STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROYRES ANTWON PATTERSON,

APPELLANT

APPELLATE CASE NO. 2016-001084

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to grant appellant a new trial where the state did not reveal that critical witness Terrence West's cell phone was in the possession of the state prior to trial, and the contents of the cell phone revealed West had called appellant days after the shooting proving West lied at trial, since this evidence was material under Kyles v. Whitley 514 U.S. 419 (1995), and the trial court erroneously found this evidence was "merely impeaching" by applying an improper standard?

STATEMENT OF THE CASE

Appellant was indicted by the Anderson County Grand Jury for the offenses of murder, attempted murder, and possession of a weapon during the commission of a violent crime. Appellant's case was called to trial on April 25, 2016, before the Honorable R. Scott Sprouse, and a jury. Bruce Byrholdt represented appellant. Lauren Price and Chelsey Moore were the assistant solicitors. R. 1.

On April 27, 2016, the jury found appellant guilty on each count. R. 573, l. 11 – 574, l. 2. Judge Sprouse sentenced appellant to thirty years imprisonment for murder, twenty years concurrent for attempted murder, and five years consecutive on the weapons charge. R. 585, l. 10-19.

This appeal follows.

ARGUMENT

The court erred by refusing to grant appellant a new trial where the state did not reveal that critical witness Terrence West's cell phone was in the possession of the state prior to trial, and the contents of the cell phone revealed West had called appellant days after the shooting proving West lied at trial, since this evidence was material under Kyles v. Whitley 514 U.S. 419 (1995), and the trial court erroneously found this evidence was "merely impeaching" by applying an improper standard

Relevant facts

Anderson County Sherriff's Deputy Kevin Looney was dispatched to the "horseshoe," Hall and Oliver Streets in Anderson, at about 8:30 p.m. on June 7, 2014. The call was about a drive by shooting. R. 122, l. 15 – 124, l. 7. Looney was informed that there were two "gunshot victims," and that one of the victims was dead. R. 124, ll. 8-15.

Looney was told by an eyewitness that he observed a "box-style" silver car occupied by "three black males, and the front seat passenger had held the gun out the window and started firing at a group of black males standing on the side of the road." R. 131, ll. 16-24. The state's theory of the case was that appellant was the passenger who fired the shots from a Mitsubishi sedan owned by Terrance West, his uncle. That Mitsubishi not matching the "Kia Soul hamster box car commercial" given by eyewitnesses became a key defense theme throughout the trial. R. 134, ll. 8 – 135, l. 20.

James White, Jr., was the human resource director for Unaflex, which was a manufacturing facility in Anderson where appellant and his uncle, Terrence West, worked. R. 136, l. 5 – 139, l. 23. Again, the shooting in this case occurred on June 7, 2014. White said that the last day that appellant came to work was June 6, 2014. White said West continued to come

to work until he was arrested about a week later at work. White acknowledged that the manufacturing facility did not check on their employees when they did not show up for work to ascertain if they were alright or the reason for their absence. R. 143, ll. 14-20.

Terrence West, the uncle, testified against appellant at trial. West acknowledged that he "hung out" with appellant. West had known David Bennett, another man implicated in the shooting, for "a couple of months." R. 159, ll. 3-22. Bennett would later testify that he did not know appellant.

West said on the morning of June 7, 2014, he was home with his daughter. Later in the day, he drove his Mitsubishi Mirage 2014 gray sedan over to East Market Street. West testified he was drinking beer with some other men, and they planned to buy some marijuana. Appellant came by the house after West had been there for about two hours, and he started drinking also. West said he went to the store with appellant and David Bennett to get more beer. R. 162, l. 13 – 168, l. 4.

West claimed as he was driving appellant was telling him where to turn to get to the drug dealer who was going to sell them marijuana. R. 168, ll. 3-23. David Bennett also knew the man or men who were going to sell them the marijuana. R. 169, ll. 3-24.

West remembered that when he turned the corner onto another street, he saw five or six men on the sidewalk. West claimed that as David Bennett started to get out of the back door of the car to meet and pay the drug dealer that appellant started shooting. West said Bennett "hopped back in the car, he shut the door, and I pulled off." R. 170, ll. 7-25. West claimed that appellant had pulled the gun from his side, cocked it, and "started firing backward, back towards the crowd." R. 171, ll. 1-22.

West maintained that he did not know that anyone in the car had a gun. However, West admitted he was wearing a hat at the time, and there would later be testimony that no eyewitnesses could identify the men in the car because they each wore hats so low on their head that they could not be recognized. Appellant denied being present to Detective Danny Barton, and essentially his defense was that he was being used by his uncle, West, and Bennett, who fled to New York as a scapegoat.

