STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HORACE ELIJAH WATTS,

APPELLANT

APPELLATE CASE NO. 2017-000255

RECEIVED
FEB 12 2018
SC Court of Appeals

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing hearsay testimony that alleged witnesses told the police appellant and his brother, Malik Davis, were the shooters, and by also allowing victim Tyrone Johnson to give hearsay testimony that he was told appellant and Davis were the shooters, since this inadmissible hearsay testimony was very prejudicial, and denied appellant his constitutional right to Confrontation?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offenses of murder, attempted murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. R. 1048 – 1055. Appellant's case was called for trial on February 6, 2017, before the Honorable Clifton Newman. Carter Potts, Jessica Nickels and Brent Arant were the assistant solicitors. Adam Ruffin, Jonathan Comish, and Stephen Krzyston were the defense attorneys. R. 1.

On February 9, 2017, the jury found appellant guilty on all four counts. R. 787, l. 23 – 788, l. 11. Judge Newman sentenced appellant to thirty years imprisonment for murder, and he imposed a ten year consecutive sentence for attempted murder. Judge Newman also sentenced appellant to a concurrent five year term for possession of a weapon during the commission of a violent crime, and one year imprisonment for unlawful carrying of a pistol. R. 811, ll. 17-22.

This appeal follows.

ARGUMENT

The court erred by allowing hearsay testimony that alleged witnesses told the police appellant and his brother, Malik Davis, were the shooters, and by also allowing victim Tyrone Johnson to give hearsay testimony that he was told appellant and Davis were the shooters, since this inadmissible hearsay testimony was very prejudicial, and denied appellant his constitutional right to Confrontation

Relevant Facts

This case involves the July 12, 2014 shooting at a family birthday party off of Two Notch Road in Columbia, where about thirty to forty people had gathered to celebrate. Columbia Police Officer Ivan Birochak testified on that day he was dispatched to an incident off of Magnolia Street near Two Notch Road in Columbia. "It was dispatched as a disturbance, possibly a fight in progress." R. 129, l. 17 – 130, l. 5.

However, when he arrived, Officer Birochak remembered, "I observed, I would say, probably thirty, forty people standing out from the house and in and around the house. No one was in distress. I spoke to several adults on the scene, stated there had been a disturbance." R. 130, ll. 6-13. This was about 8:26 pm, and Officer Birochak left the scene at 8:31. He did not do an incident report since everything appeared calm, and whatever problem there had been was apparently over. R. 130, ll. 6-25.

Birochak remembered that this Magnolia Street residence, the Cleckley household, "always had something going on." Birochak said there were barbecue grills in the yard, and there were usually people sitting around playing cards, drinking beer, and it was a busy location. R. 132, ll. 3-16.

While Birochak left the scene, he said another call came in "kind of in the same community." R. 133, ll. 6-11. Birochak described this area as bordering on Waites Road, Two Notch Road, and Magnolia Street. It was near the Benedict College football stadium. R. 133, l. 15 – 134, l. 3.

When Birochak returned to 2723 Magnolia Street, he remembered "we were dealing with a pretty loud situation." "They upgraded the call to shots fired and individual hit." R. 136, l. 1 – 137, l. 12.

Birochak described this as "a very chaotic scene." R. 137, ll. 19-25. Birochak recalled that he was "mobbed by people" at the scene and that there was yelling, screaming, and crying. Birochak walked over to Ike Lewis, who was laying on the ground, and "I didn't see any signs of life. You know, there were people shaking him, trying to, you know, again, in their state of panic administer some sort of first aid." Lewis was laying in "a large pool of blood," and he died in the yard. R. 138, l. 22 – 139, l. 24.

When the solicitor asked Birochak what people were telling him at the scene, defense counsel's objection to hearsay was *sustained*. R. 141, ll. 4-9. When Birochak still attempted to say what people were telling him at the scene, defense counsel again objected to hearsay and the judge sent the jury out. R. 142, ll. 1-25.

Defense counsel Ruffin again argued that Birochak was attempting to give hearsay testimony, and he disagreed with the state that it constituted a present sense impression or an excited utterance. For one thing, there had been a time lapse since the shooting and when these people descended on Birochak. Defense counsel also argued that allowing Birochak to testify what others supposedly told him would violate appellant's right to confrontation. R. 143, l. 1 –

149, l. 15. This time the judge overruled the defense objections, and the jury returned. R. 149, l. 15 – 150, l. 17.

Birochak then testified: "Numerous people came up and were [telling me] we know who did this. We know who shot us up. We know who just shot us. And they named Malik Davis *and Horace Watts*. And that was throughout the entire time there. I was approached by numerous people saying, we know who did it. We know where they're staying. We know who did this to us." R. 150, l. 18 – 151, l. 4. (emphasis added)

Birochak admitted: "I never made contact with Horace Watts." R. 162, ll. 6-10. Birochak saw the second victim, Tyrone Johnson, sitting in the passenger seat of a Ford Explorer. Johnson was shot, but alive. As stated, Ike Lewis died at the scene of the shooting. R. 167, l. 22 – 168, l. 18.

