

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DASHAUN LIVAUGHN SIMMONS,

APPELLANT

APPELLATE CASE NO. 2018-001128

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

ORIGINAL

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by allowing Sidearis Singleton to testify that co-defendant Heyward physically abused her daughter, who was critical state's witness Trina Rivers, since this was inadmissible propensity evidence of Heyward's poor character that was also prejudicial to appellant given their joint defense of the lack of credibility of the surviving witness and Trina Rivers?

2.

Whether the court erred by declaring Verna Lockhart-Carter a hostile witness and allowing the state to ask leading questions of her, since she was not a "hostile witness," and declaring her one was prejudicial to appellant since the witness was also led into testifying she believed co-defendant Heyward was involved in the shootings immediately after it occurred?

STATEMENT OF THE CASE

Appellant and Denzel Marquis Heyward were indicted by the Charleston County Grand Jury for the offenses of murder, attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. R. 838. Kadeem Ali Chambers was the decedent and subject of the murder indictment. Jujuan Hemingway was the brother of Kadeem Ali Chambers, the surviving witness, and the subject of the attempted murder indictment. R. 838.

The co-defendants' cases were called to trial on November 10, 2014, before the Honorable Roger M. Young. Supp. R. 1. Appellant was represented by Peter McCoy and Sara A. Turner. Co-defendant Denzel Heyward was represented by Alex Apostolou and Rodney Davis. Assistant solicitors Jennifer Kneece Shealy, Nina Savas and Daniel Cooper represented the state.

At 1:20 a.m. on November 14, 2014, the jury announced it could not reach a verdict on the murder count. However, the jury found appellant and co-defendant Heyward guilty of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. R. 824, l. 21 – 825, l. 20.

Judge Young sentenced appellant and co-defendant Heyward to thirty years imprisonment for attempted murder, thirty years consecutive for armed robbery, and five years consecutive “on the weapons charge.” R. 837, ll. 2-8.

This appeal follows.

STANDARD OF REVIEW

Issues 1 & 2: “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

1.

The court erred by allowing Sidearis Singleton to testify that co-defendant Heyward physically abused her daughter, who was critical state's witness Trina Rivers, since this was inadmissible propensity evidence of Heyward's poor character that was also prejudicial to appellant given their joint defense of the lack of credibility of the surviving witness and Trina Rivers.

Relevant facts

Prior to trial, the defense, which included defense counsel McCoy for appellant pitching in, moved to prevent co-defendant Heyward's girlfriend, Quasantrina Rivers, from making "unfounded allegations about physical abuse from him." Defense counsel Apostolou continued, "That paints him in an ugly light. We have a number of ladies on the jury. We don't want them thinking, well, he's a bad guy regardless of that, and we are hoping to exclude her testimony. It's not relevant at all as to whether he committed the crimes that he's accused of." R. 6, l. 1 – 23, l. 13.

The solicitor appeared to reason that Quasantrina (hereinafter "Trina") was a battered woman, and that was why she was loyal to Heyward. The solicitor said that the jury would be confused, for example, about her driving "them [Heyward and appellant] to the scene that evening and her turning herself in before her name or their names [appellant and co-defendant Heyward] are ever mentioned" and she tells the police what happened. "As with a lot of females in crime, there's some complication to her relationship with Mr. Heyward. She has continued to go see him at the jail and her name appears on the visitor's logs when she takes her child to go see him. She exhibits behavior that I think the jury is entitled to understand, and there was a

physical component to this that frightened her and that she very much was sort of under the spell of Denzel Heyward.” R. 7, ll. 6-22.

The judge asked the assistant solicitor to further explain her theory on the admissibility of the physical abuse suffered by Trina. The solicitor argued that co-defendant Heyward was “a master manipulator of her. When she acts bad, he acts bad physically towards her.” Assistant Solicitor Shealy argued the evidence of physical abuse was relevant and admissible. R. 7, l. 23 – 9, l. 13.

