

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
General Sessions Court
Kristi L. Harrington, Circuit Court Judge

Case No. 2015-GS-08-01333
Appellate Case No. 2015-002668

RECEIVED
AUG 23 2018
SC Court of Appeals

The State,

Respondent,

v.

Sha'Quille Washington,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, appellant, Sha'Quille Washington, respectfully requests rehearing of his appeal, decided August 8, 2018 (Published Opinion No. 5586), based on principles of law and evidence overlooked or misapprehended by the Court of Appeals, as follows:

I. Exclusion of Larry Kinloch's Prior Statement.

Appellant challenged the trial court's refusal to admit the testimony of Kenneth Grant that Larry Kinloch told him he did the shooting, arguing that the proffered testimony was admissible under Rules 801(d)(1)(A), 803(1), and 803(2) of the South

Carolina Rules of Evidence. The Court rejected appellant's arguments with respect to each of these grounds.

A. Prior Inconsistent Statement.

The Court initially questioned whether the prior inconsistent statement argument was preserved. Its discussion of the preservation issue overlooked the principle that, to be preserved for appellate review, the specific evidentiary argument need only be "made known to the court" or be "apparent from the context." See Rule 103(a)(2), SCRE; *cf. State v. Foster*, 354 S.C. 614, 620 n.4, 582 S.E.2d 426, 429 n.4 (2003) (specific ground for objection to evidence of prior consistent statement was apparent from context); *State v. Hamilton*, 344 S.C. 344, 360-61, 543 S.E.2d 586, 595 (Ct.App. 2001) (ground for objection made in off-the-record bench conference was apparent from context of later argument of jury charges and mistrial motion contained in the record), *overruled on other grounds, State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Here, counsel's articulation that the testimony was not hearsay because Kinloch had already testified, in the context of Kinloch's having denied the statement, advised the court that the grounds for introducing this testimony was that it was non-hearsay as a prior inconsistent statement. See Rule 803(d)(1)(A), SCRE.

The Court also noted that the trial court's admonition of "no speaking objections," made throughout the trial, did not appear to be implemented with respect to this issue. In drawing this conclusion, the Court misapprehended the impact of the court's earlier repeated admonitions to that effect, which established that the court would not allow argument on the record of the evidentiary issues that arose. Grant's testimony was during the afternoon of the third day of trial, the second day of witness testimony before the jury.

The day before and earlier on the day Grant testified, the trial judge had repeatedly admonished against “speaking objections,” establishing a practice and mode of trial in which full development of evidentiary arguments on the record was not permitted. That the judge did not repeat the admonition during the argument of the hearsay objection does not negate the impact the earlier admonitions had in limiting how much trial counsel said on the record with respect to this particular objection. Under these circumstances, and in the context of what counsel did place on the record, the argument is preserved. *Cf. Foster*, 354 S.C. at 620 n.4, 582 S.E.2d at 429 n.4.

On the merits, the testimony of Grant that Kinloch said he did the shooting was admissible as a prior inconsistent statement under Rule 803(d)(1)(A). The Court misapprehended the foundation requirement of Rule 613(b) and required much greater specificity as to time and place than has been required by our Supreme Court. The Court overlooked the precedent of *State v. Fossick*, 333 S.C. 66, 508 S.E.2d 32 (1998), cited in appellant’s principal and reply briefs, in which the Supreme Court found error in the exclusion of similar testimony upon a far weaker foundation. In *Fossick*, the only foundation as to time was “a time back in 1989.” There was no reference whatsoever as to the place of the statement. Notwithstanding this lack of foundation, the Supreme Court held the trial court erred in not admitting the prior inconsistent statement under Rule 613(b), SCRE. *See Fossick*, 333 S.C. at 69-70, 508 S.E.2d at 33. Here, the foundation testimony was far more precise than in *Fossick*. In the context of questioning Kinloch about having made the statement, the defense questioned him about what occurred “the night when the shooting took place” when he ran and Grant assisted him “away from the shooting,” and about his having seen Grant “after the shooting that night.” R. pp. 175-76.

