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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge

Opinion No. 2018-UP-092

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

PETITION FOR REHEARING

In its February 21, 2018, opinion, this Court reversed the trial judge's decision finding inadmissible the testimony of Sergeant Jonny Wells regarding the name of a presumed third party, though Appellant expressly rejected third party guilt or identity as the basis for the testimony's admission. Initially, Green only offered the context of the victim's dying words as the basis for admission,¹ then later agreed with the Court's assessment under SCRE 804(b)(2). The Court failed to address Respondent's contention Appellant did not preserve the testimony's relevance on the basis of third party guilt for this Court's review. Respondent respectfully

¹ Counsel for defense argued, "Well, Your Honor, I'm not exactly saying that the third party did it. I'm just wanting the jury to hear the victim's final words." (R. p. 129, lines 17-19.) This could be construed as arguing for admission to frame the context of the crime, or, a *res gestae* argument. Green did not, however, argue the words were relevant to the identity of the perpetrator.

submits the Court's opinion misconstrues or misapprehends important facts of record and erroneously construes and improperly applies well-established Supreme Court precedent. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks modification of the erroneous opinion to be consistent with our State Supreme Court.

I. The Court of Appeals decided an issue of relevance that was not raised or relied upon by the defense for the admissibility of evidence. In so doing, the Court of Appeals misconstrued clearly established law of the Supreme Court of South Carolina.

The procedural bar overlooked by the Court of Appeals concerns the relevance of the evidence offered by the defense, not its admissibility pursuant to either a dying declaration or third party guilt. For purposes of issue preservation, the Court of Appeals misconstrues the argument before the trial court on the basis for admission of the testimony. The trial court initially understood the testimony of Sergeant Wells was only relevant to the identity of the killer. Indeed, it is hard to imagine another basis for relevance. Nonetheless, when asked by the trial court whether the admission of the victim's statement "Douglas" shot him was in the implicated third party guilt, trial counsel rejected that argument, saying, "I'm not exactly saying that the third party did it." (R. p. 129, lines 17-19.)

Although the Court of Appeals notes this rejection of relevance in the opinion, the Court ultimately adopts the argument new presented on appeal for the first time by ruling on third party guilt and refusing to conduct a harmless error analysis. The Court's opinion addresses the relevance argument raised on appeal, not the argument raised at trial, in violation of Supreme Court of South Carolina precedent. *See TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995)(a party cannot argue one ground below and then argue another ground on appeal); *State v. Benton*, 338 S.C. 151, 156-57, 526

S.E.2d 228, 231 (2000) (finding Appellant could not argue a palm print was direct evidence at trial and then argue the print was circumstantial evidence on appeal).

The Court of Appeals found the statement admissible as a dying declaration, but the statement's qualification as a hearsay exception does not end the analysis of admissibility. Admissibility must be consistent with all the Rules of Evidence to ensure fairness in the proceedings for all parties. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). Moreover, Rule 103, SCRE, provides the following:

(a) Effect of Erroneous Ruling. **Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and**

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, **the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court** by offer or were apparent from the context.

(emphasis added).

The defense is obligated to present its case within the confines of these rules. Green told the trial court he was not offering Wells' testimony to show a third party shot the victim. If the defense was not offering the statement for the identity of the shooter, then there was no clear relevance offered. The opinion says "Green did not have a burden to establish Douglas' identity

or the likelihood that Douglas, and not Green, was the actual shooter.” Green did, however, have a burden to show the relevance of his proffer of admission in accordance with Rule 103. If the defense sought to offer the statement to show the identity of the killer, as conceded on appeal (FBOA at p. 17), then Green was required to argue identity as the basis for admission to the trial court, particularly when the court questioned admissibility under Rule 403. Green never proffered a basis for admission, and he declined to offer relevance. Further, when pressed by this Court at oral argument, appellate counsel could not explain why trial counsel did not argue admissibility to show the identity of the killer.

