

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Bamberg County

Honorable Doyet A. Early, Circuit Court Judge

RECEIVED

JAN 22 2020

RESPONDENT,

SC Court of Appeals

THE STATE,

V.

KWAMAINE JARELLE ROSS,

APPELLANT

APPELLATE CASE NO. 2018-001212

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence showed the murderer was wearing a yellow shirt?

STATEMENT OF THE CASE

Appellant was indicted by the Bamberg County Grand Jury for the offense of murder. R. 249. His case was called to trial on June 19, 2018, before the Honorable Doyet A. Early, III, and a jury. Ola Johnson represented appellant. Deputy solicitor David Miller and assistant solicitor R. Jackson Cooper represented the state. R. 1.

On June 21, 2018, the jury found appellant guilty of murder. R. 238, 1. 25 – 239, 1. 3. Judge Early sentenced appellant to thirty years' imprisonment. R. 244, 1. 24 – 245, 1. 2.

This appeal follows.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” 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)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The court erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence showed the murderer was wearing a yellow shirt

Relevant Facts

Andrea Rahn was working at the Dollar Tree in Bamberg on October 24, 2015. The Dollar Tree was apparently very close to the house where the decedent lived with the mother of his two children, Octavia Bannister: R. 6, l. 17 – 7, l. 11.

Andrea remembered that “Octavia come (sic) running to me for help, screaming and crying and upset . . . I was locking up the store and I just put my deposit into my truck and I talk -- I was talking to the lady that owns the building next door. And around that time Octavia come (sic) running across the street screaming, crying, upset, just in panic. And she says, please help me. He’s got a gun, he’s in my house and my babies are inside. Please call 9-1-1.” R. 7, ll. 10-23.

Andrea recalled, “I immediately grabbed my cell phone and started dialing 9-1-1.” “I happened to look up beyond her and seen (sic) a gentleman come running out. He come running out toward our direction and take an immediate right behind the house.” R. 8, ll. 8-11. She said this man “was tall, slender, had dreads. He had on a white T-shirt and a pair of blue jeans . . . He was a dark fellow. I couldn’t see his face.” R. 8, ll. 8-20.

Alonza “Duck” Ross was a key witness in this case. Appellant was his nephew. R. 10, l. 11 – 11, l. 15. Alonza was living at 33 Hill Street in Bamberg on October 24, 2015. He knew the decedent as “Bird.” R. 14, ll. 4-15. Alonza said he had “no idea” who lived with Bird, but

he knew "Bird" lived "right behind Betty's Quick Store" on Highway 301 South about a quarter of a mile from his house. It was within walking distance. R. 14, l. 21 – 15, l. 21.

Alonza said it was not unusual for people to "hang out" at his house. That particular day, Alonza remembered that appellant came by his house with two other men, and one of them was called "Peace." Although Alonza knew the name "Peace," he did not really know the two men with appellant. R. 16, l. 24 – 17, l. 17. Alonza testified while the men were visiting, they drank beer. Appellant and the two other men apparently left for about five minutes at one point, and came back with "some Heineken Beer." R. 18, l. 16 – 19, l. 25.

Ross acknowledged at some point, "Kwamaine and the other two boys left." R. 20, ll. 4-6. Alonza took a bath and he remembered he then got a phone from Harriet Washington, who regularly listens to a police scanner. Alonza apparently learned from her phone call that there had been a shooting or a homicide in the area. R. 20, l. 11 – 103, l. 8.

Alonza said he told appellant, "They said he [the shooter] had on a yellow shirt." At this point, the judge interrupted Alonza and told him to listen carefully to the questions to seemingly avoid hearsay. Alonza then repeated that the suspect apparently "had on a yellow shirt." R. 23, ll. 2-14.