West said that appellant did not come back to work the week after the shooting, and he claimed he had not talked to appellant since the night of the shooting. West made a point of telling the jury that he did not "hang out" with appellant after the shooting, and he conveyed himself as cutting off all ties to appellant. R. 176, ll. 18-24.

West was allowed to plead guilty to misprision of a felony given his claim that he did not know anyone in the car had a gun that night, given his assurance that he was telling the truth at trial, and given his assertion that he did not try to "get his story together" with appellant or Bennett after the shooting. R. 176, l. 18 – 179, l. 21.

West admitted he lied to the police when he denied the men were going to purchase marijuana at the time of the shooting. However, he rationalized: "Why am I going to tell the police I'm going to buy some [marijuana], you know." R. 192, l. 20 – 193, l. 8.

The pathologist, Dr. Brett Woodard, did an autopsy on the decedent on June 9, 2014. Dr. Woodard said the decedent, Mr. Willingham, was five foot ten, and he weighed one hundred eighty pounds. He was a black man with long dreadlocks. He had a single gunshot wound to the side of his body, which killed him. R. 213, l. 12 – 215, l. 6.

Dr. Woodard said he reviewed the medical reports on the man who lived, Rayshawn Cowan, who had been shot four times. "Miraculously, none of them produced a life-threatening

injury." R. 219, l. 25 – 222, l. 2. Cowan refused to cooperate with the police, and the solicitor had Dr. Woodard testify over a hearsay objection that Cowan told the emergency room doctor that "he was shot by an individual in an automobile, and he did not name the individual to the emergency room doctor." R. 221, l. 18 – 222, l. 8. This was seemingly admitted as a statement for medical diagnosis or treatment purposes that was relied on by the expert, Dr. Woodard. It was undoubtedly also a way to get Cowen's hearsay corroboration of West's testimony before the jury.

The police obtained a search warrant for a "drug house" located at the scene of the shooting. The shooting occurred on the street in front of the drug house, and a bullet actually lodged in the house after the shooting. It was believed that drugs and cash were stored inside this house. None of appellant's fingerprints were found in the drug house or in the Mitsubishi owned by Terrence West. R. 251, l. 6 – 256, l. 25.

David Bennett knew Terrence West as "T. West." Bennett did not know appellant. R. 284, l. 8 – 285, l. 19. Bennett testified on June 7, 2014, he was with West, appellant, and appellant's brother. Bennett said about 8:00 p.m., appellant asked the men where they were going when they got into West's Mitsubishi. Bennett told appellant were going to get some drugs, and appellant got into the front passenger seat. R. 288, l. 1 – 289, l. 15.

Bennett claimed while in the car he called "Kujo," who was the soon to be wounded victim, Cowan. R. 289, l. 7 – 290, l. 5. Bennett said although he called Kujo to set up the drug deal, he strangely claimed appellant was the one telling West where to drive. Bennett said he knew they were going to a part of town known as "the horseshoe." As West drove into the area, he recognized Kujo. Bennett said he started to get out of the car to buy drugs from Kujo when he maintained appellant unexpectedly "started shooting." R. 290, l. 1 – 291, l. 23.

Bennett said following the shooting, appellant said: "Y'all didn't see nothing. Y'all don't know nothing." R. 297, l. 22 – 298, l. 12. Over defense counsel's relevance objection, Bennett claimed he was scared following the shooting, and he claimed he did not know West or appellant had a gun. R. 302, l. 25 – 304, l. 9. Bennett maintained that West also acted like he did not know there was going to be a shooting. West allegedly asked appellant: "What the hell is wrong with you? I just got this damn car." R. 304, ll. 11-15. Bennett claimed when they returned "to the house," that appellant said to his brother, "got the man that shot you." R. 302, ll. 9-16.

The state's theory of the case was that the two victims were unintended victims, and that appellant, who they claimed was the shooter, was trying to shoot Jarkeelas Lee, "Hitman," another black man with long dreadlocks who appellant allegedly thought shot and injured his brother the night before. To this end, the state introduced a year old photograph of Lee over objection. R. 440, l. 2 – 443,1. 1. The solicitor had Bennett testify he noticed appellant's brother leg had a bandage on it, "I guess from the shooting they was talking about the night before." R. 311, ll. 9-15. The judge earlier expressed his concern about this unintended victims, and photograph evidence. The judge initially ruled the photograph was not admissible. R. 106, l. 5 – 114, l. 2.

