STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTWUAN LEVON NELSON,

APPELLANT

APPELLATE CASE NO. 2017-001406

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this self-defense case, whether the trial judge erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at appellant, was in the hospital?

STATEMENT OF THE CASE

An Horry County grand jury indicted appellant for murder, a weapons charge, and possession with intent to distribute crack cocaine. R. 497 – 502. On June 12, 2017, appellant was tried before the Honorable Larry B. Hyman and a jury. R. 1. Mary Ellen Walter and Scott Hixson represented the State. R. 1. Charles Barr represented appellant. R. 1. The jury acquitted appellant of murder and the drug charge, but convicted him of voluntary manslaughter and the weapons charge. R. 463, ll. 12 – 23. Judge Hyman sentenced appellant to twenty-five years for manslaughter and a consecutive five years on the weapons charge. R. 480, l. 22 – 481, l. 2. This appeal follows.

ARGUMENT

In this self-defense case, the trial judge erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at appellant, was in the hospital.

Factual Background

This case is the rare "hen's tooth" where a trial court's abuse of discretion in denying a continuance substantially prejudiced a defendant. See Morris v. State, 371 S.C. 278, 282-83, 639 S.E.2d 53, 56 (2006) (acknowledging State's argument that reversals for denial of a continuance are rare as hen's teeth, but reversing because of the prejudice to defendant). The trial court charged self-defense and mutual combat based on the facts of this shooting and the jury acquitted appellant of murder and a drug charge, but convicted him of the lesser-included offense of voluntary manslaughter. R. 452, l. 9 – 454, l. 25. R. 463, l. 1 – 25. Had the trial judge not refused to delay the case so that a material defense witness, who was in the hospital, could testify that the decedent, carrying a shotgun, had been looking for appellant and shot first, appellant likely would have been acquitted. R. 484 – 496.

The police officers who responded to this shooting at an apartment complex described a chaotic scene with an angry group of forty people. R. 24, l. 2 – 26, l. 6. The people were "yelling, threatening the defendant." R. 26, ll. 1 – 6. Appellant Antwuan Nelson ("Nelson") was standing by his car and peacefully complied with the officers' commands. R. 25, ll. 19 – 23. After putting Nelson in handcuffs, an officer stayed with him because of the angry crowd. R. 25, l. 19 – 26, l. 6. Another officer put Nelson in the car and took him to the station "for his safety

and to calm things down." R. 87, ll. 4 – 24. On the way to the station, Nelson told the officer that he shot the decedent because the decedent was going to shoot him. R. 87, l. 25 – 88, l. 8.

Despite the presence of forty people at the scene, the State only called two non-police officer fact witnesses. One was the resident of a nearby apartment complex who had a stray bullet lodge in her end table and then saw a man throw something over a fence. R. 92, l. 23 – 93, l. 2. R. 96, l. 24 – 98, l. 12. The other was the decedent's girlfriend, Kristen Bloomer ("Bloomer"). R. 274, ll. 12 – 25. It was apparent from Bloomer's testimony that the decedent's son, Jerome, was a material witness to the shooting, but the State did not call him to testify. R. 287, ll. 7 – 16. R. 291, l. 15 – 300, l. 12.

Bloomer's credibility was thoroughly impeached by the inconsistency of her trial testimony with her statement and because she moved evidence after the shooting. R. 356, l. 11 – 357, l. 23. R. 303, l. 14 – 304, l. 12. Bloomer and the decedent, Michael Rogers ("Rogers"), lived together in an apartment in Myrtle Beach. R. 274, l. 22 – 276, l. 14. On the afternoon of the shooting, Bloomer was home and saw Rogers and Nelson come into the apartment. R. 279, l. 9 – 280, l. 20. Rogers and Nelson went into the kitchen to talk and were "pretty calm and collected." R. 279, l. 9 – 280, l. 20.

