me?" (R. p. 37 lines 14-19).

Mr. Pate goes on to testify that Robinson identified the vehicle that hit him and that it looked like a blue Suburban, like" Scott's van." Scott was identified by Mr. Pate as Mr. Pate's neighbor, who drives a Tahoe. (R. p. 39 lines 18-25).

The solicitor and Mr. Pate go on to have the following exchange:

"Q Okay. During that 25 minutes while you were waiting on the ambulance -- you testified earlier that he had been crying and he had been calling out for help -- did he continue to do that?

A Yes, sir.

Q Did he continue to seem to be, you know, in an upset and agitated state?

A Yes, sir.

Q While waiting on EMS? All right. So he never really calmed down while you were waiting on EMS?

A. **The only time I could say he calmed down at all was when he asked me why they turned around and run over him.** (emphasis added)." (R. p. 49 lines 14-25).

Despite timely objection from defense counsel (R. p. 50 lines 9-11), these statements made by Robinson to Mr. Pate were admitted as evidence by the Court.

The next witness to testify was Martha Pate, William Pate's wife. (R. p.57). She testified that she and her husband left their home at about 5:15 p.m. to attend an auction, and as they were driving, discovered Robinson lying in the road. (R. p. 57 lines 18-23). As Ms. Pate and her husband approached Robinson, she testified that Robinson said, "I'm in pain! Help me!" (R. p. 58 lines 8). The Pates questioned Robinson about what happened, and Robinson told them that he had been hit by a van and that they took his moped. (R. p. 61 lines 23-24). Ms. Pate testified further that the van that hit him was the color of Scott's, a neighbor of hers that drives a blue SUV. (R. p. 62 lines. 2-4). She went on to testify Robinson told her that "[t]hey went down to Camp Road and he said [t]hey turned around and was coming back up Freeman Road towards him. And when they got close to him, they sped up and hit him with the vehicle." (R. p. 62 lines15-19).

Despite timely objection from defense counsel (R. p. 61 lines 9-10), these statements made by Robinson to Ms. Pate were admitted as evidence by the Court.

ARGUMENT

1. **The trial court should not have admitted the hearsay statements made by Mr. Pate pursuant to the excited utterance exception.**

The trial court should have sustained defense counsel's objection to the hearsay statements made by Mr. Pate as these statements do not fall within the excited utterance exception to the hearsay rule and should not have admitted those statements into evidence. This Court should reverse that ruling and remand this matter for a new trial.

"Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

'"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE.

It was not disputed at trial that the statements made by Mr. Pate and Ms. Pate concerning what Robinson told them happened to him were hearsay statements. Rather, the solicitor argued, and the trial court agreed, that these statements fell within the excited utterance exception to the hearsay rule.

The excited utterance exception is found in Rule 803 (2), SCRE: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

"There are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the

stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.' State v. Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, supra." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691, (2007).

In order for statements to be admitted as an excited utterance, the proponent of the statement must lay the proper foundation that the declarant was under the stress of excitement caused by the event or condition. *See State v. Davis*, 371 S.C. 170, 180, 638 S.E.2d 57, 63, (S.C. 2006) citing 31A C.J.S. Evidence § 359 (1996) ("the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.")

In the instant case, the trial court should not have admitted Mr. Pate's statement that Robinson told him that the defendant had turned his vehicle around and came back and ran over him. Mr. Pate testified that Robinson was *not* under the stress of excitement at the time he made that particular statement. In fact, Mr. Pate testified that he had calmed down at the time he made that statement: "The only time I could say he calmed down at all was when he asked me why they turned around and run over him." (R. p. 49 lines 14-25). Because Robinson was not under the stress of excitement at the time he made that statement to Mr. Pate, it does not fall within the excited utterance exception, and this statement should not have been admitted into evidence.

It is important to note that the trial court did not admit the statements made by Robinson to Mr. Pate as a dying declaration, and only as an excited utterance. (R. p. 36 lines 5-7).

