STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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AUG 01 2017

SC Court of Appeals

Appeal from Greenville County

Honorable C. Victor Pyle, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SYLVESTER KEEJAUN KING,

APPELLANT

APPELLATE CASE NO. 2015-002541

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by allowing Sheriff's Deputy Suber to testify the decedent's son, who was a prime suspect in the murder, told him that he believed his mother's boyfriend (appellant) was the murderer because he kept saying they were "hiding from him," since this testimony was not admissible as an excited utterance, and it was inadmissible prejudicial hearsay?

2.

Whether the court erred by allowing Greenville Sheriff's Investigator Peeples to testify that she heard someone at appellant's place of business allegedly told someone else that appellant had had "called into work," and told someone at work that "he was a victim of a home invasion where he was injured," since this testimony was inadmissible prejudicial hearsay?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offenses of murder, and possession of a weapon during the commission of a violent crime. R. 358 – 359. Appellant's case was called to trial on November 30, 2015 before the Honorable Victor C. Pyle, Jr. and a jury. Alex Kornfeld represented appellant. Judith Munson and Brittany Scott were the assistant solicitors. R. 1.

On December 2, 2015 the jury found appellant guilty on both counts. R. 353, ll. 4-12. Judge Pyle sentenced appellant to life imprisonment for murder, and five years imprisonment for possession of a weapon during a violent crime. R. 357, ll. 11-20.

This appeal follows.

ARGUMENT

1.

The court erred by allowing Sheriff's Deputy Suber to testify the decedent's son, who was a prime suspect in the murder, told him that he believed his mother's boyfriend (appellant) was the murderer because he kept saying they were "hiding from him," since this testimony was not admissible as an excited utterance, and it was inadmissible prejudicial hearsay.

Introduction

The decedent's minor son, sixteen or seventeen-year-old Raquan Lewers, became an instant suspect in his mother's murder. Lewers told the police that he was home with his mother on the night of March 16, 2014, and she was asleep. Lewers offered that his girlfriend, Fernandez, and her friend, Prease, drove to his house. They did not come into the house, and Lewers left with them for only about ten to fifteen minutes that night. R. 69, l. 2 – 76, l. 18. When he returned everything looked normal. However, Lewers said when he reentered the house after this short trip he found his mother had been fatally and brutally stabbed. The house was a bloody mess. When Lewers came back outside and told Fernandez and Prease that mother was dead, they thought by his demeanor that Lewers was "playing" or 'joking." R. 50, l. 6 – 51, l. 4.

The minor Lewers had also received a financial settlement from UPS because one of their trucks apparently hit him. The settlement money that was being held in trust for him by his mother until he "reached the age of majority." R. 84, l. 11 – 85, l. 15. As will be seen infra, Lewers tried to impress others on Facebook with his alleged access to money and cars.

Relevant facts

Quianna Fernandez was the nineteen-year-old girlfriend of Lewers, and she brought her friend, Shakia Prease, over to the home where Lewers lived with his mother that March 16, 2014

night. They stayed in the car, and did not go into the house before drove appellant and Prease to the Citgo station to buy cigars to use as blunts. Fernandez then took appellant by the Greenville Arms apartment complex so he could sell marijuana to a "Hispanic man" there. Again, all of this allegedly happened in about ten minutes to fifteen minutes before they returned to his mother's house. R. 69, l. 2 – 76, l. 18.

Lewers said when they got back to his house he went inside, and he saw "blood all over the door. I started calling my mom's name. I got scared. I thought it might have been [some juice] or something. I followed it into her room. I didn't know what to do. From there, I really don't remember half of the stuff that happened . . . [I] tried to shake her. I tried to wake her but she wouldn't [move]." She had been stabbed to death. R. 70, l. 24 – 71, l. 17.

Lewers had been incarcerated until about three weeks before the murder for armed robbery and simple possession of drugs. He was in drug court at the time his mother was murdered. Lewers admitted selling marijuana that night but stated he did not smoke marijuana or use drugs because "I was in drug court." R. 62, ll. 8-23. R. 70, l. 10 – 71, l. 5.

Lewers testified that appellant was his mother's *prior boyfriend*, and Lewers admitted he very much liked appellant -- he had known him since he was eleven-years-old. Lewers admitted appellant was like a "step-daddy" to him. Lewers said and that while his mother did not want to interfere with his relationship with appellant she no longer wished to see appellant. In fact, Lewers said his mother did not even want appellant to know where they lived. R. 58, l. 14 – 65, l. 1.

