

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Kristi Lea Harrington, Circuit Court Judge

DEC 04 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTHONY WILLIS, JR.,

APPELLANT

APPELLATE CASE NO. 2012-213066

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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South Carolina Commission on Indigent Defense
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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	
The court erred by allowing EMS employee Brian Acord to testify about what the decedent allegedly communicated to him in the ambulance since his testimony was hearsay and also contained an inadmissible opinion.....	5
Relevant Facts	5
Discussion.....	8
CONCLUSION.....	11
PETITION TO BE RELIEVED AS COUNSEL	12

TABLE OF AUTHORITIES

Cases

<u>State v. Sims</u> , 387 S.C. 557, 694 S.E.2d 9 (2010)	8
<u>State v. Davis</u> , 371 S.C. 170, 638 S.E.2d 57 (2006)	9
<u>Mariano v. State</u> , 933 So.2d 111 (Fla 2006)	9
<u>State v. Dennis</u> , 337 S.C. 275, 523 S.E.2d 173 (1999)	9
<u>State v. King</u> , 158 S.C. 251, 155 S.E.2d 409 (1930)	10

Rules

Rule 801(c), SCORE	8
Rule 802, SCORE	8
Rule 803(2), SCORE	9

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing EMS employee Brian Acord to testify about what the decedent allegedly communicated to him in the ambulance since his testimony was hearsay and also contained an inadmissible opinion?

STATEMENT OF THE CASE

Appellant was indicted by the Dorchester County Grand Jury for the offense of murder: R. 372. His case was called to trial on September 17, 2012 before the Honorable Kristi Lea Harrington, and a jury. Mitchell Farley and John Loy represented appellant. Russell Hilton and Warren Giese were the assistant solicitors. R 1.

On September 18, 2012 the jury found appellant guilty of murder R. 360 ll. 5-10. Judge Harrington sentenced appellant to life imprisonment. R. 369 ll. 4-6.

This appeal follows.

ARGUMENT

The court erred by allowing EMS employee Brian Acord to testify about what the decedent allegedly communicated to him in the ambulance since his testimony was hearsay and also contained an inadmissible opinion.

Relevant facts

The solicitor argued in his opening statement that the decedent, Justin Smoot, was shot twice by a high powered rifle. He asserted appellant got in a verbal altercation with the deceased and eventually shot him. He stated appellant then ran away. R. 58 l. 10 - 60 l.21. Each of these assertions would be important for the state to prove, and it attempted to so in an improper fashion as will be seen infra.

Earl Lewis testified on May 2, 2011 he was at his home at 102 Muir Court, Apartment C. At about 4:00 in the afternoon he heard a gunshot, and went outside. He saw the victim on the ground. His brother told him to call 911. Lewis called 911 and the police and paramedics arrived. R. 68 l.2- 70 l.22.

The EMS employee, Brian Acord testified that when he reached the crime scene the decedent was on the ground "surrounded by a whole bunch of bystanders." R. 78 l.7- 79 l.15. Acord maintained the decedent was conscious but not able to speak. Acord said he was able to communicate with the decedent because "he was able to shake his head yes or no." R. 79 l.19- 80 l. 3. The following occurred on direct examination of Acord:

Q: Did you have the opportunity to communicate with Mr. Smoot while he was in the ambulance?

A: Yes, sir.

Q: What's the purpose of that communication?

A: It's to get a better understanding for the medical reasons what exactly occurred to him.

Q: What are some of the questions that you asked him on that ride to the hospital?

Mr. Farley: Objection. This response requires the witness's opinion as well as hearsay.

The Court: Overruled.

The Witness: I asked him if he knew *who the shooter was*, he shook his head *yes*. I also asked if he knew what type of firearm caused the injury, and he said *yes*, in which case I asked—since it was kind of *yes or no* questions, I asked was it a pistol and he said *no*. And I asked if it was a shotgun, and he said *yes*. *And given the wound, it didn't appear to be shotgun in nature.*

Mr. Farley: Objection, Your Honor. Opinion.

The Court: Overruled.

The Witness: So then I asked if it was *a rifle*. *He stated yes*. And I again asked him if it was a rifle. And again, he said that it was, shaking his head.

R. 80, l. 9 – 81, l. 6.

Quinton Jackson testified he knew appellant by his nickname "AJ." Jackson said when he got out of school he was sitting on a bench with other young men. The decedent, the seventeen-year-old appellant, and the others were present. R. 96, l. 2- 97, l. 18.

Jackson said appellant was wearing an orange shirt. At some point he and the decedent began arguing. The decedent left. Jackson began walking "through the cut to my house." At some point he heard a gunshot. R. 97, l.17 – 98, l.19; r. 100 ll. 21-23.

The state's star witness was Ryan Pollard. Pollard claimed he was a witness to the shooting. However, he admitted he did not give a statement to the police or

detectives after the shooting. In fact, he only came forward a week before the trial claiming he had information about the shooting. R. 140 ll. 2-24.

Pollard testified that on May 2, 2011 he was talking to the decedent after getting off of the school bus. Quinton Jackson and Nathan Hill were also present. Appellant pulled up on a moped. R. 118 l.6 -121 l. 21.

Pollard said the decedent went to question appellant "about something [and] they got into a little scuffle and he [appellant] ran off." R. 121, l. 24 – 122, l. 2. Pollard claimed he saw appellant come back into the area "with a gun in his hand." R. 123, ll. 19-22.

