STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DARRELL HEYWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001564

ANDERS BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting extrinsic evidence of a witness' prior inconsistent statement where Appellant objected that the admission violated his confrontation rights, the statement was the only evidence of guilt against Appellant, and the witness testified he had no memory of the matter or of the statement?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on December 13, 2012, for burglary (violent) in the second degree based on the nighttime entry and theft of landscaping equipment from a landscaping business. App. 227-228. Appellant was tried May 28 – 29, 2015, before the Honorable Perry H. Gravely and a jury. App. 1. Jeffrey Stephens represented Petitioner; Patrick Hall and Julie Sweeney appeared on behalf of the state. App. 2. The court sentenced Appellant to confinement for nine years. App. 202, ll. 7-9.

The Court of Appeals dismissed Appellant's appeal because counsel failed to timely file notice of the appeal. *State v. Heyward*, Appellate Case No. 2015-001680 (S.C. Ct. App., Filed October 19, 2015).

Appellant filed an application for post-conviction relief (PCR) on September 9, 2016. App. 205-211. The state filed a return to this application dated April 17, 2017. App. 212-217. Petitioner filed an amended return dated May 23, 2017. App. 218-219. An evidentiary hearing was held before the Honorable Diane Schafer Goodstein on June 9, 2017; Ashley McMahan represented Petitioner and Ruston Neely appeared on behalf of the state. App. 220. The state consented to Appellant's receipt of a direct appeal, and Appellant withdrew his remaining PCR allegations.

By order filed July 5, 2017, Judge Goodstein granted Appellant a belated direct appeal and dismissed Appellant's remaining PCR issues. App. 224-226.

This brief of Appellant follows.

ARGUMENT

The trial court erred in admitting extrinsic evidence of a witness' prior inconsistent statement where Appellant objected that the admission violated his confrontation rights, the statement was the only evidence of guilt against Appellant, and the witness testified he had no memory of the matter or of the statement.

Statement of facts

Appellant was employed as a crew member of the Brickman Group, a landscape contractor in Bluffton. App. 69, ll. 6-8; App. 70, ll. 15-19. The Brickman Group was burglarized overnight on October 8 or 9, 2012, and several items of landscaping equipment were stolen. App. 47, ll. 1-17. Appellant did not continue to work for Brickman after October of 2012, as he did not appear for work after the burglary. App. 71, ll. 12-17.

A Bluffton police officer pulled over a car for speeding at 3:43 a.m. on October 9, 2012. App. 81, l. 24 – 82, l. 16. His patrol car's camera system recorded the event. App. 82, l. 19 – 83, l. 3. When the car stopped, the driver fled on foot and was not located. App. 83, ll. 18-21; App. 86, ll. 17-19. The passenger, Jimmy Gregory, was arrested for disorderly conduct. App. 83, l. 22 – 84, l. 13. The officer noticed several large pieces of landscaping equipment, such as blowers trimmers, and edgers in the car. App. 84, ll. 16-17; App. 52, ll. 12-13; App. 133, ll. 4-6. Serial numbers on the landscaping equipment in the car later proved it belonged to the Brickman Group. App. 59, l. 21 – 60, l. 8.

The lawn equipment and areas of the car—including the steering wheel and gear shift—were processed for DNA. App. 62, l. 17 – 63, l. 8; App. 64, ll. 8-18; App. 65, ll. 5-15. However, the state never sought a DNA sample from Appellant. Law enforcement did not attempt to lift any fingerprints from the car, nor did they seek a search warrant for Appellant's home. App. 65,

ll. 5-9; App. 138, l. 25 – 139, l. 12. Appellant did not confess to the crime, and there was no physical evidence connecting him to the crime. Appellant was arrested a month later based solely on a statement by Jimmy Gregory to Investigator Seifert of the Beaufort County Sheriff's Office that Appellant committed the burglary with him. App. 145, l. 8 – 146, l. 15; App. 130, ll. 18-21.

