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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2015-GS-08-01333
Appellate Case No. 2018-001878

The State,

Respondent,

v.

Sha'Quille Washington,

Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626
South Carolina Bar number 5457

Katherine Carruth Goode
229 South Congress Street
Post Office Box 1175
Winnsboro, South Carolina 29180
Telephone: 803-799-4440
South Carolina Bar number 8951

Attorneys for Petitioner

INDEX

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's exclusion of testimony of a defense witness that Larry Kinloch told him he committed the shooting?

2. Did the Court of Appeals err in affirming the trial court's exclusion of a toxicology report and testimony of the forensic pathologist concerning the report's findings as to the deceased's blood alcohol level?

3. Did the Court of Appeals err in affirming the trial court's exclusion of the testimony of a defense witness who had been present in the courtroom briefly, in violation of the court's sequestration order?

4. Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on self-defense?

5. Did the Court of Appeals err in affirming the trial court's giving a jury charge on accomplice liability?

6. Did the Court of Appeals err in affirming the trial court's giving an *Allen* charge at the close of a day's deliberations, then excusing the jury for the night?

ARGUMENT IN REPLY

Petitioner, Sha'Quille Washington, has filed a petition for writ of certiorari, to which the state has filed a return. Petitioner submits this reply to address certain facets of the state's arguments, and to note certain arguments and authorities raised by petitioner to which the state has chosen not to respond. Petitioner stands by the arguments and authorities in his petition for writ of certiorari without repeating them herein.

The state's return, like its brief in the Court of Appeals, portrays a one-sided version of the conflicting evidence presented at trial, highlighting the testimony favorable to the state's position concerning the events and altercation that led to the shooting of Herman Manigault. For example, the state asserts Larry Jenkins was 100 percent certain of his identification of petitioner as the shooter, without acknowledging that Jenkins also testified he was less than 100 percent certain of that identification. App. p. 74. The state

mischaracterizes the evidence of Arianna Coakley's arming herself with a beer bottle, implying that she armed herself only after petitioner allegedly struck Manigault. In fact, Coakley grabbed the bottle ***before*** going outside, not after the altercation began. App. pp. 113, 227. She raised it to strike petitioner ***before*** she claims petitioner pointed a gun at her. App. pp. 91, 110.

The state asserted in the Court of Appeals "[t]he only evidence is this was an assassination." App. p. 717. In its return to the petition for writ of certiorari, the state declares Manigault was "chased down and murdered." These claims are simply incorrect. The evidence was in sharp dispute. Even the state's own witnesses contradicted aspects of one another's accounts. The jury certainly disagreed with the state's unfounded "murder" and "assassination" claims, acquitting petitioner of the charge of murder and instead finding him guilty of voluntary manslaughter.

For the reasons set out below, and the additional reasons fully articulated in the petition, this Court should grant a writ of certiorari, reverse petitioner's conviction, and remand for a new trial.

I. The Court of Appeals erred in affirming the trial court's exclusion of testimony of a defense witness that Larry Kinloch told him he committed the shooting.

Petitioner contends the lower court erred in excluding the testimony of Quentin Kenneth Grant that Larry Kinloch admitted, just minutes following the shooting, having been the person who shot Manigault. Grant's proffered testimony was admissible under Rules 801(d)(1)(A), 803(1), and 803(2) of the South Carolina Rules of Evidence. In keeping with its position in the Court of Appeals, the state argues the only preserved argument with respect to this issue is the argument premised on Rule 803(1). To the contrary, the other bases for petitioner's attempt to have this testimony admitted are

apparent from counsel's statements and from the context revealed by the record, and each facet of petitioner's argument is preserved for appellate review.

In reviewing the state's error preservation claims, the Court should be mindful that, throughout this trial, the trial judge limited defense counsel in placing objections on the record, repeatedly informing counsel that it would not allow "speaking objections," often cutting counsel off before the objection could be fully stated on the record, and requiring that the objection be argued in off-the-record bench conferences. This occurred when the state objected to the defense's questioning of Grant concerning Kinloch's statement.

The state called Kinloch as a witness in its case in chief. App. p. 162. On cross-examination, the defense questioned Kinloch about having told Grant and Darlene Washington that he did the shooting, and Kinloch denied having made that statement to them. App. p. 181. The defense called Grant to testify about Kinloch's statement to him. When the state objected to the defense's questioning of Grant on hearsay grounds, defense counsel initially asserted the grounds for admission of the testimony, stating that "Larry already testified." App. p. 448, line 12. The court sustained the state's objection. App. p. 448, line 15-16. Thereafter, when the statement was elicited and the state renewed its objection, the remainder of the argument occurred in an off-the-record bench conference, after which the court struck the testimony, instructed the jury not to consider it, and instructed the foreman not to allow it to be discussed by the jury. App. p. 449, lines 1-18; p. 450, lines 18-25.