Rogers sold and used drugs. R. 281, l. 24 – 282, l. 24. Bloomer could tell he was discussing a drug sale with Nelson. R. 281, l. 24 – 282, l. 24. She heard their voices "getting hostile." R. 281, ll. 15 – 23. Nelson threw a punch at Rogers and they began scuffling. R. 281, l. 15 – 285, l. 4. Rogers was on the ground with Nelson on top punching and kicking.[1] R. 284, l. 16 – 285, l. 12. Rogers told Bloomer "to get his gun." R. 285, ll. 12 – 14. Bloomer knew

[1] A police officer testified she "spent probably 10 minutes looking at" Nelson's hands and saw no injuries. R. 194, ll. 5 – 14.

Rogers had a shotgun, but claimed not to know where the shotgun was at that moment, so she instead opened the front door and Nelson ran away. R. 285, l. 12 – 286, l. 14.

Bloomer tried to get Rogers to calm down and not leave the apartment, but "[t]hat did not happen." R. 286, ll. 19 – 25. Rogers was "furious." R. 287, ll. 1 – 6. Rogers and Bloomer went down the stairs from their apartment to the front of the building, passing Rogers' son, Jerome, on their way. R. 287, l. 7 – 288, l. 22. Curiously, Bloomer could not remember whether Rogers was holding his shotgun when he went down the stairs even though Rogers told her to get it a few minutes earlier. R. 287, l. 17 – 288, l. 15. Rogers, "outraged," stood in the driveway yelling "to where he believed the defendant was" challenging appellant to come out and "fight like a man." R. 289, l. 21 – 290, l. 18.

Rogers was standing near his truck while he was yelling at appellant. R. 289, ll. 3 – 8. Even though Bloomer could not remember whether Rogers had his shotgun when he went downstairs, she testified that Rogers did not have his shotgun while yelling at appellant. R. 290, ll. 14 – 18. Even more curious, Bloomer claimed that she convinced Rogers to return to their apartment, but Rogers stopped and "grabbed a shotgun **out of the bed**" of his truck, which was parked outside of an apartment complex where Rogers dealt and bought drugs. R. 291, l. 19 – 292, l. 20 (emphasis added). Rogers, holding the shotgun in his hand, "casually" walked back up to their apartment. R. 292, ll. 16 – 20.

Twenty minutes passed in their apartment while Bloomer convinced Rogers to drive her to pick up their daughter from daycare. R. 292, l. 16 – 294, l. 9. However, Rogers ultimately decided not to go and walked back up to the apartment. R. 294, ll. 10 – 23. Bloomer could not remember why Rogers decided not to go to the daycare. R. 294, ll. 11 – 16.

Bloomer saw Nelson come down the stairs. R. 294, ll. 10 – 19. Nelson went to the trunk of his car and then approached Bloomer with a rifle in his hand. R. 294, ll. 16 – 25. Nelson did not point the rifle at Bloomer. R. 295, ll. 7 – 13. He told Bloomer to call Rogers and "tell him to bring his stuff." R. 295, ll. 1 – 6. Bloomer told Nelson her phone's battery was dying and then started to walk back to her apartment. R. 295, ll. 2 – 6.

Bloomer then heard the door to her apartment shut and saw Rogers in the building's breezeway holding his shotgun. R. 297, ll. 1 – 24. Rogers peeked around a corner, ducked, then Bloomer heard shots. R. 297, l. 25 – 298, l. 7. Rogers' son yelled for her. R. 298, ll. 1 – 7. She heard more shots, then "ran past Jerome in the breezeway" to Rogers, who was lying on the ground, bleeding. R. 299, ll. 1 – 23. Rogers died of a gunshot wound to the neck. R. 199, l. 11 – 200, l. 22.

Bloomer denied taking away any spent shotgun shells from the scene. R. 301, ll. 13 – 15. She admitted taking drugs and drug paraphernalia from her apartment and putting them in Rogers' truck because she was afraid the police would take her child. R. 303, l. 3 – 304, l. 9. On direct-examination, she testified that she did not know whether Rogers ever fired the shotgun, but admitted that in her statement she "believe[d]" Rogers fired. R. 301, l. 16 – 302, l. 19. Appellant called Bloomer as a witness during his case. R. 349, ll. 19 – 24. Confronting Bloomer with her statement, she admitted that she initially said she "saw one of [Rogers'] shots. R. 356, l. 11 – 358, l. 22.

