STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NAIJUWUAN S. CHISOLM,

APPELLANT

APPELLATE CASE NO 2017-000544

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err when he allowed the state to introduce three text messages sent from a phone number purportedly connected to Appellant where the danger of unfair prejudice and confusion of the issues substantially outweighed the probative value of the text messages?

STATEMENT OF THE CASE

On July 23, 2015, a Jasper County grand jury indicted Appellant for murder (2015-GS-27-258) and possession of a weapon during a violent crime (2015-GS-27-259). R. 394-395; R. 397-398. The state, represented by Mary Jones and Brian Hollen, called the case to trial before the Honorable Perry M. Buckner, III, and a jury on February 21-23, 2017. R. 1-2; R. 307. Robert Hughes represented Appellant. R. 2. The jury found Appellant guilty as charged. R. 367, ll. 11-18. Judge Buckner sentenced Appellant to forty years imprisonment for murder and five years imprisonment for the weapon. R. 375, l. 22 – R. 376, l. 4; R. 396; R. 399. Judge Buckner ordered the sentences to be served consecutively. R. 376, ll. 4-5; R. 396; R. 399.

On February 28, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Collins, 409 S.C. 524, 529-530 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E. 2d 216, 220 (2006)). The reviewing court "'is bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Baccus, 367 S.C. at 48, 625 S.E. 2d at 220). "'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" Id. at 530 (quoting State v. Wise, 359 S.C. 14, 21, 596 S.E. 2d 475, 478 (2004)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" Id. (quoting Wise, 359 S.C. at 21, 596 S.E. 2d at 478). Put another way, rulings on evidentiary matters may be overturned for an abuse of discretion that prejudices a party. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). A trial judge abuses his discretion when his ruling rests on a legal error or inadequate factual support. Id. Prejudice to a party occurs when it is likely the challenged evidence or its omission influenced the verdict. Id.

STATEMENT OF FACTS

On June 9, 2015, Sterling "Slim" Jenkins was sitting on the porch with his girlfriend, Lucretia Jordan, and his friend, Frank "Slick" Carter, eating breakfast. R. 197, l. 17 – R. 198, l. 18. Slick left, and then Lucretia went into the apartment to bathe her baby. R. 198, l. 19 – R. 199, l. 7. While Lucretia was inside, she heard multiple gunshots. R. 199, ll. 8-16. When Lucretia went outside, she found Slim on the ground. R. 200, ll. 8-16. Lucretia called for help. R. 200, ll. 12-13.

Across from Lucretia's apartment, Barnesha Houston and her boyfriend were sitting on their porch. R. 204, ll. 3-5; R. 206, ll. 12-14. Barnesha's older sister, Erica Lewis, was standing nearby. R. 206, ll. 18-20. Barnesha's twin sister, Jesneisha, was also outside the apartments. R. 206, ll. 21-22. Barnesha saw a man "peeking" around the corner of the apartment building – the man was looking at Slim. R. 207, ll. 4-24. According to Barnesha, the man ran onto the porch. R. 213, ll. 19-21. Slim tried to open the door to enter the apartment but the door would not "budge." R. 213, ll. 22-24. The man then shot Slim. R. 233, l. 24. After the shooting, the man ran away. R. 214, ll. 11-13. Barnesha never saw the shooter's face. R. 216, ll.12-13.

According to Jesneisha, she was walking to her mailbox on June 9, 2015, in the late morning. R. 224, ll.14-19. She claimed Slim saw Appellant[1] peeking around the corner and spoke to him. R. 225, ll. 14-21. Jesneisha alleged Appellant shot, then ran to the right, turned around, and shot Slim four more times before running off again. R. 226, ll. 5-12.

