

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED

JAN 27 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT CARL WARE,

APPELLANT

APPELLATE CASE NO 2016-000133

INITIAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT

1.

The court erred by allowing the highly prejudicial reply testimony of Phillip Williams that he refused to rent a suite at the Wave Rider to appellant because of “problems with him in the past,” since this involved a collateral matter., it was not proper reply testimony, it was also impermissible character evidence, and it should also have been excluded under Rule 403, SCRE even if it was relevant. 3

Relevant facts..... 3

Cross-examination..... 8

Proposed reply witness 9

Discussion..... 10

Summary 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983) 10

State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001) 11

State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1925) 10

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 11

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 11

Rule

Rule 403, SCRE..... 1, 3, 9, 11, 12

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the highly prejudicial reply testimony of Phillip Williams that he refused to rent a suite at the Wave Rider to appellant because of “problems with him in the past,” since this involved a collateral matter., it was not proper reply testimony, it was also impermissible character evidence, and it should also have been excluded under Rule 403, SCRE even if it was relevant?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of murder and possession of a weapon during a violent crime. His case was called to trial on January 12, 2016 before the Honorable Larry B. Hyman, Jr. Grant Smaldone represented appellant. George DeBusk and J. Stephen Grooms were the assistant solicitors. Tr. 1.

On January 14, 2016 the jury found appellant guilty of both offenses. Tr. 480, ll. 10-17. Judge Hyman sentenced appellant to life imprisonment for murder, and he imposed a five year sentence for possession of a firearm during a violent crime. Tr. 487, l. 15-19.

This appeal follows.

ARGUMENT

The court erred by allowing the highly prejudicial reply testimony of Phillip Williams that he refused to rent a suite at the Wave Rider to appellant because of “problems with him in the past,” since this involved a collateral matter., it was not proper reply testimony, it was also impermissible character evidence, and it should also have been excluded under Rule 403, SCRE even if it was relevant.

Relevant facts

Myrtle Beach Police Officer Austin Cox responded to a shooting call at approximately 2:30 a.m. at the Wave Rider motel and resort on August 7, 2014. Tr. 82, l. 16 - 83, l. 6. Cox found Sabrina Boatwright, who said she was the decedent’s fiancée, “hysterical.” The decedent was bleeding from the mouth and there was blood on his chest. He had been shot once in the chest. He was unresponsive. Tr. 84, ll. 8-23.

The decedent was a commercial plumber. Sabrina said he had hurt his back badly at work, and he had also fallen off a ladder. Tr. 100, l. 3- 101, l. 25.

Sabrina told the jurors that the decedent was often “in severe pain.” When his prescription medications expired, he was able to get “pain medicine” . . . from friends.” Tr. 102, ll. 4-11. One of those friends was appellant. Sabrina remembered they had been living at the Wave Rider resort or motel for about six months when appellant came to stay with them. Sabrina had known appellant for four or five years at the time, and she verified that the decedent and appellant were friends. The three of them often socialized together, and appellant would “hangout” at their “place.” Sabrina offered that both the decedent and appellant were “loud and opinionated,” but they were also good friends. Tr. 104, l. 22- 107, l. 4.

Sabrina also noted that while the decedent and appellant “argued quite a bit” -- it never got physical. Neither one of them had ever hit the other. When appellant stayed with them he “paid” the decedent for rent or food with “prescribed morphine” that appellant had a prescription for at the time. Tr. 109, l. 22 – 110, l. 10.

Sabrina remembered on the day of the fatal altercation that appellant telephoned her while she was working in Florence and asked her for a ride to the liquor store when she got home. Sabrina testified she told appellant she was not that close to getting home. Appellant told her he would just walk to the liquor store instead. Tr. 110, l. 1 – 112, l. 14.

Sabrina maintained she was aware that the decedent was allegedly going to ask appellant “to leave,” and find somewhere else to live later that evening. Their main complaint with appellant was that he allegedly did not help clean up the suite while they both worked. Sabrina offered essentially that the decedent was a “neat freak,” and that he was annoyed that appellant did not always keep the suite clean even though he was not working. As will be seen infra, appellant would later take strong issue with this assertion. Appellant said that the decedent was often angry with Sabrina over the condition of the suite, and appellant offered that the relationship between Sabrina and the decedent was a stormy one. Tr. 112, l. 2 - 114, l. 3.