The police recovered Nelson's rifle when they arrested him at the scene and Nelson had already taken out the magazine. R. 31, ll. 10 – 20. They also recovered Rogers' shotgun in the alley close to his body. R. 56, ll. 5 – 16. Two unspent shotgun shells were found by the police.

R. 56, ll. 17 – 23. An additional two unfired shotgun shells were found on Rogers' body at the autopsy. R. 208, ll. 3 – 14.

The solicitor emphasized with the police witnesses that were at the scene that no spent shotgun shells were found and that the police had no evidence that any of the crowd tampered with the evidence. R. 56, ll. 17 – 23. R. 128, l. 15 – 129, l. 7. R. 143, l. 19 – 156, l. 15. The crime scene investigator testified about her extensive search and that no spent shotgun shells were found. R. 143, l. 19 – 156, l. 15. The shotgun was empty. R. 156, ll. 14 – 15. The crime scene investigator specifically testified that she found no evidence of birdshot or wadding at the scene. R. 172, ll. 12 – 15.

This testimony from the police was called into great question by a defense witness, Tom Davis ("Davis"). R. 368, l. 6 – 376, l. 20. Davis had lived in Myrtle Beach for sixty-two years and had acquired "quite a bit of property," including the apartment building where the shooting took place. R. 368, l. 6 – 376, l. 20. Davis went to the scene that day because of calls from his tenants. R. 368, l. 6 – 376, l. 20. Davis was familiar with firearms and shotguns and found windowpanes shot out and holes in the door consistent with the same shells Rogers had. R. 368, l. 6 – 376, l. 20. Despite multiple objections from the solicitor, Davis was able to testify that he had a conversation with the Myrtle Beach police at the scene about the damage to his property from the shotgun blast. R. 371, l. 3 – 376, l. 22. R. 377, ll. 2 – 24.

The Missing Witness and the Trial Judge's Ruling

After ruling on the defense motions at the close of the State's case, trial counsel told the judge that he had two witnesses under subpoena who were not present. R. 338, ll. 9 – 24. One of the witnesses was Davis, who testified the next day about the shotgun damage that the police did not find. R. 338, ll. 18 – 21. The other witness was Lillian Brockington ("Brockington"),

who trial counsel told the court was "in the hospital in Georgetown." R. 338, ll. 18 – 21. Judge Hyman asked whether trial counsel complied with Rule 7 of the Rules of Criminal Procedure regarding the missing witnesses' testimony and trial counsel replied that he had not. See S.C.R.Crim. P. 7(b). R. 338, l. 22 – 339, l. 10. Trial counsel then asked the court to recess for the day (at 3:00) and resume in the morning so the defense could "get these people lined up." R. 339, ll. 5 – 10. The State did not oppose adjourning court for the day and the trial judge excused the jury. R. 340, ll. 1 – 21.

The next morning, the court again took up the problem of Brockington's attendance at trial. R. 342, l. 3 – 349, l. 11. Pursuant to the continuance rule, Rule 7(b), trial counsel provided the court with an affidavit stating the necessity of Brockington's testimony, a transcript of her statement to police, and a note from Tidelands Georgetown Memorial Hospital stating that Brockington had been admitted on June 13, 2017 (the day before) and would "remain in the hospital until MD release." R. 342, ll. 4 – 7. R. 484 – 496.

Trial counsel confirmed for the court that Brockington had been served with a subpoena, but admitted that she had not been served before the start of the trial. R. 342, ll. 3 – 23. Judge Hyman asked trial counsel "what do you want me to do" and trial counsel asked the court to declare a mistrial. R. 342, l. 24 – 343, l. 16. Trial counsel summarized Brockington's testimony:

> Judge, I expect her to testify consistent with the statement she gave police, and if she does that, she'll say that the decedent came up to her apartment, initially with the shotgun, looking for Mr. Nelson, that he went back downstairs, that he shot—in fact, I think she said he shot twice, Mr. Nelson shot.

R. 343, ll. 9 – 16. When questioned why this issue was not addressed until the fourth day of the trial, trial counsel stated he thought Brockington planned to appear voluntarily and he did not know she would be going into the hospital. R. 344, l. 14 – 345, l. 17.

