

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Upon Certiorari to the Court of Appeals

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 BRIEF OF PETITIONER

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Attorneys for Petitioner

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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?

ARGUMENT IN REPLY

Petitioner, Sha'Quille Washington, and Respondent, the state of South Carolina, have both filed briefs with respect to the five questions as to which the Supreme Court granted a writ of certiorari. Petitioner submits this reply brief to address certain facets of the state's arguments. Petitioner stands by the arguments and authorities in his principal brief without repeating them herein.

The state's brief, 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 declared 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 Petitioner’s principal brief, this Court should 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. As it has throughout this appeal, the state continues to assert that 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, as fully outlined in

Petitioner's principal brief. *See* Brief of Petitioner, pp. 4-7. Each facet of Petitioner's argument is preserved for appellate review.

In his principal brief, Petitioner has set forth why this evidence was admissible under the evidence rules, and those arguments and the supporting authorities are not repeated here. *See* Brief of Petitioner, pp. 7-13. 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). In response, the state claims the Court was addressing a different issue in *Fossick*. To the contrary, the Court stated the issue as follows: "Whether the trial judge erred in excluding impeachment evidence of a prior inconsistent statement by State's witness Shane Parker and, if so, was the error harmless?" *See Fossick*, 333 S.C. at 68, 508 S.E.2d at 33. The Court's discussion included a summary of Shane Parker's testimony and a quotation of the specific passage in which he was questioned about having made the prior statement, "I killed that bitch and I'll kill you." *See id.*, 333 S.C. at 68-69, 508 S.E.2d at 33. The Court then addressed the admissibility of the statement under Rule 613(b) of the South Carolina Rules of Evidence. The Court quoted Rule 613(b), including its language setting forth the time and place foundational requirement, and held, "[s]ince Shane denied the statement, the proffered extrinsic evidence was admissible under Rule 613(b). *See id.*, 333 S.C. at 69-70, 508 S.E.2d at 33 (footnote omitted). This is precisely the question Petitioner is asking the Court to address in his case.

The Court of Appeals did not address Petitioner's argument premised on *Fossick* or explain why the similar statement Grant would have testified Kinloch made to him was not likewise admissible under Rule 613(b). Contrary to the state's claim that the

foundation requirement was not met, the foundation laid for Grant's testimony about Kinloch's statement he did the shooting was much more specific and detailed than that presented in *Fossick*, as set out in the principal brief. *See* Brief of Petitioner, pp. 9-10. 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.” App. pp. 181-82. The trial court erred in failing 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 principal brief, 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. *See* Brief of Petitioner, pp. 10-12. 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.

To the contrary, had the jury heard Grant's testimony that Kinloch admitted being the shooter, it is likely the jury would have reached a verdict of acquittal. The evidence was replete with discrepancies and contradictions. Two witnesses testified they were personally observing Petitioner when the shots were fired, and they 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 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 contends 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. The assertion that the issue is not preserved is specious.

For the reasons articulated in the principal brief, at pages 13-16, this evidence was admissible under Rules 401, 402, and 403. This Court should reverse the exclusion of this evidence and remand the case for a new trial.

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 the argument of this issue contained in his principal brief. *See* Brief of Petitioner, pp. 16-19.

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 principal brief, 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* Brief of Petitioner, pp. 20-22. 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: both the state and the Court of Appeals rely on isolated aspects of the various witnesses' testimony to negate the elements of self-defense, while 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 shot. 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. This Court should reverse the denial of a charge on self-defense and remand for a new trial.

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 brief, the state argues this jury charge was warranted, based on 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. *Cf. Wilds v. State*, 407 S.C. 432, 439, 756 S.E.2d 387, 390 (Ct.App. 2014), *cert. dismissed as improvidently granted*, *Wilds v. State*, 414 S.C. 341, 778 S.E.2d 112 (2015).

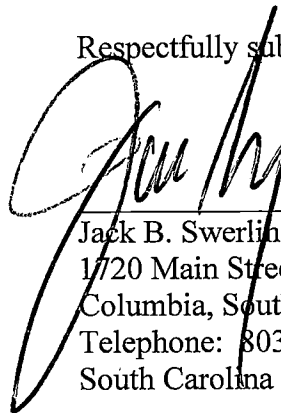
The state contends, as the Court of Appeals held, that because defense witnesses testified they observed Petitioner when the shots were fired and he was not the shooter, it was equivocal as to who was the shooter and therefore an accomplice liability charge was warranted. To the contrary, there was no evidence that Petitioner was acting in concert with anyone other than Kinloch that night, and there was no evidence before the jury for consideration pointing to Kinloch as the shooter. To the extent the evidence indicated someone other than Petitioner or Kinloch was the shooter, the accomplice liability instruction could not be predicated on such evidence, since there was no evidence that Petitioner was acting in concert with that unidentified person.

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 was therefore “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 showing that it confused 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 the jury any further clarification or 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 reverse on this issue and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the rulings of the trial court and the Court of Appeals and grant Petitioner a new trial.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioner, by mailing a copy, postage prepaid, to counsel for respondent, Senior Assistant Attorney General David Spencer, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549, on May 9, 2019.



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May 9, 2019

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

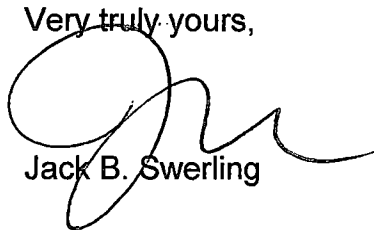
Dear Mr. Shearouse:

Enclosed for filing in the above referenced matter are the original and fourteen copies of the Reply Brief of Petitioner, along with the Proof of Service.

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: David A. Spencer, Senior Assistant Attorney General
Katherine Carruth Goode, Esquire
Sha'Quille Washington #00365760
Melissa Washington

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