Bennett claimed that afterwards, the men were still drinking and smoking marijuana when the news came on television about the decedent being killed. Bennett said the following morning he went to New York because he was afraid the decedent's family would retaliate against him. Bennett claimed he met with the decedent's father before he left for New York, and that "I told him the same thing I told y'all today in court, what happened." R. 304, l. 16 – 305, l. 25. Bennett said he was threatened the following day when he was told that he had been spotted in the vehicle that did the drive by shooting. R. 315, ll. 7-22.

During an in camera hearing, Bennett admitted he was a member of the Bloods, a well-known violent gang. R. 316, ll. 3-7. The judge ruled at that point in the trial there was no nexus or evidence that the shooting was gang related, and he instructed the jury to disregard defense counsel's question about Bennett being in a gang. R. 319, l. 2 – 320, l. 24. On cross-examination, Bennett admitted he had been convicted of giving false information to the police. R. 321, ll. 13-19.

The firearms expert said the murder weapon was never found, and that there was a mistake on the ballistics report as to whether a certain shell casing or casings were Remington or Federal. R. 354, l. 2 – 361 l. 16; R. 362, l. 4 – 363, l. 11.

The lead investigator, Danny Barton, testified that appellant denied being at the scene of the shooting, and he denied being with West at that time. He did not know David Bennett. R. 393, l. 17 – 394, l. 25.

After the verdict, defense counsel moved for a new trial since neither he nor the solicitor knew David Bennett was going to testify that "he made a phone call to Mr. Cowan during the time of the alleged incident, we have not had time to see if that is, in fact, true." The solicitor said this was newly discovered evidence, and that it would not change the result of the trial. The judge denied the motion noting that Bennett had been cross-examined. R. 576, l. 23 – 578, l. 10.

Following appellant's conviction, defense counsel filed a motion for a new trial based on after-discovered evidence. R. 589, ll. 5-8 r. 633-639. A hearing was held on May 11, 2016.

Defense counsel argued that Terrence West, appellant's uncle, was a key witness against appellant at trial. Following the trial, defense counsel learned that Terrence West's cell phone was in Detective Danny Barton's desk drawer. That fact was not made known to the defense. A

search of the cell phone revealed that West called appellant on June 13, 2017 -- after the incident -- and this showed conclusively that West lied during the trial. R. 589, l. 16 – 591, l. 2.

Defense counsel reminded the judge that the jury convicted appellant based on the testimony of West and Bennett, two men who were high on drugs, and drinking heavily. R. 591, l. 12 – 592, l. 7. Defense counsel noted that this evidence was very material, and it went "straight to the heart of the testimony of Mr. West." Defense counsel said he could be ready for trial in thirty days if the judge would grant a new trial based on this after-discovered evidence grounds. R. 592, l. 12 – 593, l. 6.

The solicitor claimed this evidence was only impeaching, not material, and she said it would not change the result of the trial if a new trial was granted. The solicitor claimed: "It's a non-issue." R. 594, l. 16 – 597, l. 9.

Defense counsel responded to the solicitor's argument that this evidence as not material, by citing Kyles v. Whitley 514 U.S. 419 (1995). Counsel argued that this evidence was material under Kyles v. Whitley, and that if the failure to turn over the cell phone evidence was inadvertent, it had prejudiced the defense nonetheless. R. 597, l. 12 – 600, l. 21.

The judge ruled that the state did not turn over the cell phone evidence regarding West as an oversight, and that it was not intentional. The judge ruled under Rule 29(b), SCCrimP, that this evidence was not material, and it only went to impeachment. The judge denied the motion for a new trial.

Discussion

Defense counsel correctly argued that the state's case against appellant was the word of Terrence West, and the word of David Bennett. Both were doing drugs and drinking on the night of the incident. Bennett immediately fled Anderson for New York City following the incident.

Yet, the state determined Bennett did not do anything wrong, and he testified for the state against appellant. Bennett, in fact, was also a gang member, although the jury never heard that fact.

The shots that were fired that night came from Terrence West's Mitsubishi. West chose to blame his nephew, appellant, for the shooting. West testified at trial that he did not have any further contact with appellant after the shooting, and West said he no longer "hung out" with appellant. West, in essence, told the jury that he cut all ties with appellant because of the shooting. That simply was not true given the cell phone call. Given that West was a critical witness against appellant, the jury had a right to know that West was lying about cutting ties with appellant. West also had his cap down over his head, hiding his face, on the night of the shooting. This is certainly not the conduct of a man who did not know something illegal was going to happen.

No independent witnesses named appellant as the shooter. The state presented West and Bennett in a false light to the jury, and that undermines confidence in the verdict – the correct standard on "materiality."