The solicitor opposed any delay or mistrial and said the issues about which Brockington would testify were "Undisputed" because Bloomer said she saw Rogers with a shotgun and that Rogers had loaded shells. R. 344, l. 7 – 347, l. 2. The solicitor said "for the record and Court of Appeals" that appellant would not be prejudiced because evidence already existed in the record about Rogers' shotgun and that he would be able to impeach Brockington for bias. R. 346, l. 6 – 347, l. 2. He said "the only issue" regarding Brockington's potential testimony would be that she claimed Rogers fired first. R. 346, ll. 6 – 15.

Trial counsel argued all of this was for the jury's consideration and the solicitor's argument related to Brockington's credibility, not the necessity of the testimony for the defense. R. 347, l. 3 – 348, l. 1. He argued that who shot first was a "key issue" and the jury was entitled to judge Brockington's credibility against Bloomer's credibility. R. 347, l. 3 – 348, l. 1.

After a brief recess, Judge Hyman ruled, "Mr. Barr, your motion for a continuation is denied. I think it is most likely—I mean your motion for a mistrial is denied. I will not continue the case." R. 348, ll. 8 – 13. The court criticized trial counsel for not subpoenaing Brockington until the Tuesday of the trial. R. 348, l. 8 – 349, l. 11. The court then reasoned that after looking at Brockington's statement, "what I can see here are things that have been testified to. We've heard testimony that the victim in this matter did arm himself, did have a gun." R. 348, ll. 19 – 25. He further ruled:

> This case boils down to self-defense and mutual combat. There is nothing I've seen in her statement that cannot be confirmed or has not been confirmed or is not in dispute in this. So I'm going to deny your motion to postpone or continue this case, or to grant a mistrial.

R. 349, ll. 6 – 11.

Trial counsel attached Brockington's statement given the day of the shooting to his Rule 7(b) affidavit. R. 484 – 496.In her statement, Brockington said she heard Bloomer tell Rogers,

"here we go babe, here we go babe," Rogers got his gun, and shot first at Nelson. R. 484 – 496. She unequivocally stated that Rogers shot first. R. 484 – 496. Rogers earlier was in her apartment with his shotgun asking for Nelson by his nickname. R. 484 – 496. Rogers left when he heard Bloomer yell "here we go babe." R. 484 – 496. Brockington explained that Bloomer was "tracking" appellant. R. 484 – 496. She heard Rogers fire and could see Nelson at his car. R. 484 – 496. Nelson then got his gun together and returned fire. R. 484 – 496.

The Trial Court Erred in Refusing to Continue the Case or Declare a Mistrial

Brockington's testimony was essential for the jury's consideration in this self-defense case and the court erred in not delaying the trial so that she could testify. Appellate courts have traditionally frowned upon reviewing trial judge's decisions on motions for a continuance. State v. McMillan, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). "A trial judge's denial of a motion for a continuance will not be disturbed absent a clear abuse of discretion." Id. "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." Id.

Nelson's case is a hen's tooth. The trial court recognized this case "boils down to self-defense and mutual combat," yet inexplicably usurped the jury's function to judge Brockington's credibility on the key issue in the trial. Had the jury chosen to believe Brockington, it would have shown that Nelson acted in self-defense and did not arm himself until after Rogers fired at him. The jury also could have believed that because Rogers and Bloomer were actively looking for Nelson, he had no ability to retreat and no choice but to arm himself. Brockington's testimony about Bloomer "tracking" Nelson would have further undermined her credibility because it would have shown that she was complicit in Rogers' attempt to shoot Nelson and had an incentive to testify in a manner reducing her own culpability in Rogers' death.

Our appellate courts have reversed refusals to continue cases where far less was at stake than the importance of Brockington's testimony in this case. In McMillan, the Court reversed because the defense did not have time to order a transcript to impeach a key witness at the second trial of a case. McMillan at 22-23, 561 S.E.2d at 604-05. Holding that the verdict "hinged" upon the witness's credibility and the defendant was hampered in his ability to impeach her, the Court reversed the trial judge's refusal to grant a continuance to obtain the transcript. Id.