Nonetheless, after suggesting the trial court’s consideration of admissibility beyond a dying declaration was improper, the Court then appears to assume relevance and assesses the testimony pursuant to the third party guilt standard. Thus, even though the Court misconstrues the holding in *Holmes*, as will be discussed in the following section, the Court’s finding on the merits of the third party guilt argument ignores the procedural bar forbidding the merits consideration of an unpreserved claim. The statement’s relevance is not preserved for review, should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

II. Prior to Any Admission, the Trial Court Must Subject Third Party Guilt Evidence to Some Scrutiny, As Required by *Gregory*² and *Holmes*.³

Next, the Court’s opinion misconstrues the holding of *Holmes v. South Carolina* to preclude the courts from making any assessment of the evidence offered by the defense to

² *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

³ *Holmes v. South Carolina*, 547 U.S. 319 (2006).

support a third party guilt argument, instead finding the evaluation of the evidence to be within the exclusive province of the jury. The Court found the following:

Green did not have a burden to establish Douglas's identity or the likelihood that Douglas, and not Green, was the actual shooter. Green's right to present witnesses in his own defense was fundamental, and the jury had a right to evaluate the strength of both parties' evidence. *See Holmes*, 547 U.S. at 331 (“[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.”).

This finding ignores the gatekeeping function of the trial court to make a threshold determination of the admissibility of the evidence, as mandated by *Gregory* and *Holmes*, when the defense invokes the theory of third party guilt by specifically naming a presumed⁴ third party. Respectfully, Respondent submits this finding is in error.

In *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004), the Supreme Court of South Carolina evaluated the strength of the State's case against Holmes in determining whether the evidence of another perpetrator was admissible as third party guilt. The Supreme Court concluded Holmes could not “overcome the forensic evidence against him to raise a reasonable inference of his own innocence.” *State v. Holmes*, at 343, 605 S.E.2d at 24. The Supreme Court of the United States vacated and remanded the state court's decision, finding the state court the erroneously considered the strength of the prosecution's case in determining admissibility. *Holmes v. South Carolina*, 547 U.S. at 329. Despite the state court's error, *Holmes* confirmed the *Gregory* standard for third party guilt as the controlling standard. *Gregory* said “before such

⁴ Because the issue of identity was not developed, we do not necessarily know if the name “Douglas” was, in fact, a third party. “Douglas” could have been a mishearing of “Dalonte,” Green's first name. In other words, this testimony could have been beneficial to the defense or the State. The victim's statement is uncertain, in light of the testimony of the injuries to his mouth, and the lack of evidence pointing to an identifiable third party named Douglas. However, the Court of Appeals erroneously assumes this was an identification of a third party.

testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.” *Gregory*, at 104-105, 16 S.E.2d at 534-35.

In its opinion, the Court of Appeals noted the U.S. Supreme Court’s additional warning in *Holmes* that “by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” *Holmes* at 331. The Court of Appeals misconstrues this holding to suggest the trial court has no role in the evaluation of the defense’s proffer of third party evidence. The Court’s finding Green has no burden to establish Douglas’ identity is incorrect. If Green attempts to introduce evidence of a presumed third party’s guilt, *Holmes* and *Gregory* make it clear he does have some burden to establish a “proof of connection” “before the testimony can be received.”

Holmes did not forbid the trial court from examining the defense’s third party guilt evidence. Instead, *Holmes* found the trial court erred by considering the strength of the State’s case rather than determining the corroboration of the third party guilt by the defense. *Id.* at 328–29. Indeed, by affirming the *Gregory* standard, the U.S. Supreme Court **necessarily required** the trial court to make a threshold evaluation of the third party guilt evidence to determine whether “the proof of connection” exists. The Court of Appeals’ holding that this evaluation is within the exclusive province of the jury misconstrues the *Holmes* finding and would otherwise mandate the admission of any evidence of third party guilt, regardless of whether it cast only a bare suspicion of third party guilt. The opinion is also inconsistent with its holding in *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), overruled on other grounds by *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011), in which it found the trial court properly excluded evidence of

third party guilt when the witness had given an inconsistent statement to a fellow inmate naming an unknown third party as the perpetrator of the crime. The Court of Appeals cited *Holmes* and *Gregory* and said the following:

The trial court adhered to the *Gregory* rule and applied the proper standard for admission of third-party guilt evidence—there must be such proof of connection with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at times, with no clarification as to whether they were the same individual. The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere “bare suspicion” on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.