When Alonza continued to talk about the information he had gotten from another person and that he had been told "it was just an accident," defense counsel's hearsay objection was sustained. R. 22, l. 4 – 24, l. 8. Defense counsel continued to object to hearsay, and he objected to the solicitor's attempt to publish appellant's statement to the jury when it was not admitted into evidence. R. 25, l. 14 – 26, l. 14. The following occurred on direct examination of Alonza Ross:

Q: Mr. Ross, you were asked: Did Kwamaine do anything when he came back. And the answer was: I said, What's wrong,

and Kwamaine said, I ain't did nothing. I told him somebody said something about the shooting and a yellow shirt. Kwamaine changed shirts and took it with him when he left. Do you remember telling --

A: I don't remember saying he took it with him when he left. I don't know whether he took it or not. I don't remember saying that now.

Q: So you don't remember that part?

A: Not that part. I remember him changing, but I don't remember him taking it with him now.

R. 26, l. 19 – 27, l. 6.

Alonza said he remembered talking to Special Agent Owen at some point, possibly less than a month after the shooting. R. 27, ll. 16-22. Alonza repeated that it was his testimony that appellant came to his house with two other men, they left to get beer, and appellant came back again. R. 27, l. 23 – 28, l. 24.

On cross-examination, Alonza said what he told an investigator, apparently a defense investigator was: "They went to the store and got beer. And then he left and came back no more then." The following occurred on cross-examination of Alonza:

Q: Okay. And did you state to him that Kwamaine and Lenell had walked to the store, were not going [gone] long.

A: I didn't say Kwamaine and Lenell, I said me and Lenell walked to the store.

Q: Okay. And did you state to Mr. Tony Taylor that you felt that he did not -- my client did not seem nervous or angst to you?

A: Not to me. He just like he come to my house before and just act like he usually act to me.

R. 30, ll. 14-22.

On redirect examination, the solicitor attempted to return to the yellow shirt issue:

Q: Earlier when I read to you that, Did Kwamaine do anything when he came back; and the answer: I said, What's wrong

and Kwamaine said, I ain't did nothing. And then it says, I told him somebody say something about the shooting in a yellow shirt, Kwamaine --

A: That's when he --

Q: -- changed shirts --

A: That's when he told me he didn't do nothing when I told him about the shooting.

Q: Okay. And you said you don't remember saying that he took it with him when he left?

A: I don't remember saying that, now.

Q: But you remember the rest of that?

A: Uh-huh.

Q: Why did you ask him what was wrong?

A: Well, because he -- because he -- one reason he had come back for one reason and then, then, just like I said, when the person told me about the yellow shirt, see he had on something like yellow. That's why I said that. That's why I asked him that.

R. 31, l. 17 – 32, l. 11.

Jeffrey Porter remembered October 25, 2015, as “the evening my friend got killed.” R. 34, ll. 10-16. Porter remembered while walking down the road less than 100 yards from “Bird’s house,” he saw “two guys walking down the road mighty close, so we made a comment about that that it was gay. And the events after that, it was just -- well, it’s kind of hard to go back. But the events after that, it was hard. We heard these shots, so I took it to be an echo from somebody like hammering, like an echo from a hammer and some. But my sister said it was gunshots . . .”¹ R. 33, l. 17 – 34, l. 23.

¹ The testimony of several state’s witnesses, including Jeffrey Porter, were often very disjointed and difficult to follow. Counsel has tried to make coherent what is often not very coherent.

Porter remembered "I heard Tay [not Octavia Bannister] screaming and I told my sister I said, that's Tay, you know, and I ran down the road and I got she was, she was complaining about the kids was in the house." R. 34, ll. 10-23.

Porter said when he was told the children were still in the house he hesitated but then went into the house. He began calling "Bird, Bird, it's Jeff, I'm coming in your house." Porter remembered seeing signs of a fight instead, and he saw cereal bowls on the floor. He also saw a drop of blood and he then he spotted the decedent [Bird] lying face down on the floor. The children the children were on the bed. R. 37, l. 12 – 38, l. 6.

Porter and Tay got the children out of the house. Porter said on cross-examination that Octavia Bannister was already outside the house when he arrived on the scene. R. 39, ll. 13-19. Porter described the two men he saw walking near the house at the time of the shooting as one wearing a dark shirt and the other "was like a light color." R. 39, l. 10 – 40, l. 8.

