ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALKER MANNING HUGHES

APPELLANT

APPELLATE CASE NO.: 2014-000294

FINAL BRIEF OF APPELLANT

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Whether the court erred by denying appellant's motion to require the state to open fully on the law and facts and then reply only to the closing argument of appellant since granting the state the full opportunity to the last argument on the facts and law was a denial of due process because it was fundamentally unfair?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offense of murder, burglary in the first degree, grand larceny and possession of a weapon during a violent crime. R. 804 – R. 809. His case came on for trial on February 3, 2014 before the Honorable J. Michael Baxley, and a jury. Chris Scalzo, John Crangle and Tim Sullivan represented appellant. Leigh Paoletti and Sloan Ellis were the assistant solicitors. R. 1.

On February 7, 2014 the jury found appellant guilty on both counts. R. 788, l. 13 – 789, l. 7. Judge Baxley sentenced appellant to life imprisonment for murder, and concurrent terms of life imprisonment for first-degree burglary, five years for grand larceny, and a consecutive five year term for possession of a weapon during the commission of a violent crime. R. 791, ll. 14-24.

ARGUMENT

1.

The court erred by admitting hearsay testimony about the specifics of why appellant's mother, the victim, was allegedly afraid of him since this testimony was not admissible under the state of mind exception, and it was extremely prejudicial.

Introduction

The state offered evidence that appellant was the immediate suspect when his mother was found murdered. The defense sought to show that the police quickly came to the conclusion that assuming appellant was the murderer a safe assumption, and thus failed to investigate the case for other suspects. The state would introduce, over appellant's hearsay objections, testimony from several witnesses about the **specifics** of the fear appellant's mother allegedly had him. The judge admitted this testimony finding it admissible under the "state of mind" exception to the hearsay rule.

Relevant Facts

Prior to trial, the solicitor told the judge that the state planned to introduce evidence that the victim "was fearful of the defendant." The solicitor said the state, among other things, planned to introduce testimony that appellant had pled guilty to forgery, was on probation, and had been placed under a "no contact order with the victim two days before she was murdered. He pled guilty to forging checks on the trust account." R. 12, ll. 2-14.

Defense Counsel Scalzo told the judge that this testimony involved "multiple witnesses," hearsay testimony and that there were also "remoteness problems with this hearsay testimony involving many witnesses." R. 13, l. 15 – 14, l. 11. The judge observed that this was "a complicated issue, counsel." The solicitor claimed the issue was "easy," and

that under State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006), that all of this evidence the defense alleged was hearsay was admissible to show the fact the victim was afraid of her son. However, even the solicitor conceded that the reasons for the victim's alleged fear was not admissible under the state of mind exception as Weston clearly holds. R. 15, ll. 1-22.

Defense counsel again stated this testimony is going to involve multiple witnesses, and that it was a "back door" method of admitting inadmissible hearsay bad character evidence against the appellant, and that it was also unduly prejudicial under Rule 403, SCRE. R. 15, l. 24 – 17, l. 24. The judge observed that he could not rule on these issues in the abstract, and he cautioned the state to proceed carefully. R. 17, ll. 4-16.

Jury in

Greenville County Sheriff's Deputy Christopher Miller testified that on Monday, April 11, 2011, he responded to a dispatch to the house of appellant's mother in Greer, South Carolina at about 10:15 a.m. Miller recalled, "Karen Hughes, an employee of the Greenville City Fire Department" did not show up for work that morning and the police found her dead inside her home that morning. R. 49, l. 5 – 51, l. 18.

The police made a forcible entry into the house "because all the doors and windows were found to be locked." R. 56, ll. 9-16. Further, the police used a bolt cutter to cut the lock off of the front gate. As they approached the screened-in porch they noticed that "there was a tear in the screened–in porch door." R. 57, l. 8 – 59, l. 20.

Miller opined that "rigor mortis was present and he estimated the victim had been dead from twenty-four to forty-eight hours. R. 61, l. 13 – 63, l. 4. Miller speculated that appellant's mother had been killed on Friday night, April 8, 2011, which was the last time she was seen outside her house. R. 65, l. 15 – 66, l. 18.

On April 11, 2011 when the victim's body was found appellant was the suspect in the murder. Miller testified that witnesses he interviewed and the victim's co-workers were "adamant" that appellant had to be the person who murdered his mother. R. 90, l. 19 – 94, l. 12.

