

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Stephanie P. McDonald, Circuit Court Judge

RECEIVED
FEB 06 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RANDAL WILLIAM BENTON,

APPELLANT

Appellate Case No. 2012-208508

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

ARGUMENT

**The trial court reversibly erred by admitting a hearsay statement of the
decedent through the witness Rules 803(1) and 803(3), SCRE..... 8**

CONCLUSION 11

PETITION TO BE RELIEVED AS COUNSEL 12

TABLE OF AUTHORITIES

Cases

State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) 10

State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) 9, 10

State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000)..... 9

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 10

Rules

Rule 801(c), SCRE 8

Rule 802, SCRE..... 8

Rule 803(1), SCRE 6, 8, 9

Rule 803(3), SCRE 6, 8, 9

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by admitting a hearsay statement of the decedent through the witness under Rules 803(1) and 803(3), SCRE?

STATEMENT OF THE CASE

Appellant Randal William Benton was indicted by the Dorchester County grand jury on January 27, 2011 for the alleged murder of his wife, Treva Benton (Wife). R. 26, line 22—R. 27, line 8; R. 459—R. 460. Appellant’s case proceeded to trial on February 9, 2012, before the Honorable Stephanie P. McDonald and a jury. John Loy and Michelle Suggs (collectively, “Counsel”) represented Appellant, while Russell Hilton and Barney Giese represented the State. R. 1. The jury found Appellant guilty as charged, in the trial court imposed a sentence of life imprisonment. R. 443; lines 5-10; R. 456, lines 8-10; R. 461.

STATEMENT OF THE FACTS

Appellant's and Wife were married for approximately 5 years; however, by October 30, 2010, the two had lived separately for approximately six months. Although separated, Appellant and Wife still spoke regularly, and they remained romantically involved. R. 193, lines 13—R. 194, line 3; R. 302, line 11—R. 304, line 12.

Earlier in the day on October 30, 2010, Wife moved her belongings from her home in Ladson to a storage unit, and planed on temporarily living with another family member. Several family members and friends helped Wife move her belongings, including Appellant and Wife's son, Michael Palmer, IV (Palmer). R. 193, lines 13—R. 194, line 3; R. 302, line 11—R. 304, line 12. After helping Wife move her belongings, Appellant left at approximately 1:00 to 1:30 pm. R. 308, lines 6-8.

After running several errands in the afternoon, Appellant later visited a bar in Summerville between 8:30 to 9:00 PM that was about 10 to 12 miles from his home. While there, Appellant had approximately five to six drinks. R. 308, line 18—R. 312, line 6. Furthermore, Appellant accepted an unknown drink from an unknown woman from Missouri when he was walking in the parking lot to leave. An altercation subsequently ensued between the woman's brother and Appellant; while walking away from an altercation in the parking lot of the bar, Appellant was struck in the head by what he believed was a thrown bottle. Although disoriented, Appellant entered his truck and drove to another nearby bar, "Shooters." R. 313, line 13—R. 320, line 22. Yet, Appellant merely drove through that parking lot; he did not stay because he did not see the vehicles of any of his friends. R. 320, line 25—R. 321, line 19.

Appellant's disorientation continued to progress, and he decided he needed to go home. However, rather than arriving at his own residence, Appellant ended up driving to a former address where he and Wife once lived together; this was approximately one and one-half blocks away from the parking lot of "Shooters." R. 321, line 16—R. 322, line 8.

Wife's son, Palmer, still lived at the residence where Appellant arrived. When Appellant entered the back screen porch of the condominium sometime between 9:45 and 10:00 PM, Palmer came out of the back door of the building and greeted him. Palmer called Wife because Appellant indicated he came to ask Wife for a ride home, and the 2 remained on the screen porch until Wife arrived at the condominium approximately 10:00 to 10:30 PM. R. 197, line 6—R. 199, line 4; R. 325, line 23—R. 326, line 6.

When Wife arrived, she went upstairs to change. Palmer also walked up the stairs to see if anything was wrong, and defendant walked up the stairs as well. R. 200, line 6—R. 201, line 7.

