STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Florence County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORY NETTLES ALLEN,

APPELLANT

APPELLATE CASE NO. 2016-000686

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to redact the portion of the 911 call where Coe speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect?

STATEMENT OF THE CASE

Appellant was indicted by the Florence County Grand Jury for the offense of murder. R. 409 – 410. His case came on for trial on March 21, 2016, before the Honorable R. Knox McMahon, and a jury. Rose Mary Parham represented appellant. Edgar L. Clements, III, was the solicitor. R. 1.

On March 23, 2016, the jury found appellant guilty of murder. R. 407, ll. 20-22. Judge McMahon sentenced appellant to forty years imprisonment. R. 408, ll. 5-9.

This appeal follows.

ARGUMENT

The court erred by refusing to redact the portion of the 911 call where Coe speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect

Relevant Facts

Appellant Cory Allen told the police when they arrived on the scene in the Tara Village neighborhood that the decedent pulled a gun, and shot at him. Appellant returned fire in self-defense after the decedent, who had been riding on a moped, shot at him or pointed a gun at him. R. 321, l. 21 – 322, l. 7.

Florence County Sherriff's Deputy Andrew Hardin testified that on June 4, 2014, he went to Tara Village, which was referred to as "the hood" during the trial, to a "shots fired" dispatch. R. 59, l. 6 – 61, l. 3. Hardin got out of his police car, and he pulled his gun. He pointed the gun at the ground as he was trained. R. 59, l. 13 – 61, l. 16.

Hardin ordered appellant and his brother Fred "to get on their knees and let me see their hands. . . . Mr. Cory pulled a pistol from around his back side where he was holding it, and then placed it on the ground and got on his knees and spread his arms and legs out." R. 61, l. 21 – 62, l. 3.

Hardin said he walked over to appellant and put handcuffs on him. He read him his Miranda[1] warnings. R. 62, ll. 10-18. Appellant told Hardin that the decedent pulled a gun on him, and that he shot him in self-defense. R. 63, ll. 14-22. The shooting occurred in front of

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Debra Coe's house, and appellant asked Coe to call 911. R. 323, ll. 6-15. Appellant told Coe "that he had pulled a gun on me and I shot [him]." R. 323, ll. 21-22.

The state's theory of the case was that appellant intentionally shot the decedent because the decedent had killed his brother years before, and the decedent was acquitted of murder in that case. The decedent went to prison for a short time for illegally being in possession of a gun, and for a probation violation. "Revenge" as will be seen infra was the solicitor's theme and his theory of this case.

The 911 caller, Ms. Coe, was not called to testify before the jury because the solicitor claimed he could not trust her to tell the truth. The 911 tape was published to the jury without the opportunity for cross-examination before the jury.

As will also be seen infra, defense counsel argued that the first portion of the 911 tape stating the emergency -- that the decedent had been shot-- was admissible. However, defense counsel Parham, argued the portion of the 911 tape where Coe speculated about appellant's "motive" to shoot the decedent – **an incident that occurred about a year before** -- no longer qualified as an excited utterance or present sense impression. That portion of the 911 tape should have been redacted, since it was inadmissible speculative hearsay that tended to confuse the matter.

The 911 tape is on file for this Court to review. It easily could have been redacted to remove Coe's speculation that appellant shot the decedent because of a prior incident. It was extremely prejudicial, and defense counsel correctly argued it was confusing. It was clear defense counsel's objection was pursuant to Rule 403, SCRE, because the 911 call regarding the prior incident had a spurious tendency to "corroborate" the state's theory of the case that appellant shot the decedent *because of that prior incident, and not in self-defense*. In context, it

also showed Coe did not believe the shooting was in self-defense where she would not make herself available for cross-examination where the state refused to call her, and the 911 tape did the damage without an opportunity for cross-examination. As will also be seen infra Coe had nothing to say that would have been helpful to appellant, and he correctly did not call her as a witness.

Further, and respectfully, the judge's reasoning that the state did not have to prove a motive missed the point. The remainder of the 911 call that was not admissible as an excited utterance or present sense impression, and it was highly prejudicial given its speculative nature about motive – the prior incident -- which tracked the state's theory of the case. R. 38, l. 18 – 46, l. 2. The fact the prior incident occurred more than one year before was irrelevant. What was clear was that **Coe speculated appellant shot the decedent because of the prior incident**. That destroyed the complete defense of self-defense.

The state called Veronica Peoples, the 911 worker, as its first witness. Peoples testified on June 4, 2014, at 8:30, Deborah Coe called 911 about the shooting in Tara Village. R. 37, l. 10 – 38, l. 22. When the solicitor went to publish the 911 call, defense counsel objected. Counsel Parham specifically objected to the portion of the tape where Coe talked about the shooting being about a prior incident, about what happened about a year ago (actually, more than a year ago) when the decedent shot and killed appellant's brother and was acquitted at trial. Parham noted the in camera testimony of Coe, where she said she was in her back yard cutting the grass at the time of the shooting, and she did not see the shooting. Her conclusions that appellant shot the decedent because of a prior incident did not qualify as an excited utterance or present sense impression, and it no longer remained under the hearsay exception. It was confusing and

prejudicial, and the 911 tape could have easily been redacted to remove the speculation about the prior incident.