These questions supplied both the time and place of the statement, with far more precision than the foundation testimony in *Fossick*. The foundation for the statement Kinloch denied making was that it occurred the very night the shooting took place, not some vague time in another year. It occurred at the location to which he had run and where Grant was assisting him, “away from” the shooting. The foundation as to time, the night of the shooting, was clearly established. The foundation as to place, while less precise than that as to time, was far greater than the non-existent foundation as to place in *Fossick*.

The Court found the question of Kinloch as to place – away from the shooting – was contrary to Grant’s testimony they were at Kinloch’s home. To the contrary, the foundation question and Grant’s testimony are consistent, because Kinloch’s statement at his home was made at the place to which he had fled upon getting “away from the shooting.” Like the statement in *Fossick*, Grant’s testimony concerning Kinloch’s statement should have been admitted as a prior inconsistent statement.

B. Present Sense Impression.

Appellant also contended Kinloch’s statement was admissible under the present sense impression exception of Rule 803(1). In rejecting this ground for admission, the Court misapprehended the immediacy requirement of that rule. While acknowledging that the declaration does not need to be made “instantly” after the perceived event to which it pertains, the Court held a declaration occurring 20 to 25 minutes after the event was not sufficiently immediate to qualify for admission under this exception. The Court’s conclusion overlooked the unique circumstances of this case and the close temporal proximity of the statement to the event that had occurred. Grant had assisted

Kinloch away from the scene of the shooting, and Kinloch made the declaration after he had gotten away, within 20 to 25 minutes. Under these circumstances, this brief lapse of time was within the Rule 803(1) requirement that the statement occur “immediately thereafter.”

The Court correctly noted the rationale behind the present sense impression but misapprehended its significance under the circumstances of this case. A present sense impression is admissible because its close temporal proximity to the event negates the likelihood of deliberate or conscious misrepresentation. The Court’s analysis overlooked the content of the declaration, which negated any possibility that it was the product of reflection or a deliberate misrepresentation. Had it been the product of reflection, it would not have been inculpatory and against Kinloch’s personal interest.

C. Excited Utterance.

The Court also questioned whether the excited utterance exception argued by appellant was preserved. As the Court acknowledged, the argument of the hearsay objection occurred in multiple off-the-record bench conferences. And as the Court also acknowledged, a statement later made by trial counsel during discussion of the proposed jury charges revealed that one of the grounds he had argued was the excited utterance exception, which counsel referenced or the court reporter transcribed as “utter excited exception to the hearsay rule.” Counsel thereby placed on the record this basis for the earlier objection, and it is properly preserved. *Cf. Hamilton*, 344 S.C. at 360-61, 543 S.E.2d at 595.

On the merits, Kinloch’s statement to Grant that he did the shooting was admissible as an excited utterance under Rule 803(2). The Court correctly noted the

requirements for an excited utterance, but misapplied those requirements to the circumstances presented in this case. The Court correctly acknowledged that the time between the startling event and the declaration is not dispositive, but then it unduly focused on the lapse of 20 to 25 minutes in finding the statement was not made while under the stress of excitement due to the shooting. And, as with its analysis of the present sense impression exception, it misapprehended that the circumstances did not comport with the rationale behind the excited utterance exception – that the startling event suspends reflective thought and thereby reduces the likelihood of fabrication. In this case, Kinloch’s declaration against his own interest, in which he confessed to a shooting and exposed himself to possible criminal liability, could not be the product of reflection and could only be attributable to the stress of the excitement of having just shot someone, thereby negating any possibility of fabrication.

II. Evidence of Blood Alcohol Level.

Appellant challenged the trial court’s refusal to admit into evidence a toxicology report and related testimony of the forensic pathologist as to the blood alcohol content of the alleged victim, Herman Manigault. The Court found no error in exclusion of the evidence that his blood alcohol level was .235.

Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” Although the Court stated this standard, the Court’s analysis focused only on the probative value aspect, not on the remainder of the standard. The evidence was in dispute as to Manigault’s drinking that night, and no

eyewitness established the level of his drinking – whether a single drink or a continuous course of drinking that would result in an extremely high blood alcohol level. On the other hand, the proffered scientific evidence established the exact level of his intoxication – a blood alcohol content of .235. Contrary to the Court’s conclusion, this evidence was highly probative of his actual level of intoxication, as compared to the vague and imprecise witness testimony concerning his drinking or not drinking that night.