Later during the trial, Tyrone Johnson was called as a witness. Johnson was forty-six years old, and he stated he knew the Cleckley family, and even had dated one of their nieces for ten years. Johnson remembered the July 12, 2014 birthday party "to a point." R. 533, l. 20 – 534, l. 23.

Johnson recalled it was dark by the time he arrived at the party. Johnson testified: "[A]ll I know is I got shot. It's just -- it was just very vague that night. All I know is I remember some stuff like somebody saying he's been shot, too. And I'm like who. So I didn't know until I got in the ambulance. And I just started screaming for my boo, I want my boo [Julie]." R. 536, ll. 10-17.

Johnson remembered he was in a Ford Explorer that night, and he vaguely recalled hearing "a noise and everything." R. 537, ll. 6-20. The solicitor asked Johnson if he had any idea why he was shot that evening. The following occurred on direct-examination of Johnson:

Q. Mr. Johnson, do you have any idea why you got shot?

A. No. And that's the thing that I do not understand. First of all, I don't understand why my uncle [Ike Lewis] got killed either. Second of all, I don't even know y'all, so how am I going to get shot?

Q. And when you say I don't know y'all, who are you talking about?

A. **When I learned about Horace** –

MR. RUFFIN: Objection, Your Honor, *lack of personal knowledge* –

THE COURT: **Objection is overruled.**

BY MS. NICKLES:

Q. You can go ahead.

A. So all I just did was heard the name and everything, you know, and I was like, I still don't know them, you know. And they said you played basketball with them a long time ago. And I still -- so many people be in that yard.

Q. Okay. So you don't remember ever meeting **Horace Watts?**

A. No, I don't remember meeting him.

Q. Do you remember ever meeting Malik Davis?

A. No. Because, like I said, so many people be in that yard. And we all played basketball, so.

R. 538, ll. 2-25. (emphasis added).

Johnson thought he spent "a couple days" in the hospital, but he was not sure. R. 540, ll. 6-10.

In his closing argument, the solicitor admitted law enforcement did not know who shot Tyrone Johnson: "I'm not sure I can tell you who shot Tyrone Johnson. I can't tell you whether *it was Horace or Malik, but they're both just as guilty*. I can tell you who shot Isaac Lewis, that

was Horace Watts, but they are both just as guilty [that is what the hand is the hand of all means]." R. 744, ll. 8-20. (emphasis added).

The solicitor's statement about Isaac Lewis being shot by appellant was based on the alleged eyewitness testimony of April Cleckley, Terrell Threatt, Avery Dickson, Paris Young, and Diamond Corbett, who each claimed they saw appellant shoot Ike Lewis before Lewis died. R. 192; r. 254; r. 270; r. 277; r. 333; r. 350.

Several witnesses, including April Cleckley, testified that Malik Davis got in a confrontation with Terrell Threatt at the party, and that Malik Davis left and came back with his brother, Appellant Horace Watts. R. 189, l. 13 – 190, l. 8. April said when Malik came back with appellant, "they had guns in their hands." April ran into the back yard, and did not see what occurred although she heard gunshots. R. 190, l. 4 – 191, l. 19. April recalled the decedent, Isaac Lewis, was "getting all the kids up to get them in the house." R. 191, ll. 16-19. April admitted in her statement to the police after the shooting that she did not see a gun, she only heard it, and she did not see who shot the gun. R. 211, ll. 9-13.

Terrell Threatt testified the decedent was his wife's uncle. R. 230, ll. 1-10. Terrell remembered that he was playing cards, dominoes, and grilling out at the birthday party. The decedent, Isaac Lewis, was manning the grill. R. 230, ll. 19-25.

Terrell got into an argument with his girlfriend at the party, and his cousin and his girlfriend then "got to fighting." The fight was broken up and Terrell remembered seeing his friend Malik Davis "walking up the street." R. 231, l. 22 – 233, l. 3. Terrell knew Malik from C.A. Johnson High School, and "I seen him like every other day." R. 233, ll. 1-22.

Terrell remembered telling Malik Davis that the confrontation between him and his girlfriend and his cousin was "a family altercation," and he asked Davis to leave. R. 234, ll. 4-

21. Davis swung at him, and he hit Davis back during the fight. R. 235, ll. 1-8. The fight was broken up and Terrell went home. He saw Davis walking down the street also. R. 235, l. 5 – 236, l. 7.