Sabrina said she was aware that appellant kept a “survival rifle” with his belongings which he kept in a “green bag.” Tr. 114, l. 7 - 115, l. 21. Sabrina saw the .22 rifle in appellant’s bag that fatal day. Sabrina remembered that appellant came back from the liquor store with “a half gallon bottle of liquor, vodka.” Appellant made himself a drink and sat down. Sabrina testified that the decedent started “fussing” about the suite not being clean, and Sabrina claimed she knew in advance the decedent was going to make a scene in appellant’s presence for effect. Tr. 116, l. 22 – 118, l. 20.

Sabrina started preparing dinner, and she testified that appellant went with her to the beach to look for "shark's teeth." The decedent asked appellant to leave at some point that evening, and Sabrina remembered the appellant left as requested. He took his "green bag" containing his belongings, and the "survival rifle" with him. Tr. 120, l. 14 – 123, l. 22.

Sabrina maintained after appellant left "it was like a perfect night." Tr. 123, ll. 16-22. Sabrina recalled that at about 2:00 in the morning appellant knocked on the door, and the decedent let him in inside. Sabrina heard the decedent tell appellant: "Robert, go ahead and get on the couch. He said, 'Robert, we love you to death, we're just tired of the disrespect. Just go ahead on the couch and we will talk about this tomorrow.'" Tr. 125, ll. 5-22.

Sabrina remembered a little later the decedent left the bedroom to apparently make another drink in the kitchen, a "Sunny Delight." The decedent was outside the bedroom for ten to fifteen minutes. Sabrina claimed she heard the decedent and appellant yelling at each other in the living room during this time. She then heard a loud noise, and she "wrapped the sheet around me and I ran to the door, and Randy was at the [bedroom] door. He had his hand on his chest, and he said, 'oh, my God, Sabrina, I can't believe he just shot me.'" Sabrina claimed as she tried to attend to the wounded decedent that appellant was sitting "on the love seat with a gun pointed at me". Sabrina testified that she ran back into the bedroom, grabbed her phone, and "ran out the back door for help." Tr. 128, l. 1 – 131, l. 21. She called 911. Tr. 132, ll. 2-3.

I went outside and I was trying to -- I was pounding on people's doors and screaming for help and trying to turn the phone on. Finally, I got the phone on, and then I seen him coming up -- down the hallway with the backpack and gun sticking out and then he yelled, **It's self-defense**, and I was like, No. No, it wasn't, and he just kept walking and left. I ran back in there and was talking to 911.

Tr. 137 ll. 10-17 (emphasis added).

On cross-examination Sabrina acknowledged that while appellant and the decedent were good friends that they argued about politics, and “stupid stuff like that.” Sabrina said the two men would yell back and forth at each other. Sabrina testified this final time appellant had stayed with them for about four days before the fatal incident. Sabrina admitted she did not witness the fatal incident, she only heard the yelling. Tr. 142, l. 11- 145, l. 25; 146, ll. 18-19.

Appellant took the stand in his own defense. He testified he had been staying with the decedent and Sabrina at the Wave Rider for three days before the fatal incident on August 6, 2014. Appellant had stayed with them at the Wave Rider “a couple of times” before this final stay. Tr. 280, ll. 3-7.

Appellant walked to the liquor store that day. He admitted he was upset at having to walk because his moped has been stolen. As seen, Sabrina also could not give him a ride that day. Tr. 284, l. 10 – 286, l. 25.

This testimony was in response to the state having called the owner of Giff’s Liquor Store, Matthew Giffin, to testify appellant was a frequent customer. Giffin said on the day of the shooting appellant was in an unusually bad mood, and he allegedly was “muttering” to himself: “I’m going to kill that motherfucker.” Tr. 246, l. 11 – 248, l. 5. Giffin testified that this was very unusual behavior for appellant. Tr. 248, ll. 4- 11.

Appellant explained that he thought the decedent was “bipolar,” and “once he got into a manic mode his personality would flip over.” Appellant recalled that as the decedent cleaned the suite constantly, and that day he was particularly loud. Appellant decided he would spend the night somewhere else. Appellant testified the decedent did not want him to leave, and the decedent said: “Where are you going, and I said, Man, I’m not staying here tonight, you guys are going to be

fighting and stuff. And he said, no. No. No. You ain't going nowhere you stay here." Tr. 294, ll. 5- 25.