In finding the evidence was not relevant, the Court placed undue emphasis on the absence of evidence as to the effect this level of intoxication would have had on Manigault. Such evidence was not required, since the jurors could draw on their common knowledge and experience as to the loss of judgment, loss of inhibitions, and tendency toward aggression that result from such extreme intoxication. No expert testimony was necessary to assist the jurors in this area, *see* Rule 702, SCRE, and the absence of such evidence does not render the blood alcohol evidence irrelevant. This evidence was relevant and necessary to provide a complete picture of the circumstances and events of that night.

The Court summarily concluded there was danger of unfair prejudice, without articulating what that prejudice was. This conclusion misapprehended the applicable test – that the probative value be “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” There was no such danger from admission of this evidence. In fact, its admission would have resulted in clarity on the issue of Manigault’s drinking, which was relevant to the issue of provocation. The evidence was not prejudicial, confusing, misleading, or cumulative,

therefore its probative value outweighed any factor that would warrant its exclusion under Rule 403. *Cf. Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 477, 540 S.E.2d 484, 487 (Ct.App. 2000) (physician's alcohol dependency admissible under Rule 403 test).

III. Violation of Sequestration Order.

Appellant challenged the exclusion of a defense witness, Kevin Watson, who was briefly present in the courtroom during a portion of a prior witness's testimony, in violation of a sequestration order announced earlier in the trial when he was not in the courtroom. The Court found no reversible error in the trial court's exclusion of Watson's testimony. In its analysis of this issue, the Court misapprehended the potential for Watson to conform his testimony to what he heard while in the courtroom. That clearly did not happen here. Watson entered the courtroom when a detective was on the stand, while appellant's recorded statement was playing, but otherwise Watson heard no testimony. As shown by the proffer of his testimony, he did not model it after appellant's recorded statement, instead testifying to his own observations – that he was outside the club when tussling was going on, saw fighting, and did not see either Kinloch or appellant with a weapon. He did not provide in his testimony the details appellant described in the recording. His brief presence in the courtroom before taking the stand did not shape his testimony in any way, and the Court overlooked this fact in analyzing the issue.

The Court further overlooked prior precedents that approved allowing witnesses to testify, notwithstanding violation of a sequestration order, where the violation was not knowing, intentional, or flagrant. *See State v. Simmons*, 384 S.C. 145, 173-74, 682

S.E.2d 19, 33-34 (Ct.App. 2009); *State v. Tisdale*, 338 S.C. 607, 615-18, 527 S.E.2d 389, 394-95 (Ct.App. 2000).

The Court also misapprehended that, at best, the testimony was cumulative to that of another witness. In this case, there were numerous witnesses who gave contradictory accounts. Where there was such a sharp conflict in the testimony, it was prejudicial to the defense for the court to prohibit the testimony of this witness who would have corroborated that appellant did not have a weapon.

IV. Requested Charge on Self-Defense.

Appellant challenged the trial court's refusal of his request for a jury charge on self-defense. The Court found there was no evidence to support the giving of a self-defense charge. In so doing, the Court wove together factual conclusions with respect to each of the four elements of self-defense, based on parts of certain witnesses' testimony and other parts of other witnesses' testimony. But those factual conclusions excluded other aspects of the evidence that favored the defendant's contention a self-defense instruction was warranted. The ultimate factual determination was for the jury, and the court should have allowed the jury to consider self-defense because it was a factual issue in dispute based on the evidence presented.

Much of the Court's discussion of the requested charge on self-defense and its elements turned on the Court's factual finding that the evidence indicated mutual combat, which defeats a claim of self-defense. That finding overlooked the testimony of multiple witnesses that it was Manigault who was about to snap and who took what he apparently perceived as an affront to a new level, going outside and removing his shirt in preparation to fight. Once appellant was outside and saw Manigault's act of aggression, he could act

on appearances. *See State v. Starnes*, 340 S.C. 312, 320-22, 531 S.E.2d 907, 912-13 (2000); *State v. Fuller*, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684-85 (1955). He did not have to wait for Manigault to get the drop on him, and he had the right to act under the law of self-preservation. *See Starnes*, 340 S.C. at 322, 531 S.E.2d at 913; *State v. Rash*, 182 S.C. 42, 188 S.E. 435, 438 (1936). The fact that appellant may have thrown the first punch does not negate his claim of self-defense, where Manigault had displayed his readiness and made the first move toward a physical altercation.

