STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL JEREMIAH JETER,

APPELLANT.

APPELLATE CASE NO. 2019-000065

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the 911 call over defense counsel's objections under Rule 403, SCRE without performing the requisite Rule 403 analysis on the record, where the admission of the 911 call was cumulative in nature and so prejudicial as to inflame the passions of the jury?

STATEMENT OF THE CASE

On January 11, 2018, Appellant was indicted for burglary, first degree, attempted common law robbery, and assault and battery, first degree by a Spartanburg County grand jury. R. XX. The state, represented by Spenser Smith and Sara Bozarth, called the case to trial before the Honorable J. Derham Cole and a jury on January 7, 2019. R. 1. Paul Neely represented Appellant. R. 1. Appellant and counsel were served with life without parole notice prior to the start of the trial. R. 20.

After a two-day trial the jury acquitted Appellant of attempted common law robbery and assault and battery, first degree, but found him guilty of burglary, first degree. R. 268. Judge Cole sentenced appellant to life in prison. R. 271. This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)); see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct.App.2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

ARGUMENT

The trial court erred in admitting the 911 call over defense counsel's objections under Rule 403, SCRE without performing the requisite Rule 403 analysis on the record, where the admission of the 911 call was cumulative in nature and so prejudicial as to inflame the passions of the jury.

Relevant Facts

On October 25, 2017, Appellant was homeless, living on the streets in Spartanburg County, staying with friends or relatives when he could. R. 161, ll. 1-3. Appellant walked everywhere he went and was dressed that night for the cooler weather in a ski mask. R. 202, ll. 14-24. Appellant had spent the evening drinking "Hurricane" beers and had drank a twelve pack through the night. R. 201, l. 22-R. 202, l. 8. "Hurricane" beers contain 8.1% alcohol by volume. R. 202, ll. 4-5. By midnight, Appellant was intoxicated. R. 202, ll. 9-13.

Anthony Hollis, a cousin of Appellant's who lived on Gentry Street, had told Appellant he could come over that evening. R. 203, ll. 2-3; R. 207, ll. 12-16. Appellant was looking for Hollis' car, a green Crown Victoria, which he believed was parked in front of Hollis' home. R. 203, ll. 5-8; R. 209, ll. 9-10. When he saw a green Crown Victoria parked in front of a home, he assumed it was where Hollis was, knocked on the door and then tried the doorknob. Id. The front door of the home was unlocked, the TV in the living room was on, and Appellant could hear someone talking from one of the back bedrooms. R. 203, ll. 10-17.

Appellant proceeded through the home to the back bedroom where he had heard voices and opened the door, expecting to see his cousin. R. 203, ll. 15-19. At that moment Appellant realized he had made a mistake and was in the wrong home. R. 203, ll. 20-22. Intoxicated,

confused, and scared, Appellant closed the door to the bedroom and began to back away thinking to himself "how [sic] I end up in the wrong house?". R. 203, ll. 24-25.

As Appellant backed away from the bedroom doors, Sharaia Walker opened her bedroom door and yelled at Appellant to get out of her house. R. 204, ll. 1-2. The shouting brought Alexus Walker and Katrina Walker into the hallway where Appellant was essentially cornered. R. 41, ll.19-20; R. 50, ll. 10-12. Sharaia retrieved her gun from her bedroom and cocked it to fire. R. 50, ll. 13-17. As Appellant was running to get out of the house Sharaia fired her gun. R.104, ll. 19-25. Appellant was struck four times in the back and lost a significant amount of blood. R. 204, ll. 19-25; R. 146, ll. 12-22.

None of the gunshots struck Appellant while he was still inside the Walker home. R. 146, ll. 6-11. There were no signs of forced entry to the Walker home. R. 149, ll. 7-17. A trail of blood led police to Appellant, who was discovered unconscious in the neighbor's back yard. R. 213, l. 19-R. 214, l. 1. The lead investigator noted that according to the medical staff, Appellant had a high blood alcohol level. R. 173, ll. 4-11.

From the time Sharaia Walker saw Appellant to the time she ultimately shot Appellant was less than a minute. R. 50, ll. 18-21. Sharaia called 911 to report the alleged burglary and shooting incident. R. 45, ll. 5-7. She described Appellant has having on a hoodie and a ski mask that was pulled up[1]. R. 53, ll. 2-10. At no point did Appellant display any weapon, even though it was discovered that he had pepper spray in his pocket. R. 55, ll. 1-3; R. 205, ll. 14-20.