The lawyers in McMillan at least were able to cross-examine the witness. Here, the jury never heard Brockington's testimony. If being hampered in the ability to cross-examine the key witness is enough to warrant reversal, then refusal to allow time to secure the key witness's presence should amount to reversible abuse of discretion. "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). The trial court's conclusion that Brockington's testimony was unnecessary in this close case is without evidentiary support.

Appellant's case is factually similar to State v. Williamson, 115 S.C. 315, 315, 105 S.E. 697, 698 (1921). In Williamson, the Court reversed for refusing to grant a continuance where the defendant's wife, who was a crucial witness in the case, was unable to attend court due to her advanced stage of pregnancy. Id. The wife's doctor submitted an affidavit, stating it would be dangerous for her to testify at the trial. Id. at 315, 105 S.E. at 697. However, it was undisputed, she was "a most important witness for her husband; the killing of [the decedent] having occurred on account of alleged opprobrious language used to her by him a few days before the killing, ... and she was present and witnessed the homicide." Id. The Court held the trial judge "was manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case." Id. at 315, 105 S.E. at 698. Just like Williamson, the trial judge here

erred in not continuing the case because of appellant's proffer showing the need for Brockington's testimony. See also State v. Burns, 294 S.C. 338, 364 S.E.2d 465 (1988) (reversing for refusing to grant continuance so defense could locate a police informant); Logan v. Gatti, 289 S.C. 546, 347 S.E.2d 506 (Ct. App. 1986) (reversing failure to grant a continuance when plaintiff's expert witness was called up to duty by the Navy); Graham v. Greenville City Coach Lines, 233 S.C. 175, 104 S.E.2d 72 (1958) (reversing because trial court refused to continue case when key witness suffered complications from operation); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918) (holding trial judge erred in refusing to continue case because of illness of crucial witness in self-defense case).

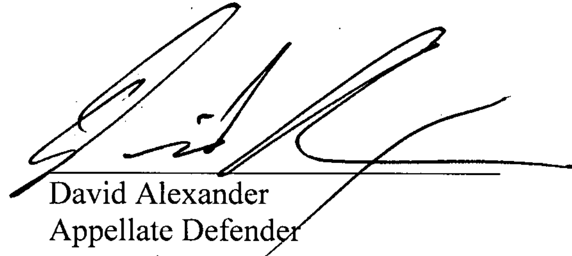
While the trial judge criticized appellant for not subpoenaing Brockington until after the trial began, appellant made the proper showing under Rule 7(b) for a continuance. Rule 7(b), S.C.R.Crim. P. Trial counsel provided an affidavit explaining that Brockington had been subpoenaed, that her testimony was necessary, the substance of her testimony, and the hospital's explanation of Brockington's absence. R. 484 – 496.

Even if appellant had subpoenaed Brockington a month before trial, it would have made no difference because of her hospitalization. The above-cited cases show that continuances for a missing, material witness are hen's teeth compared to cases where the defense bore some fault or simply needed more time to prepare. The court's refusal to continue the case or, in the alternative, grant a mistrial, was error and prevented Nelson from having his case fairly heard by a jury. See State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) (holding that double jeopardy barred the State from retrying the defendant after the State asked for a mistrial because of a missing witness, but noting that double jeopardy does not apply when the mistrial is with the defendant's consent). Brockington's testimony was a manifest necessity. See State v.

Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (applying "manifest necessity" standard for mistrial). Even without hearing Brockington, the jury acquitted appellant of murder. Had they heard Brockington's testimony, they likely would have found that the State failed to disprove self-defense and would have acquitted Nelson. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



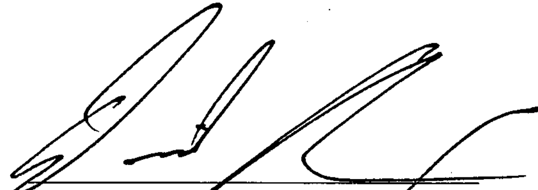
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2018.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



David Alexander
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ATTORNEY FOR APPELLANT

This 5th day of September, 2018.