Shealy said that “there is one [incident] that evening when he pulls her hair and smacks her, and Dashaun Simmons is present when that happened. Denzel does it towards her. This is before they go to Cynthia Avenue. It would certainly give reason why she should drive two guys, who picked up an AK47 earlier in the day, where they tell her to drive.” R. 9, ll. 16-23.

Shealy also referenced an incident where co-defendant Heyward hit Trina before a court proceeding which was captured on videotape from the municipal court. The municipal court incident on videotape happened “one month before this” according to Shealy. Shealy also said there was an incident “that was a month before, the one that’s on audio.” The following occurred between Shealy, the court, and defense counsel McCoy:

MS. SHEALY: Judge, they need to understand the relationship. The jury needs to understand their relationship. When they were arrested, Judge, on an unrelated drug charge, Denzel Heyward was in the back of the car like a madman screaming at her when she's telling the police stuff.

THE COURT: Do you have that on video?

MS. SHEALY: Yes.

THE COURT: Okay. You can play that.

MS. SHEALY: Okay.

THE COURT: As far as something that happened earlier in that evening, if it's your theory that that's part of the corpus delicti of the crime, well, then that might come in for that.

MS. SHEALY: Okay. Let me --

THE COURT: -- that happened a month or so ahead of time.

MS. SHEALY: Okay. The one I was just referencing, just to make sure you're clear, *that was a month before, the one that's on audio, when he's yelling at her about not talking to the police.*

MR. MCCOY : *That's a separate incident, Judge, too; totally different incident. I don't have that video.*

MS. SHEALY: It's in discovery.

THE COURT: A different incident and you want to have that shown for the purpose in this case of --

MS. SHEALY: Describing their relationship so the jury can understand why she would drive him, knowing -- okay. Let me -- you need to have a few more facts about this case. Earlier in the evening -- earlier in the day in question, *Quasantrina drives these two guys to a safe house to pick up an AK47. The jury is going to wonder why in the world would she do that for them.* Later, after he hits her and pulls her ponytail, or hairpiece, or whatever, he has her drive them to Cynthia Avenue to do a lick.

R. 10, l. 13 – 12, l. 4. (emphasis added).

The judge stated that bad character evidence was usually not allowed in under Rule 404(b), SCRE. R. 12, l. 16 – 13, l. 17. Shealy claimed, "I'm not trying to enter it to establish this man's bad character." The judge responded, "That's exactly what it sounds like to me." R. 13, ll. 18-22. The solicitor again argued it went to "the character of their relationship." R. 13, ll. 23-25. The judge then said, "I don't know if that's a hair that you can split," and the judge again observed that he did not see how this evidence could be admitted under Rule 404(b), SCRE.

Shealy told the judge that Trina listened to the codefendants. She was "sitting in the car while they were doing their deed. And they summoned her to get out of the car, pick up the keys off the ground . . ." R. 15, ll. 6-9. The judge finally ruled that he did not think this evidence

was admissible under Rule 404(b), SCRE, and that it would not be admissible unless the defense opened the door to this testimony. R. 17, l. 23 – 19, l. 15.

During the trial, as seen infra, the judge incorrectly ruled that the defense opened the door to evidence of co-defendant Heyward's physical abuse of Trina Rivers being abused by co-defendant Heyward. The Supreme Court later ruled that the defense did not open the door to testimony about co-defendant Heyward's alleged prior physical abuse of a cooperating co-defendant [Trina Rivers] and that this inadmissible propensity for violence evidence was not harmless error. The Court therefore granted co-defendant Heyward a new trial. See, State v. Heyward, 426 S.C. 630, 828 S.E.2d 592 (2019). The Supreme Court rejected the state's assertion that the issue was not preserved because the objection was not put on the record after a bench conference. The Supreme Court ruled it was apparent what the objection was given the pre-trial hearing. State v. Heyward, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019).

The Supreme Court further concluded this propensity evidence "was introduced solely to demonstrate Heyward's poor character, and given close case presented, we are unable to find the error was not prejudicial." This Court therefore granted co-defendant Heyward a new trial. State v. Heyward, 426 S.C. 630, 638, 828 S.E.2d 592, 596 (2019).

