STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT

V.

TIMIYA RASHAD MASSEY,

APPELLANT

APPELLATE CASE NO. 2017-002348

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to allow the defense to question alleged accomplice, Nyerere Williams, if he was aware that he could receive a life sentence if he was convicted of murder in this case, since his correct potential sentencing exposure for a crime he was charged with was well settled proper cross-examination where Williams was testifying as a state's witness against appellant?

STATEMENT OF THE CASE

Appellant was indicted at the August 2017 term of the Greenville County Grand Jury for the offenses of murder, attempted murder, burglary in the first degree, kidnapping, attempted armed robbery, and possession of a weapon during a violent crime. R. *. His case came on for trial on November 6, 2017, before the Honorable Robin B. Stilwell, and a jury. Carlyle Steele represented appellant. Doug Richardson was the assistant solicitor. Tr. 1.

On November 8, 2017, the jury found appellant guilty on each count. Tr. 449, l. 14 – 450, l. 14. Judge Stilwell sentenced appellant to forty years imprisonment for murder, thirty years imprisonment for burglary in the first degree, thirty years imprisonment for kidnapping, thirty years imprisonment for attempted murder, twenty years imprisonment for attempted armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime. All sentences were concurrent. Tr. 458, ll. 2-22.

This appeal follows.

STANDARD OF REVIEW

"The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice." State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013) (reversing the trial judge's refusal to allow cross-examination regarding mandatory minimum sentences witness avoided to show bias). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002).

ARGUMENT

The court erred by refusing to allow the defense to question alleged accomplice, Nyerere Williams, if he was aware that he could receive a life sentence if he was convicted of murder in this case, since his correct potential sentencing exposure for a crime he was charged with was well settled proper cross-examination where Williams was testifying as a state's witness against appellant

Relevant Facts

Greenville County sheriff's deputy Robert Whatley testified that on September 30, 2015, at approximately 8:30 pm, he was dispatched to the Dolphin apartment complex on North Franklin Road. Tr. 68, ll. 3-22. The dispatch noted there was a gunshot victim involved so the police responded with blue lights on and sirens blaring. Tr. 68, l. 24 – 69, l. 2. Whatley was the fourth or fifth patrol car to arrive at the Dolphin apartment complex. Tr. 69, ll. 6-9.

A deceased man was located at the bottom of a stairwell. Tr. 69, ll. 21-23. The police entered Apartment 24 searching for more victims or suspects. Instead, they found a lot of shell casings on the floor. Tr. 70, l. 21 – 72, l. 10.

Whatley remembered that appellant was later found lying in a thicket on the side of the apartment complex, "and he was later identified as Timiya Massey." Appellant had been shot in the leg. Tr. 75, l. 13 – 76, l. 8.

Investigator Wayne Campbell also responded to the Dolphin apartment complex that evening. Campbell learned that "the victim was deceased." Tr. 78, l. 13 – 82, l. 4. Campbell identified a ski mask and a firearm that were found at the apartment complex. Tr. 84, ll. 2-7.

Campbell remembered seeing an individual "lying in what I call the thicket, meaning briars, underbrush and all. And you could see from . . . his waist down there lying in that

thicket." Campbell went to see if appellant was breathing and still alive. Tr. 90, ll. 8-23. Appellant had shallow breathing and his eyes were closed. However, he was still alive. Tr. 96, ll. 2-11.

Appellant had on light grey sweatpants[1] and he was wearing a white t-shirt. He had been shot in the leg. Tr. 96, l. 12 – 97, l. 24. Campbell testified that he thought appellant was attempting to hide from the police. Tr. 91, ll. 5-14.

The police found a gun laying in the long grass and another ski mask outside the apartment complex. Tr. 104, l. 2 – 105, l. 4. A variety of shell casings from a "PMC 9-millimeter Luger" were also located. Tr. 121, l. 17 – 126, l. 21.