Thereafter, Arianna Coakley supplied further evidence in support of the requested charge on self-defense, testifying that she raised a beer bottle to strike appellant and he defended himself with a weapon in response to her threatening action. Her testimony established he was in actual imminent danger, and his response of drawing a weapon provided evidence of his belief he was in danger. No one testified he displayed a weapon before Coakley threatened him with the bottle.

The testimony concerning Manigault's and Coakley's actions was also sufficient to give rise to a jury issue on the question whether appellant's belief he was in danger was reasonable and whether, under the circumstances presented, he had any other probable means of avoiding the danger presented. Manigault was clearly agitated to the point of being about to snap, and he demonstrated an intention and readiness to fight. Coakley armed herself and physically threatened appellant with a beer bottle. Upon the evidence presented, it was the province of the jury to resolve the factual issues of the reasonableness of appellant's belief, his ability to avoid the danger presented, and the existence or non-existence of an opportunity to retreat without increasing the danger.

The Court's discussion of mutual combat misapprehended its significance at the stage of determining the law to be charged and overlooked the precedent of *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973), which held the question whether a person acted in self-defense or engaged in mutual combat is for the jury to determine. The presence of some evidence of mutual combat does not deprive the defense of the right to a charge on self-defense, where there is also evidence to dispute mutual combat and to support the claim of self-defense. The Court's summary of the evidence on all the elements of self-defense overlooked the existence of some evidence contradicting the state's claims as to appellant's involvement in provoking, precipitating, or participating in the altercation that led to the shooting, and that evidence necessitated that a self-defense charge be given.

V. Jury Charge on Accomplice Liability.

Appellant challenged the court's giving of a charge on accomplice liability, based on the absence of any evidence in the record that Kinloch was the shooter and that appellant was acting with him when the shooting took place. In rejecting this claim of error, the Court misapprehended the applicability of precedents and incorrectly found this case to be analogous to *Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011), where in fact *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct.App. 2014), is controlling.

To determine if an accomplice liability charge should have been given in this case, the question was whether there was any evidence that a co-conspirator was the shooter and that appellant was acting with him when the crime took place. *See Barber*, 393 S.C. at 237, 712 S.E.2d at 439. The alternate theory of liability may only be charged

when the evidence is equivocal on some integral fact and the jury has been presented some evidence upon which it could rely to find the existence or non-existence of that fact. *Id.*, 393 S.C. at 236, 712 S.E.2d at 439. Here, there was no evidence that a co-conspirator was the shooter. The defense attempted to introduce evidence that Kinloch was the shooter, but the court refused to admit Grant's testimony concerning Kinloch's statement to that effect and further instructed the jury to disregard that testimony. With Grant's testimony excluded, there was no evidence in the record to support an accomplice liability charge

In *Wilds*, the Court of Appeals addressed the precise issue presented here. The trial court gave an accomplice liability charge, over defense counsel's objection. Appellate counsel failed to appeal this issue and was found to have provided ineffective assistance of counsel in this omission. The trial record established there was no evidence that anyone other than the defendant was the shooter, and the Court of Appeals found the trial court erred in giving the charge and the error was prejudicial. *See Wilds*, 407 S.C. at 438-40, 756 S.E.2d at 390-91. The Supreme Court agreed, dismissing a writ of certiorari as improvidently granted. *See Wilds v. State*, 414 S.C. 341, 778 S.E.2d 112 (2015).

The Court's determinations that there was evidence to support a conclusion that Washington and Kinloch were acting together and that there was evidence to support a finding that Washington had an accomplice who was the shooter overlooked the premise of the *Barber* and *Wilds* decisions, which both turned on the existence or non-existence of evidence that an alleged accomplice of the defendant was the shooter. There was such evidence in *Barber*, and the accomplice liability charge was appropriate. There was no

such evidence in *Wilds*, and an accomplice liability charge was improper. The facts of this case are in keeping with the facts of *Wilds*.