Special Agent David Owen testified he had been a SLED agent for four years at the time of this incident. R. 42, ll. 6-10. Owen testified that Octavia Bannister looked at three different lineups, and as will be seen infra, she identified appellant as the man in her house on the night of the murder of Bird. Owen confirmed that another man, Lenell Ross, was also a suspect in the shooting. R. 72, ll. 5-10. Owen also admitted that at the time of trial, Jamal Green was still a person of interest in the shooting. R. 89, l. 21.

Owen explained the police thought more than one person could be involved in the shooting. He reasoned this was because of Octavia Bannister's "statement of what the individual looked like, his size, the color of shirt he had on and then Ms. Rahn's statement of the size of the person that she saw run out and the color shirt that he had on." R. 89, ll. 10-21.

At another point, Owen said there could be “the third person involved. There were three at Uncle Duck’s house.” R. 80, l. 18 – 81, l. 4. Owen would later assert there could have been two to four men involved in the murder. R. 83, ll. 10-23. As to the color of the shirt it was believed the murderer wore, Owen said, “One of them had on a light green or yellow shirt and the other had on a white shirt.” R. 77, l. 22 – 78, l. 11.

As to the three photographic lineups, Owen said Octavia Bannister hesitated to identify Ronald Ross as one of the men involved because she said: “I’m not 100 percent positive, but it looks like him.” R. 74, ll. 12-18. When Owen interviewed appellant after his arrest for this murder, he said appellant told him, “He was wearing a blue shirt . . . He said that he never changed his clothes.” R. 66, ll. 7-12.

Owen remembered showing Octavia Bannister another six-man lineup on October 29, 2015, in the back seat of his police car. Owen said Bannister identified appellant “as being the person who I saw at the back door on Sunday night as I was running.” R. 84, ll. 10-22. Owen maintained that Bannister was “physically shaking, crying, and became distraught” when she identified appellant’s photograph in this lineup. R. 56, ll. 16-25.

Finally, again, as to the identifying shirt information, Owen repeated, “One of them had on a light green or yellow shirt and the other had on a white shirt.” R. 77, l. 22 – 78, l. 8.

Lenell Ross

Lenell Ross testified that appellant was his first cousin. He remembered the night of October 24, 2015. R. 92, l. 19 – 94, l. 22. Lenell denied that he ever told Agent Owen that appellant was wearing a yellow shirt on the night of the murder. R. 96, ll. 7-24.

Lenell also denied telling *the solicitor* the day before the trial that appellant changed his shirt that night. Lenell said appellant could not fit into another shirt that Lenell attempted to give him. R. 96, l. 12 – 98, l. 4.

Lenell confirmed that he left Bamberg after the shooting because “I had death threats. So that’s why I left.” R. 98, ll. 13-22. Lenell also said he did not think appellant knew the decedent, Travis “Bird” Anderson. R. 99, ll. 20-22.

On redirect examination by the solicitor, Lenell denied that he had changed his “story” with the authorities. R. 101, l. 19 – 102, l. 1. When defense counsel objected to the solicitor using leading questions and treating Lenell like a “hostile witness,” the judge interjected, “Well, obviously, *he’s changed his story* and I’ll allow him [the solicitor, to continue].” R. 101, l. 19 – 102, l. 16. (emphasis added).

When the solicitor asked Lenell if appellant ever left that night from Uncle Duck’s house and he did not see appellant anymore, Lenell answered, “Yeah, I said he came back, so I said that. I said -- he said he wasn’t going to stay and they done turned around, so he came back. He came back and said I’m staying with your cousin. I just said it.”² R. 102, ll. 18-24.

The hearsay testimony regarding Ross

The solicitor recalled Special Agent David Owen as a witness. R. 56, ll. 3-8. When the solicitor asked what Lenell Ross told him on November 2, 2015, about the crime, defense counsel objected on the basis of hearsay. The solicitor said he was going to impeach Ross’s earlier testimony and the judge ruled that was proper. Owen then testified that Lenell Ross told him in November of 2015 *that appellant was wearing a yellow shirt on the night of the murder and that he changed that shirt*. Defense counsel continued to object to hearsay and leading

² The pathologist, Dr. Susan Erin Presnell, said the decedent was shot six times and the fatal shot was in the side of his neck. R. 148, l. 19 – 150, l. 15.

questions, which was again overruled. R. 139, l. 9 – 140, l. 1. (emphasis added). Owen said Lenell Ross never told him that appellant only “attempted to” change his shirt but was unable to do so. R. 140, ll. 3-5.