The Greenville chief evidence custodian, Josh Spurgeon, admitted he had been reprimanded and given letters of caution for losing evidence and incorrectly gathering or maintaining the integrity of evidence.[2] Tr. 165, l. 4 – 167, l. 24.

Kenneth Leach was visiting a girlfriend at the Dolphin apartments that September 30, 2015, evening. Leach remembered as he was walking down the stairs, "four guys came out with guns and had masks on. Held me hostage. Tried to rob me, but I didn't have nothing to take. So they told me to go up the steps and knock on this guy's door. And it was the guy's door that lived right across from the girl I was visiting. I knocked on the door, they shoved me off to the side and knocked the guy in the head. They went in there. The guy was laying on the floor." Leach recalled that one of the men hit the victim in the head with the barrel of a gun. Tr. 171, l. 9 – 173, l. 16.

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1 Alleged accomplice Terry Harris testified that the four men allegedly involved all had "jeans on." Tr. 335, l. 17-336, l. 8.

2 As will be seen infra, the state presented testimony that appellant's DNA was found on one of the masks left behind.

Leach was shoved onto a recliner inside the apartment and he saw the decedent's brother came around the corner from the bedroom. A shootout occurred between the decedent's brother and the men in the ski masks. As will be seen infra, two of the alleged masked accomplices testified they ran, and did not see what happened. As to the third man, the alleged driver, the police were never even given a full name for him, and he was never found -- if he in fact -- existed. Tr. 173, l. 10 – 174, l. 25.

When the shooting stopped, apparently because the men were out of bullets, Leach ran to safety where he hid. He later spoke with the police although he could not identify anyone. Tr. 174, l. 20 – 175, l. 24.

The decedent's brother, Haskell Nutridge, was forty-three years old. He was married, and he had four children. However, he was living with the decedent, at the Dolphin apartments, at the time of the shooting, because he was separated from his wife. Tr. 294, l. 12 – 295, l. 25.

Nutridge remembered he was sitting on the couch in the decedent's house eating and drinking beers. He later admitted he was also smoking a "blunt." Tr. 296, l. 11 – 297, l. 15. Nutridge went into the back bedroom to lie down because he was tired when he later "heard a commotion." "I heard the knock on the door. My brother opened the door and someone hit him in his face. But it was the commotion he recalled vividly: "'Where it is at, where is the shit at?'" Tr. 297, l. 9 – 298, l. 9.

"I got up off the bed, got my .38 and headed towards the living room." Tr. 298, ll. 18-21. "I seen a guy on top of my brother with a ski mask with a pistol in his hand." The gun was pointed at the decedent and Nutridge opened fire. Nutridge said the person hitting his brother "he turned to me and started firing their weapon. So, I backed back around the corner into my bedroom." Nutridge never saw the shooter, or any of the other men, and he therefore was unable

to identify anyone. Tr. 299, l. 7 – 301, l. 23. Nutridge said he tried to tell his wounded brother to hold on and that help was coming but the decedent died at the scene. Tr. 303, l. 18 – 307, l. 19.

Terry Harris was known as "T-Black." Harris had a criminal record for crack cocaine and failing to stop for a blue light. He had been charged in this case with the same charges as appellant. Tr. 316, l. 2 – 317, l. 21. Harris testified he had known appellant for about ten years as "Bam." Tr. 317, ll. 18-25.

Harris remembered that appellant and a man named Cornelius picked him up at his house. Cornelius was the driver, appellant was allegedly in the front seat. It was never identified during the trial who Cornelius was or where he allegedly went following the shooting. Harris claimed he had no idea what the men were going to do when they picked him up that evening. "He asked me to ride with them." Tr. 318, l. 18 – 320, l. 2. When the men arrived at the apartment complex, Harris remembered that they all put on masks, and he said appellant had a gun that he kept in a holster. Tr. 320, l. 5 – 321, l. 21.

