

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

RECEIVED

JAN 18 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

CHRISTOPHER JERMAINE WELLS,

APPELLANT

APPELLATE CASE NO 2016-000950

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that Appellant's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Appellant stood trial?

STATEMENT OF THE CASE

On April 10, 2015, the Laurens County Grand Jury indicted Appellant Wells for armed robbery, criminal conspiracy and possession of a weapon during the commission of a violent crime, indictments #2015-GS-30-503, 504, 505. On July 24, 2015, the Laurens County Grand Jury indicted Appellant for murder, indictment #2015-GS-30-1162. On April 25, 2016, Appellant proceeded to jury trial on all indictments before the Honorable Frank R. Addy, Jr. Rodney Richey represented Appellant at trial. Warren Mowry and Ruston Neely prosecuted the case. The jury found Appellant not guilty of murder but guilty of armed robbery, conspiracy and the weapon charge. Judge Addy sentenced Appellant to life in prison without the possibility of parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on May 2, 2016. This appeal follows.

ARGUMENT

The trial judge erred in finding that Appellant's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Appellant stood trial.

On October 31, 2013, officers with the Laurens County Sheriff's Department answered a 911 call in reference to shots fired on River Hill Road in Enoree. When the officers arrived at the scene they found David Lee Walker outside of the trailer and Johnny Lee Cheeks inside of his trailer. Both men had been shot. (Tr. pp. 168-174). Investigator Marty Crain testified that Cheeks told him that Walker shot him. (Tr. p. 182, lines 7-16). According to Investigator Bryant Cheek, Walker stated that he had been attacked by two guys he did not know. (Tr. p. 284, lines 5-20). Cheeks later died as a result of blood loss from a gunshot wound to the abdomen. (Tr. p. 271, lines 2-4). Walker survived.

Kelly Ball testified that sometime between 10:30 PM and 11:00 PM on the night of October 31, 2013, she was with Cheeks inside of his trailer when someone knocked on the door. (Tr. pp. 126-127). Ball testified that Cheeks sold drugs and liquor from his trailer. (Tr. p. 122, lines 1-11). Cheeks answered the door and went outside when Ball heard a verbal altercation and then gunshots. (Tr. p. 127, line 9 – p. 128, 129, lines 1-6). Ball called 911 and then went outside to check on Cheeks. (Tr. p. 130, lines 6-10). Ball found Cheeks lying on the ground and noticed another person on the ground by Cheeks' Suburban SUV. (Tr. p. 131, lines 22-25). At trial she identified that person as Walker. (Tr. p. 132, lines 1-9). Ball claimed to have seen another individual standing in the driveway that night. (Tr. p. 132, lines 12 – 25). She told police that the person in the driveway resembled Ty, a large, dark skinned black male. (Tr. p. 300, lines 7-11). Ball, however, identified the individual as Appellant. (Tr. p. 133, lines 13-21).

Investigator Cheek admitted that Appellant was not dark skinned. (Tr. p. 300, line 20- p. 301, lines 1-5). Appellant's complexion on the Department of Corrections website is noted as medium brown.

Ball claimed that when she pulled Cheeks inside the trailer after the shooting that he handed her his gun from his holster and she put the gun under the mattress. (Tr. p. 140, lines 19 – p. 141, lines 1-3; p. 148, line 5 – p. 149, lines 1-16). The gun found inside the trailer under the mattress was a revolver with two live rounds and two spent rounds. (Tr. p. 207, lines 1-24). A Lorcin 380 semi-automatic handgun was found outside in the yard. (Tr. p. 204, lines 3 – p. 205, lines 1-4). Officers additionally found three 380 shell casing in the yard and a slug inside the trailer. (Tr. p. 205, lines 6-25). The firearms examiner from the South Carolina Law Enforcement Division [SLED] testified that the casings came from the same gun but he could not conclusively say that the casings were fired by the 380 found in the yard. (Tr. p. 258, lines 9 – p. 259, lines 1-10). The examiner was, however, able to testify that the slug found inside the trailer was fired by the 380 found in the yard.