However, the statement Jesneisha gave to police on the day of the shooting was markedly different. Jesneisha told police that Slim and the shooter were sitting on the porch together. R. 236, ll. 18-25. Slim got up and tried to enter his apartment. R. 236, ll. 21-22. The shooter stood

[1] Jesneisha claimed she knew Appellant because the two were in school together several years prior to the shooting. R. 216, ll. 10-19.

up and shot Slim. R. 237, ll. 1-4. The shooter stopped, shot four more times, then took off running. R. 237, ll.1-4. Jesneisha was adamant that she was unsure of the gun the shooter used. R. 238, ll. 8-10. Nevertheless, When Jesneisha spoke to police, she said the gun was "'black, small...like a nine.'" R. 238, ll. 11-15. Jesneisha revealed that the police *told* her the gun used was "probably" a nine so she included that in her statement as well. R. 238, ll. 11-21; R. 240, ll. 23-25.

On June 15, 2015, the police arrested Appellant for Slim's murder. R. 254, ll. 18-23.

ARGUMENT

The trial judge erred when he allowed the state to introduce three text messages sent from a phone number purportedly connected to Appellant where the danger of unfair prejudice and confusion of the issues substantially outweighed the probative value of the text messages.

Relevant facts

When the state first sought to introduce text messages sent from a phone purportedly connected to Appellant, Judge Buckner ruled the messages were inadmissible. R. 261, l. 21 – R. 265, l. 16; see also R. 391-393. According to Judge Buckner, the messages were testimonial, and as a result, admission of them violated the Confrontation Clause. R. 261, l. 21 – R. 265, l. 16. After the state rested its case, Judge Buckner indicated he was inclined to change his ruling based upon legal research he conducted overnight. R. 310, l. 4 – R. 312, l. 2; R. 313, ll. 16-21. Relying upon United States v. Alvarado, 816 F.3d 242 (4th Cir. 2016), Judge Buckner determined the text messages were not testimonial. R. 310, l. 4 – R. 312, l. 2; R. 313, ll. 16-21. Based upon the judge's indication he planned to alter his ruling, the state moved to reopen its case. R. 312, ll. 3-9. Defense counsel did not object to the state's motion. R. 312, ll. 11-12. However, defense counsel continued to object to the text messages being entered into evidence, explaining the state could not authenticate the sender of the messages and that the danger of unfair prejudice and confusion of the issues arising from the messages substantially outweighed the probative value. R. 313, ll. 2-6.

In ruling on the motion, Judge Buckner explained the text messages "could possibly be" "admission[s] against interest." R. 314, ll. 11-14. Recognizing there was no testimony that Appellant sent the text message, Judge Buckner explained the evidence merely showed "this was text from a telephone number which allegedly belonged to" Appellant. R. 314, ll. 22-25.

Nevertheless, the judge concluded the text messages had "some probative value" and the probative value outweighed the prejudice. R. 315, ll. 1-6.

Thereafter, Dylan Hightower, the solicitor's investigator, read three text messages to the jury. All three messages were sent from a phone with the number of 843-540-8048. R. 320, ll. 13-23; R. 321, ll. 15-17; R. 391-393. The first message occurred at 2:53 p.m. on June 9, 2015, and read as follows: "12, one, two, number 12, prolly l-u-k-n for me, s-u-m-b-d-y, prolly, t-l-d-d-e-m who it was." R. 321, ll.18-25; R. 391-393. The next message was sent at 3:32 p.m. on the same day: "Keep watxhn nd let me kno if my name came up plz or find out if 12 k-n-o it was me." R. 322, ll. 1-7; R. 391-393. The final message occurred three minutes later and read as follows: "Damn so, the number 12, k-n-o it was me." R. 322, ll. 8-12; R. 391-393. Hightower admitted he could not say *who* sent the text messages. R. 323, ll. 19-25.

During the trial, several witnesses claimed the number 12 was street slang for the police. R. 149, ll. 5-11; R. 201, ll.4-8.