Harris claimed that appellant "grabbed a white dude and carried him upstairs." Harris said as soon as the decedent answered the door, it was his claim that appellant "started pistol whipping the dude." Tr. 321, l. 18 – 324, l. 12. Harris maintained appellant was the man yelling, "Where the shit at?" Harris testified that they were looking for drugs. Tr. 324, l. 8 – 325, l. 9.

Harris said when the gunfight started he "took off . . . back to the car." Tr. 326, l. 13 – 327, l. 9. Harris maintained that Cornelius, the unknown man, dropped him off near his house and took his gun. Harris claimed he had been cooperative with the police since that time. Tr. 328, l. 11 – 329, l. 12.

On cross-examination, Harris admitted he had pled to a weapons charge in federal court. He was given a hundred and twenty month sentence. Harris openly admitted when he later pled guilty in this case that he wanted his state court prison sentence to run "concurrent with my federal time." Harris readily admitted "that means you would serve no extra time at all." Harris acknowledged this was an ideal situation, and one he was hoping for to dispose of the charges in this case. Tr. 330, l. 4 – 332, l. 2.

Harris admitted the concurrent time he wanted was the reason he was testifying for the state at appellant's trial. Harris further acknowledged he was telling the jurors that appellant "set this thing up." Tr. 331, l. 12 – 332, l. 23.

Thirty-seven-year-old Nyerere Williams admitted he had been charged in this case also, that the charges were pending, and he "confirmed" to the solicitor that no promises had been made for him at sentencing in exchange for his testimony. Tr. 339, l. 24 – 340, l. 23. Williams admitted he had a prior record for distribution of crack cocaine. Tr. 340, l. 24 – 341, l. 9.

Williams testified on September 30, 2015, that appellant picked him up with T-Black, which was Terry Harris. Williams remembered that the four men then went to the Dolphin apartment complex. Tr. 341, l. 17 – 342, l. 21.

The men then put on their ski masks and Williams testified that the men grabbed a man coming down the steps and "took him up the steps." They knocked at the door, and they rushed in when the door was opened. "Seconds after that, the shooting starts." Tr. 342, l. 13 – 344, l. 25. Williams recalled hearing arguing before the shooting started and he said he ran back to the car where he found Harris. Williams remembered he was dropped off on "Hampton Avenue" after he threw down his ski mask. Tr. 345, l. 11 – 346, l. 22.

Williams said he heard in the neighborhood that he was wanted by the police, and he told the solicitor that is why he turned himself in. Tr. 346, ll. 16-25. Williams said he turned himself in because "it was the right thing to do." Tr. 346, ll. 16-18. Williams admitted he had lied to the police when he first talked to them. This admission came on cross-examination. Williams also admitted on cross-examination that Harris asked him if he wanted "to go get some weed" before they went to the Dolphin apartments. Williams now said that was "part true." Tr. 348, l. 21 – 349, l. 23.

Williams said he did not know the man who was driving that day, and he never saw him again after this incident. Williams admitted he did not know "who shot who" but he did know that Terry Harris had a gun. Tr. 352, l. 20 – 353, l. 21.

On cross-examination, Williams also said the men were supposed to break into the apartment to get marijuana but that no one was supposed to get hurt. Tr. 353, l. 22 – 356, l. 6. Williams claimed he did not have a gun that day and he said that his orders came from Terry Harris. Tr. 356, l. 22 – 357, l. 15.

Sentencing exposure cross-examination

Williams admitted he was facing the same charges as appellant, which included murder, kidnapping, and attempted robbery. Tr. 357, ll. 16-21. Williams claimed he did not expect any sentencing assistance from the solicitor for his testimony. Williams refused to admit he hoped for a shorter sentence in return for his testimony. Tr. 358, l. 19 – 359, l. 23.