Ball testified that the individual she saw in the driveway turned, ran up the hill and got into the back passenger seat of a brown older model box style car and left. (Tr. p. 133, line 23 – p. 134, 135, lines 1-25). Despite Balls' description of the car as brown, Officer Ashley with the Laurens City Police Department claimed that he received information that an older model dark blue car had been involved in a shooting. (Tr. p. 213, lines 7-14). Based on the blue car description, Officer Ashley followed a blue car and eventually found it parked at Appellant girlfriend's house. (Tr. p. 218, line 2 – p. 219, lines 1-6). Appellant consented to a search of his vehicle and nothing of evidentiary value was found. (Tr. p. 219, lines 11-21).

Toris Moore testified that she saw her uncle, co-defendant David Walker, Appellant and Johnny Lee Saxon together on Halloween night. (Tr. p. 108, line 20 – p. 109, 110, lines 1-5). According to Moore, Walker told her they needed another gun because they were going to rob an old man who stayed with a white lady and sold liquor and drugs from his house. (Tr. p. 110, lines 6- 24).

At the start of the case the judge stated:

I also indicated in chambers the State had hoped to get into the fact that the co-defendant had already been convicted and I just explained in chambers that we just need to stay away from that. Obviously, it's standard provision of law that every – the evidence against each defendant must stand on its own. And the fact that a co-defendant has previously been found guilty of murder in this case, obviously, is not evidence that the gentleman did anything wrong. That's simply proof that somebody else in front of a different jury was found guilty of the offense of murder. Obviously, the prejudicial effect to Mr. Wells [Appellant] would outweigh any probative value of allowing the prior conviction.

(Tr. p. 74, line 23 – p. 75, lines 1-10).

After Appellant's cross examination of Investigator Cheek, the State, outside the presence of the jury, stated:

Your Honor, at this point, since Mr. Richey is casting speculation on other people that might have done the shooting, I think it would be appropriate for the jury to know that 12 jurors in Laurens County have found David Walker guilty beyond a reasonable doubt of murder of Johnny Lee Cheeks. And I would submit that the State should be allowed to enter into evidence the certified copy of the indictment and sentencing sheet in his case.

(Tr. p. 304, lines 16-24). Appellant argued, "Judge, I didn't open the door. I just said these people shoot. I said nothing about any other person. I was talking about Walker and this individual, who we've all said – he put in evidence – there's no way I even remotely opened the door to let that conviction in." (Tr. p. 305, lines 1-5). After a short break the judge determined that the door was opened to a degree by the "last series of questions concerning drug dealers and isn't it possible that this is a drug-on –drug-type of a thing." (Tr. p. 306, line 25 – p. 307, lines 1-

2). The judge ruled, "I will allow you to ask this witness is it your understanding that Mr. Walker is currently in the Department of Corrections serving a sentence for murder in this incident." (Tr. p. 307, lines 12-15). After a brief explanation the judge told Appellant, " And you do not need to contemporaneously object, you are covered." (Tr. p. 309, lines 18-19).

On re-direct examination, the prosecutor asked Investigator Cheek, "Are you familiar with the fact that David Walker is in the South Carolina Department of Corrections serving time for this homicide?" (Tr. p. 312, lines 12-14). Investigator Cheek answered, "Yes, sir." In closing argument the prosecutor referenced Walker's conviction stating, "Mr. Richey has also talked about an anonymous phantom rival of Johnny Cheeks doing the killing when we know David Walker has been convicted of this homicide. David Walker, who was with the other two, Saxon and Wells, that night planning out the robbery." (Tr. p. 341, lines 21-25). At the close of the case Appellant renewed all objections and the judge again denied the motions. (Tr. p. 386, lines 16-25). The judge erred in allowing Investigator Cheek to testify that Walker had been convicted of the murder of Johnny Lee Cheeks.

In regard to reference to the guilty plea of a non-testifying co-defendant, the Fourth Circuit Court of Appeals in United States v. Blevins, 960 F.2d 1252, 1260 (4th Cir. 1992) wrote:

Courts have generally agreed that evidence of a non-testifying co-defendant's guilty plea should not be put before the jury. See, e.g., United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990); United States v. De La Vega, 913 F.2d 861, 866 (11th Cir.1990). The reason for this prohibition is twofold. First, by not having the opportunity to cross-examine the co-defendant who entered the guilty plea, the defendant on trial is unable to probe the motivations for entry of the plea. This significantly undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant. See United States v. Griffin, 778 F.2d 707, 711 (11th Cir.1985) (citing Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965)). Second, introduction of such guilty pleas raises the concern that a defendant might be convicted based upon the disposition of the charges against the co-defendants, rather than upon an individual assessment of the remaining defendant's personal culpability. See Griffin, 778 F.2d at 711.