The trial evidence

The mother of Trina Rivers, Sidearis Singleton, testified she worked for the Charleston County School District. She previously had worked in the legal department for Charleston County DSS. R. 210, l. 6 – 211, l. 21. Singleton said co-defendant Denzel Heyward was the father of one of Trina's children. R. 212, ll. 2-9.

Singleton testified on May 18, 2012, she received a text message from her daughter. They met at Singleton's mother's house and Trina "appeared to be nervous and kind of like

paranoid like somebody was watching her or following her.” R. 212, l. 16 – 213, l.19. Singleton remembered that when Trina told her what happened pertaining to the shooting, “I was like, oh, no; you have to go and turn yourself in; somebody (sic) child life was lost and somebody child was beaten, so you need to go turn yourself in.” R. 214, ll. 2-5. Singleton said, “As a family, we spoke and we arranged for her to go and turn herself in.” R. 216, ll. 20-23.

Trina Rivers was then arrested and charged with “accessory to murder, accessory to attempted murder, accessory to robbery. I believe those were the three terms,” Singleton testified. R. 216, l. 24 – 217, l. 20.

On cross-examination, defense counsel Apostolou asked Singleton if she was aware Trina had worked as a stripper. The solicitor objected and the judge sustained the objection. R. 223, l. 15 – 224, l. 6. Defense counsel Apostolou also asked Singleton if she was aware that Trina had accused her husband Phillip of “sexually assaulting her.” Singleton said she was not aware of such an allegation. R. 222, l. 12 – 223, l. 7. Defense counsel also asked if Singleton was aware that Trina had attempted suicide previously. R. 224, ll. 16-19.

On redirect examination, solicitor Shealy asked if Singleton was aware of anyone who had abused Trina. A bench conference was held and Singleton then answered that “Fat,” Denzel Heyward had abused her daughter in the past. R. 231, l. 15 – 232, l. 21. Singleton then said that co-defendant Heyward had “busted” her daughter’s lips and he also had pulled some of her hair out. Singleton said she was not happy with her daughter having a relationship with co-defendant Heyward, and she told the jury that this abuse happened in other cities besides Charleston at different times. R. 232, l. 1 – 233, l. 22.

Trina Rivers

Trina Rivers then testified that on the night of the murder, she was with Heyward, appellant and her daughter, Trinity. They dropped her daughter off at her grandmother's house. Rivers then told the jurors how Heyward argued with her, physically abused her until she got in the car and she drove appellant and co-defendant Heyward to John's Island. She was told by the men where to drive. R. 241, l. 20 - 254, l. 25.

Rivers said she drove in the direction she was told to go and they came to Lorenzo Mehciz's house on John's Island. Lorenzo lived with his mother, and he came outside to talk. R. 255, l. 1 - 256, l. 25. Appellant and Heyward both got out of the car to talk to Lorenzo. Rivers remembered that appellant had on a black shirt and Denzel Heyward had on a red shirt. R. 257, l. 1 - 258, l. 15.

Rivers claimed that a car drove by and pulled up close to them. The car was a Mercedes, and inside it was the decedent, Chambers, and his seventeen-year-old little brother, Jujain Hemingway. "When it pulled in, Denzel and the boy on the passenger side [Chambers] was outside talking, saying what's up, and *Denzel like physically bum-rushed him*. And I just remember the boy saying, I already knew what time it was. And with that evening . . ." R. 258, l. 21 - 259, l. 17. Rivers said that Heyward pushed the young man "onto the car, his brother came out of the car and Dashaun [appellant] came running out of the woods and ran up on both of them. R. 260, ll. 2-24. Rivers said appellant had a gun in his hand at the time that looked like an AK47. R. 261, l. 6 - 262, l. 25.