Rice, at 322, 652 S.E.2d at 419. In *Rice*, the Court of Appeals affirmed the trial court’s ruling on its threshold determination of the admissibility of the evidence. The Court’s instant opinion appears to abandon the *Rice* line of reasoning.

Holmes also held that though the trial court erred in denying the admissibility of the statement, the limitations on the admissibility of third party guilt as outlined in *Gregory* do not deny a defendant his right to present evidence. *Id*; see also, *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010); *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 599 (2008). *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third-party guilt. In other words, Appellant’s offer of third party guilt evidence is subject to scrutiny by the trial court **before** its credibility falls within “the exclusive province of the jury.”

To be clear, Respondent does not suggest the State is relieved of its burden to prove the identity of the perpetrator. Nor is the defense hamstrung from offering evidence that suggests the defendant **is not** the perpetrator. For example, in a six person photo lineup, if a witness chose photograph 1 and the defendant was pictured in photograph 5, the defense would be entitled to

offer evidence the witness could not identify him as the perpetrator. Similarly, if fingerprints were found at a crime scene that did not match those of the defendant, a jury would be entitled to hear such evidence offered by the defense. In the instant case, however, Green did not argue the evidence was admissible to show the victim did not identify him as the shooter. As noted before, he argued no relevance at all. The testimony offered, however, specifically named an individual. When a presumed third party is specifically named in evidence offered by the defense,⁵ the limitations of *Gregory* and *Holmes* are necessarily implicated. The Supreme Courts of South Carolina and the United States have affirmed the trial court's determination of some proof of connection to a third party. The Court's finding the statement is entitled to be submitted to the jury renders the holding in *Gregory* and *Holmes* meaningless. If the statement is not properly excluded here, when counsel denies its relevance to a third party, when would third party guilt evidence ever be excluded?

The trial court properly made a threshold determination of Green's proffer in accordance with prevailing case law. In reversing the trial court, the Court of Appeals erred.

III. There Was No Abuse of Discretion Pursuant to the *Holmes* and *Gregory* Standard.

Further, the Court of Appeals failed to show how the trial court abused its discretion when the court found Green failed to argue relevance by offering sufficient "proof of connection" "or circumstances, as tends clearly to point out such other person as the guilty party" for Wells' testimony to be admissible. Again, the trial court repeatedly questioned Green on the relevance of his offer of evidence pursuant to third party guilt, and Green declined to make that

⁵ Using the photo lineup and fingerprint examples, a defendant could certainly offer the testimony of the officer or the witness to show the defendant was not the individual chosen by the witness. This offer would not be in violation of Rule 403. The defense would not, however, be allowed to name the party identified in the lineup and argue that person's guilt without further proof of a connection of that third party to the crime.

offer. Green admitted he could not identify who “Douglas is because of the one witness I have as to who Douglas was.” (R. p. 128, lines 21-22.) Thus, unlike in other cases in which the third party was an identifiable person, in the instant case no other evidence was offered to show the third party actually exists. Even Appellant acknowledged this. As the trial court found, the mere mention of a name cannot give rise to a “reasonable inference or presumption as to [Appellant’s] innocence.” *Gregory*, 198 S.C. 98, 16 S.E.2d at 534. The opinion fails to acknowledge and give appropriate deference to the factual findings of record. The record fully and fairly supports Judge Buckner’s findings. To hold the trial court abused its discretion in refusing to admit the statement, when the record is replete with evidence supporting the trial court’s efforts and failure to elicit an argument on relevance from Green, is improper.