Appellant testified that the decedent and Sabrina were very aware he had a "survival gun." This was apparently a military gun that appellant could "break down" into pieces, and rapidly put it back together. Tr. 293, l. 6 – 294, l. 23.

Appellant testified he went onto the beach that night looking for somewhere to stay so he would not have to go back to the Wave Rider. Appellant had his "survival rifle" with him but he decided to go back to the Suite because of "threatening looking people" in the area, and also because he did not want "the beach patrol" to see that he had a weapon in his "bag." Tr. 294, l. 24 – 297, l. 12.

Appellant went back to the Suite, and he knocked on the door. The decedent answered the door, and appellant told him he planned to sleep in their car for the night but that it was locked. Appellant recalled that decedent told him: "You're not going to sleep outside, You're going to come on inside. I said alright . . . I came in through the bedroom door. Sabrina is on the bed against the wall. We walk on through." Tr. 297, ll. 13-23.

Appellant said his gun was fully assembled at that time, and the decedent was aware he had his gun with him. Tr. 298, l. 2 – 300, l. 3. Appellant put his bag -- which included the gun -- on the carpet and made himself a drink.

Appellant said a short time later the decedent came out of the bedroom, and closed the door behind him. The decedent started yelling at him. The decedent said appellant could not be coming in at "2:00 in the morning." Appellant said the decedent was very intoxicated, loud, and "very aggressive." Tr. 301, l. 7- 303, l. 8.

The decedent then went back into the bedroom. However, he emerged again about ten minutes later. Tr. 303, l. 9 – 305, l. 5. Appellant remembered that the decedent asked him how much longer he needed before he could find his own place to live. Appellant said he asked the decedent to stop screaming at him, and he asked the decedent what he had done wrong to incur his wrath. The decedent again went into the bedroom. Tr. 306, l. 5 - 310, l. 14; Tr. 317, ll. 3 -10.

The decedent came out of the bedroom again about ten minutes later. He closed the bedroom door behind him again. Appellant remembered the intoxicated decedent was acting strangely. The decedent “rushes right up to me and the bag is right there.” Appellant said the decedent had a “crazy look in his eye.” Appellant told the jurors: “*I knew he was going to grab the gun. I ain’t going to let him have it when he is acting like this.*” Appellant said *the decedent grabbed the gun and put his hands around it.* Appellant described the “*tug of war*” he and the decedent had over possession of the gun, and the gun accidentally went off as they fought over it. Tr. 306, l. 5- 310, l. 14; Tr. 317, ll. 3-10.

Cross-examination

On cross-examination by the solicitor, appellant acknowledged he had been staying with Sabrina and the decedent at the Wave Rider for a couple of days or possibly a week before the fatal incident. The solicitor asked appellant to draw a circle around a map or photograph of Sabrina’s car near the Wave Rider. The following strange exchange occurred between the solicitor and appellant:

Q Draw a circle around it, if you would.

A Huh?

Q Draw a circle around it.

A (Witness complied).

Q Is there any doubt in your mind that that is on the property of the Wave Rider?

A Of course it is.

Q *Isn't it true that the magistrate told you to stay off the property?*

A No.

Q *So the management of Wave Rider never told you to stay off their property?*

A *Nope. Actually, Randy a couple days before had gone down to the office, because one of the people that worked there said I was not to be on the property. Randy got upset about that and went down and talked to the manager and told the manager, This is my guest, blah, blah. I was never kicked off that property anyway. I left on my own. I used to live there*

Tr. 339, l. 11 - 340 l. 4. (emphasis added).

On continued cross-examination appellant acknowledged that a maintenance man had once told him he was not allowed on the property. Appellant said he reported the maintenance man to management because the maintenance man had once attempted to break into his suite or room. Tr. 340, l. 5 – 341, l. 13.

Proposed reply witness

The purpose of this strange cross-examination became apparent after the defense rested. The solicitor informed the judge he wanted to call the Wave Rider owner and manager, Philip Gregory Williams, who oversaw all operations there to testify that appellant attempted to rent a suite at the Wave Rider a few days before the fatal incident. The solicitor said the manager told appellant:

“I’m not renting to you, you are not allowed on the property, end of story, please leave.” Tr. 384, l.