At trial the state alleged that Appellant had entered the house to commit a robbery and that during the alleged burglary he had knocked down Katrina Walker injuring her. Sharaia,

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[1] Her testimony indicated that the hood on the hoodie was down and that while Appellant initially had a ski mask covering his face, he removed it during the incident. R. 53.

Katrina, and Alexus all testified at trial to their version of the events that occurred on the evening of October 25, 2017.

Sharaia stated she had come inside and was in her bedroom talking on her phone when a dark figure "poke [sic] its head into the door." R. 41, ll. 3-9. Unsure of who it was, Sharaia got up, opened her door and saw the dark figure to her left in the hallway. R. 41, ll. 9-16. According to Sharaia the figure put his hand up to his mouth and told her to be quiet. R. 41, ll. 16-17. Sharaia began to yell, attracting the attention of her sister and mother who came into the hallway. R, 41, ll. 18-20. With all three women in the hallway the dark figure was cornered. R. 50, ll. 10-12. As the figure began to run down the hallway Sharaia retrieved her gun from her closet, cocked it and fired at the figure, who allegedly had knocked over Katrina and demanded money from her. R. 50, ll. 11-17; R. 51 ll. 22-25.

Alexus testified that she was awoken the night of the incident by Sharaia screaming. R. 83, ll. 1-4. She came into the hallway at the same time as her mother Katrina, saw the man by the bathroom and then closed her door to retrieve her bat. R. 83, ll. 7-9; R. 85, ll. 5-6. When she came back into the hallway, she saw the man standing over her mother. R. 84, ll. 14-15. Alexus never heard the man demand money and did not see him shove her mother. R. 88, ll. 5-14.

Katrina also testified that Sharaia screaming woke her up the night of the incident. R. 92, 9-10. She and Alexus met in the hallway and saw the man standing by the bathroom door. R. 92, ll. 14-17; R. 93, ll. 3-5. Suddenly Katrina was on the ground but was not sure if she had moved toward the man or if the man had pushed her. R. 92 l. 23- R. 93, l. 3. Katrina stated that as the man stood over her, he pointed at her and asked, "where is the money?". R. 93, ll. 12-14. At that moment both she and the man heard a gun cock and the man took off running. R. 93, ll. 16-22.

In their respective written statements to police Sharaia, Katrina, and Alexus never stated that Appellant had demanded money that evening. R. 71, l. 22-R. 72, l. 6; R. 88, ll. 5-9; R. 104, l. 23-R. 105, l. 8. Further, none of the women put in their written statements that Appellant pushed Katrina Walker to the ground.[2] Id. The women also admitted that Appellant passed a fifty-five-inch HD television and at least one purse in the living room, prior to getting to Sharaia's room, and that those items, along with all the other items in the home, were not touched. R. 66, ll.1-22; R.86 l. 16-R. 87, l. 2.

During the trial the state sought to admit and play a copy of the 911[3] call that Sharaia placed the evening of the incident. R. 45, ll. 11-18. Defense counsel asked that the jury be excused and then objected to the admission of the 911 recording under Rule 403, SCRE[4]. R. 45, ll. 19-20. R. 46-47. In arguing against the admission of the 911 recording, defense counsel relied on the "cumulative evidence" and "prejudicial versus probative" portions of Rule 403, SCRE. R. 46-47; R. 48.

Specifically, counsel argued that the 911 recording offered no new evidence to the case, was purely cumulative, and served to bolster the in-court testimony that Sharaia was giving. R. 46, ll. 14-21. Further, the 911 recording was extremely prejudicial because you could hear Katrina Walker screaming hysterically in the background throughout most of the call. R. 46, ll. 23-25; State's Exhibit 1. The 911 operator had to repeatedly ask Sharaia to have the person screaming in the background calm down because the 911 operator was having difficulty hearing.

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2 In Katrina Walker's statement she wrote that she was not sure if she fell or if Appellant pushed her. R. 105, l. 7-17.

3 The CD of the 911 call is State's Exhibit 1 and has been transported to the Court.

4 Defense counsel also objected to improper foundation, arguing that Sharaia Walker was not the proper witness to authenticate the 911 call but ultimately waived that objection after speaking with the Solicitor and trial judge in chambers. R. 46 ll. 8-14; R. 48, ll. 2-10.