Jesneisha Houston claimed she had known Appellant for approximately eight years. R. 220, ll. 10-19. She also claimed she received a message via Facebook on June 6-7, 2015, from Appellant, in which Appellant gave her his phone number of 843-540-8048. R. 221, l. 13 – R. 224, l. 10; R. 390. Jesneisha admitted she never spoke to Appellant by phone, however. R. 221, ll. 11-12.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's

probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two. The purpose of Rule 403, SCRE, is to allow the judge to ensure fairness by "excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).

"'Relevant evidence' means 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. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the

jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Danger of confusion of the issues

After determining the probative value of the evidence, the court must next evaluate the danger of confusion of the issues by presenting the evidence. Very little case law exists in South Carolina regarding this aspect of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the

marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice and confusion of the issues of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

Applying this analytical framework to the present case reveals that balancing of the low probative value of the text messages offered by the state, the extreme danger of unfair prejudice and confusing of the issues posed by the evidence necessitated the exclusion of the text messages. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury. The question before the jury was – did the state prove beyond a reasonable doubt that Appellant killed Slim with malice? The text messages were not probative of whether Appellant shot Slim. The text messages were from a phone number purportedly connected to Appellant. However, that connection relied upon the testimony of Jesneisha and an easily created digital representation of a phone number. Only Jesneisha linked Appellant to the phone number at issue. The state presented no evidence of the sender or recipient of the text messages. The

messages themselves were cryptic, using shortened words and spelling words phonetically. While the messages indicate the sender was concerned, the messages never indicated the cause of that concern.

The danger of unfair prejudice and confusion of the issues from the text messages was high. The messages, particularly coupled with the testimony that "12" is slang for the police, made it appear that Appellant was confessing to Slim's murder. The messages were presented without context or the identities of those participating in the conversation. By allowing the messages to be admitted during the murder trial without the state being able to explain the messages, the trial judge allowed the jury to assume that the state wanted – that Appellant shot Slim and was worried the police would find out. At a minimum, the messages indicated Appellant was concerned the police were looking for him for some reason. Thus, the jury was left to speculate that even if Appellant's text messages did not indicate he had shot Slim or that he was fearful the police would think he was the shooter, then the messages must indicate that Appellant must have commit some criminal offense in order to explain why he was concerned about the police. The vagueness of the text messages and the lack of context or identifies of those involved in the conversation created a high danger of unfair prejudice and confusion of the issues.

After balancing the extreme danger of unfair prejudice and confusion of the issues resulting from the admission of the text messages against its low probative value, it is clear that any probative value of the messages was substantially outweighed by the danger of unfair prejudice and confusion of the issues. The state's case against Appellant rested entirely upon Jesneisha. Jesneisha was a weak witness for the state because her testimony at trial contradicted her earlier statement to police in key ways – primarily, whether the shooter was on the porch with Slim prior to the shooting and whether Slim tried to enter the apartment but was unable to do so because the door was jammed.

Jesneisha's testimony also contradicted her sister, Barnesha, because Barnesha claimed she could not see the shooter's face. The solicitor tried to explain Jesneisha's inconsistencies by claiming she was "distraught" when she gave her statement because it was "30 minutes after" the shooting. R. 329, ll. 13-19. Likely fearing even more inconsistencies, the state did not even call Erica as a witness. Yet, the state played Erica's call to 911 for the jury, likely in violation of Appellant's right to cross-examine the witnesses against him. The danger of unfair prejudice and confusion of the issues substantially outweighed any probative value of the text messages in this case.

CONCLUSION

Appellant respectfully requests this court reverse his convictions and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NAIJUWUAN S. CHISOLM,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Naijuwuan S. Chisolm states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Perry M. Buckner, which was held from February 21-23, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738, (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Naijuwuan S. Chisolm.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of May, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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) Entire trial transcript dated February 21-22, 2017 (Tr);
(2) Entire trial transcript date February 23, 2017 (Tr.I.);
(3) State's Exhibit #14 (screen shot)
(4) State's Exhibit #23 (Verizon wireless records);
(5) True-billed indictments; and
(6) Sentence sheets

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

May 14, 2018

Susan B. Hackett

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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."

May 14, 2018.

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