Williams maintained that no one had talked him into "changing his story." Williams said he did not know the maximum possible sentence that he could receive. Williams admitted he was charged with murder, and defense counsel then asked him: "You are aware you could get a

life sentence?" The solicitor's immediate objection, stating no grounds for it, was immediately sustained. Tr. 360, ll. 14-20.

After cross-examination, the judge instructed the jury that he was not trying to keep secrets from them, but that a potential sentence of a witness was not relevant in the case. Tr. 364, ll. 6-25.

The remaining witness, pathologist Dr. Michael Ward, testified the decedent died of a gunshot wound to the abdomen and the right leg. Tr. 373, ll. 4-7.

Discussion

It is well settled law that the sentencing exposure of a witness testifying for the state is permissible cross-examination to show the potential bias of the witness to the jury responsible for judging his or her credibility. It is also well settled law in South Carolina that it is error to refuse to allow the defendant to cross-examine his co-defendant, co-conspirator, or co-accomplice on the possible sentences he faced, where that witness had not pled guilty or reached a plea agreement with the state. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).

In Mizzell, the limitation on cross-examination involved a co-conspirator witness's potential sentence if he was convicted of the same crimes as the defendants. The Supreme Court in Mizzell noted that the lack of a plea agreement, if anything, suggests the witness will testify more favorably to the state's position. State v. Mizzell, 349 S.C. 326, 332, 563 S.E.2d 315, 318 (2002).

In Mizzell, the Supreme Court held that a criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the

witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" State v. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 *citing* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986),

The elementary cross-examination limitation error, respectfully, by the trial court here is reversible error without the necessity of any Confrontation Clause or other Constitutional analysis. That is true because "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976).

In this case, alleged accomplice, Terry Harris, a/k/a "T-Black" admitted he was in federal custody and serving a 120 month sentence for a firearms violation. Harris readily admitted that he expected to plead guilty to the charges in this case, and he open coveted "concurrent time." Harris admitted, which he had to, that concurrent time meant he would not serve any more prison time for having committed or been involved in the murder, burglary, kidnapping, and other crimes involved in this case. Tr. 330 – 331.

However, alleged accomplice Nyerere Williams, the next witness, was a different story. The solicitor immediately upon calling him as a witness had Williams testify that he had pending charges, "the same charges that the defendant has." Importantly, he added, upon questioning by the solicitor, that solicitor Richardson had not made him "any promises regarding those charges." Tr. 340, ll. 12-23.

On cross-examination, Williams admitted he was charged "with exactly the same thing that Timiya Massey is charged with." Williams admitted those charges included murder, kidnapping, attempted armed robbery, "and all the others." Tr. 357, ll. 16-21.

Williams said the only reason he was testifying against appellant was because it was **"the right thing"** to do. Williams boldly asserted he did not have any expectation that his testimony against appellant would help him at all at sentencing. Tr. 358, ll. 3-24.

Again, Williams was aware he was charged with murder in this case. Defense counsel then asked Williams if he was also aware he could get a life sentence for murder. The solicitor immediately objected, without stating a ground, and that objection was immediately sustained. Tr. 360, ll. 9-20.

S.C. Code § 16-3-20 provides, where the state does not seek the death penalty for murder, that a person who is convicted of or pleads guilty to murder can receive a sentence of life imprisonment or a mandatory minimum term of thirty years. The defense cross-examination of Williams on murder carrying a possible life sentence was legally correct sentencing exposure, and proper under well settled precedent. The judge therefore erred by refusing to allow it. The judge improperly reasoned that the potential sentence a witness was facing was not relevant to the jury's deliberations, which obviously involve witness credibility determinations. That was error since it was relevant cross-examination as to bias. Tr. 364, ll. 8-25. Again, the scope of cross-examination in South Carolina for bias is broad. See State v. Brewington.

In State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006), this Court found error in the court prohibiting defense counsel from questioning co-defendants on the sentencing exposure they faced for murder and other charges in the decedent's death. The trial judge in Curry stated he was not going to allow the defense to elicit whether the co-defendant knew what his potential sentences were in the case.