Miller said the victim's other son, Larry Hughes, was very emotional and upset when he talked to him about his mother's death and that he acted in a manner Miller thought was proper. R. 86, l. 12 – 87, l. 12. Miller testified he also spoke with the victim's estranged husband, Douglas Hughes, noting that it was "obvious he had a brain injury," and that Hughes had trouble standing and walking. This testimony was obviously meant to convey to the jury that it should not consider victim's other son, Larry, or her estranged husband, Douglas, as suspects in the murder. The victim had a trust fund, set up by her parents, as will be seen infra, of close to a million dollars. Appellant and his brother, Larry, were to be the beneficiaries upon the death of the Mother. R. 102, l. 17 – 103, l. 12; R. 158, l. 6 – 161, l. 16.

Miller found it strange that appellant's mother had a dead bolt on her bedroom door, and that her car was missing from her garage. The garage door could only be opened from the inside of the house with the garage door opener. The car was later found in appellant's possession in Laurens, South Carolina. Appellant later testified that he "made up" with his mother before she was killed, and that she allowed him to take the car. R. 104, ll. 19-22; R. 141, l. 5 – 143, l. 23. Miller testified over defense counsel's hearsay objection that after talking with Teri Hughes, the wife of appellant's brother, Larry, appellant was the primary suspect in the murder. R. 149, l. 11 – 150, l. 15.

Margo Green had known the victim since the second grade. Green worked for Attorney Bill Bannister as a paralegal. She remembered that the victim changed lawyers in her domestic action against her husband and she hired Mr. Bannister in late 2010. R. 243, l. 7 – 245, l. 6. Green last talked to the victim on Friday, April 8, 2011. The victim was found dead on April 11, 2011. The judge overruled defense's objection to Green's testimony when she began to testify that the victim's voice "was just a little shaky [that day] She was talking a little faster than she normally did." The solicitor then asked if the victim told Green why she was agitated. Over objection, Green then testified that the victim was upset because appellant had been released from jail, and the solicitor's office had failed to notify her that appellant was out of jail. Green said the victim told her that she now had to be extra careful in her actions because appellant "was back out on the street." R. 248, l. 1 – 250, l. 1.

Ben Leaphart, a lawyer in Greenville, worked with the trust set up by appellant's mother. R. 406, l. 7 – 410, l. 2. Leaphart testified that the trust was set up so the victim could take money out of the nearly million dollar trust to pay her bills, and that after she died, the money remaining went to her two sons equally. R. 410, l. 8 – 412, l. 22.

When the solicitor asked Leaphart what the victim: "Felt about her son, Walker?" Defense counsel objected on the basis of hearsay. The solicitor again stated that this went to the victim's state of mind under State v. Weston, and the judge allowed the testimony. Leaphart then said, over defense counsel's repeated hearsay objection, that the victim was not comfortable being with appellant because of appellant's drug use, and his lifestyle in general. The victim told Leaphart about verbal altercations she had with appellant, and she

she was also concerned that her estranged husband was allowing appellant to access money from the trust. R. 423, l. 1 – 424, l. 20.

Max Few was a neighbor of appellant's mother. He testified he last spoke to her on Friday, April 8, 2011. Prior to this testimony the judge overruled a defense objection to his testimony, and Few said the victim told him that appellant was out of jail, and she wanted Few to look out for her because she was afraid appellant was going to come to her house, and kill her. "That's her words." R. 527, l. 7 – 531, l. 25.

Marion Beachum was employed by Palmetto Trust. Appellant's mother was referred to him by "Ben Leaphart, a good friend of mine and [he] refers a good bit of business to our bank." R. 634, l. 4 – 635, l. 24. Beachum explained that the trust was originally set up by the victim's parents. Appellant's mother received the net income of the trust during her lifetime, and the remainder was to be distributed to her sons, Walker and Larry, "free of trust if they were over 35 years of age at the time." R. 635, l. 22 – 637, l. 21.

The solicitor asked Beachum if the victim ever said anything to her about appellant. Defense counsel objected, and the solicitor once again claimed this testimony was admissible under State v. Weston. The judge overruled the objection. Beachum testified that the victim was "deathly afraid" of appellant, and that the victim told him "if he [appellant] ever got her alone, he would kill her." Beachum opined the victim was not afraid of her husband, Doug, or her other son, Larry. R. 639, l. 9 – 640, l. 8.

Discussion

In State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006), the Supreme Court held that "while the present state of the declarant's mind is admissible as an exception to hearsay rule, the reason for the declarant's state of mind is not." (*Citing* United States v. Cohen, 631

Fed.2d 1223, 1225 (Fifth Circuit 1980). In Cohen, the court stated that "the state of mind exception does not permit the witness to relate to **any of the declarant's statement as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind."**

Our Supreme Court held that for the state of mind exception to be properly applied it must be *narrowly limited* to those admissible statements that involve declarations of a condition - - "I'm scared" - - "and not belief" - - "I'm scared because [someone] threatened me." State v. Weston, 367 S.C. at 286, 625 S.E.2d at 645.

