STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEXTER L. MYERS,

APPELLANT

APPELLATE CASE NO. 2015-001881

FINAL BRIEF OF APPELLANT

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Appellate Defender

South Carolina Commission on Indigent Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in concluding a text message was a present sense impression, and therefore admissible as an exception to the rule against hearsay, where the state failed to present evidence that (1) the statement described or explained an event or condition; (2) the statement was contemporaneous with the event it was describing; and (3) that the declarant personally perceived the event allegedly described or explained?

STATEMENT OF THE CASE

On August 14, 2014, a Richland County grand jury indicted Appellant for attempted murder (2014-GS-40-5481) and murder (2014-GS-40-5482). R. 610-611; 613-614. The state, represented by Luck Campbell, Meghan Walker, and J.J. Shellenberg, called the case for trial before the Honorable J. Derham Cole and a jury on August 31, 2015. R. 1. Tracy Pinnock, Rhodes Bailey, and Catherine Mubarak represented Appellant. R. 1.

Based on the evidence presented, the judge instructed the jury on murder, voluntary manslaughter, involuntary manslaughter, attempted murder, assault and battery of a high and aggravated nature, self-defense, and accident. R. 564, l. 1 -- R. 581, l. 8.

The jury began deliberating on September 3, 2015, at 3:54 p.m. Approximately an hour later, the jury requested "clarity" on the difference between voluntary manslaughter and involuntary manslaughter. R. 587, ll. 13-25; R. 608. In compliance with the request, the judge re-charged the jury on voluntary manslaughter and involuntary manslaughter. R. 587, l. 25 – R. 589, l. 25. The jury resumed deliberating at 4:50 p.m. R. 590, ll. 4-5. At 6:51 p.m., after deliberating another two hours, the jury requested to go home for the evening and return the following day to continue deliberations. R. 590, l. 19 – 591, l. 1; R. 609. The judge permitted the jurors to retire for the evening at 6:53 p.m. R. 591, ll. 22-23. On September 4, 2015, the jurors returned and commenced deliberating at 9:06 a.m. R. 592, ll. 5-8. At 3:51 p.m., after deliberating for a total of approximately ten hours, the jury delivered its verdicts. R. 592, ll. 18-19. Ultimately, the jury found Appellant guilty of the lesser-included offense of voluntary manslaughter. R. 594, ll. 4-8. The jury found Appellant guilty of attempted murder. R. 594, ll. 9-12.

Judge Cole sentenced Appellant to thirty years' imprisonment for voluntary manslaughter and to twenty years' imprisonment for attempted murder. R. 599, ll. 1-10; R. 612; 615. He ordered the sentences to be served consecutively. R. 599, ll. 10-11.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

In July of 2014, Appellant was living in an apartment with his sister, Mahogany Speech-Harris, her husband, Dajuan Harris, his brother, Shamaray Myers, and his sister's two daughters. R. 140, ll. 2-7; R. 397, ll 13-17. Mahogany and her husband shared a bedroom, and the daughters had bedrooms. R 141, ll. 11-12; R. 398, ll. 8-12. Appellant and Shamaray slept in the living room. R. 141, ll. 13-18; R. 397, l. 25 - R. 398, l. 7; R. 398, ll. 13-14.

According to Mahogany, she awoke early on July 2, 2014, because her younger daughter was crying. R. 141, l. 19 – R. 142, l. 2. Unable to get the daughter to return to sleep, Mahogany got up and started preparing breakfast. R. 142, ll. 2-5; R. 143, ll. 2-15. A short while later, Mahogany's older daughter woke up and joined them for breakfast. R. 143, ll. 13-25. Realizing Dajuan was still in bed, Mahogany along with her younger daughter, went to the master bedroom to wake Dajuan, who then joined them for breakfast. R. 143, l. 23 – R. 144, l. 8. She prepared plates for Dajuan and for her daughters. R. 143, ll. 23-25; R. 144, ll. 9-15. While Dajuan and his daughters were at the table eating, Mahogany was in the kitchen preparing her plate when she heard gunshots, which she initially believed were firecrackers. R. 144, l. 16 – R. 146, l. 7. Then, Mahogany heard Shamaray say, "No, Dexter, no." R. 146, l. 8; R. 146, l. 16; R. 146, l. 21; R. 146, ll. 23-25. When Mahogany looked up, she saw the gun. R. 146, l. 9; R. 146, ll. 21-22. She claimed Appellant pointed the gun at her. R. 147, ll. 2-7. She then fell on the floor. R. 147, ll. 10-14. Mahogany did not see Dajuan – she did not "even remember seeing anything." R. 147, ll. 23-25; R. 148, ll. 4-5. She only saw the gunshots. R. 148, ll. 1-4.