R.48, ll.19-23. Defense counsel argued admission of the 911 recording would simply inflame the passions of the jury, was more prejudicial than probative, was entirely cumulative and should be excluded under Rule 403, SCRE. R. 47, ll. 2-5, R. 48, ll. 10-24.

After a discussion in chambers, defense counsel reiterated his objection to the admission of the 911 call. R. 47, l. 19-R. 48, l. 24. After hearing argument, the trial judge ruled that the motion was denied, and the objection overruled. R. 49, ll. 3-4. The judge did not perform an analysis in support of his ruling and did not articulate any reason for admitting the 911 call.

The 911 call lasted a total of two minutes and nine seconds. Shortly after the 911 operator answered the call a person in the background is heard screaming hysterically. Thirty-six seconds into the call the 911 operator request that the person in the background stop screaming. The screaming continues until the 911 operator again asks, at one minute and seven seconds, for the person in the background to calm down. Continued exclamations and crying can be heard through almost the entire call.

Discussion

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant the evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

In determining whether evidence is admissible under Rule 403, SCRE, the court must conduct an on the record analysis to determine "whether the probative value of the

evidence is substantially outweighed by the danger of unfair prejudice." State v. King, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, such as an emotional one. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

This Court has held that failure of the trial court to conduct an on-the-record Rule 403 balancing test was error. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). In Spears a prior bad act of the defendant was used by the state under Rule 404(b), SCRE. After ruling the prior bad act admissible, the trial court failed to conduct the requisite Rule 403 prejudice analysis. The failure to conduct the requisite on the record balancing test was found to be error requiring remand to the trial court to conduct the proper analysis.

Similarly, in State v. King, 424 S.C. 188, 818 S.E.2d 204 (2018), the Supreme Court affirmed this Court's holding that the failure to conduct any analysis on the record before deciding to admit evidence constituted error. In King, the state moved to admit prior bad act evidence to which the defense objected under Rules 401, 403, and 404(b), SCRE. The court, without explanation, ruled the evidence admissible. This Court properly found error and remanded the case to the trial court for a proper on the record analysis. The Supreme Court, on certiorari, determined that the remand was not needed due to the state's concession that the evidence was improperly admitted and instead conducted a harmless error analysis that resulted in the reversal of King's conviction.

Appellant finds himself comparably situated to the defendant in King. Appellant raised a valid objection to prejudicial evidence that required the trial judge to perform a full analysis on the probative value of the evidence and the prejudicial impact it would have on Appellant. The

trial court instead admitted the 911 call without explanation or analysis. There is nothing in the record to show that the court reviewed the 911 call, considered what possible relevance it had to the case, or attempted to balance the prejudicial nature of the 911 call against the alleged probative value.

Here, the 911 call had no probative value. It was not contested that Appellant was in the Walker home the evening of the incident. The question for the jury was to determine Appellant's intent while inside the home. Appellant testified he was drunk, mistakenly in the wrong house, that he attempted to leave as soon as he realized his mistake, that he never armed himself with a weapon of any sort even though he had pepper spray on him, and that he never demanded money from the Walkers. The Walkers testified that Appellant was in the house and demanded money, after pushing Katrina Walker to the floor.

For the 911 call to be relevant and have probative value it would need to assist the trier of fact in determining Appellant's intent, *which it could not do*. The 911 call did not assist the jury in determining the main issue of the case, the "intent to commit a crime therein." S.C. Code Ann. § 16-11-311 (A) (A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling*). The only purpose the 911 call served was to appeal to the emotions of the jurors.

Everything that Sharaia Walker stated in the 911 call was covered, in detail, in her live testimony. In fact, the hysterical screaming, crying and general panic of Katrina Walker in the background of the call was so distracting that focusing on what Sharaia said was nearly impossible. Unlike the 911 calls in State v. Bratschi[5] and State v. Shuler[6] the recording in this

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5 413 S.C. 97, 755 S.E.2d 39 (Ct. App. 2015)

6 353 S.C. 176, 577 S.E.2d 438 (2003)

case did not serve to somehow better explain other testimony, establish a fact in contention, or make any allegation more probable or less probable than it would have been without the 911 call admitted into evidence.