Defense counsel also noted at the time that Coe may later refuse to testify for the state, and she therefore could not be cross-examined. Coe certainly was not going to be a favorable witness for the defense. A common sense reading of her demeanor from the trial transcript, and listening to the 911 tape reveals she was "a loose cannon." The 911 tape was published to the jury over defense counsel's objection. R. 38, l. 18 – 45, l. 25.

Nicole Bethea was an employee of the Florence County Clerk of Court's office. She testified that the decedent, Edward Windham, had been indicted for murder, possession of a weapon in the commission of a violent crime, and possession of a weapon by a person convicted of a violent crime. The victim in that case was appellant's brother "Robert Allen." The decedent was found not guilty of murder and not guilty of voluntary manslaughter and not guilty of possession of a weapon during the commission of a violent crime in the death of appellant's brother. However, he was found guilty of possession of a pistol by a person convicted of a violent crime. Decedent received a five year prison term at the time, and a consecutive sentence for the resulting probation violation. R. 47, l. 1 – 48, l. 13.

There was evidence presented that following the shooting of the decedent by appellant that a crowd gathered in the area, and "there were several disorderly people" in the crowd. Florence County Sherriff's Deputy Jake Chamberlain testified appellant was cooperative with the police, and he sat in the grass with his handcuffs on while this disorderly crowd gathered. Coe also told the 911 operator that a crowd was gathering. R. 65, l. 18 – 70, l. 7. That 911 tape is on file for this Court to review.

A Lincoln Town Car, that belonged to appellant's brother, Fred, was parked down the street from the site of the shooting. Inside the glove compartment was a pistol and a holster which the police witnesses would acknowledge was not illegal. R. 82, l. 3 – 84, l. 16.

SLED gunshot residue expert Whitney Berry testified that the gunshot residue tests on the decedent "were negative for gunshot residue."[2] Appellant obviously tested positive since he admitted shooting the decedent in self-defense. Appellant's brother, Fred, also did not have gunshot residue on his hands. R. 263, l. 22 – 268 l. 13. The jury was read a stipulation that a twenty-five caliber pistol found near the moped after the shooting belonged to the decedent in this case, Edward Windham. Supp. R. 1, ll. 14-23.

A nine millimeter Ruger, a magazine which was partially full, and another magazine that was completely full, were found at the scene of the shooting, as was the twenty-five caliber pistol. Shell casings were also found at the scene. R. 113, l. 3 – 119, l. 13. The decedent's money and a cigarette lighter were in the decedent's pocket. The state chose not to have the twenty-five caliber pistol analyzed for DNA since it stipulated the gun belonged to the decedent. R. 156, l. 17 – 157, l. 16.

The decedent's cell phone was also inspected, and it was determined there was no evidence on either the decedent's cell phone or appellant's phone linking the two men to each other by phone call, text message or otherwise. R. 185 l. 10 – 187, l. 13. Appellant acknowledged he knew the decedent, and that he was afraid of the decedent. Appellant told the

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2 This Court can take judicial notice that Whitney Berry was subsequently fired from SLED as a result of inaccurate conclusions on GSR cases. SLED's faulty gunshot residue tests delaying some prosecutions around South Carolina, The State Newspaper, May 6 2017. http://www.thestate.com/news/local/crime/article149066069.html

solicitor that the decedent had made threats to him through "other people" while he was in jail, and appellant was afraid because the decedent "had killed before." R. 346, ll. 9-25.

The state called Glyn Peter Farnum as a witness. Farnum ran Farnum's Frame and Body Shop in Florence. He was from Barbados. R. 219, l. 14 – 221, l. 3.

Farnum testified that appellant worked for him at the body shop about sixteen months prior to the shooting in this case. R. 221, ll. 10-19. Farnum admitted he paid appellant one hundred and twenty-five dollars a week in cash for his work, and he did not keep any employment records. Appellant worked for him for about six months. R. 226, l. 16 – 227, l. 10. Farnum admitted he could not be exact about these timeframes since he did not keep any records.

The essence of Farnum's testimony was that appellant had a concealed weapons permit, which was undisputed, and Farnum confronted appellant about carrying the gun. Appellant told Farnum he had a concealed weapons permit. Appellant explained to Farnum that his brother had been killed, and the man who killed him "didn't get a long time." Farnum claimed appellant told him: "I'm going to kill him." Farnum maintained he told appellant his mother had already lost one son, "If you do this, she gone (sic) lost two sons." R. 221, l. 24 – 223, l. 22.

Farnum said he later saw a television report that appellant had shot the decedent. Farnum claimed that he felt obligated to get involved. R. 224, ll. 12-24.