Appellant testified that on the morning of July 2, 2014, he woke up to the sound of loud noises. R. 398, ll. 18-25. He got his phone, checked the time, and got on a social media website. R. 399, ll. 14-21. He heard a door slam in the back of the apartment, and saw Mahogany rush out of

the room. R. 400, ll. 1-6. Dajuan was following her. R. 400, ll. 11-13. Appellant turned his attention to Dajuan when he heard Dajuan's aggressive tone. R. 401, ll. 7-25. The two then exchanged words. R. 402, ll. 1-24. Dajuan went for a gun that was on the living room floor. R. 402, ll. 24-25; R. 403, ll. 3-7. Fearing what Dajuan would do, Appellant also went for the gun. R. 403, ll. 8-17. Although Dajuan got the gun first, the two struggled for control of it. R. 403, l. 18 - R. 404, l. 2. During the struggle, the gun fired. R. 404, ll. 3-6. As the two continued to fight, more shots were fired. R. 404, l. 7 - R. 406, l. 7. Mahogany approached them and was shot as well. R. 405, ll. 13-19; R. 406, ll. 3-12.

After the shooting, Appellant left the apartment. R. 408, ll. 1-2. Mahogany ran across the hall to her neighbor's apartment. R. 17, ll. 17-24; R. 148, ll. 16-19. From there, the neighbor called for help. R. 18, ll. 19-20; R. 148, ll. 20-22. The police arrived quickly, and began search for Appellant. R. 24, ll. 7-19. Later that day, the police found Appellant at the home of his friend. R. 408, ll. 18-21; R. 409, l. 25 – R. 410, l. 3. Although Appellant initially lied to the police by denying involvement, Appellant eventually told the police about the struggle over the gun and the shooting of Dajuan and Mahogany. R. 412, l. 5 - R. 414, l. 5; R. 603.

Ultimately, Dajuan died from injuries he sustained as a result of gunshot wounds from the struggle with Appellant. R. 37, ll. 1-21; R. 321, ll. 4-6. Mahogany suffered minor injuries from two to three gunshot wounds to her leg. R. 149, ll. 2-15; R. 199, ll. 13-20.

Thus, it was undisputed that Appellant shot Dajuan and Mahogany. The only questions for the jury to resolve concerning were whether Appellant committed murder or attempted murder, a lesser offense, or whether his conduct was excused based on self-defense or accident. Therefore, evidence of Appellant's intent was central to the jury's determination.

ARGUMENT

The trial judge erred in concluding a text message was a present sense impression, and therefore admissible as an exception to the rule against hearsay, where the state failed to present evidence that (1) the statement described or explained an event or condition; (2) the statement was contemporaneous with the event it was describing; and (3) that the declarant personally perceived the event allegedly described or explained.

Relevant facts

When the state initially called Mahogany to testify, she mentioned that after the shooting, she "was going through [her] text messages" and saw a text message allegedly from Dajuan, which she turned over to law enforcement. R. 149, l. 20 – R. 150, l. 4. Prior to Mahogany testifying a second time, defense counsel informed the judge of a "matter of law." R. 293, ll. 5-6. Thereafter, the parties engaged in a bench conference, which was not reported. R. 293, l. 8. The state called Mahogany to testify the second time concerning a text message only. According to Mahogany, she went through the text messages on her cell phone sometime after the shooting. R. 293, ll. 17-19. She found a text message that caught her attention. R. 293, ll. 23-25. As a result, she contacted a detective at the Richland County Sheriff's Office about the text message. R. 293, ll. 20-22. When the state attempted to introduce the text message, defense counsel objected. R. 294, ll. 1-12. The judge overruled the objection. R. 294, l. 13.[1]