Pollard maintained appellant pointed the gun, a rifle, towards the men and shot it. However, Pollard testified that no one was hit by the gun shot. R. 124, l. 14 – 127, l. 13. All of the young men ran. Pollard next claimed he saw appellant coming back past him and "I heard the bullets jingling in his pocket and see (sic) him holding his --- at the time I thought was a revolver or something or a handgun..." Pollard said appellant was talking with the decedent and he claimed he saw appellant "pull his shirt up over his face and get on the side of this building, on the side of this building right here, and pull the rifle out and shoot." R. 128, l.16 – 129, l. 11. Pollard said he knew the decedent was hit because he screamed. R. 131 l. 5- 132 l. 5.

The state also presented evidence that a rifle was found in a ditch near the apartment complex, and that two live 30-30 rounds were recovered from appellant's house that were compatible with the rifle. R. 170, l. 14 – 172, l. 8 ; r. 277, l. 18 – 278, l.23.

Discussion

The state in this case used the hearsay testimony of EMS employee Acord to put before the jury that the decedent allegedly communicated that he knew who shot him. In addition, Acord stated that the decedent initially told him he was shot with a shotgun, but Acord said he knew the decedent was not shot with a shotgun. Acord then claimed the decedent agreed he had been shot with a rifle.

Acord was not qualified as an expert in firearms, emergency medicine, pathology, or any other field that would have given him the right to express an opinion on what type of weapon caused the injury to the decedent.

Appellant and the decedent knew each other. The state presented evidence that a rifle was found submerged in a ditch near the crime scene. Further, the state offered evidence that the 30-30 cartridges found in appellant's apartment were compatible with the hidden rifle that was thought to be the murder weapon.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801 (c), SCRE. Generally, hearsay is not admitted unless there is a hearsay exception in the rules of evidence or by other rules prescribed by the Supreme Court or by statute. See Rule 802, SCRE.

Acord's testimony about what decedent allegedly communicated to him was offered for the truth of the matter asserted -- that the decedent knew appellant and that he suffered a gunshot wound fired by a rifle. This was highly prejudicial hearsay See, State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (2010).

The state did not attempt to lay any foundation that this statement was admissible as an “excited utterance.” An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” and may be admitted at trial as an exception to the hearsay rule. See, State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999); Rule 803(2), SCRE.

The state has the burden of establishing a foundation for the excited utterance. See, Mariano v. State, 933 So..2d 111 (Fla 2006) In State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) the Supreme Court held that the testimony of a state’s witness that an associate of the defendant told him that the shotgun had been used to murder the victim belonged to Davis was not admissible as an excited utterance. The state did not elicit any evidence that the decedent was under the stress or excitement of the event such that he lacked the ability for reflective thinking.

The state had the burden of establishing the foundation for an excited utterance here. Since it did not the defense correctly objected that testimony of the EMS worker was inadmissible hearsay.

In addition, defense counsel properly objected that the Acord’s opinion that he knew appellant’s wounds were not made by a shotgun, and that the decedent confirmed the wound was made by a rifle constituted hearsay and an inadmissible opinion by Acord. Again, Acord was not qualified as an expert in any acceptable area to render this opinion. Rule 701, SCRE provides a witness who is not testifying as a expert can only give testimony in the form of opinions or inferences if three factors are met: (a) they are rationally based on the perception of the witness, (b) they are helpful to a clear

understanding of the witness' testimony or the determination of a fact or issue, and, (c) they do not require special knowledge, skill, experience, training.

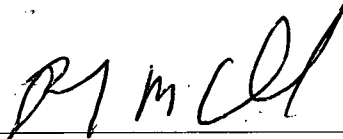
The primary basis for the rule is reliability. See, State v. King, 158 S.C. 251, 155 S.E.2d 409 (1930). Here, Acord did not have any special knowledge, skill, or experience to allow him to testify a gunshot wound came from a rifle rather than a different type of weapon. No foundation was laid by the state to establish that lay testimony, rather than expert testimony, made Acord's opinion inadmissible.

This was highly damaging hearsay and improper opinion testimony because it seemingly had the decedent corroborating other testimony put forth by the state that the decedent was shot by a rifle, and that he knew appellant. The solicitor seized on this in his closing argument telling the jury that the decedent's "communications" were that he knew the shooter, and that Dr. Ross corroborated the fact a rifle was used to shoot him. This was highly effective and damaging. R. 301, l. 18 – 302, l. 10. The state's theory of the case was argument between appellant and the decedent allegedly led to the shooting. The error was not harmless here.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Dorchester County of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2013.

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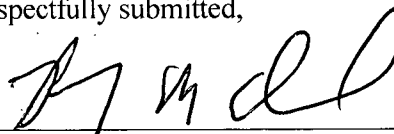
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Willis Jr. states:

1. He is Chief 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 Kristi Lea Harrington, which was held on September 17-19, 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 Anthony Willis Jr.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2013.

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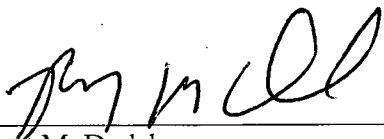
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Entire trial transcript.

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

December 4th, 2013



Robert M. Dudek
Chief Appellate Defender

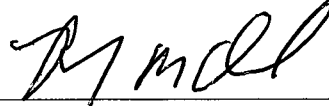
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 4, 2013

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

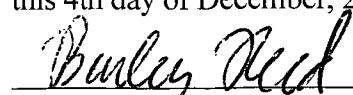
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Anthony Willis, Jr., #352475 at Lee Correctional Institution, on this 4th day of December, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of December, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021