On cross-examination, Lewers denied he was a member of a gang. He maintained that the initials "PSC" stood for "Pinckney Street Child," and not "Pickney Street Crypts." Lewers confirmed he had been out of jail for about three weeks at the time his mother was murdered. R. 81, l. 2 – 82, l. 2.

Ms. Fernandez was nineteen years old at the time of the murder, and she said Lewers was only sixteen-years-old. She recalled that on the evening of October 16, 2014 she went over to the house where appellant and his mother lived. Appellant agreed to take Fernandez's phone inside to charge it while Fernandez and her friend, Prease, waited outside in the car. R. 38, l. 5 – 39, l. 5.

Feranandez drove them to the Citgo station, and then she took appellant to the Greenville Arms Apartment complex to sell marijuana. Fernandez remembered appellant selling the marijuana to a Hispanic man. R. 38, l. 5 – 41, l. 20. Fernandez said that when Lewers discovered his mother's body stabbed to death inside the house that they both called 911. Fernandez denied that Lewers called his grandmother first, and then 911. R. 41, l. 3 – 42, l. 1.

Fernandez's friend, Ms. Prease, remembered after they took the trip for Lewers to sell marijuana at Greenville Arms that she and Fernandez again waited outside in the car while Lewers went inside. Prease recalled Lewers came outside and told them: "My mom is dead." We thought he was playing. He was, like, he wasn't kidding. We got out and followed behind him . . . when we first walked in it was blood immediately. When you first walked in the door, it was a trail of blood it was blood all on the wall." R. 50, l. 6 – 51, l. 4.

Investigator Michael Fortner testified he naturally considered Lewers to be a suspect. Fortner explained:

> [T]he main reason why we, of course initially started feeling that he may have been **our suspect was his story** was that he told us that when he called his friends, *his friends come over and then he goes out to them instead of them coming in to him.* Then, they leave. At that time, they were saying maybe **10 *minutes or so they were gone. In that short amount of time, they get back and they find his mom in the condition that he found her in.* I was suspicious of that**. It was short time frame for something like that to happen."

R. 197, l. 17 – 198, l. 2. (emphasis added).

Appellant's present girlfriend, Shelia Martin, had been dating appellant for about one year at this time in March, 2014. She was living in Anderson, South Carolina. Appellant would stay over to her house in Anderson at times but he did not have a key. R. 97, l. 10 – 98, l. 23.

Shelia remembered on March 16, 2014 that she telephoned appellant earlier in the day because she was in Greenville. Appellant told her he would come over to her house later in the day. R. 102, l. 23 – 103, l. 22.

Shelia testified that appellant came to her house at about 2:00 in the morning. Shelia said appellant was acting normally. However, he then went into her bedroom and lay face down on the floor. She asked appellant "what was wrong?" Appellant told her that he had "been in a fight." Shelia noticed that appellant's hand was bandaged underneath his shirt, and that he had a deep cut on his wrist. He was bleeding profusely. Shelia said appellant told her he and his cousin had gotten into a fight with four other men at a liquor house "just off Whitehorse Road." Shelia, who had nursing training, then helped appellant re-bandage his hand to put pressure on the wound. R. 104, l. 2 – 106, l. 23.

Shelia "took him to the emergency room" in Anderson County. Shelia had let appellant drive her black Mazda that day, and she said appellant told her: "He messed up my car . . . he said he had blood all in my front seat." R. 106, l. 13 – 108, l. 11.

Shelia identified the emergency room security camera which showed them entering early on the morning of March 17, 2014. Shelia remembered that appellant was calm, and the nurses and doctor in the emergency room were able to re-bandage his hand more effectively. Appellant was discharged with" pain medication and instructions to keep the bandage clean," and "he came back the

next day for surgery." Appellant, Sheila said, also told the ER personnel about the fight at the liquor house.[1] R. 109, l. 13 – 112, l. 24.

Shelia acknowledged she was later contacted by the Anderson Police Department. She said appellant wanted nothing at all to do with the police. Shelia remembered returning to her house one day to see several police cars. Appellant happened to be with her. Appellant told her, as she was driving, to just let him out of the automobile down the road from her house. She slowed down, and appellant got out of the car. R. 117, l. 5 – 118, l. 19.

Hearsay Testimony – Issue two

Greenville investigator Shawnee Peeples testified that appellant's name came up during the stabbing death murder investigation of the decedent in this case. Peeples was working in a different division than homicide at the time but she said *she tried to listen to what the homicide investigators were talking about in the case*. Peeples said she heard that appellant had called into work "and he told his job that he was a victim of a home invasion where he was injured." Defense counsel immediately objected to this testimony, and the judge immediately overruled the objection. R. 158, l. 20 – 159, l. 7.