[1] Defense counsel renewed her objection at the close of the state's case, specifically explaining the text message should not have been admitted as it was not permissible as an exception to the hearsay rule. R. 391, ll. 14-20. After the defense's presentation, defense counsel renewed her objections and motions as well. R. 469, ll. 15-17. Defense counsel made sure to renew her motions and objections after the state's reply witness testified. R. 492, ll. 11-21. Finally, after the jury's verdict, defense counsel moved for a new trial and explained one of the bases for the motion was the trial judge's erroneous admission of the text message as inadmissible hearsay. R. 595, ll. 3-13.

Mahogany was permitted to testify regarding the content of the message and the message was admitted as an exhibit. R. 294, l. 10 – R. 295, l. 1; R. 607. The message stated: "Where you at your brothers around tbere 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 becàuse I heard them talking about it and good luck." R. 607; see also, R. 294, l. 23 – R. 295, l. 1 (Mahogany read the text message to the jurors in which she corrected at least one misspelled word and the court reporter added punctuation presumably based upon Mahogany's inflections when reading the message). Mahogany claimed the text message was from Dajuan despite no evidence being presented of his phone number or her phone number. R. 294, ll. 6-9. In fact, the message itself only indicates "*Husband My" and does not reveal the sender or recipient. R. 607. Although not revealed on direct examination, Mahogany admitted on cross-examination that the text message was dated March 21, 2014. R. 295, ll. 10-13; R. 607. She further admitted she did not contact the police or anyone about this information at the time. R. 295, l. 14 – R. 296, l. 2.

At the first opportunity, defense counsel put the basis for the objection on the record. Defense counsel explained the text message was hearsay and did not fit within any of the exceptions. R. 350, ll. 10-24. Further, defense counsel argued Appellant was unable to confront or cross-examine the alleged author of the text message. R. 350, ll. 14-15. The state argued the text message was a "present sense impression of the sender of the text message" and was "authenticated by the witness that it was from her husband." R. 351, ll. 2-5. In response, defense counsel cited State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015) to support her argument. R. 351, ll. 7-9. Defense counsel explained that in order for the present sense impression exception to apply, the state must establish that the statement describes or explains an event or condition made while the declarant was perceiving the event or condition, or

immediately thereafter. R. 351, ll. 11-15. Further, defense counsel explained the "three elements for the foundation of the admission of that statement." R. 351, ll. 15-17. According to defense counsel, the state was required to show: "The first being the statement must describe or explain an event or condition, the statement must be contemporaneous with the event, and third, the declarant must have personally perceived the event." R. 351, ll. 17-21. Defense counsel explained that "[n]one of those elements were presented to the Court." R. 351, l. 21. Specifically, no evidence had been presented of *when* "this alleged conversation between [Appellant] and his brother occurred." R. 351, ll. 22-24. There was no evidence of the time of the alleged conversation or even if the conversation occurred on the same day as the text message. R. 351, ll. 24-25.

Discussion

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is 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. The state argued, and the judge apparently found, the text message was admissible as a present sense impression. R. 350, l. 25 – R. 351, l. 5. However, the trial judge erred in finding the text message admissible as a present sense impression.

The Rules of Evidence permit the introduction of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" as an exception to the bar against hearsay. Rule 803(1), SCRE. "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); see also, United States

v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998). The state failed to present evidence to satisfy any of the three elements.

Descriptive

By the Rule's very language, the proffered statement must describe or explain an event or condition. The South Carolina Supreme Court held a statement by an alleged victim that he planned to meet the defendant for a drug deal was not admissible as a present sense impression because the statement was "regarding a *future* event and not a statement regarding something contemporaneously perceived." State v. Griffin, 339 S.C. 74, 78 n. 3, 528 S.E.2d 668, 670 n. 3 (2000)(emphasis in original). Importantly, the statement must not concern an opinion or draw a conclusion; rather, the statement must "explain, elucidate or in some way characterize the nature of the event." State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 337 (1978)(explaining how a statement would not be admissible under the present sense impression of Rule 803 of the Federal Rules of Evidence due to conclusory nature). The text message admitted into evidence failed to demonstrate that it was a description or explanation of an event or condition, and the state failed to present any additional evidence to support such a conclusion.

