STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2015-001881

The State, Respondent,

vs.

Dexter L. Myers, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On August 14, 2014, the Richland County Grand Jury indicted Appellant for attempted murder and murder. He proceeded to trial before the Honorable J. Derham Cole and a jury on August 31, 2015. On September 4, 2015, the jury found Appellant guilty of attempted murder as charged and of the lesser included offense of voluntary manslaughter. The trial court sentenced Appellant to thirty years' imprisonment for voluntary manslaughter and twenty years for attempted murder; the sentences to be served consecutively.

STATEMENT OF FACTS

Mahogany Speech-Harris, the victim of the attempted murder charge, lived in an apartment with her husband Dajuan Harris, the victim of the murder charge; their two children; and her two brothers, one of which is Appellant. (T.223; R.___). Appellant and his brother had lived with Mahogany off and on for about three years, but had been told in March 2014 that they needed to move out. (T.223-224; R.___). Mahogany and Harris had a bedroom, their daughters had a bedroom, and her brothers slept in the living room. (T.224; R.___).

The brothers were still living in the apartment in July 2014. On July 2, 2014, one of the children could not sleep so Mahogany got up to fix breakfast. (T.225; R.___). She took her youngest daughter with her to wake up Harris and have him join them to eat. (T.226-227; R.___). Harris and the children were at the table and began eating. According to Mahogany, there were no arguments between her and her brothers or anyone and her brothers that morning. (T.231; 233-234; R.___). Mahogany turned to fix her own breakfast and heard "something go pow, pow." (T.228-229; R.___). She said it sounded like fireworks, but then she heard her brother saying: "No, Dexter, no" and when she looked up she saw the gun. (T.229; R.___). Mahogany never saw her husband, she only saw Appellant and indicated: "He just kept shooting . . . ." (T.230-231; R.___).

Mahogany ran across the hall to her neighbor's apartment to call 911. (T.231; R.___). Her neighbor heard three gunshots. (T.93; R.___). Thereafter, Mahogany ran into her apartment "screaming and hollering 'My brother shot my husband.'" (T.94; R.___). Mahogany told her neighbor she had been shot and her neighbor indicated Mahogany was bleeding. (T.94; R.___).

Master Deputy Fairbanks was the first responder on the scene. He found Mahogany at her neighbor's apartment. He indicated Mahogany had been shot in the leg. (T.99; R.___). He

entered the other apartment and found Harris locked in the bedroom. (T.99-100; R.___). After kicking the door open, they found Harris leaning up against the door. (T.100; R.___).

EMS arrived and located Harris. He was "wedged behind the door lying prone in a pool of blood with obvious . . . trauma to his face and chest area." (T.119-120; R.___). Harris was not breathing, his pupils were fixed and dilated, and he was "cold." According to EMS, he was "obviously dead." (T.120; R.___). They then approached Mahogany who had five holes in her outer thigh and buttocks area from where she had been shot. (T.121; R.___). According to the ER doctor, Mahogany had 2-3 gunshot wounds. (T.284; R.___).

The pathologist performed the autopsy on Harris. (T.404; R.___). She indicated Harris had a gunshot wound to the left side of his head, which exited on the right back of the head. Another gunshot wound to the right side of his neck. Finally, there was a gunshot wound to his lower back. (T.406; R.___). She indicated the gunshot to the head was nonfatal as it missed the brain. (T.410-411; R.___). The bullet that entered through the neck perforated his trachea, then perforated the major subclavian artery, went through the left upper lobe of the lung, and ultimately entered the soft tissue left arm. (T.412; R.___). The gunshot to the neck was the fatal gunshot.(T.412-413; R.___). The final gunshot entered the lower back and twice hit the small intestine. (T.413; R.___).

After the shooting, Appellant fled the apartment. (T.510; R.___). He sought a ride from a neighbor who happened to be leaving at the time. (T.214; R.___). She gave Appellant a ride from the Apartment complex. He told her he was in a fight with his girlfriend and he "just wanted to get away." (T.215; R.___). Appellant was later apprehended at a friend's house. (T.324; 510; 512; R.___).