Patrick Woodberry had known appellant "from the neighborhood" for about twenty years. Woodberry also knew the decedent, who was known in the neighborhood as "Littles." They were both from "the hood" -- Tara Village. R. 248, ll. 3-24. Littles also knew Debra Coe, the 911 caller, since the decedent had been Coe's neighbor. R. 256, ll. 18-20.

On the day of the shooting, Woodberry remembered seeing appellant's brother's Lincoln Town Car parked on the street. He also recalled seeing the decedent driving his moped in the

area. R. 251, l. 11 – 253, l. 21. Woodberry said he saw the decedent about every day in the neighborhood or down by the "the store" riding on his moped. Woodberry remembered seeing the decedent after he had been shot laying on his hands and knees near the moped. R. 254, l. 7 – 257, l. 17. Coe told the 911 operator that it was apparent that the decedent was dead.

Appellant testified that he was in Tara Village that day to help a friend work on a car. He did not expect to see the decedent in the neighborhood that day. R. 353, ll. 5-10. Appellant told the jurors that he was walking on Candy Lane in the neighborhood when the decedent came up on his moped. The decedent pulled a gun "on me and I fired at him." Appellant testified that he was afraid of the decedent because the decedent had threatened him through other people. R. 322, ll. 1-20; r. 346, ll. 9-25.

Discussion

Defense counsel correctly argued that the portion of the 911 tape – about the prior incident -- that did not constitute an excited utterance or present sense impression should have been redacted. Coe's speculation about what the cause of the shooting -- the prior incident --was extremely prejudicial where appellant's defense was self-defense. At the time of the admission of the 911 tape, it was known there was a very clear possibility that Coe would refuse to testify. The trial judge had told her she had no right to take the Fifth Amendment since she was not in jeopardy regarding this case or any other case. Coe responded that she was not going to testify "against nobody." She told the judge she was not going to testify, and the judge told her if she refused to testify or was not respectful to the court "I will hold you in direct contempt." R. 18, l. 6 – 22, l. 5. The judge said if Coe refused to testify that he would seemingly have to deal with the situation at that time. The judge then admitted the 911 tape over the defense objection that is should first be redacted to remove the prior incident reference.

Appellant was denied the opportunity to cross-examine Coe. The solicitor decided not to call Coe, and he stated that the defense could call Coe as a witness if she chose. Again, it was apparent that Coe would not have been a positive witness for appellant – he had shot her former neighbor -- and defense counsel should not be faulted for not calling her as a witness. Moreover, it would have been simple for the 911 tape to have been redacted to remove the objectionable speculation about the prior incident having been the motive for the shooting. Even if the speculation was relevant and probative—and it was not—defense counsel correctly objected that it would be confusing to the jury and unduly prejudicial to appellant.

That Rule 403, SCRE objection was absolutely on point. The speculation had the impermissible spurious tendency to confuse the jury that Coe, who knew both appellant and the decedent, essentially corroborated the state's theory of the case immediately after the shooting.

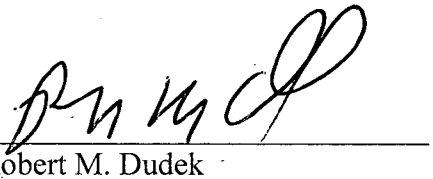
The trial judge abused his discretion by not redacting the 911 tape to take out speculation about the prior incident because it would confuse the issues for the jury. See, State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941); State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice or it is confusing). Rule 403, SCRE. Defense counsel correctly argued the speculation contained on the 911 tape no longer qualified as an excited utterance under Rule 803(2), SCRE or a present sense impression under Rule 803(1), SCRE. That part of the statement that no longer was a statement relating to a startling event while Coe was under the stress of the excitement caused by the event or statement describing or explaining an event while Coe was perceiving the event or immediately thereafter. It was Coe's speculation that appellant shot the decedent because of the prior incident. In a self-defense case it was extraordinarily prejudicial.

This was a highly unusual case where Coe's speculation seemed hand in glove with the state's theory of the motive for the shooting, and it was therefore very prejudicial and irrelevant under Rule 401, SCRE, since it was not evidence having any tendency to make the existence of any fact that was of consequence to the determination of the action more or less probable than it would have been without Coe's speculation. Even if it was relevant, it should have been excluded because of its tendency to confuse the jury, and because its probative value was substantially outweighed by the danger of the undue prejudice of the speculation. See, Richardson v. Donald Hawkins Construction Inc, 381 S.C. 347, 673 S.E.2d 808(2009) (unusual procedural posture can cause evidence to confuse or mislead the jury). Rule 403, SCRE.

Here, the state's theory of the case was that the prior incident – the killing of appellant's brother by the decedent – was the motive for the killing of the decedent. "Revenge" was the solicitor's theme in his opening, R. 26, and his closing, R. 370. That made Coe's speculation about the prior incident later in the 911 call extremely and unduly prejudicial and confusing. The 911 tape should have been redacted to easily remove that speculation in this self-defense case. Appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2017.

CERTIFICATE OF COUNSEL

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

September 12, 2017

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