2. **The trial court should not have admitted the hearsay statements made by Ms. Pate pursuant to the dying declaration exception or the excited utterance exception.**

The trial court should have sustained defense counsel's objection to the hearsay statements made by Ms. Pate as these statements do not fall within the dying declaration exception to the hearsay rule or the excited utterance exception to the hearsay rule and should not have admitted those statements into evidence. This Court should reverse that ruling and remand this matter for a new trial.

As to the dying declaration exception, the Court should not have admitted Ms. Pate's statements as to what Mr. Robinson told her as a dying declaration because there was no evidence that Robinson believed he his death was imminent. Our Rules of Evidence specifically require that the declarant believe that his death is imminent in order for a statement to fall under the dying declaration exception: " In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Rule 804 (2), SCRE.

It is undisputed that the case at bar is one for the prosecution for a homicide, as one of the two charges Starnes faced was for murder. The defendant also concedes that the third prong of SCRE 804 (2) is satisfied inasmuch as Ms. Pate's testimony as to what

Robinson told her concerned what Robinson alleged to be the cause and the circumstances surrounding his later death.

However, there is no testimony from Ms. Pate that Robinson believed that his death was imminent, or even that he thought he was dying. Her testimony was that Robinson was hurt, but there is no mention that he thought he would die, and would die imminently. Accordingly, a proper foundation for Robinson's statements to Ms. Pate was not laid, and the statements should not have been admitted as a dying declaration.

The case of *State v. McHoney*, 344 S.C. 85, 90, 544 S.E.2d 30, 32, (2001) is illustrative of when a proper foundation of a dying declaration has been made. In *McHoney,* the victim had her throat cut and was not able to speak. *Id* at 90. However, she was conscious and able to communicate with medical staff by nodding. *Id.* A nurse recited the alphabet and asked the victim to nod her head when she reached the attacker's initials, and in this way the victim's attacker was identified. *Id.*

Additionally, the nurse told the victim she was going to a hospital where she would get the best care and assured the victim she would be fine. In response to the nurse's statement, "**the victim looked at her, shook her head no, and closed her eyes**. The victim lost consciousness before the flight, and she died two weeks later without regaining consciousness." (emphasis added) *Id.*

The *McHoney* victim clearly demonstrated that she did not believe she would be fine, and from that testimony the court could infer that she believed her death was imminent. In the instant case, there is no such testimony from Ms. Pate. Certainly, she testified that Robinson was hurt and in pain. He was crying out for help. But there is no

testimony that he thought his death was imminent. Accordingly, the statement should not have been admitted as a dying declaration.

Likewise, the statements made by Robinson to Ms. Pate should not have been admitted as an excited utterance. The State failed to establish a proper foundation that Robinson remained in an excited or agitated state for the duration of his conversation with Ms. Pate. The Appellant concedes that Robinson was in an excited state when the Pates discovered him on the road, but there is no testimony from Ms. Pate to establish that he *remained* excited and agitated throughout the entirety of the conversation. In fact, the only testimony presented on this issue is from Mr. Pate, and his testimony was that Robinson had calmed down when he told the Pates that he had been run over.

In order for Ms. Pate's statement that the driver of the vehicle that hit Robinson turned around, sped up and hit Robinson while he laid on the road to be properly admitted as an excited utterance, the State needed to first prove that Robinson was in an excited state when that statement was made. This was not done, and these statements should not have been admitted.

CONCLUSION

For the reasons stated this Court should reverse Starnes' conviction for murder and armed robbery and remand this case for a new trial.

Respectfully submitted,

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Case no. 2014-002652

The State of South Carolina..... Respondent

v.

Willie Thomas Starnes.....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 Sherrie Butterbaugh, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of April, 2016.

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2015-001065

THE STATE,

RESPONDENT,

V.

RONNIE MARTIN,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Alan Wilson, Esquire, Attorney General, and V. Henry Gunter, Jr., Esquire, Assistant Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of April, 2016.

Cruise Mitchell
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 20th day of April, 2016.

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