Same hearsay objection regarding Duck Ross

When the solicitor turned to the alleged “impeachment” of Alonza “Duck” Ross, defense counsel Johnson again objected on the basis of hearsay, and the judge again overruled the objection. R. 140, ll. 6-14. Owen said that he was told by Ross that appellant left the house with two other men and that appellant returned to the house by himself and that “the two boys later returned -- the two boys, or the two gentlemen that arrived with Kwamaine previously, later returned, stayed for a few moments or a few minutes and then left with Kwamaine in the black SUV.” Owen also offered that Ross told him when he returned to his house after going to the store for beer, “he noticed a lot of police activity and a helicopter flying above, near his house.” Owen testified that Alonza Ross told him this was “between the second and third time that Kwamaine returned back to his house.” R. 141, ll. 18-21.

Other evidence

Octavia Bannister testified that she lived near Betty’s Quick Shop in Bamberg. She identified Bird as “my high school sweetheart.” They had two children together. R. 152, ll. 1-13.

Bannister said she was working at the Piggly Wiggly in Denmark, South Carolina and she returned home from work at about 9:15 that October evening. She noticed that the sliding glass door on her house was open, and all the lights in her house were on. This was very unusual. R. 152, l. 16 – 154, l. 16.

She entered the house calling out Bird's name. She noticed her children's table had been turned over, and there was food on the floor. She again called out Bird's name, "and then -- that's when I heard a gunshot . . . It was upstairs. And when I heard the gunshot one of my kids screamed out." R. 154, ll. 2-21. Bannister claimed she looked and saw appellant standing inside her house with a gun in his hand. She ran outside screaming. R. 154, l. 2 – 156, l. 14.

On cross-examination, Bannister testified that the person she saw inside her house that night was wearing a green and not a yellow shirt. R. 161, ll. 18-25. Bannister said a lot of people came by her house because the decedent "sold weed, drugs, or just weed." R. 162, ll. 1-14.

Appellant testifies consistently

Appellant took the stand in his own defense. He said that he worked in construction and that he was living in Orangeburg with his fiancé before he was arrested in this case. R. 165, l. 16 – 166, l. 21. Appellant testified that he was at his Uncle Duck's house on the day of the shooting and that nothing out of the ordinary occurred. R. 168, l. 17 – 171, l. 18.

Appellant related he was open and honest with the police and he told them he was wearing a blue shirt on the night of the shooting and "my story hasn't changed." The solicitor responded, "I grant you, your story has not changed." R. 171, l. 15 – 172, l. 18.

Jailhouse snitches

The state also presented the testimony of Keon Kimble, who said he met appellant in the Bamberg County Detention Center. Kimble claimed appellant told him the crime was supposed to be a robbery that evening, and the robbery "went bad." He said he understood "Bird was selling drugs or whatever, so I guess [it was] for that." R. 119, l. 7 – 120, l. 6.

Kimble denied on cross-examination that he told defense investigator Tony Taylor that he did not want to talk to him because there “wasn’t nothing in it for me.” R. 121, l. 12 – 122, l. 23. Tony Taylor later testified that when he interviewed Kimble, Kimble said, “the first thing out of his mouth was what’s going to be in it for me.” R. 175, ll. 6-20. Taylor added on cross-examination, without objection, that Duck Ross told him appellant was wearing a yellow shirt on the night of the murder and that appellant changed shirts. R. 176, ll. 2-12.

Charles Lott also testified he talked to appellant at the Bamberg County Detention Center. Lott claimed appellant told him he was “going to hit a lick” and that he was at a house across 301 near the Dollar Tree. He got frightened when a car pulled up and he ran away. R. 124, l. 22 – 126, l. 21.

Discussion

The recall testimony of Agent Owen that Lenell Ross allegedly told him on a prior occasion that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed that shirt, was inadmissible hearsay. “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 of asserted.” Rule 801(c), SCRE. As a general rule, hearsay is inadmissible unless an exception applies. State v. Davis, 420 S.C. 50, 65, 800 S.E.2d 138, 146 (Ct. App. 2017).