Rivers claimed that appellant held the gun "to the back of the boy's head." Rivers maintained that she watched all of this "from my rear-view mirror." She maintained that she saw Heyward stomping on one of the victim's head as he lay on the ground. Heyward told one of the victims to open the trunk, and he removed a suitcase from the trunk. Rivers heard three

shots being fired and appellant and Heyward came running back to her car. Appellant put the gun in the back seat and Rivers drove away.¹ R. 263, l. 3 – 269, l. 18.

The vehicle's headlights were off at the time and Rivers maintained that appellant fired shots out the window at the surviving victim, Hemingway, who was running away. Rivers claimed she swerved and turned her lights on so appellant would have a harder time shooting the young man. R. 263, l. 3 – 269, l. 18. Rivers also testified that both Heyward and appellant were telling her what direction to drive in away from the scene of the shootings. R. 269, l. 19 – 271, l. 6.

Rivers testified that later that night, appellant talked about burning his clothes. Appellant and another man, Skrill, wrapped the gun up in a bag “and they left and me and Denzel was there.” R. 273, l. 12 – 275, l. 4. Rivers said after appellant left with Skrill, that Heyward was “[b]asically apologizing and crying, saying he wished it never happened.” R. 275, ll. 5-11.

Rivers said in the days following the shootings that Heyward kept track of her, and “he was calling and texting and just telling me not to say anything.” R. 276, l. 23 – 277, l. 22. Rivers testified that she named appellant and Heyward as the shooters to the police before either co-defendant was arrested. R. 285, l. 2 – 289, l. 17.

On cross-examination by defense counsel McCoy, Rivers admitted she had been charged with accessory after the fact of murder and attempted murder. She was also charged as an accessory after the fact of armed robbery. R. 296, ll. 3-20.

¹ Rivers strangely claimed she slept during of the attacks on Chambers and Hemingway. She also admitted she had lied to the police but claimed she was “scared” at the time. R. 360, l. 25 – 363, l. 8.

Rivers testified that she was cooperating with the police. She ultimately agreed on cross-examination that she was worried about what her own fate. R. 298, ll. 4-15. Rivers claimed she never gave false information to the police, but she had disclosed all of the details to them. R. 305, ll. 18-25. Rivers also admitted despite naming appellant and Heyward as the perpetrators in the murder, attempted murder, and armed robbery that she had visited Heyward more than ten times in jail since his arrest. R. 309, l. 11 – 310, l. 23.

Rivers admitted she had been seeing Heyward at the detention center and that instead of facing thirty years to life imprisonment for murder she was facing zero to fifteen years imprisonment for being an accessory after the fact. R. 347, ll. 18-23. Rivers claimed she was not sure if she could “get out of all this with probation” in exchange for her testimony. R. 348, ll. 7-9.

Closing arguments

Defense counsel McCoy argued to the jury that Trina Rivers was not a credible witness. She had changed her story repeatedly. McCoy said Rivers could not have seen the incident involving appellant, Heyward, the decedent Chambers and the wounded Hemmingway through her rear view and side mirrors, as she claimed. R. 732, ll. 8 – 14.

McCoy also told the jurors that Trina’s claim that she tried to use the car keys to open the hood of her car did not make any sense, and that her stories “don’t add up.” R. 732, l. 19 – 737, l. 13. McCoy added that juror doubts Trina was telling the truth created a reasonable doubt in and of itself. R. 737, l. 14 – 738, l. 15.

McCoy also asserted that Hemmingway’s testimony was not credible. R. 738, l. 16 – 747, l. 6. McCoy asked the jurors if they believed the co-defendants committed a robbery when the surviving victim, Hemmingway, had \$700 in his pocket afterwards. R. 747, l. 5 – 748, l. 9.

Defense counsel Apostolou also argued that the state's theory of the case was based on a lie, "start to finish." He also argued that the testimony of Trina Rivers and Hemingway was not believable. R. 750, l. 10 – 774, l. 14.

