ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN DEVON MOSS,

APPELLANT

APPELLATE CASE NO 2018-001552

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it admitted the entirety of Keondra McKie's recorded statement, including a prior consistent statement that appellant was the perpetrator, where the elements of Rule 801(d)(1)(B), SCRE were not met, since there was no assertion of recent fabrication or improper motive or bias?

STATEMENT OF THE CASE

On January 3, 2018, an Aiken County Grand Jury indicted appellant for the offenses of burglary in the first degree, armed robbery, kidnaping, assault and battery in the first degree, and possession of a firearm during the commission of a violent crime. R. 388 – 397. Appellant was tried before the Honorable William P. Keesley and a jury, from August 6 – 9, 2018. R. 1.

Nicholas McCarley and Brianne Steiner represented appellant. R. 1. Appellant was tried jointly with his codefendant Denzil Jordan, who was represented by Derek Bush and Grant Gibbons. R. 1. Bradley McMillan and Samuel Grimes represented the state. R. 1. Appellant was convicted as indicted and was sentenced to imprisonment for concurrent terms of twenty-five years, twenty-five years, twenty-five years, ten years, and five years, respectively. R. 385, l. 10 – 386, l. 6.

This appeal follows.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald,* 343 S.C. 319, 540 S.E.2d 464 (2000). The issue in the instant case is governed by South Carolina's Rules of Evidence, adopted in 1995.

> Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if:
> [1] the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement;
> [2] the statement is consistent with the declarant's testimony;
> [3] the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and
> [4] the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose.
> Rule 801(d)(1)(B), SCRE; *accord Saltz, supra.*

State v. Foster, 354 S.C. 614, 620-21, 582 S.E.2d 426, 429 (2003).

ARGUMENT

The trial court erred when it admitted the entirety of Keondra McKie's recorded statement, including a prior consistent statement that appellant was the perpetrator, where the elements of Rule 801(d)(1)(B), SCRE were not met, since there was no assertion of recent fabrication or improper motive or bias.

When defense counsel moved to admit the first portion of Keondra McKie's statement as extrinsic evidence of a prior inconsistent statement that she denied making, the court erroneously accepted the state's claim the entire statement was admissible under the rule of completeness and admitted the entire statement. This was error because the prior consistent portion did not meet the requirements of Rule 801(d)(1)(B), SCRE, since McKie had not been charged with recent fabrication or improper influence or motive.

Relevant facts

On August 1, 2017, Raymond Butler was robbed by two men who broke into his apartment, hit him with a pistol, played "Russian roulette" with him, and took his debit cards. R. 109, ll. 11-12; R. 113, l. 6 – R. 116, l. 16. When Butler reported the crime to police, he neglected to tell them that he was alone in his home with Keondra McKie when the burglary began. R, 150, ll. 21-24. Butler gave a total of three written statements to law enforcement—on August 1, August 3, and August 5—about the matter, and in none did he claim appellant was involved, **even though he knew appellant** through "family events" and allegedly saw his face during the robbery. R. 137, l. 18 – 138, l. 2; R. 112, ll. 15-22. At trial, Butler claimed he did not identify appellant because he was afraid. R. 138, ll. 16-20. However, Butler eventually claimed appellant—who he knew—was the perpetrator. R. 174, ll. 7-15; R. 126, ll. 2-16.

McKie was tied to the crime because she was photographed as she used Butler's debit cards. R. 146, ll. 5-9. When confronted by police with McKie's photograph at the ATM, Butler admitted she had been in his apartment. R. 127, ll. 2-10. McKie was interviewed by police officers—an interview that was recorded—and she was dishonest, telling a number of different stories. Initially, McKie claimed she was a victim too. *See* Defense Exhibit #1. Then she claimed the robbers were strangers who forced her to participate and dropped her off at a hotel. R. 214, ll. 4-9; Defense Exhibit #1. [1] Eventually McKie admitted her involvement and named Denzil Jordan as one of the robbers, and finally she claimed appellant was the second robber. *See* Defense Exhibit #1. At the time, appellant was apparently in a romantic relationship with another woman and with McKie. R. 213, ll. 3-10. There was no forensic evidence tying appellant to the crime.

At trial, McKie, who was also charged, testified against appellant and his codefendant. R. 147, ll. 13-14. Defense counsel and the codefendant's counsel cross-examined McKie about her prior inconsistent statements to law enforcement, particularly about her repeated statements to the officers that she did not know the identities of the robbers. R. 230, l. 13 – 232, l. 24. Although McKie was advised of the substance of the statement, the time and place it was made, and the person to whom it was made, she denied making many of the inconsistent remarks. R. 227, l. 13 – 232, l. 24; R. 251, ll. 16-20; R. 258, ll. 17-20. In particular, when questioned by defense counsel about whether she told Officers Sherman and Nelson that she was "being totally honest, like totally honest" with them she denied making that statement, even though she was recorded saying so. R. 258, ll. 17-20.

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[1] McKie's recorded statement was made Defense Exhibit #1 and is on file with this court. R. 247, ll. 22-23.