In Bratschi, this Court found the 911 call was properly admitted as it shed further light on the decedent's state of mind, particularly why he was in feared for his life and his fear of the defendant. Bratschi at 118, 755 S.E.2d at 50. Likewise, in Shuler the Supreme Court held the admission of the decedent's 911 call during the sentencing phase of a capital case was proper in that it relevantly described the crime scene immediately after the incident and it established the aggravating circumstance of physical torture. The Court noted that while difficult to hear it was not so disturbing as to suggest a sentence was made on an improper basis. Shuler at 187, 577 S.E.2d at 442.

The federal courts have also considered this question in dealing with the federal version of Rule 403. In U.S. v. Laudermilt, 576 Fed.Appx 177, 180-81 (4th Cir. 2014) the court held the 911 call provided context that was relevant to explain to the jury why six officers appeared at the defendant's home on the night of the incident. There was no parallel in the instant case. Here the admission of the 911 call had absolutely no probative value.

Further, the 911 call provided nothing but cumulative testimony. While the admission of cumulative evidence is allowed, that evidence must be relevant and serve some purpose other than repetition. All three Walker women gave detailed testimony about the night of the incident. This testimony was supplemented by the testimony of law enforcement along with the testimony of Appellant. It was extremely clear that Appellant was in the home of the Walker's on the night in question, the jury simply needed to decide whether Appellant's entrance into the Walker house was mistaken or criminal. The admission of the 911 call did not help the jury in

determining the issue before it. It did not relevantly explain a circumstance or give insight into a fact in contention. Playing the 911 call was merely extremely emotional repetition of the testimony the jury had and would receive.

In a case that came down to witness credibility the impact of the 911 call cannot be ignored. While the failure to conduct the requisite balancing test under Rule 403 was an error of law, the admission of the 911 tape, as it had no probative value and was highly prejudicial, was an abuse of discretion. Further, there was no overwhelming evidence of guilt that can be relied upon to cure the admission of the 911 tape as the case turned on Appellant's state of mind.

Clearly, the jury had concerns about the state's theory of the case considering that Appellant was acquitted of both attempted common law robbery and assault and battery first degree, the crimes Appellant was alleged to have had the intent to commit once inside the Walker home. However, the jury found Appellant guilty of burglary. The contradiction in the verdicts can be attributed to the 911 call and the emotional impression it had upon the jurors.

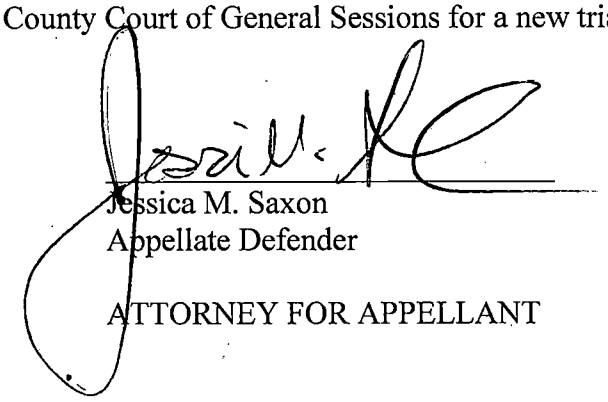
Accordingly, this matter would not be amendable to harmless error analysis as there is a reasonable probability that the error complained of might have contributed to the conviction. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert denied, 507 U.S. 927 (1993). The 911 call suggested an emotional basis for the jury to rest its verdict upon and the error of the admission of the 911 call, in relation to everything else the jury considered in deciding the case, cannot be deemed unimportant. Id. at 166, 420 S.E.2d at 839. Further, to hold the error harmless would require the appellate courts to determine the credibility of witnesses and give weight to their respective testimony. See State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) (the abuse of discretion standard of review does not allow the appellate

court to reweigh the evidence or second-guess the circuit court's assessment of witness credibility).

The appellate courts of this state have repeatedly admonished the trial courts to conduct the necessary balancing test on the record and analyze objections under the proper legal framework. See Hamrick v. State, 426 S.C. 638, 652, 828 S.E.2d 596, 603 (2019). Failure to conduct the required test, under the proper legal framework, is error. Based on the record and the contradictory verdicts it is clear that the 911 call impacted the outcome of the trial. While the trial judge committed error in failing to conduct the hearing, he further abused his discretion by admitting the 911 call.

CONCLUSION

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



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL JEREMIAH JETER,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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 Initial Brief of Appellant and Designation of Matter have been served on Samuel Jeremiah Jeter, #242979, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 4th day of November, 2019.

Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2019

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.