23 – 385, l. 8.

Defense counsel objected to this testimony because it was impeachment on a collateral matter, and it also was not admissible under Rule 403, SCRE. In addition, defense counsel argued

this testimony was impermissible bad character evidence. The judge ruled this testimony went to appellant's credibility, which he reasoned was important in this case, and justified the admission of the reply testimony. Tr. 384, l. 23 - 286, l. 3.

Over defense counsel's objection the solicitor then called Philip Gregory Williams, the property manager of the Wave Rider, as a reply witness. Tr. 394, ll. 1-15. Williams said he was responsible for all operations at the Wave Rider. Williams said he knew appellant, and that appellant came to his office in August, 2014 wanting to rent a unit at the Wave Rider. Williams said he told appellant, "No, sir. I told him no because we have had problems with him in the past." Defense counsel again objected again to this line of testimony. Williams said he had "a reason" why he did not want appellant back on the property but he did not elaborate. Williams reiterated that he had refused to rent to appellant at the Wave Rider. Tr. 395, l. 1 -396, l. 12.

Discussion

In State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983) our Supreme Court noted that in State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1925), it adopted the following test for determining whether a matter is collateral: "Would the cross-examining party be entitled to prove the fact as part of, and is *tending to establish, his case*? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral." State v. Bailey, 279 S.C. 437, 440, 308 S.E.2d 795, 796 (1983) (emphasis added).

The "would not rent to appellant" evidence is collateral in this case because the fact that the property manager at the Wave Rider had refused to rent to appellant for some unknown "bad conduct" in the past was not relevant to whether the shooting in this case was murder, involuntary manslaughter, or an accident. Further, it was **undisputed** that the decedent and Sabrina **allowed appellant to stay with them at the resort as their guest**, and it was undisputed appellant was

their guest at the time of the fatal altercation. Since it was undisputed that appellant shot the decedent, the only matter at issue was whether the shooting was murder, involuntary manslaughter or accident. It was also undisputed that appellant and the decedent were friends, and that appellant provided the decedent with morphine. Again, it was undisputed that the decedent allowed appellant back into their suite at approximately 2:00 in the morning.

Since there was no dispute that appellant was an invited guest of the decedent and Sabrina the fact that the property manager had refused to rent another unit to appellant was irrelevant. Further, any relevance this testimony had was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE, as defense counsel objected.

The reply testimony was calculated to show the jury that appellant allegedly committed some unknown bad act or bad acts in the past, and for that unknown reason the property manager, Williams, refused to rent to appellant. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The jury was left with the limits of its own imagination to speculate about what had occurred with appellant at the Wave Rider in the past that caused Williams to refuse to rent to him. That was extraordinarily prejudicial. It was transparently gratuitous on the part of the solicitor, and it was meant to end the testimony the jury heard with an attack on appellant's character. See State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999).

Defense counsel correctly objected that this was a collateral matter, it constituted bad character evidence, and it was not admissible under Rule 403, SCRE, even if it was relevant.

After appellant testified, and presented his firearm expert, Christopher Robinson, it was apparent the state had sandbagged the defense with the purpose of the final testimony the jury heard being that of the property manager who testified he refused to rent to appellant because of some

“unknown alleged bad conduct” on his part in the past. That was fundamentally unfair, the testimony was highly prejudicial, and it was meant to tip the case in favor of the state.

Summary

It was undisputed that appellant was staying with Sabrina and the decedent as an invited guest. The fact the property manager refused to rent to appellant was irrelevant, and even if relevant it violated Rule 403, SCRE. The reply testimony was inadmissible impeachment on a collateral matter, and it was adverse character evidence.

The only question for the jury in this case was whether the shooting was murder, involuntary manslaughter or accident. The error could not have been harmless given the fact that this was a close question for the jury to resolve given that Sabrina did not witness the shooting, and there were therefore no eyewitnesses to the shooting. Appellant’s description of the “tug of war” over the gun, after appellant knew the decedent was “going to grab it,” while acting “crazy and intoxicated,” and the gun’s accidental discharge should have rendered the true verdict involuntary manslaughter or accident.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.