The Court misapprehended the significance of the witness testimony it relied on in reaching its conclusion as to the existence of evidence on these points. None of the testimony on which the Court relied supplied evidence that Kinloch was the shooter. While some witnesses refuted that Washington was the shooter, they did not implicate Kinloch in that role. Any inference from a witness's testimony that someone other than Kinloch or appellant was the shooter does not support a charge on accomplice liability, because there was no allegation and no evidence whatsoever that appellant was acting with anyone other than Kinloch. In the absence of any evidence that Kinloch was the shooter, it was improper to charge the jury on accomplice liability. There was no basis for appellant to be found guilty as an accomplice for Kinloch's actions, where there was no evidence that it was Kinloch who shot Manigault.

The Court made only passing mention of the apparent confusion the jury had with respect to the accomplice liability charge, based on two notes the jury sent out during its deliberations. Those notes are important because they demonstrate the jury was focusing its attention on the accomplice liability charge and did not have a correct understanding of that concept. The notes demonstrate the jury was focused on this principle of law – which had no evidentiary support in the record – and therefore demonstrate that prejudice resulted from the erroneous giving of the accomplice liability instruction.

VI. Giving of *Allen* Charge and Dismissing the Jury for the Night.

Appellant challenged the court's decision to give an *Allen* charge and release the jurors for the evening, without having them immediately resume deliberations. The

Court agreed the trial court may have abused its discretion in giving the charge and then dismissing the jury for the night, due to the judge's statement that she was required to give the charge before sending the jury home. Neither the state nor the Court of Appeals has pointed to any authority in support of the trial court's assertion of such a requirement in this state, and there is none.

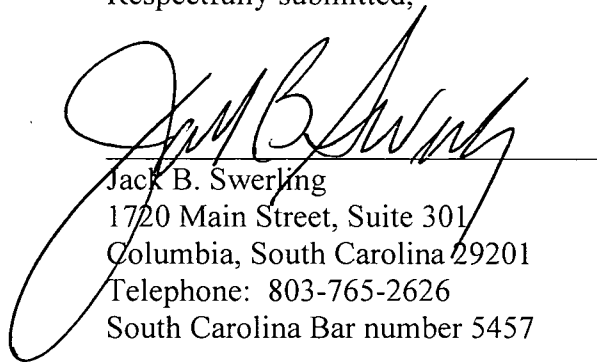
Rather than giving an answer to the legal question presented – what is the proper timing for the giving of an *Allen* charge when a jury is deadlocked but needs to be excused for the night to resume deliberations the following day – the Court declined to answer the question. Instead, the Court determined appellant was not prejudiced by the procedure the trial court followed. But a lack of prejudice should not be presumed under the circumstances presented. The premise of an *Allen* charge is to require continued deliberations, which by its terms directs the jurors to continue to deliberate and to specifically consult with each other, express their views, listen to the other jurors, and discuss their differences with open minds. The procedure adopted by the court defeated that purpose, because it interrupted those deliberations, separated the jurors, and sent them home for the night. This procedure thwarted the very purpose of the *Allen* charge, which is to require continued deliberations in an effort to reach consensus, and was therefore prejudicial.

The impact on the deliberations was not obviated by the judge's additional instruction immediately before releasing the jurors. The brief cautionary statement on which the Court relied in finding no prejudice did not negate the effect of sending the jurors home with their own individual thoughts, rather than having them immediately resume their deliberations in light of the *Allen* charge. The Court should rehear its

determination as to prejudice and resolve the question of the proper procedure to be employed under the situation presented here.

For all the reasons outlined above, the Court should rehear this appeal as to every issue, find reversible error, and remand for a new trial.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by mailing a copy, postage prepaid, to counsel for respondent, Senior Assistant General David Spencer, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549, on August 23, 2018.



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August 16, 2018

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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RE: The State v. Sha'Quille Washington
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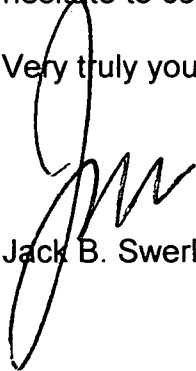
Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving David A. Spencer, Senior Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,


Jack B. Swerling

JBS/ksr
Enclosures

cc: David A. Spencer, Senior Assistant Attorney General
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