The trial court in this case improperly allowed the solicitor to use the witnesses, as seen above, to testify that the victim was afraid of appellant for various reasons, including that he had gotten out of jail, that she had not been notified by the solicitor's office that appellant was out of jail, she had verbal altercations with appellant, appellant used drugs, his "lifestyle," and she believed appellant would kill her if she was left alone with him, and if Few failed to protect her. The solicitor skillfully used the testimony of these witnesses to contrast it with the victim's statements in evidence that she, in contrast, did not fear her husband or her other son for any reason.

The hearsay testimony is this case did not properly fit into the state of mind exception, and it was highly prejudicial. Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. In this case the objectionable hearsay involves statements made by the victim which were made: out of court, by a person not testifying, offered in evidence to prove the truth of the matter asserted: That the decedent was afraid of appellant for various specific reasons, and that he killed her as she had feared. This

testimony from these multiple witnesses was inadmissible hearsay. See Collins, South Carolina Evidence § 16.3 at 476, 477 (2nd Ed 2000). The hearsay testimony in this case denied appellant his right to a fair trial.

Appellant took the stand in his own defense and he denied that he killed his mother. The forty-two year old appellant explained that he was released from jail on April 6, 2011, and he eventually made his way to his mother's house in Greer. Appellant admitted that while he was under a "no contact order," he explained to his mother that: "I walked two days and spent the night in the woods to get here to see you. You said we'd talk again when the issues were resolved and the issues are resolved. And for the first time in my life, I'd rather be housed and fed and clean than I would to be on drugs." Appellant offered that he told his mother she now had a granddaughter because he had a child with a woman whom his mother had not yet met. His mother wanted to know the details about her grandchild. R. 657, ll. 3-13; R. 692, l. 21 – 693, l. 11. His mother gave him $140.00, and allowed him to take the car from the garage. R. 692, l. 1 – 698, l. 21.

Appellant said that when he was arrested in Laurens because he had his mother's car, he kept asking the police "what's going on," and they eventually told him his mother had been murdered. R. 718, l. 11 – 719, l. 17.

The solicitor only asked appellant one question on cross-examination and that was if he had been thinking about his trial for a long time. (Appellant did not make bail because he could not access the trust fund money for bond, or to retain private counsel). The solicitor did not otherwise cross-examine appellant. R. 725, l. 23 – 726, l. 4.

The hearsay testimony in this case denied appellant his right to a fair trial. While the alleged fact that appellant's mother was afraid of him was admissible under Weston and

State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999), the specifics of his mother's reasons for her fear were not admissible. The hearsay "state of mind evidence" went far beyond the narrow scope set out in Weston. It was allowed to swallow the hearsay rule. Appellant should be granted a new trial as his testimony and explanations for his actions around the time his mother was murdered were plausible, and the error was therefore not harmless beyond a reasonable doubt.

2.

The court erred by denying appellant's motion to require the state to open fully on the law and facts and then reply to the closing argument of appellant since granting the state the full opportunity to the last argument on the facts and law was a denial of due process because it was fundamentally unfair.

Prior to trial defense counsel filed a Motion to Require the State to Open Fully on the Law and the Facts and then Reply to the Argument of Defendant. Court's Exhibit 1. R. 794 – R. 796. The motion argued that the long standing early practice in South Carolina was for the state to open fully on the law and the facts. In State v. Atterberry, 129 S.C. 464, 124 S.E.2d 649 (1924), the Supreme Court of South Carolina held "the failure to require the state to open fully on the law and the facts was reversible error." The instant motion explained how the practice had changed to "the more recent tradition of requiring the state to open only on the law." Motion at 1-2. R. 794 – R. 795.

The motion further argued that the Delaware Supreme Court had recognized the practice of "sandbagging" in a closing argument in a criminal case was highly prejudicial. "In Bailey v. State, 440 A.2d 997 (Del. 1992), the court noted that 'closing arguments is an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" Id. at 1004. Motion at 2. R. 795. The motion noted that "the majority of states in the federal court require the prosecutor to open fully on the law and the facts." Motion at 3. R. 796.

Defense counsel orally argued his motion to the trial judge near the close of the trial. Defense counsel cited his written motion which argued that it would be a violation of Due Process to sandbag the defense with arguments the defense did not have the

ability to respond to, and rebut. Defense counsel told the judge that the state should be required to open in full, the defense could respond in its closing, and then the state could then rebut any specific argument made by the defense. R. 647, l. 3 – 648, l. 16.