Discussion

The Supreme Court granted co-defendant Heyward a new trial on this domestic violence evidentiary issue in State v. Heyward, 426 S.C. 630, 228 S.E.2d 592 (2019). As seen, defense counsel McCoy, on behalf of appellant, participated in the argument to keep inadmissible propensity evidence of the physical abuse of Rivers by co-defendant Heyward from coming before the jury. The joint defense in this case, as was apparent from the closing arguments, and even the "hostile witness" argument that follows, was that the state's witnesses' stories of what occurred were not credible. That was particularly true of Trina Roberts and witness Hemingway.

Most respectfully, there is no reason why the co-defendants – Hemingway and appellant - in this case should not be fed out of the same spoon. Justice respectfully dictates that appellant also be granted a new trial on this issue.

In State v. Heyward, 426 S.C. 630, 228 S.E.2d 592 (2019), the Supreme Court found that the evidence of domestic violence committed against Rivers by he co-defendant, and the history of physical abuse of Rivers, including her lip being busted, and her hair being pulled, was inadmissible propensity evidence. The Supreme Court rejected the state's attempt to procedurally bar this issue in Heyward, finding that given the pretrial hearing on this domestic violence issue that it was apparent from the record what the defense objection was to it. Rule 103 (a)(1), SCRE; State v. Byers, 392 S.C. 438, 444-47, 710 S.E.2d 55, 58-59 (2011).

Further, the defense did not open the door to this propensity evidence by asking Rivers' mother, Singleton, about whether Rivers had accused Singleton's husband, Philip, of a sexual

assault. The same was true of questions about Rivers' mental health problems, and her attempted suicide. State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008); Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

Further, this was a "close case," as was apparent from the jury being unable to reach a verdict on the murder charge, and where the jury deliberated for approximately eight hours. The jury sent multiple notes to the court, it was given an Allen² charge before the jury finally returned verdicts finding co-defendant Heyward and appellant guilty of attempted murder, armed robbery, and a weapons charge at 1:20 a.m. in the morning. State v. Heyward, 426 S.C. 630, 638, 228 S.E.2d 592, 596 (2019).

Appellant, as was co-defendant Heyward, should be granted a new trial based on the admission of inadmissible violent propensity evidence, since the state's case was that appellant and Heyward acted together, they were joined at the hip, and the defendants' joint defense was that Rivers and Singleton were not credible witnesses, and the state's story or narrative from beginning to end "did not add up" in this case.

² Allen v. U.S., 164 U.S. 492 (1896).

The court erred by declaring Verna Lockhart-Carter a hostile witness and allowing the state to ask leading questions of her, since she was not a "hostile witness;" and declaring her one was prejudicial to appellant since the witness was also led into testifying she believed co-defendant Heyward was involved in the shootings immediately after it occurred

Relevant facts

Verna Lockhart-Carter was the mother of Lorenzo Mehciz. Lorenzo was twenty-one at the time of trial and nineteen at the time of the incident in this case. R. 143, l. 6 – 144, l. 17.

Mehciz would invoke his Fifth Amendment privilege against self-incrimination and refuse to testify for the state. The solicitor therefore wanted Lockhart-Carter to testify that Lorenzo told her he was talking to "Fat," co-defendant Heyward, just before the fatal incident occurred. When the state tried to elicit this information on direct examination, the defense objected on the basis of hearsay. R. 146, l. 16 – 147, l. 7; R. 158, l. 15.

The testimony was then proffered. At the end of the proffer, the judge ruled that Lockhart-Carter could not testify what Lorenzo told her that fatal night. The question therefore became whether she could independently identify Heyward without stating what Lorenzo allegedly told her. R. 158, l. 8 – 161, l. 3.

Having ruled against the state, the judge asked the solicitor if she still needed any more testimony from Lockhart-Carter. The solicitor said the state wished to continue with her as a witness. R. 161, ll. 4-6.