To be preserved for appellate review, the specific evidentiary basis for seeking to introduce evidence 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).

One of multiple grounds counsel was asserting for admission of this evidence was that Kinloch had testified and denied the statement, and Grant was testifying concerning Kinloch's prior inconsistent statement, which is admissible as non-hearsay. *See* Rule 801(d)(1)(A), SCRE. Counsel's specific reference to Kinloch's having already testified, in the context of Kinloch's having denied the statement, clearly reveals the basis for the defense's offer of this evidence – that it was a prior inconsistent statement. Nothing more was necessary to preserve this aspect of the evidentiary issue for appellate review. *Cf. Foster*, 354 S.C. at 620 n.4, 582 S.E.2d at 429 n.4.

Another ground that counsel argued during the bench conference was later revealed on the record in argument of the jury charges. With respect to the state's request to give a charge on "the hand of one is the hand of all," counsel revisited the court's rulings on the defense's repeated attempts to introduce evidence of Kinloch's statement, specifically referencing its argument that the statement was an excited utterance. App. p. 545, lines 2-3 (noting that counsel had argued the "utter excited (sic) exception to the hearsay rule"). Counsel thereby placed on the record this basis for its earlier attempt to

introduce the statement Kinloch made to Grant, and this aspect of the argument is preserved for appellate review. *Cf. Hamilton*, 344 S.C. at 360-61, 543 S.E.2d at 595.

All three grounds for admission of Kinloch's statement – prior inconsistent statement under Rule 801(d)(1)(A), present sense impression under Rule 803(1), and excited utterance under Rule 803(2) – are properly before the Court based on the statements of counsel and the context reflected by the record. App. pp. 448-49 (prior inconsistent statement); p. 460 (present sense impression); and p. 545 (excited utterance). Contrary to the state's assertions, this Court should address all aspects of the argument of this issue.

In his petition for writ of certiorari, petitioner has set out why this evidence was admissible under the evidence rules, and those arguments and the supporting authorities are not repeated here. *See* Petition, pp. 4-11. With respect to his contention that the statement was admissible as a prior inconsistent statement, petitioner relies in particular on the decision of this Court in *State v. Fossick*, 333 S.C. 66, 508 S.E.2d 32 (1998). Although he relied on *Fossick* in his principal and reply briefs in the Court of Appeals, the decision of the Court of Appeals did not address that precedent at all. The Court of Appeals did not attempt to explain why, unlike the statement in *Fossick* that one of the state's witnesses had admitted the killing for which the defendant was on trial, the comparable statement of Kinloch to Grant would not be a prior inconsistent statement that was excluded in error.

Similarly, the state's return to the petition for writ of certiorari fails to address *Fossick* at all. The state contends the proper foundation as to time and place of the making of the statement was not laid in the defense's questioning of Kinloch and its

eliciting his denial that he made the statement. However, the state does not address the clear holding of *Fossick* that it was error to exclude testimony about a similar statement, denied by the earlier witness upon far less foundation than that presented here, because it qualified as a prior inconsistent statement and was admissible. *See Fossick*, 333 S.C. at 68-70, 508 S.E.2d at 33.

Like the testimony in *Fossick*, the testimony of Grant that Kinloch said he did the shooting was admissible as a prior inconsistent statement. As detailed in the petition for writ of certiorari, the foundation in this case referenced both the time – "after the shooting that night" – and the place – where Kinloch was with Grant "away from the shooting" – of Kinloch's prior statement to Grant. App. pp. 181-82. This foundation was far more precise than the vague foundation in *Fossick*, only as to time and without reference to place, simply "a time back in 1989." *See Fossick*, 333 S.C. at 68, 508 S.E.2d at 33. Upon the better foundation laid for the testimony in this case than the foundation in *Fossick*, the trial court erred in refusing to admit Grant's testimony as a prior inconsistent statement. *See* Rules 613(b), 801(d)(1)(A), SCRE.

Similarly, in its argument of the other grounds for admission of this statement – present sense impression and excited utterance – the state contends there was insufficient foundation to establish admissibility under those exceptions and to demonstrate that Kinloch's statement to Grant was not the product of reflection or was made while under the stress of excitement, so as to render the statement trustworthy and reliable. To the contrary, as explained in greater detail in the petition for writ of certiorari, Kinloch's statement to Grant that he did the shooting, just minutes after the shooting, met the immediacy requirement for a present sense impression and the spontaneity requirement

for an excited utterance. Kinloch's statement could not have been made as the result of reflective thought, because it was against his own interest, implicated him in a crime, and exposed him to potential incarceration. The very content of the statement negated any likelihood of deliberate or conscious misrepresentation by Kinloch, and Grant's testimony was admissible under both of these hearsay exceptions. *See* Rule 803(1), (2), SCRE.