Captain McDonald interviewed Appellant after he was apprehended. After being read his Miranda rights, Appellant agreed to speak with Captain McDonald. Appellant initially denied any involvement and any knowledge of the shooting. He even denied being present. (T.328; R.___). After being confronted with some of the facts that the officers knew from Mahogany, Appellant continued to deny involvement. His story changed to indicate he was at the apartment that morning but had gotten up and left to buy some marijuana and had not returned. (T.329; R.___). Appellant's story changed again as the questioning continued. His third version indicated he was present at the apartment, awakened in the living room, and found a gun on the floor. Appellant indicated the gun was a dangerous gun because the hammer was always cocked. He said he picked it up and it just went off and struck Harris. Appellant told Captain McDonald he had the gun in his hand and it "kept going off and struck Mahogany." (T.329; R.___).

Eventually, Appellant led other investigators to where he had disposed of the gun. (T.331; R.___). After returning, he again spoke with Captain McDonald and gave a written statement which differed from his prior statements. He indicated they have a gun at the apartment for protection and keep it under the couch in the living room. Appellant stated Harris picked up the gun so none of the children would get it. (State's Exhibit 2; T.332; R.___). Harris put the gun in Appellant's hand after Appellant warned him about the hammer being cocked. Appellant explained the gun just went off and hit Harris, and then it went off a few more times and it hit Mahogany. (State's Exhibit 2; T.333; R.___). He indicated there was no argument with Harris that morning and that he did not intentionally shoot Harris. (State's Exhibit 2; T.334; R.___).

Appellant later gave a second written statement. (State's Exhibit 3; T.582; R.___). In this statement, Appellant indicated Mahogany entered the kitchen mad and followed by Harris.

Harris then looked at him and he said "man" meaning move on to Harris. Harris was coming at him and going for the gun. (State's Exhibit 3; T.583; R.___). Appellant said he grabbed the gun and it went off shooting Harris. He said Harris was still on him so he shot him again. His sister then came at him and Appellant shot her. (State's Exhibit 3; T.584; R.___). This is a similar version of events to the one Appellant testified to at trial, but he had difficulties remembering many details of the events. (T.519-523; R.___).

The trial court ultimately charged the jury with murder, voluntary manslaughter, and involuntary manslaughter as it related to the death of Harris. The court charged both attempted murder and assault and battery of a high and aggravated nature as it related to the wounds sustained by Mahogany. The court also charged the jury with defenses of accident and self-defense. (T.666-684; R.___). The jury found Appellant guilty of voluntary manslaughter as to Harris and attempted murder as to Mahogany.

ARGUMENT

I. The trial court did not err in admitting a text message from the deceased victim containing a present sense impression. Further, any possible error is entirely harmless.

Appellant contends the trial court erred in admitting a text message sent from the deceased victim to his wife because it was inadmissible hearsay. The text message fell under an exception to hearsay as a present sense impression. Further, any error in the admission of the message is entirely harmless.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

Hearsay is defined 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." Rule 801(c),

SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.[1] One such exception allows for the admission of a present sense impression. See Rule 803(1), SCRE ("A statement describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter.").

"There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (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 (Ct. App. 2014). The exception is modeled after the Federal Rules of Evidence. See Rule 803 cmt., SCRE. The Note provided by the Advisory Committee to the 1972 proposed rules explains the inclusion of the present sense impression exception: "The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Rule 803 cmt., FRE.

In March, several months before the shooting, Mahogany received a text message from Harris. The message read: "Where you at your brothers around there talking a whole lot of shit like they said they going to burn me and the kids I think they trying to buy a gun because I heard them talking about it and good luck." (State's Exhibit 223; T.392-393; R.___). The text message in this case can be read to be a description and explanation of an ongoing or recent event perceived by Harris. He starts the message by asking where Mahogany was currently located—"Where you at"—then indicates "your brothers around there [sic] talking a whole lot of shit"

[1] Whether a misstatement or a misrepresentation, it is interesting to note Appellant's brief only includes a portion of Rule 802. (Appellant's Brief at 10). The quote includes the first part of the Rule: "Hearsay is not admissible," but omits the most significant portion of Rule 802 for purpose of this appeal: "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Clearly, this case involves one of the exceptions to the inadmissibility of hearsay—the present sense exception.

again indicating presently talking. He gives an example of the "shit" they are talking by saying "they said they going to burn me and the kids" which reads as an explanation or description of the recent event being discussed. He describes the remainder of the discussion among the brothers indicating "I think they trying to buy a gun because I heard them talking about it" and ends by wishing his wife "good luck" for the interview she had the day of the text. (T.392-393; State's Exhibit 223; R.___). The discussion can clearly be read as a contemporaneous description and explanation of the discussion going on between Mahogany's brothers. It does not need to be a live transcription of the events as seems to be argued by Appellant.