Jamichael Lewis remembered the birthday party, and his great-uncle, Isaac Lewis, getting shot. R. 242, ll. 10-24. Lewis said that several people at the party helped break up the fight between Terrell and Malik Davis. Lewis said both Malik Davis and Terrell then went home. R. 245, ll. 4-20.

Lewis remembered a short time later he heard gunshots, and "we didn't want to get hit by a stray bullet or whatever, so we just sat back and hid behind the brick on the front porch. R. 247, ll. 10-20. Lewis said that appellant returned with Malik Davis after the fist fight, and he claimed that appellant came into the yard shooting. Lewis testified it looked like Malik Davis' gun "ran out of bullets or jammed." R. 249, l. 25 – 251, l. 4. Lewis testified: "I see (sic) Horace running out the yard and see my uncle on the ground." R. 251, ll. 16-22.

Lewis said he later picked out appellant's photograph from a lineup, and he maintained that appellant "shot and killed my uncle." R. 254, ll. 21-25. On redirect examination, Lewis claimed he identified appellant "because I seen him do it and I was there and seen them." R. 270, l. 18 – 271, l. 1.

George Smith was with the Columbia Police Department Crime Scene Unit. Smith testified that at the Magnolia Street birthday party crime scene he found both spent .9 mm and .45 caliber shell casings. R. 368, l. 1 – 370, l. 18.

Smith also participated in the execution of a search warrant at the Waites Road home where appellant apparently lived. R. 383, l. 25 – 385, l. 17. Smith said the police found two shell cases near the wall next to the bed. R. 385, l. 18 – 387, l. 25. Smith testified in the

bedroom the police also "collected .9 mm live round unfired cartridge, a box of twenty, [and a] .45-caliber box." R. 388, ll. 1-6. Smith also testified in the second bedroom, that 45-caliber "spent" shell casings were located. R. 398, ll. 7-12.

In his closing argument defense counsel Ruffin told the jury that eyewitness identifications were suspect, and that large groups of individuals "tend to feed off of each other's statements about what they see. There's sort of a feedback loop kind of thing that goes on. We sort of confirm each other's beliefs about what we saw." R. 758, l. 23- 759, l. 15. The judge gave an instruction to the jury on how they should evaluate alleged eyewitness identifications. R. 774, l. 21 – 779, l. 1.

Discussion

Rule 801, (c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The hearsay in this case was that Officer Birochak, who was not present at the time of the shooting, testified that he was told by other unknown persons that appellant and his brother Malik Davis were the shooters. This testimony was offered to urge to the jury that other persons, who did not testify, and who Officer Birochak could not even name, told Officer Birochak that appellant and his brother were responsible. That testimony was offered to prove the truth of the matter asserted.

Bystander statements are viewed as very suspect, particularly, as here, where there is no evidence or foundation to show the unknown bystander witnessed the actual shooting. "Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule." 23 C.J.S. Crim.Law § 876 (1989). The hearsay

statement of an unknown bystander is admissible under the excited utterance exception only when the circumstances which surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness. People v. Mares, 705 P.2d 1013, 1016 (Colo.App.1985). See also People v. Fields, 71 Ill.App.3d 888, 28 Ill.Dec. 202, 390 N.E.2d 369 (1979) (if nature of event or circumstances indicate bystander did not observe the act, declaration should be excluded); State v. Kent, 157 Mich.App. 780, 404 N.W.2d 668 (1987) (declarant must have had opportunity to personally observe the matter of which he speaks); Commonwealth v. Stetler, 494 Pa. 551, 431 A.2d 992 (1981) (declarant must have perceived the happening); Underwood v. State, 604 S.W.2d 875 (Tenn.Crim.App.1979) (excited utterance of bystanders admissible when declarant observed the act and the declaration arose from personal observation). Cf. Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923) (under res gestae exception, declarant must have had opportunity to personally observe the matter of which he speaks). State v. Hill, 331 S.C. 94, 99-100, 501 S.E.2d 122, 125 (1998).

Similarly Tyrone Johnson, the attempted murder victim, did not see who shot him. Johnson was allowed to testify over defense objection that he was told by other unknown people that appellant and his brother Malik Davis were responsible for his gunshot wounds.

As seen, the solicitor admitted in his closing argument that he did not know who was responsible for shooting Johnson. The solicitor exploited the hearsay testimony that appellant and Malik Davis were the shooters by telling the jury it did not matter who shot Johnson because they were both guilty under the "hand of one is the hand of all."

Rule 802, SCRE, provides hearsay is not admissible evidence "except as provided by these rules or by rules prescribed by the Supreme Court of this state or by statute." In State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (2010), the Supreme Court dealt with testimony from witness

Davis, who testified she asked Natalie English: "What was going on?" and if her friend appellant Sims had stolen a car. Davis said that Natalie English told her: "Keith [Sims] had murdered somebody."