As Palmer testified at trial, the three eventually went back downstairs, and Appellant walked out the front door. However, when Palmer began to reiterate a statement by Wife made to him as she was exiting the front door, Counsel immediately objected on the basis of hearsay. After overruling Counsel's objection on the basis of rules 803 (1) and 803 (3), the trial court permitted the State to elicit the following testimony from Palmer:

Q. Michael, you said your mom was walking out the door. She had turned to you and said what?

A. *My cell phone is on. If I'm not back in 20 minutes, call me. If I don't answer, call the police.*

R. 201, lines 18-22.

Appellant testified at his trial that Wife drove him in her SUV, ostensibly to take him home. However, an argument ensued inside the SUV between the two, and Wife pulled the vehicle over into the parking lot of a nearby Perkins restaurant. Appellant indicated that the argument escalated, and wife struck him; he blacked out in anger, and apparently shot Wife. The next thing Appellant stated that he remembered was being at a BP gas station in Alabama where he was arrested the following morning at approximately 9:00 AM by local authorities. R. 208, line 16—R. 210, line 9; R. 329, line 7—R. 334, line 2; R. 357, line 25—R. 363, line 18.

During closing arguments, the State reminded the jury of Wife's statement to Palmer as she exited the door. Specifically, the State argued to the jury the following:

Remember this, what is the one thing that the victim said prior to getting into the car with her--with him? If I'm not back in 20 minutes, call the police. Isn't that amazing? Think about it. Because 15 minutes later she is dead. 15 minutes later she has got eight holes in her. Eight shots.

R. 412, lines 1-6: The jury found Appellant guilty as charged, and the trial court sentenced him to life imprisonment. R. 443, lines 5-10; R. 456, lines 8-10; R. 461.

This appeal follows.

ARGUMENT

The trial court reversibly erred by admitting a hearsay statement of the decedent through the witness under Rules 803(1) and 803(3), SCRE.

Appellant asserts the trial court reversibly erred by admitting impermissible hearsay statements of Wife through Palmer because they do not fall within either exception listed by the court in support of its ruling. First, the statements made by Wife are not “Present Sense Impressions,” because they were not explaining an event or condition made while perceiving the event of the shooting. Second, the words are not statements describing a “Then Existing Mental, Emotional, or Physical Condition” because they arguably reveal the declarant’s reason for her state of mind. Further, Appellant was prejudiced by the trial court’s erroneous admission of this hearsay evidence. The State specifically pointed to the statements in its closing argument to the jury in order to convict Appellant of the offense. Accordingly, Appellant requests reversal of his conviction, and remand for a new trial.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Generally, hearsay is inadmissible unless it falls within an enumerated exception. Rules 802 and 803, SCRE. In the present case, the statements made by Wife to which Palmer testified were unquestionably hearsay. They were statements declared by Wife, who did not testify, and offered to the jury through Palmer to prove the truth of what Wife declared.

Appellant further asserts that the trial court erred by admitting the hearsay statements under two exceptions: Rule 803(1), and Rule 803(3) of the South Carolina Rules of Evidence.

First, Rule 803(1) permits hearsay statements when they are “Present Sense Impressions.” Specifically, the rule provides as follows:

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Rule 803(1), SCRE. Here, Wife was not describing or explaining anything, let alone while she was perceiving an event or condition. Simply stated, the statement was not made while the offense was being committed—it was not made while Appellant shot at anyone. Moreover, it was not made while she was calling anyone on her cell phone or while anyone was calling her. Accordingly, the trial court erroneously applied this “Present Sense Impression” exception when admitting the hearsay statement. See, e.g., State v. Griffin, 339 S.C. 74, 78 n.3, 528 S.E.2d 668, 670 n.3 (2000); State v. Garcia, 334 S.C. 71, 77 n.4, 512 S.E.2d 507, 510 n.4 (1999).