The very nature of the text message demonstrated it was a *conclusion* when the author stated "I think." According to the text message, the author thought "they trying to buy a gun because I heard them talking about it." The author did not describe *what* he heard the individuals, whom are not identified specifically, talking about; rather, he explained the *conclusion* he drew from whatever, if anything, he heard.

Additionally, the author stated "your brothers around tbhere talking a whole lot of shit like they said they going to burn me and the kids." There was no indication of which brother made the comment allegedly heard by the author. Certainly, both did not speak at exactly the same time and

say the exact same thing. In light of the author's use of the term "like" preceding his statement regarding what he heard, it is entirely possible that he was not providing an example of the "talking a whole lot of shit," but he was providing an analogy and, therefore, the statement attributed to the brothers was not a statement at all, but was the author's comparison.

Contemporaneity

In State v. Burroughs, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997), this Court held a statement given nearly ten hours after the alleged incident was not made while the declarant was perceiving the event or condition, or immediately thereafter, as required by the Rule. The South Carolina Supreme Court made clear that in order for a statement to fall within the present sense impression exception, the record must contain evidence of when the event or condition occurred in order to establish the statement was made while the declarant was perceiving the event or condition or immediately thereafter. State v. Garcia, 334 S.C. 71, 77 n. 4, 512 S.E.2d 507, 510 n.4 (1999).

The text message, and the record as a whole, are completely devoid of any evidence to suggest *when* the author of the text message heard the information described in the message, if the author ever did. The text message was dated March 21, 2014, but there was no evidence provided at all regarding when the information within the text message occurred. According to the author, Mahogany's brothers were "around tbere talking a whole lot of shit like they said they going to burn me and the kids." The author did not say when the brothers were talking. The conversation allegedly heard by the author may have occurred hours, days, weeks, or even months prior to the text message. It clearly transpired prior to the writing of the text message as evidenced by the use of the past tense "said" and was not being described in the text message as it was occurring.

The author also claimed to have "heard them talking about it." There was no indication of when the author heard the brothers talking. Although the assumption is that the author heard the brothers talking about a gun, the author did not identify "it," specifically in the text message or when the conversation about "it" occurred. Again, the use of the past tense supports the conclusion that the conversation occurred prior to the execution of the text message, but offers no other clues as to when the conversation actually took place.

Personally perceive

This Court has emphasized that the declarant actually perceive the event or condition described. In State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014), this Court held statements during a 911 call by a mother concerning her daughter's allegations of rape were not a present sense impression because the mother did not perceive the rape. The Supreme Court likewise emphasized the necessity that the declarant actually perceive or witness the event or condition in State v. Davis, 371 S.C. 170, 180 n. 9, 638 S.E.2d 57, 63 n. 9 (2006) where the record contained insufficient evidence that the declarant witnessed the shooting.

The text message described the brothers being "around tbere." It appears the author meant "around there." In other words, the author was describing the brothers as being in some place different from the author. Thus, if the brothers, who were allegedly "talking a whole lot of shit," were doing so "around there," then the author could not have personally perceived the conversation. Rather, the author would have described the brothers as being "around here" to explain how the author was aware of the contents of the conversation. In light of the author's choice of words to describe the brothers as "talking a whole lot of shit" "around there," the author was explaining that the brothers were talking outside of his presence.

The second part of the text message concerning buying a gun does not explain what the author actually heard. Instead, the author explained his conclusion, "I think they trying to buy a gun" based upon what he heard, "I heard them talking about it." The author did not describe what he actually heard, therefore, this part of the statement could not be what the author actually perceived.

The trial judge erred in admitting the text message as a present sense impression because the state failed to present evidence that (1) the statement described or explained an event or condition; (2) the statement was contemporaneous with the event it was describing; and (3) that the declarant personally perceived the event allegedly described or explained.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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 11, 2018

Susan B. Hackett

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 11th day of May, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of May, 2018.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.