Peeples said that as soon as she heard appellant had allegedly called his place of business, and said he had been a victim -- and that he was injured -- she started checking all of the local hospitals for leads. R. 159, l. 1 – 160, l. 12. Peeples also testified she was able to view footage of appellant entering the Anderson emergency room, and she drove to "Anderson and I obtained that information." R. 159, l. 10 – 160, l. 24.

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[1] Investigator Michael Fortner also testified that at some point during the investigation appellant told him the decedent had taken him over to her house that March 16, 2014 evening. While they were lying in bed an intruder entered and said: "Oh, hell no; and, at that time, produced a knife and started attacking them with a knife . . . and that's how he says he got cut, during the course of the fight with the individual." R. 211, ll. 2-15.

More Hearsay Testimony – Issue one

Greenville County Sheriff's Deputy Ronald Suber responded to a call that an individual had been found dead inside the decedent's home. Suber remembered knocking on the door and that Lewers eventually answered the door. Lewers had two young women with him at the time. Lewers told Suber that he was the son of the murdered decedent. R. 254, l. 3 – 255, l. 20.

The solicitor then told the judge she was going to ask Suber a question. She maintained Suber's answer was admissible as an excited utterance. Defense counsel immediately objected and stated the statement the solicitor wished to elicit was not an excited utterance. Defense counsel also reminded the judge that Lewers had testified earlier (meaning this alleged statement to Suber as he investigated the crime was not elicited from Lewers). The judge quickly ruled that he was going to allow this testimony over the defense objection. R. 255, l. 17 – 256, l. 6.

Suber said Lewers: "Kept saying that he believed his mother's boyfriend had done it because he kept saying they [his mother and Lewers] were hiding from him [appellant]." Suber said Lewers then told him that Sylvester King was his mother's boyfriend. R. 256, ll. 8-20.

This was technically incorrect since his mother had a new boyfriend but the context of Lewers pointing the finger at appellant as Suber investigated because of Lewers' alleged belief that appellant was the murderer was inescapable.

The pathologist

The pathologist, Dr. Michael Ward, testified that an autopsy was performed on the decedent on March 17, 2014. She died of stab wounds to the head and neck. R. 271, ll. 4-8; r. 282, ll. 15-17.

DNA

The state also presented evidence that the decedent's blood and appellant's blood were found inside her house. R. 177, l. 7 – 179, l. 13. There was also evidence that a third person's DNA was

also found on the sole of a shoe. R. 187, ll. 4-19. None of appellant's DNA was found in the bedroom where the decedent's body was discovered. R. 186, l. 9 – 188, l. 15.

Discussion

Defense counsel correctly objected to Deputy Suber repeating what Lewers told him that night. Lewers allegedly told Suber he believed his mother's boyfriend, appellant, "had done it because he kept saying they were hiding from him. Defense counsel correctly argued this statement did not qualify as an "excited utterance."

In State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008), Adria Cropper witnessed her former boyfriend, Washington, stab her new boyfriend after an altercation in Charleston. Cropper was taken to the police station to give a statement. A police officer described Cropper as being "*extremely upset and distraught* over the incident." Another officer informed Cropper during the interview that the victim had died, and Cropper became "*hysterical.*" State v. Washington, 379 S.C. 120, 123, 665 S.E.2d 602, 603-604 (2008).

Even with this evidentiary foundation showing Cropper was hysterical, extremely upset, and distraught, our Supreme Court held that her statement to the police **was not admissible** as an excited utterance.

The rationale underlying the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006).

Here, Lewers was a suspect in his mother's death, and there was no evidentiary foundation showing that he was hysterical or extremely distraught. In fact, his girlfriend's friend, Ms. Prease, testified she and his girlfriend, Fernandez, thought by Lewers's demeanor that he was joking when he told them his mother had been killed.

Further, the police were naturally suspicious of Lewers given the facts that were imparted to them by Lewers. Lewers told the police that his girlfriend, Fernandez, and her friend, Ms. Prease, had come to his house that evening. They did not come inside, and Lewers offered that his mother was asleep at the time. Lewers said they left for only about 10 or 15 minutes to go to the Citgo station, and then for him to make a sale of marijuana at the Greenville Arms apartments. When they returned ten to fifteen minutes later the decedent had been murdered, and the house was left a bloody mess. There was no evidence of forced entry, and given the small timeframe – the 10 to 15 minutes they were gone -- the police were naturally very suspicious. Lewers knew Suber was a law enforcement officer investigating a murder when he talked to him. Lewer's statement did not qualify as a statement made under the *immediate and uncontrolled domination of the senses*. See, State v. Mahoney, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001).