When the jury returned, the witness again began to testify that Lorenzo told her he was talking to "Fat" that fatal night. R. 163, ll. 8-15. Defense counsel McCoy objected, and the judge reminded Lockhart-Carter that she could not testify as to what her son told her. The judge

told the jury to disregard the witness's comment about what Lorenzo allegedly told her. R. 163, l. 16 – 164, l. 22. When the state continued to attempt to elicit what Lorenzo told his mother, defense counsel McCoy objected on the basis of leading. R. 164, l. 1 – 165, l. 8.

Lockhart-Carter testified she then went upstairs to go to bed, and she heard “a boom and I was like, okay, the transformer was blowing.” R. 166, l. 1 – 167, l. 8. Lockhart-Carter claimed her son, Lorenzo, was sitting in the living room at the time she heard that boom, and that he had been in the shower at the time she heard “the first boom.” R. 167, l. 11 – 168, l. 13. In other words, her son was allegedly inside when the shots were being fired.

When the solicitor again sought to elicit from Lockhart-Carter what Lorenzo had said to her, defense counsel McCoy now objected that the solicitor's leading questions amounted to the solicitor testifying for the witness. R. 168, ll. 5-15. A bench conference was then held and over objection the judge declared Lockhart-Carter to be a hostile witness. The judge ruled the solicitor could therefore ask leading questions of the witness. R. 168, l. 19 – 169, l. 3.

The following immediately occurred between the solicitor and Lockhart-Carter after the judge's ruling:

Q: Ms. Carter, when we met at your house, *do you remember telling us that you could identify that Fat was in your driveway when you pulled in that night?*

A: Only by what you told me.

Q: Do you remember *telling us that you actually had a conversation with Fat and he said, hey, mom, what's up and you said, hey, Fat?*

A: Yes.

Q: So you did have a conversation with Fat where you said, hi, Fat, while he was in your driveway that night?

A: That's it: hi.

Q: But you did call him Fat?

A: Yes.

R. 169, ll. 4-18. (emphasis added).

The following also occurred between the solicitor and Lockhart-Carter:

Q: And did you -- *do you remember telling us that you said to Lorenzo, give me your phone, I want to call Fat?*

A: *Correct.*

Q: And you told us that you called him immediately because he was there just prior to that incident --

A: *Correct.*

Q: -- *and you believed that he had something to do with it? He was involved in some fashion?*

MR. MCCOY: *Objection, Your Honor. She's not even asking a question.*

THE COURT: Let her answer the question before you break off to another one.

A: Ma'am?

THE COURT: Go ahead and repeat your first question.

Q: *Do you recall that you asked to call -- you asked Lorenzo to call Fat because you thought he was involved?*

A: *Correct.*

R. 170, l. 18 – 171, l. 12. (emphasis added).

The solicitor also elicited, again over objection, that Lorenzo told her that he had been talking to co-defendant Heyward, "Fat," that night in their driveway. R. 172, l. 12 – 173, l. 25.

The jury obviously was paying close attention because it sent the judge a note, as the judge explained stating, "please define what a hostile is. And that's a good question. We tend to take for granted that y'all know what we're talking about . . . "the law says sometimes the party

that calls the witness, after they ask a few questions *it becomes apparent that they're not answering the questions in the form that they were asked and so we are allowed to call them a hostile witness.* In other words, we then just allow them to ask leading questions. That's really the only difference. It's one of those form over substance sort of things that the law dealt with. I don't want you to take anything from the fact that the witness was declared hostile. It doesn't, you know, impugn their testimony in any way. And, most importantly, remember what I told you earlier that the questions are not evidence, it's the answers to the questions. So the question really relates to do they get to ask leading questions or not. Okay? Hope that helps." R. 185, 1. 9 – 186, 1. 19.

Discussion

Lorenzo Mehciz invoked his Fifth Amendment right against self-incrimination and refused to testify as a state's witness. As seen, the solicitor wanted before the jury testimony that Lorenzo talked to co-defendant Heyward just before the shooting. When Lorenzo refused to testify, and his mother was declared "a hostile witness," the state got even more than that.