While finding error in the judge's cross-examination limitations in Curry, this Court found the error harmless, reasoning error is harmless "where guilt has been conclusively proven

by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

There are substantial differences between a harmless error analysis in Curry and here. In Curry, Ronald Coursey, the other victim in the robbery, unequivocally identified Curry as the shooter. Here, the decedent's brother, who opened fire to protect the decedent, could *not* identify the masked shooter.

Further, Curry was overheard in a discussion with co-defendant Savage making inculpatory statements about the murder weapon. State v. Curry, 370 S.C. 674, 681-682, 636 S.E.2d 649, 653 (Ct. App. 2006). Here, there were no inculpatory statements attributed to appellant in any fashion. Further, in this case, Terry Harris testified that he ran away when the shooting started, and he did not name a shooter. Harris openly admitted he hoped to receive great sentencing consideration for testifying during appellant's trial, and he acknowledged he wanted concurrent time to his federal 120-month sentence.

Williams also admitted he did not see the shooting, and he essentially acknowledged that he was operating under the orders of **Harris**, not appellant, which was relevant to jury's analysis of the issue of accomplice liability.

"The hand of one is the hand of all" was a jury issue in this case where the two alleged accomplices, Harris and Williams, claimed they were not around at the time of the shooting. Also strange, the third man involved, the alleged driver, "Cornelius," could not be found. No one allegedly even knew his last name.

Further, the defense properly attacked the evidence collection in this case, since Crime Scene Processor Josh Spurgeon had been reprimanded for his unprofessional evidence gathering and evidence preservation in the past. Tr. 159, l 7 – 169, l. 6. Lead investigator Chris Hammett

admitted that the testing of evidence was only as good as the integrity of its collection. Tr. 222, l. 11–229, l. 8. Essentially, all the state could rely upon besides the assertions of Harris and Williams was appellant's DNA being found on a mask that was allegedly properly collected by Spurgeon from the apartment grounds.

Once again, State v. Mizzell, on this legal issue was decided in 2002, fifteen years before the trial in this case. State v. Curry on this legal issue was decided in 2006, eleven years before this trial. Tr. 1. State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), was decided five years before the 2017 trial in this case. In Gracely, our Supreme Court extended the logic on this issue by holding that the defense had the right to ask state's witnesses the mandatory minimum sentence they could have received where it was significantly longer than the sentence they received in exchange for their cooperation.

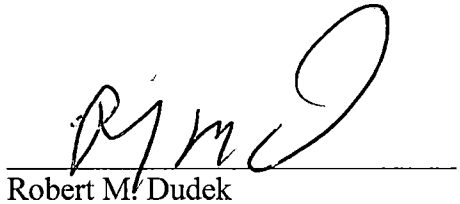
The defense in this case had the right – under clearly established case law -- to question Williams about whether he was aware he could receive a life sentence for murder, which he could have received pursuant to S.C. Code §16-3-20 (A). The jury understanding that Williams faced a life sentence, spending the rest of his life in prison, was powerful evidence as to his credibility and his incentive to testify for the state and slant his testimony for favor.

The facts of this case, as seen above are unusual. No victim or independent witness identified appellant, and no inclulpatory statements were attributed to appellant. This accomplice liability case was strange because the testifying accomplices claimed what was to occur that night was unknown or at least that no one was expected or supposed to get hurt. Two of the alleged participants said they ran when the "unexpected shooting" occurred, and the alleged driver, "Cornelius," was never located his last name was allegedly not even known. Appellant was respectfully left "holding the bag" the way this case unfolded. For the reasons

above, the well-settled legal error in the limitation of the cross-examination of Williams on his sentencing exposure for murder was not harmless error. State v. Mizzell, supra.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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V.

TIMIYA RASHAD MASSEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Timiya Rashad Massey, #322913, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of December, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.