Finally, the state contends that any error in the exclusion of Kinloch's statement that he did the shooting was not prejudicial and was harmless beyond a reasonable doubt. The state contends the jury rejected claims that petitioner was not the shooter and therefore Kinloch's admission to being the shooter would not have affected the result of trial. This contention is disingenuous. The evidence was replete with discrepancies and contradictions. Two witnesses were personally observing petitioner when the shots were fired and negated his being the shooter. App. pp. 482-83, 488, 495-96. The excluded evidence as to Kinloch's admission that he was the shooter would have corroborated the observations of these witnesses and given the jury a solid basis for reaching the conclusion that petitioner was not. The evidence was in great conflict, with the state's own witnesses giving accounts that were inconsistent. The jury was deadlocked after five hours of deliberations, then deliberated an additional five hours before arriving at a verdict. App. pp. 616-17, 631. Based on the evidence, it cannot legitimately be said that the outcome of the jury's deliberations would not have been affected by an admission by Kinloch, a participant in the altercation, that he, rather than petitioner, did the shooting. Exclusion of this evidence was extremely prejudicial, was not harmless, and amounts to reversible error. This Court should grant certiorari, reverse, and remand for a new trial.

II. The Court of Appeals erred in affirming the trial court's exclusion of a toxicology report and testimony of the forensic pathologist concerning the report's findings as to the deceased's blood alcohol level.

Petitioner challenges the trial court's refusal to admit into evidence a toxicology report and related testimony of the forensic pathologist who conducted Manigault's autopsy, which revealed he had a blood alcohol level of .235. App. pp. 464-68, 647, 650. The state implies this claim of error is not preserved because the defense never put on the record the basis for seeking admission of the evidence. The issue is preserved. The state objected to the evidence invoking Rule 404, which pertains to relevance. App. p. 464; *see* Article IV, SCRE ("Relevancy and Its Limits"). Although the objection was argued in an off-the-record bench conference, the trial court later placed on the record the basis for its ruling, stating, "[t]here has been abundant testimony as to the fact that there was drinking or not drinking by the victim, and so I have excluded this testimony." App. pp. 464-65. In context, despite the lack of argument by defense counsel on the record, the record reveals that the basis for offering this evidence and the basis for the court's exclusion of it was relevance.

In the Court of Appeals, petitioner argued the evidence was admissible under all of the evidence rules pertaining to relevance, including Rule 403. Although the initial objection by the state was premised on Rule 404, the trial court's ruling sustaining the objection was based on Rule 403, as both the state and the Court of Appeals recognized. *See* App. p. 770 n.8. Any suggestion that the issue is not preserved is specious.

For the reasons articulated in the petition for writ of certiorari, at pages 11-13, this evidence was admissible under Rules 401, 402, 403, and 702, and this Court should grant a writ with respect to this issue and reverse.

III. The Court of Appeals erred in affirming the trial court's exclusion of the testimony of a defense witness who had been present in the courtroom briefly, in violation of the court's sequestration order.

Petitioner adheres to his argument of this issue set out in his petition for writ of certiorari. *See* Petition, pp. 13-16.

IV. The Court of Appeals erred in affirming the trial court's refusal to charge the jury on self-defense.

Petitioner claims error in the trial court's refusal of a jury charge on self-defense. In his petition for writ of certiorari, he sets out the evidence in the record that supported giving a self-defense charge, noting precisely what evidence in the record touched on each of the elements of self-defense. *See* Petition, pp. 17-19. The state's brief ignores the standard for giving a requested jury charge – it must be given if there is ***any evidence*** to support it. *See State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011). The state's argument against a jury charge on self-defense suffers from the same infirmity as the Court of Appeals' conclusion on this issue: each relied on isolated aspects of the various witnesses' testimony to negate the elements of self-defense, ignoring the aspects of the witnesses' testimony that provided ***some evidence*** as to each element of self-defense. Because there was ***some evidence*** to support the charge, the trial court erred in refusing it.

The state similarly focuses only on the evidence favorable to the state's theory of the case to argue there was no prejudice from refusing a self-defense charge, claiming the testimony established Manigault was "chased down and murdered." That claim is simply not borne out by the evidentiary record. Rather, the evidence was in sharp dispute, with multiple witnesses attesting to Manigault's own provocation of the altercation, including his removing his shirt in preparation for a fight. Significantly, the witness who claimed

petitioner pulled a firearm, Coakley, testified he did so only ***after*** she raised a beer bottle to strike him. The evidence was not uncontroverted, as the state claims, and the giving of a self-defense charge likely would have altered the outcome.