Defense counsel then moved to "introduce the video recording of Ms. McKie's interview in Richmond County with Sergeant Sherman due to prior inconsistent statements up to . . . a certain point in this video." R. 261, ll. 10-14. Defense counsel wanted the video stopped before McKie's statements became consistent with her trial testimony and identified appellant as a perpetrator. R. 233, ll. 17-19. The state wanted the entire statement admitted pursuant to Rule 106, SCRE, the rule of completeness. R. 233, l. 21 – 234, l. 2. The court had previously ruled on this matter when the codefendant's counsel asked to impeach McKie with the video, although ultimately codefendant's counsel decided not to use the video. R. 245, l. 18. At that time, the court ruled that only the inconsistent portion of the video was to be admitted, and the video would be stopped before McKie gave the prior consistent statement, which occurred at the tail end of the interview. R. 241, l. 22 – 242, l. 2.

Curiously, however, when defense counsel moved to introduce the prior inconsistent portion of the video, the court seemingly disregarded its prior ruling, and ruled anew that if defense counsel used the prior inconsistent statement, the entire recording—including the prior consistent statement—would be admitted under the rule of completeness. R. 263, ll. 13-15. The entire recording was so admitted, and the jury thus heard McKie's trial testimony improperly bolstered by her prior claims that appellant was the perpetrator. R. 263, l. 19. The jury deliberated for over two hours before convicting appellant. R. 362, ll. 18-19; R. 372, ll. 14-15.

Discussion

Defense counsel was entitled to impeach McKie with extrinsic evidence of her prior inconsistent statements pursuant to Rule 613(b), SCRE, since McKie was properly advised of the circumstances surrounding the prior inconsistent statements but she denied making them.

However, the admission of the prior consistent statement was error. "[E]vidence of a prior consistent statement is **only** permitted when the elements of Rule 801(d)(1)(B) are met. Put simply, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all." *State v. Foster*, 354 S.C. 614, 621, 582 S.E.2d 426, 430 (2003) (emphasis in original) (internal quotations and citations omitted). Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if:

> [1] the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement;
> [2] the statement is consistent with the declarant's testimony;
> [3] the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and
> [4] the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose.

State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003). Here, the prior consistent statement was not offered pursuant to Rule 801, SCRE, but instead pursuant to Rule 106, SCRE—the so-called "rule of completeness." This was error, since *Foster*, *supra*, prohibits the admission of prior consistent statements unless they comply with Rule 801.

The state did not argue at trial that the statement qualified for admission under Rule 801, SCRE. Even had the solicitor tried to admit McKie's prior consistent statement under Rule 801, SCRE—the only grounds by which a prior consistent statement can be admitted—this avenue would fail, since there was no allegation of recent fabrication or improper influence or motive. Any motive McKie had to lie was present when the prior consistent statement was made—i.e., during her entire statement to police officers. Moreover, counsel did not open the door—he only questioned the witness about her prior inconsistent statements, not her prior consistent statement.

"[Q]uestioning of a witness about a prior **inconsistent** statement [i]s insufficient to invoke Rule 801(d)(1)(B)." *Foster*, 354 S.C. at 622, 582 S.E.2d at 430 (emphasis in original). A

party may not offer a prior consistent statement to rehabilitate its witness and bolster his credibility simply because it was called into question by cross-examination about his prior inconsistent statements. *Id.* at 623-24, 431. "Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.'" *State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001).

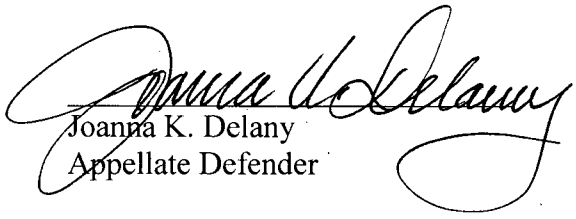
And, a prior consistent statement is only admissible under 801(d)(1)(B) provided that "the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose." *State v. Fulton*, 333 S.C. 359, 364, 509 S.E.2d 819, 821 (Ct. App. 1998) (alterations omitted); *and see Tome v. United States*, 513 U.S. 150 (1995). Here, the prior consistent statement was made after a motive to fabricate arose—i.e., after McKie knew that she was a suspect and was cooperating with police officers in an attempt to reduce her criminal liability.

While it is true that Rule 106, SCRE allows the admission of the entirety of a recorded statement when it should, in fairness, be considered, that rule is by definition and necessity subservient to other rules of evidence. The rule explicitly references "fairness." Here, it was unfair to admit the prior consistent statement, as it bolstered McKie's credibility. Moreover, there are myriad ways in which the admission of the entirety of a statement might ostensibly be admitted based on Rule 106 which would flagrantly violate other rules of evidence. For example, if McKie had gone on to claim that appellant was an axe murderer who drowned puppies, that statement would be excluded under Rule 404, SCRE, even though it constituted a portion of the statement's entirety. Therefore, Rule 106 is necessarily subservient to other rules—including Rule 801(d)(1)(B).

Since a prior consistent statement is only admissible pursuant to Rule 801(d)(1)(B), SCRE and the statement did not meet the requirements of that rule, its admission was error.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of July, 2019.

STATE OF SOUTH CAROLINA
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Appeal from Aiken County
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THE STATE,

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JOHNATHAN DEVON MOSS,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnathan Devon Moss states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge William P. Keesley, which was held on August 6 – 9, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Johnathan Devon Moss.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 1st day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Record on Appeal in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Record on Appeal have been served on Johnathan Devon Moss, #377364, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of July, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028