IV. Because the statement was not offered for identity, it was not relevant. Because it was irrelevant, its exclusion was harmless. The Court erred in assuming relevance and failing to conduct a proper harmless error analysis.

The Court of Appeals adopts appellate counsel’s new argument on appeal that the statement is clearly relevant to the identity of the killer despite trial counsel’s apparent rejection of that argument. The Court assumes relevance despite the trial court’s findings no other evidence supports the existence of a third party named Douglas. That assumption of relevance is not supported by the record because the identity of Douglas was never developed by the defense. It would be a harsh result to indemnify a murderer by construing the victim’s last words as an identification of a third party, when in actuality the declaration could be an error in hearing or a mistake in name.

Further, the Court offers no explanation why the failure to admit the testimony, even if considered error, was not subject to a harmless error analysis. The opinion cites only to *State v. Hester*, 137 S.C. 145, 161, 134 S.E. 885, 890 (1926) (providing the jury is entitled to hear all

competent testimony presented, and the failure to give it such opportunity is generally prejudicial error) for its conclusion Green was prejudiced by the refusal to allow Wells' testimony. The Court's neglected to weigh the evidence excluded against the other evidence admitted at trial. *See State v. Byrd*, 318 S.C. 247, 250, 456 S.E.2d 922, 924 (Ct. App. 1995) ("where the error may be weighed against the other evidence properly admitted during a trial, the Court must conduct such a weighing, rather than merely reversing the decision below wholesale.") Had the Court of Appeals conducted a prejudice analysis specific to this case, the Court's erroneous conclusions on the admissibility of the statement would have been revealed.

For the failure to admit the evidence to have prejudiced Green in any way, the testimony must have been relevant pursuant to third party guilt, an argument flatly rejected by Green at trial. Arguably, Green offered a limited basis of relevance as the context of the victim's last words, but he certainly never argued the words were relevant to identity. If the testimony were only offered as a dying declaration and nothing more, as repeatedly asserted by Green, there is no prejudice in trial court's discretion to preclude the testimony. The Court's citation to *Hester* assumes the testimony is "competent" without explaining how it is competent exculpatory evidence Green was entitled to admit. The Court did not consider the statement in light of the State's case against Green. Had the Court done so, it would have reached the same conclusion as that of the trial court – no other evidence connected a third party, much less a man named Douglas, to the crime. Error is harmless when it "could not reasonably have affected the result of the trial." *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The admission of an assertion of one witness who believed he heard the victim say the name "Douglas," when the victim was shot in the mouth and the defendant's first name was "Dalonte" cannot be said to have reasonably affected the outcome of the trial. Taking trial counsel at his word, the statement was merely the

victim's last words, not an assertion of the identity of the killer. The Court of Appeals misconstrued prevailing case law in disregarding the procedural bar to Green's unpreserved claim of relevance, assuming relevance asserted by appellate counsel, and finding the trial court's ruling prejudicial without weighing the evidence in this case.

CONCLUSION

For all the foregoing reasons, Respondent submits this Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion the trial court impermissibly refused to allow the admission of Sergeant Wells' testimony, and that the error was not harmless. Respondent respectfully asks this Court to reconsider its position considering the unique facts of Appellant's case in rehearing this matter and affirming Appellant's convictions.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
SUSANNAH R. COLE

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

March 8, 2018.

**STATE OF SOUTH CAROLINA
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Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge

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THE STATE,

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DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Petition for Rehearing on Appellant by depositing two (2) copies of the same via United States Postal Service, addressed to his attorney of record at:

Robert Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 8th day of March, 2018.



Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383



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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

March 8, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Dalonte Green
Appellate Case No. 2015-001059

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Return to Petition for Rehearing*, and Proof of Service in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/csm

cc: Robert Dudek, Esq., Chief Appellate Defender
Honorable Isaac McDuffie Stone, III, Fourteenth Judicial Circuit
Trisha Allen, Dir., Victim Advocate Div.