For a statement to qualify to be an excited utterance three elements must be met. (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 have caused the startling event or condition. State v. Ladner, 372 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

Here, there was no evidentiary predicate for Lewer's statement to be admitted as an excited utterance. In fact, given his apparent calm demeanor, and the suspicion the police had of him, his attempting to blame his mother's boyfriend for the murder must have been viewed by investigating law enforcement as "self-serving deflection." This was not an excited utterance.

Further, defense counsel pointed out the judge that Lewers had testified earlier. The record shows he was interrupted by the judge who was known to quickly rule. That is not a criticism – it is the reality. The solicitor chose **not** to ask Lewers about this statement to Suber, and in addition to it not qualifying as an excited utterance through Deputy Suber it constituted sandbagging by the

solicitor. Defense counsel could not know cross-examine Lewers about the statement. Counsel would have been a fool to recall Lewers as a witness to reinforce his self-serving statement to Deputy Suber, and thus the solicitor successfully and unfairly sandbagged the defense.

Further, such statements about a belief by a "witness" had about who was the murderer – because of the alleged victim's fear of the defendant-- are undeniably highly prejudicial. See, State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). Appellant should be granted a new trial.

2.

The court erred by allowing Greenville Sheriff's Investigator Peeples to testify that she heard someone at appellant's place of business allegedly told someone else that appellant had had "called into work," and told someone at work that "he was a victim of a home invasion where he was injured," since this testimony was inadmissible prejudicial hearsay.

As seen, the solicitor questioned investigator Peeples about alleged information she was overhearing at the police station. Peeple testified she became involved in the case on March 17, 2014, the day after the murder. R. 158, ll. 11-12. Peeples said: "I was just helping with the case. It happened the night before. *I was listening to them as they were talking about the case* and just finding out what I could do to piece some things together." R. 158, ll. 13-19. (emphasis added).

Peeples said she was listening to "the guys in homicide. I was assigned to family violence at the time of this incident." Over objection, Peeples was allowed to testify that she learned from someone that appellant had called into work and told someone at his jobsite "that he was a victim of a home invasion where he was injured." R. 158, l. 24 – 159, l. 8. The judge allowed the testimony which was used to contradict appellant's statement to the police that he and his cousin had been attacked by four men at a liquor house. This hearsay testimony also did not qualify as an exception to the hearsay rule, and it was rank double hearsay (in the least). See, State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (1985).[2]

In this case, investigator Peeples said she was advised by some unknown person that they learned appellant allegedly called into work, and told some other unknown person that he was the victim of a home invasion where he was injured. This testimony was rank hearsay and it was highly

[2] Abrogation recognized in State v. Dinkins, 339 S.C. 597, 605, 529 S.E.2d 557, 605, n. 1 (Ct App. 2000) discussing Ohio v. Roberts, 448 U.S. 56, 66 (1980).

prejudicial, inter alia, because this unknown person, at appellant's place of business, attributed a statement to appellant that directly contradicted other evidence he told his girlfriend and the emergency room workers that he had been attacked at a liquor house which caused the injuries to his wrist and the bleeding. Hearsay which results in prejudice to the defendant is not harmless. See, State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

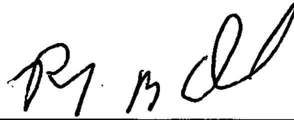
It is elementary that hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examination the declarant. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150 (1985). Where inadmissible hearsay evidence is offered reversal is required where the defendant is prejudiced by the error.

In this case, appellant, as the solicitor correctly stated, sought to show the jury that not only was he not the murderer in this case, but that Lewers committed the crime. The police were very suspicious of the story Lewers told about the murder being committed in the short time frame -- ten to fifteen minutes -- that he was away from the house.

The defense attempted to show that Lewers also had the financial motivation because the UPS settlement money was held in trust by his mother. On cross-examination the defense showed Lewers was seeking to impress others on Facebook about cars and money. R. 84, l. 17 – 92, l. 9. The defense line of attack, or thinking was that the grandmother or the natural father of Lewers would take over the money held in trust which would make it easier for Lewers to obtain the money. While appellant had no duty to offer a defense – or attempt to show the jury that there should be more suspicion of Lewers than him, it most respectfully cannot be said that the hearsay error here, or the one in issue one, were harmless beyond a reasonable doubt.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

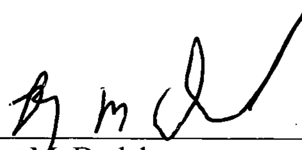
ATTORNEY FOR APPELLANT

This 1st day of August, 2017.

<u>**CERTIFICATE OF COUNSEL FOR APPELLANT**</u>

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

August 1, 2017



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