The Supreme Court disagreed with this Court's holding that the statement was not hearsay, and that it was admissible as a statement by a co-conspirator in furtherance of the conspiracy. Our Supreme Court found that the statement above was inadmissible hearsay, and it was an expression that Sims had killed the decedent in that case. The Supreme Court in State v. Sims nonetheless found this hearsay statement that Sims was the murderer was harmless given other overwhelming evidence of his guilt.

In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (2014), the Court held that a mother's statement to a 911 operator repeating her daughter's assertion that her boyfriend broke into her house, beat her up, raped her and sodomized her and that his name was Matthew Hendricks was inadmissible hearsay. The Court rejected the state's arguments, as were presented in this case, that the statement was admissible as a present sense impression or as an excited utterance.

As to a present sense impression, the Court noted the foundation for its admission are that: "(1) the statement must describe or explain an event or condition; (2) the statement must **be contemporaneous with the event**; and (3) the declarant **must have personally perceived the event**." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (2014). (emphasis added). See Rule 803(1), SCRE; United States v. Mitchell, 145 Fd. 3d. 572, 576 (3d Cir. 1998).

Here, defense counsel correctly argued there was a passage of time between the shooting and the statements given to the police officer, and thus they were not contemporaneous with the

event. Further, there was no foundation laid that any of the unknown people personally saw appellant shooting anyone, much less Johnson or Lewis.

Further, the court in Hendricks found that the mother's statement -- while surely an intense emotional reaction to her hearing her daughter had been raped -- did not prove or show that the mother was under the required stress or excitement which was necessary to preclude the possibility of thought or fabrication. See also State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011).

In State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008), our Supreme Court also held an eyewitness statement to a police officer about a stabbing incident was inadmissible under an exception to the hearsay rule for excited utterances. The Supreme Court in State v. Washington found that the statements of Washington's former girlfriend, and now the girlfriend of the decedent, were not admissible as excited utterances.

The statements were given by Washington's former girlfriend in a formal interview with the police. As is the case with the hearsay testimony in this case, the state did not lay a proper foundation to show that the statements were made while the declarant was under the stress of excitement which must be caused by the startling condition. See, also, State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

While the unknown people who spoke to the police officer in this case might have been excited, people merely forming a crowd mentality to assert appellant and Davis were the shooters did not lay the proper foundation that the police officer even knew the declarants -- any of them – *had actually witnessed appellant shooting anyone*.

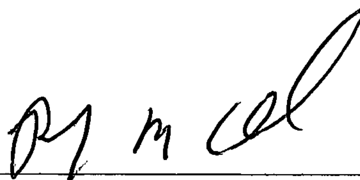
The hearsay testimony given the police officer, and by attempted murder victim, Johnson, as to hearing other people say that appellant was the shooter were very prejudicial. Malik Davis

was involved in a fight at the scene of the birthday party, and appellant was not even present. Even assuming appellant went to the birthday party for the first time with a gun to avenge his brother Malik having been in a fistfight, broad assertions that because appellant had a gun, he must have been the murderer were very dangerous, since the jury could draw the spurious, impermissible conclusion that because some people saw appellant with a gun, he must have been the murderer, and must have shot Johnson. The hearsay testimony in this case was very broad, not reliable, and without any foundation that these unknown bystanders actually witnessed appellant shoot anyone.

Given this unreliable inadmissible hearsay testimony, appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of February, 2018.

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Honorable Clifton Newman, Circuit Court Judge

THE STATE,

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APPELLANT

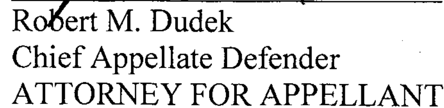
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Horace Elijah Watts 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 Clifton Newman, which was held on February 6 - 9, 2017, 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 Horace Elijah Watts.

Respectfully Submitted,



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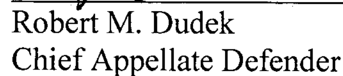
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments:
(2) Entire trial and pre-trial transcript.

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

February 12, 2018



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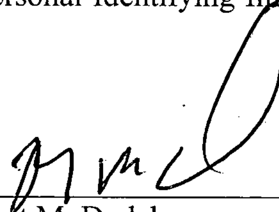
CERTIFICATE OF COUNSEL

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."

February 12, 2018.



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THE STATE,

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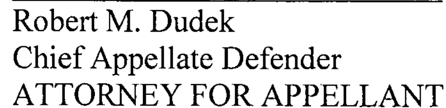
APPELLANT

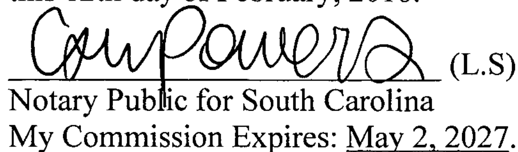
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Horace Elijah Watts, #355244, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of February, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of February, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.