The state got before the jury that Lorenzo was talking with "Fat" before the shooting, and that his mother thought "Fat," who was co-defendant Heyward, was involved in the shooting. The state's theory of the case was that Heyward and appellant acted together in committing the crimes, and that is again why appellant's attorney, Peter McCoy, fought to keep out inadmissible evidence linking Heyward to the crime.

Rule 611(c), SCRE, states, "Leading questions should not be used on direct examination of a witness except as necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls *a hostile witness*, an

adverse witness, or a witness identified with an adverse party, interrogation may be by leading questions.”

The state here wanted to, and did, lead Lorenzo’s mother into testifying that Lorenzo was talking with co-defendant Heyward immediately before the shooting. The state also had the mother testify that she believed at that time that co-defendant Heyward was involved in the shooting.

Again, this was highly prejudicial to Heyward and to appellant, since the state’s theory was that they were acting together in committing the murder and the attempted murder in this case. The mother was not a hostile witness to the state and the court labeling her as a “hostile witness” was damaging in the presence of the jury because it wrongly implied to the jury that the mother had useful information for the prosecution that she improperly sought to withhold. This gave greater attention to her damaging testimony as indicated by the jury note about it.

The state was improperly attempting to elicit hearsay testimony from the mother about what Lorenzo allegedly told her. Defense counsel properly objected that this was improper hearsay. The judge here impermissibly labeled the mother a “hostile” witness, allowing the state to lead her into testifying that Lorenzo was speaking with co-defendant Heyward immediately before the murder and that the mother believed co-defendant Heyward was involved in the shooting on the night it occurred.

Our Supreme Court found no error in the use of such leading questions when there was no objection to them in a capital case, and where the testifying witness was “ignorant, illiterate, and under nervous strain.” See State v. Davis, 239 S.C. 280, 285, 122 S.E.2d 633, 636 (1961). Here, the record shows that the witness was a very smart woman, but the state sought to exploit her because it could not properly get this inculpatory evidence and improper opinion evidence

(that she thought co-defendant Heyward was involved in the shooting) before the trial jury through her son, Lorenzo, who invoked his Fifth Amendment right against self-incrimination.

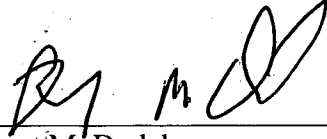
Leading questions in this case were continuously objected to during the testimony of this witness. Defense counsel McCoy also objected that solicitor was testifying for the witness. The state persisted in asking leading questions over the defense objection to get before the jury that Lorenzo was talking with co-defendant Heyward immediately before the shooting, and that Lorenzo's mother believed co-defendant Heyward was involved in the shooting at the time it occurred which was also improper lay opinion testimony. See Rule 701, SCRE; State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct.App. 2017); Cf. State v. Andrews, 424 S.C. 304, 318, 818 S.E.2d 227, 235 (Ct.App. 2018).

The rule against leading questions requires the witness, not the attorney, to testify as to what he or she knows. "This enables the judge or jury to better evaluate the evidence and the witness' credibility. The rule also prevents the attorney from giving what amounts to unsworn testimony . . . There is also the danger that leading questions may cause the witness to fill in information that he or she does not actually know." Collins, South Carolina Evidence §4.8, at p. 90 (2nd edition, 2000).

The trial judge approving the state's position that the mother was impermissibly holding back useful information from the state, and labeling the mother as a "hostile witness" was very prejudicial and gave the mother's testimony enhanced importance in the eyes of the jury. The judge abused his discretion by declaring Verna Lockhart-Carter a "hostile witness" which gave her highly prejudicial testimony even more undue emphasis to the jury. See State v. Gulledge, 277 S.C. 368, 371-72, 287 S.E.2d 488, 490 (1982), *citing* State v. Plyer, 275 S.C. 291, 270 S.E.2d 126 (1980).

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

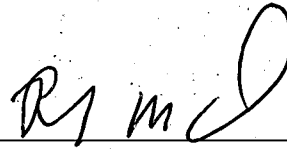
ATTORNEY FOR APPELLANT

This 21st day of February, 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."

February 21st, 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