In regard to reference to a conviction after jury trial of a testifying co-conspirator, the Fourth Circuit Court of Appeals in United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993)

wrote:

It is a well-accepted principle that “evidence about the conviction of a co-conspirator is not admissible as substantive proof of the guilt of a defendant.” United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990), cert. denied, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991). In criminal cases, it is the province of the defendant's jury to resolve questions of credibility; referring to what another jury may have done is clearly improper because the defendant's jury cannot permissibly rely on what they may assume a previous jury to have found. See United States v. Samad, 754 F.2d 1091, 1100 (4th Cir.1984) (observing that a prosecutor may not argue evidence not presented to the jury). Such conduct “raises the concern that a defendant might be convicted based upon the disposition of the charges against the [co-conspirator], rather than upon an individual assessment of the remaining defendant's personal culpability.” Blevins, 960 F.2d at 1260. Indeed, improper use of a co-conspirator's conviction infringes on the principle that the “central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.” Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

In the present case Walker was a non-testifying co-defendant, like the co-defendant in Blevins, but was convicted after jury trial like the co-conspirator in Mitchell. As in Blevins and Mitchell, it was improper to allow testimony that Walker had been convicted of the murder of Johnny Lee Cheeks. Appellant's jury had to make their own decisions in regard to credibility without reference to what they may have presumed another jury found in regard to Walker's conviction. As in Blevins and Mitchell, the improper testimony raises the concern that Appellant's conviction was based on Walker's conviction rather than an individual assessment of Appellant's guilt. The prosecutor, in effect, argued to the jury that Walker's conviction should be used as substantive evidence of Appellant's guilt. The argument was improper. The judge erred in allowing the testimony about Walker's conviction.

The trial judge initially and correctly found that evidence of Walker's conviction was inadmissible and more prejudicial than probative. (Tr. p. 74, line 23 – p. 75, lines 1-10). Later, however, the trial judge ruled that Appellant's questioning of Investigator Cheek in regard to the possibility that the shooting may have been a "drug-on –drug-type of a thing" opened the door to allow testimony about Walker's conviction. The trial judge erred. Appellant had every right, and counsel for Appellant had a duty to challenge the State's theory of the case by challenging the State's evidence that Walker was the shooter.

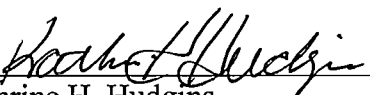
The error was not harmless. The State's case was based on the testimony of Toris Moore placing Appellant with Walker and Saxon on the night of the incident and her conversation with Walker about robbery plans and the questionable identification of Appellant and the car by Kelly Ball. The State's evidence was not overwhelming. In Blevins the Fourth Circuit found that the minimal discussion of the non-testifying co-defendants did not warrant reversal and wrote, "If for whatever reason the jury does learn that co-defendants have pleaded guilty, the court upon request should issue a limiting instruction to jurors stating that the evidence of such guilty pleas is not to be taken as substantive evidence of guilt of the remaining defendants." 960 F.2d at 1260. In the present case the State was allowed to directly question the investigator about Walker's conviction and the State relied upon that testimony in closing argument. Additionally, in the present case, the only limiting instruction to the jurors is found in the judge's final instructions on the law when he stated:

Now, ladies and gentlemen, you've heard testimony that three individual were charged in connection with this incident. I emphasize to you that only Mr. Wells is on trial in this case. Therefore, the evidence against Mr. Wells must be considered separately and apart from the cases against any other defendant and the manner in which the case against any other defendant has been resolved. In short, you must consider the evidence in this case in its totality only as it relates to Mr. Wells without regard to the case of any other co-defendant for the manner in which that case against that other co-defendant was resolved.

(Tr. p. 358, lines 8-19). The instruction does not adequately tell the jury that evidence of Walker's conviction is not to be taken as substantive evidence of Appellant's guilt. Even if the judge had directly instructed the jury that evidence of a co-defendant's conviction is not to be taken as substantive guilt of the Appellant, the error in the present case cannot be deemed harmless in light of the weakness of the State's evidence.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and sentences and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of January, 2017.

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CHRISTOPHER JERMAINE WELLS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Christopher Jermaine Wells, #193588, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of January, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 2017.

Christian Ford (L.S)

Notary Public for South Carolina
My Commission Expires: March 1, 2026