Second, Rule 803(3) permits hearsay statements when they are “Then Existing Mental, Emotional, or Physical Condition.” In particular, the rule applies under the following conditions:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Rule 803(3), SCRE. As interpreted by the South Carolina Supreme Court, “Rule 803(3), SCRE, does not permit a statement of memory or belief to prove the fact remembered, unless relating to the declarant’s will.” Garcia, 334 S.C. at 76, 512 S.E.2d at 509 (internal quotations omitted). “Consequently, while the present state of the declarant’s mind is admissible as an exception to hearsay, the reason for the declarant’s state of mind is not.”

Id.

In the case at bar, Appellant asserts that the statement made by Wife went beyond mere presentation of the declarant's state of mind; rather, it arguably indicates the reason for the declarant's state of mind. Specifically, Wife was in the process of walking out the door with her husband, Appellant, and she told Palmer: "My cell phone is on. If I'm not back in 20 minutes, call me. If I don't answer, call the police." R. 201, lines 18-22. Under the specific circumstances of the case, the words of the Wife indicate not only a concern for her safety, but also that the reason or cause for her concern was Appellant: it was Appellant and only Appellant whom Wife had left that night and who was riding in the SUV when they left to take Appellant home. Accordingly, the trial court erred in admitting Wife's hearsay statements through Palmer. Garcia, 334 S.C. at 76, 512 S.E.2d at 509.

Additionally, the State's reliance upon Wife's statement through Palmer to prove its case is made abundantly clear by its closing argument:

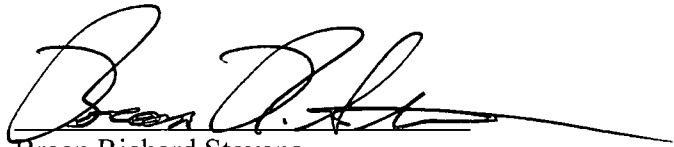
Remember this, what is the one thing that the victim said prior to getting into the car with her--with him? If I'm not back in 20 minutes, call the police. Isn't that amazing? Think about it. Because 15 minutes later she is dead. 15 minutes later she has got eight holes in her. Eight shots.

R. 412, lines 1-6 (emphasis added). This evidence and argument both tend to refute the defense regarding a lack of intent to shoot, especially prior to Appellant being struck by Wife. Thus, the trial court's error permitting the Wife's hearsay statement was not harmless as it reasonably could have affected the outcome of the trial. See, e.g., State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d 57, 63 (2006) ("Error is only harmless 'when it could not reasonably have affected the result of the trial.'") (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Appellant therefore requests reversal of his conviction, and a new trial granted.

CONCLUSION

For the foregoing reasons, Appellant Randal Benton respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of February, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDAL WILLIAM BENTON,

APPELLANT

Appellate Case No. 2012-208508

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randal William Benton states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Stephanie P. McDonald, which was held on February 9, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Randal William Benton.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDAL WILLIAM BENTON,

APPELLANT

Appellate Case No. 2012-208508

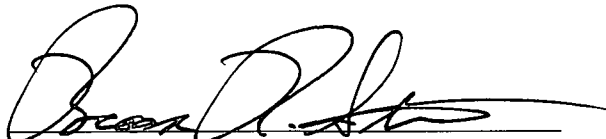
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Trial transcript, pp. 1-457;
- (3) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 6th, 2013



Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

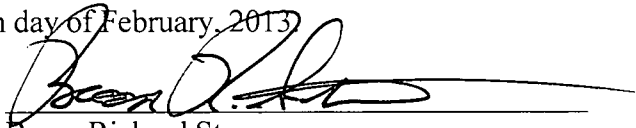
RANDAL WILLIAM BENTON,

APPELLANT

Appellate Case No. 2012-208508

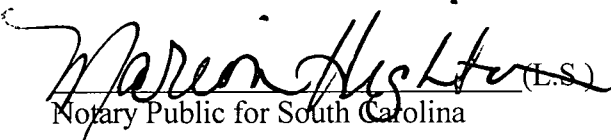
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter, and Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at P.O. Box 50666, Columbia, SC; and on Mr. Randal William Benton, #349652 at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472 this 6th day of February, 2013.


Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of February, 2013.


Notary Public for South Carolina (L.S.)

My Commission Expires: October 30, 2022 .