Defense counsel correctly argued that the cell phone incident showing that West telephoned appellant on June 13, 2014, was material evidence under Kyles v. Whitley 514 U.S. 419 (1995) since it showed West lied to the jury. The evidence that the cell phone was in Detective Barton's desk drawer was imputed to the prosecution under United States v. Bagley 473 U.S. 667 (1985). In Bagley, the court disavowed any difference between exculpatory and impeachment evidence for purposes of Brady v. Maryland 373 U.S. 83 (1963).

Brady held that the suppression by the prosecution of evidence favorable to the defendant upon request violates due process where the evidence is material either to guilt or punishment, *irrespective of good faith or bad faith of the prosecution.* Brady 373 U.S. at 87. Here, appellant

made a discovery request, and the state failed to inform the defense that it was in possession of West's cell phone. The trial judge's finding here that the failure to disclose was inadvertent was irrelevant. The fact that West telephoned appellant after the incident was important discrediting information about West. The state put up West and Bennett as witnesses promising to tell the truth. The solicitor went out of her way to put the prestige of the state behind them, and the jury never learned what was their true character. Bennett was a gang member, a Blood, and he wholly escaped responsibility despite the fact he fled to New York City immediately after the incident.

West was presented by the state as a man who continued to go to work after the incident, who promised to tell the truth, and who immediately cut ties with appellant after the incident. West in fact had not cut ties with appellant, and he easily could have blamed his crime on his younger nephew to escape the obvious consequences for his own actions.

"Bagley's touchstone on materiality is a reasonable probability of a different result, and that adjective is important. The question **is not** whether the defendant would more likely than not have received a different verdict with the evidence, but whether *in its absence, he received a fair trial, understood as a trial* ***resulting in a verdict worthy of confidence.***" Kyles v. Whitley 514 U.S. 434. (emphasis added).

Under Kyles v. Whitley, as to the materiality of the cell phone, appellant has shown that he met the Bagley standard of undermining confidence in the result of the trial.

With the materiality standard under Bagley in mind, an analysis of the five part after-discovered evidence standard in State v. Spann, 334 S.C. 618 (1999); State v. Prince 316 S.C. 57 (1993) and State v. Harris, 39.1 S.C. 539, 544-45 (Ct. App. 2011) is in order. It is clear that appellant met the second and third tiers of those cases. The cell phone evidence had been discovered

since the trial, and the trial judge correctly found it could not have been discovered by the exercise of due diligence here. Defense counsel made his discovery motion, and the state failed to turn over the cell phone evidence anyway.

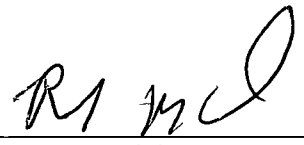
The evidence was material under Bagley, and under Kyles v. Whitley. The judge erred by ruling the evidence would not change the result, since under the Bagley and Kyles v. Whitley standard, the question was whether the failure to disclose undermined confidence in the result. The judge therefore applied the wrong standard of materiality, as well as the outcome of the trial analysis.

Finally, the evidence was not **merely** cumulative or impeaching. West and Bennett were the only witnesses against appellant, and the jury had the right to know that West was materially misleading them about appellant, and therefore West could not be trusted. Cf., State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975); Hayden v. State 279 S.C. 610, 299 S.E.2d 854 (1983).

The judge in this case applied the wrong standard regarding whether the outcome of the case would have been different since the Bagley standard regarding "confidence in the result" was the proper standard. This case should therefore be reversed, and remanded for a new hearing on the after-discovered evidence applying the correct standard. See, State v. South, 310 S.C. 504,509, 427 S.E.2d 666, 670 (1993).

CONCLUSION

For reason of the foregoing arguments, this case should be remanded to the Anderson County Court of General Sessions for a new hearing on after-discovered evidence applying the correct standards.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROYRES ANTWON PATTERSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Royres Antwon Patterson states:

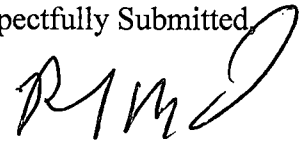
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge R. Scott Sprouse, which was held on April 25-27, 2016, and the after-discovered evidence hearing on May 11, 2016, 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 Royres Antwon Patterson.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of May, 2017.

STATE OF SOUTH CAROLINA
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THE STATE,

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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) Transcript of interview with appellant;
(3) Motion for a new trial, and return to motion for a new trial.

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

May 12, 2017

Robert M. Dudek
Chief Appellate Defender

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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."

May 12, 2017.

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