Defense counsel noted that the Court had held the right to last argument was a very valuable right. The solicitor responded that the defense was only entitled to last argument under current case law if it presented no evidence. The solicitor said he intended to waive opening on the law, and to close after the defense had argued. R. 647, l. 3 – 650, l. 17; R. 653, l. 2 – 654, l. 18.

The judge ruled that since appellant had offered evidence the state was entitled to the final argument. R. 654, l. 19 – 655, l. 10.

The solicitor then argued that appellant was on trial for four crimes. "He's charged with murder, possession of a weapon during the commission of that murder, a burglary in the first degree and of grand larceny. The evidence in this case has proved the defendant guilty beyond a reasonable doubt of each and every element of those defenses. In just a minute, I'm going to come back up and we'll continue our walk through the evidence." Defense counsel then made his closing argument. R. 729, l. 16 – 754, l. 3.

The judge then told the jury they would break for forty-five minutes for lunch before they heard the state's last argument. R. 754, l. 4 – 755, l. 14. At 2:00 p.m. that afternoon the state made its closing argument urging appellant "took great pains to cover up the fact that he was in that house on April 8th, 2011." The solicitor also cited the testimony of the jailhouse snitch who claimed that appellant had confessed while in jail. The solicitor told the jury that appellant had "over 400,000 reasons to get up and tell you

that story that he told you. And ladies and gentlemen, he's not trying to avoid being caught. He can't. He's hoping there's not enough evidence left behind to convict him." The solicitor maintained appellant had been thinking for "a long time" about his testimony before them, and that the money he stood to inherit provided the reason for what the solicitor surely thought was appellant's very coherent testimony. R. 755, l. 15 – 764, l. 16.

Discussion

In State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), the Supreme Court noted that in State v. Rodgers, 269 S.C. 22-24, 25, 335 S.E.2d 808, 809 (1997), it had held that the right to close the argument to the jury was "a substantial right, the denial of which is reversible error." It is clear beyond cavil that there are many people (Jurors) who are going to be convinced and decide an issue or case based upon the last argument that they hear.

It is elementary that one of the most critical decisions a criminal defense attorney must make is whether to offer evidence and/or have the defendant testify knowing the defense will lose the substantial right to close last before the jury if it offers *any evidence.* In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986)[1], the trial judge told the defendant that he had the right not to testify, and that the court would instruct the jury they could not hold it against the defendant, or even mention the fact that the defendant did not testify during its deliberations. However, the judge warned the defendant that the jury in fact would hold it against him if he did not testify. Our Supreme Court found that instruction to the defendant about the jury "holding it against him" to be error, and not

[1] Overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), on other grounds.

harmless error, even though the defendant chose not to testify. While the trial judge in Pierce was reversed for getting away from the proper script when instructing a defendant on his right to testify, the salient fact is that the judge was telling the defendant the truth that some jurors, if not all, want to hear from the defendant, and hear his side of the story.

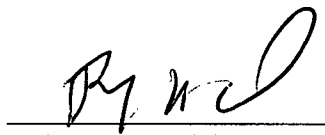
In State v. Zeigler, 364 S.C. 94, 111, 610 S.E.2d 859, 868 (Ct. App. 2005), after a three day trial, the jury began deliberating. On the second day of deliberations, the jury sent the trial judge a note asking him: "Is it a possibility that the defendants go under oath and tell their side of the story?" This Court ultimately rejected the defense argument that the jury committed misconduct by discussing the fact that the defendants did not testify during its deliberations. However, the case does highlight the apparent fact that some jurors indeed want to hear from the defendant, and hear "his side of the story." State v. Zeigler, 364 S.C. 94, 111, 610 S.E.2d 859, 868 (Ct. App. 2005).

Defense counsel properly argued that it was a denial of Due Process to deny the defense the last argument, and not require the solicitor to open fully on the law and the facts. Defense counsel properly argued that the judge should require the solicitor to open the closing arguments, then allow the defense to close, and limit the solicitor to reply in rebuttal to anything raised by the defense that had not been argued.

"The current 'traditional' procedure in South Carolina permits the state to 'sandbag' its argument and not afford the defense the opportunity to reply." Motion at 3. R. 796. The solicitor in this case skillfully used the last argument to which appellant could not reply to urge appellant's convictions. Appellant should be granted a new trial.

CONCLUSION

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



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September 16, 2015

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 16, 2015

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