The trial court found it was a contemporaneous description meeting the definition of present sense impression. After being presented the argument that the text was not made at the same time as the event, the court still allowed the message into evidence, thereby finding the message was made at the time of the event—the "talking a whole lot of shit" by Mahogany's brothers. Accordingly, the trial court found the message met the requirements of a present sense impression and this ruling is not so clearly incorrect that it amounts to an abuse of discretion.

Further, even if the statement was improperly admitted as a present sense impression, in order to constitute reversible error Appellant must demonstrate prejudice from its admission. State v. Parvin, 413 S.C. 497, 504, 777 S.E.2d 1, 4 (Ct. App. 2015). Even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

Importantly, Appellant has not argued in his brief how he was prejudiced by the admission of the text messages. As a result, he has not demonstrated reversible error. See State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("Further, the improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice."); see also, State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) (stating the burden is on the defendant to show not only error but resulting prejudice from jurors' reading of trial-related newspaper article); Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 399, 171 S.E.2d 352, 355 (1969) ("The burden is, of course, upon the appellant to show not only error but resulting prejudice."); Cumbie v. Cumbie, 245 S.C. 107, 117, 139 S.E.2d 477, 482 (1964) (finding an argument without merit when "the burden here was on appellant not only to show error, but resulting prejudice, and his argument on appeal does not even suggest wherein he was prejudiced"). Because Appellant has failed to demonstrate any prejudice from the admission of the text messages, this Court should not find reversible error.

Additionally, any error is entirely harmless in this case. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also, State v. Garner, 389 S.C. 61, 67–68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (citation and internal quotation marks omitted)). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see also, State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No

definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

The text messages from months before the shooting, at most, indicated a possible malice toward Harris by Appellant and demonstrated premeditation. Both factors are only relevant to a determination of the murder charge. The jury rejected a verdict of murder, requiring malice aforethought and premeditation, and instead convicted Appellant of voluntary manslaughter. The texts, admittedly from March and several months before the shooting occurred, could not have contributed to the heat of passion found by the jury that existed in July. Accordingly, the jury's verdict finding Appellant killed Harris in the sudden heat of passion provoked by sufficient legal provocation in July could not have been impacted in any way by text messages referencing Appellant "talking shit" and possibly buying a gun months before in March.

Additionally, nothing in the text messages referenced Mahogany and could not have established any malice or other intent to cause her harm. The texts specifically referenced only Harris and the kids. Accordingly, even if the texts were admitted in error, Appellant cannot demonstrate how they prejudicially impacted the jury's verdict finding him guilty of attempted murder as to Mahogany when the texts did not involve Mahogany in any way.

Accordingly, this Court should find the trial court did not abuse his discretion in admitting the text messages as present sense impressions because they were statements describing or explaining an event; contemporaneous with the event; and personally perceived by Harris. Even if the statements were improperly admitted Appellant has failed to demonstrate any

alleged prejudice suffered by their admission, so this Court should not find reversible error. Finally, even if error, this Court should find any error harmless because the texts, at most, were applicable to the elements of malice and premeditation for the charge of murder, and the jury convicted Appellant of voluntary manslaughter and not murder.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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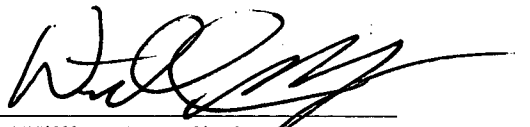
BY: 
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March 21, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2015-001881

The State, Respondent,

vs.

Dexter L. Myers, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 21st day of March, 2018.

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RE: State v. Dexter L. Myers
Appellate Case Tracking No. 2015-001881

Dear Ms. Hackett:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services