Ross’s alleged statement to Owen that appellant was wearing a yellow shirt, and that he changed that shirt when he learned the police suspected a man wearing a yellow shirt as being the murderer was offered for the truth of the matter asserted.

In Davis, this Court found error in allowing testimony from the narcotics agent that a confidential informant paid for drugs with government funds from Davis. However, this Court pointed out that the narcotics agent in fact had no personal knowledge concerning the

informant's activities during the drug purchase. The agent was, in fact, relying on the informant's statements to him that he gone to the defendant's house and purchased drugs. Consequently, this testimony was inadmissible hearsay without an applicable hearsay exception.

In Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013), this Court found the failure to object to numerous instances of inadmissible hearsay constituted ineffective assistance of counsel, even in a criminal sexual conduct case. For example, one witness testified the victim told her that Coach Vail was mad at her for telling that they "had had sex." Another witness, Murray, testified the victim said it was because of her relationship with Coach Vail that everybody would hate her. Vail v. State, 402 S.C. 77, 87, 738 S.E.2d 503, 508-509 (Ct. App. 2013.)

Here, the hearsay evidence of Agent Owen that Ross allegedly told him appellant was wearing a yellow shirt and changed it on the night of the murder went to the identification of the perpetrator of the murder, and it was therefore very prejudicial. Appellant told the police he was wearing a blue shirt that night and the Owen hearsay testimony was also calculated to depict appellant as a liar where even the solicitor admitted appellant had been consistent in his statements. See, State v. Jennings, 394 S.C. 473, 478-479, 716 S.E.2d 91, 94 (Ct. App. 2011), *citing* Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). See, also Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

Further, should the state on appeal argue that this testimony was admissible as impeachment by a prior inconsistent statement, the solicitor failed to lay the proper foundation for such impeachment under Rule 613(b), SCRE, The solicitor did not specifically advise Lenell Ross of the substance of his statement, the time and place it was allegedly made, the person to whom it was made, and Ross was not given the opportunity to explain or deny the statement as

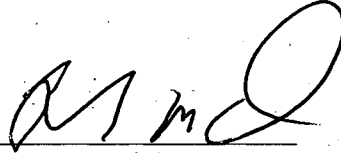
mandated by the rule. Therefore, allowing Owen to testify that Ross in fact told him appellant was wearing a yellow shirt on the night of the murder, and that Ross also told him appellant changed his shirt that evening was not proper impeachment by way of a prior inconsistent statement pursuant to Rule 613(b), SCRE. Cf., State v. Bixby, 388 S.C. 528, 550, 698 S.E.2d 572, 584 (2010). Further, as seen, *the changing* of the shirt statement was made to the solicitor and not Owen.

The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement pursuant to Rule 613(b), SCRE. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. This foundation is mandatory. See, State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), *citing* State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999). Here, to add insult to injury, as seen above, the judge weighed in by stating in the presence of the jury that appellant was “changing his story.”

Throughout the state’s case, much was made of the fact that the perpetrator allegedly was wearing a yellow shirt and that another person possibly involved was wearing a white shirt. Consequently, the solicitor purposefully focused the jury’s critical attention on the color of the shirt the perpetrator was allegedly wearing. The hearsay testimony of Agent Owen that Ross allegedly told him that appellant was wearing a yellow shirt, and that Ross also told Owen that appellant changed out of that yellow shirt -- when that description of the assailant was being circulated in the community -- was extraordinarily prejudicial hearsay testimony. Appellant should be granted a new trial.

CONCLUSION

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

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

Robert M. Dudek
Chief Appellate Defender

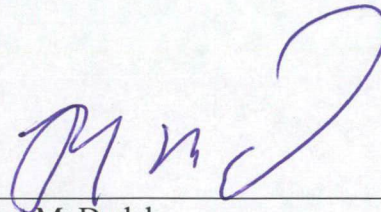
ATTORNEY FOR APPELLANT

This 22nd day of January, 2020.

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."

January 22, 2020.



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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