V. The Court of Appeals erred in affirming the trial court's giving a jury charge on accomplice liability.

Petitioner contends the accomplice liability charge requested by the state and given by the trial court was not supported by the evidence, because there was no evidence that a co-conspirator was the shooter. *See Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011); *State v. Ward*, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct.App. 2007). In its return, the state argues this jury charge was warranted, based on what the state characterizes as suggestions and inferences in defense counsel's questions that intimated Kinloch was the shooter. However, the only proper basis for a jury charge is the ***actual evidence*** admitted for the jury's consideration. Every effort by defense counsel to elicit testimony from Grant that Kinloch admitted he did the shooting was shut down by the state's objections, the court's rulings on those objections, and the court's clear instructions to the jury not to consider the stricken testimony. Upon the evidentiary record created in this trial – not suggestion or innuendo – the court could not grant the requested charge on accomplice liability, because there was no evidence whatsoever that a co-conspirator was the shooter, as is required for the giving of such a charge.

The state also contends petitioner was not prejudiced by the giving of the unwarranted accomplice liability charge, because it was given "with the standard instructions" and therefore was not unduly emphasized. This assertion ignores the clear record that shows this charge was a primary focus of the jury's attention. The jury asked the court to clarify the law of "hand of one is hand of all." *See* App. pp. 616, 655.

Moreover, it demonstrated that it misunderstood the concept, sending another note confusing the "hand of one is the hand of all" doctrine to pertain to "acting in concert with ***the victim***." *See* App. pp. 616, 657 (emphasis added). The court did not correct the jury's confusion and did not give it further instruction on the concept. *See* App. pp. 616, 657. The jury's confusion about this doctrine, which should not have been charged based on the evidentiary record, likely influenced its verdict. This Court should grant a writ of certiorari on this issue and reverse.

VI. The Court of Appeals erred in affirming the trial court's giving an *Allen* charge at the close of a day's deliberations, then excusing the jury for the night.

Petitioner challenges the procedure and timing of the court's giving of an *Allen*[1] charge, when the jury indicated it was deadlocked at the end of a day's deliberations. In its return, the state questions the authorities cited by petitioner in support of his argument, *Harvey v. Strickland*, 350 S.C. 303, 307-08, 566 S.E.2d 529, 532 (2002), and *State v. Tillman*, 304 S.C. 512, 521, 405 S.E.2d 607, 612 (Ct.App. 1991), saying those cases do not require sending the jurors home and having them return the next day before giving an *Allen* charge and having them resume deliberations. Petitioner has not made that contention, instead citing *Harvey* and *Tillman* as ***examples*** of the procedure employed in other cases where a jury stated, late in the day when it was time to adjourn for the night, that it was deadlocked. Petitioner has consistently argued that the procedure adopted by the trial court – giving an *Allen* charge then dismissing the jurors for the night rather than giving the charge upon their return the next day immediately before they resumed deliberations – was erroneous and prejudicial. Petitioner adheres to the arguments set out in his petition for writ of certiorari, at pages 22-25, and urges this Court to grant the writ,

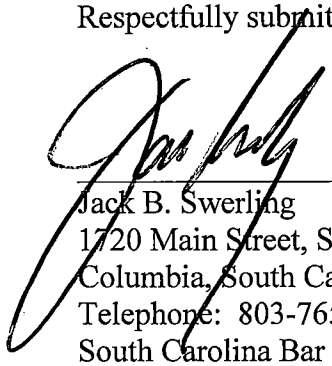
[1] *See Allen v. United States*, 164 U.S. 492 (1896).

address this issue, and instruct the bench as to the proper procedure to follow under the circumstances presented here.

CONCLUSION

For the foregoing reasons and for the additional reasons set out in the petition, this Court should grant a writ of certiorari, reverse the rulings of the Court of Appeals and the circuit court, and grant petitioner a new trial.

Respectfully submitted,



Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626
South Carolina Bar number 5457

Katherine Carruth Goode
229 South Congress Street
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PROOF OF SERVICE

I certify that a copy of the Reply to Return to Petition for Writ of Certiorari has been served upon Senior Assistant Attorney General David Spencer, P.O. Box 11549, Columbia, South Carolina 29211, on December 10, 2018.

Kellie S. Reaves
Paralegal to Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626

Law Offices of
Jack B. Swerling

1720 Main Street, Suite 301
Columbia, South Carolina 29201

Telephone 803-765-2626
Fax 803-799-4059

December 10, 2018

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: The State v. Sha'Quille Washington
Appellate Case No.: 2018-001878

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of the Reply to Return to Petition for Writ of Certiorari and 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: Clerk, South Carolina Court of Appeals
David A. Spencer, Senior Assistant Attorney General
Katherine Carruth Goode, Esquire
Sha'Quille Washington #00365760
Melissa Washington