During pre-trial motions, the parties believed Gregory would either refuse to testify or testify that he did not remember the event. App. 23, l. 24 – 24, l. 1; App. 25, l. 19 – 26, l. 1. The defense made a motion in limine to preclude the state from using Gregory's statements to the investigator pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), and hearsay rules, as they would be testimonial hearsay. App. 24, ll. 3-13; App. 25, ll. 6-16. The state argued it could question Gregory about his prior statements pursuant to Rule 613(b), SCRE, and would enter them in evidence through the investigator if Gregory denied making them. App. 26, ll. 2-18. The defense conceded that if Gregory refuted the statements, they could be used as prior inconsistent statements substantively. App. 27, ll. 17-21. The court reserved its ruling until Gregory was called. App. 28, ll. 6-14.

The defense also argued Gregory would be unavailable under Rule 804, SCRE whether he refused to testify or whether he said he did not remember. App. 90, ll. 1-7. The state provided the court with *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009) and the court found it applicable to the matter. App. 90, ll. 22-24.

The state called Gregory to testify and he repeatedly said he did not remember giving statements to Investigator Seifert. App. 93, l. 3 – 94, l. 22. Gregory said he did not recognize Seifert and had not had any dealings with him. App. 96, ll. 14-20. He denied knowing Appellant. App. 94, ll. 23-25. Gregory acknowledged that he had pleaded guilty to the Brickman burglary,

but said: "My mind gone, man. I been locked up too long, I don't know what's going on, man." App. 96, l. 21 – 97, l. 2; App. 97, ll. 11-16.

The court found Gregory "didn't really deny making the statement, he just didn't recall . . ." App. 98, ll. 15-16. The state moved to offer Gregory's statements to Seifert into evidence during Seifert's testimony. App. 98, l. 16 – 99, l. 3. While acknowledging the *Stokes* case, the defense argued: "I do believe that it's still not in effect confrontation . . ." App. 99, ll. 12-17. The court denied the defense's motion in limine. App. 99, l. 24 – 100, l. 1.

Investigator Doug Seifert of the Beaufort County Sheriff's Office interviewed Jimmy Gregory on two occasions, and the interviews were audio recorded. App. 110, l. 17-23; App. 111, l. 17 – 112, l. 1; App. 113, ll. 13-15. Gregory initially told authorities that he did not know the identity of the driver. App. 146, l. 2-5. Gregory said he was just a passenger in the car. App. 146, ll. 6-8. Gregory later told Seifert that he was involved in the burglary, and that Appellant committed the burglary with him. App. 146, ll. 9-12. These recorded statements were introduced into evidence, and the defense renewed its objections to their admission. App. 113, ll. 1-2; App. 129, ll. 7-16.

Discussion

The Sixth Amendment guarantees an accused the right to be confronted with the witnesses against him. U.S. CONST. amend. VI. This guarantee applies in state and federal court. *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

In *Crawford v. Washington*, the United States Supreme Court noted: "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50, (2004). "Where testimonial statements are at issue, the only

indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68–69.

In *Davis v. Washington*, the United States Supreme Court held that statements to law enforcement are testimonial when circumstances objectively demonstrate there is no ongoing emergency, and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Rule 613(b), SCRE allows extrinsic evidence of a witness' prior inconsistent statement admitted when the witness denies giving the prior inconsistent statement after he is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. South Carolina allows such "testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982).

Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. In criminal cases, the Confrontation Clause prohibits the use of hearsay against the accused unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant. *Crawford,* 541 U.S. at 68. Rule 804(a)(3), SCRE defines a declarant as unavailable if he testifies to a lack of memory of the subject matter of his statement.

Jimmy Gregory's prior inconsistent statements were hearsay: they were out-of-court statements offered by the state to prove the truth of the matter asserted—that Appellant participated in the burglary. The statements were testimonial, as they were given to a law

enforcement investigator to aid in the investigation, when there was no ongoing emergency. Gregory was unavailable for cross-examination at trial as he testified to a lack of memory about the subject matter in his statement, the exact example of unavailability given by Rule 804(a)(3). However, there is a distinction between unavailability for confrontation purposes, and unavailability for hearsay purposes.

After *Crawford*, a state's evidence rules no longer govern confrontation clause questions. *See United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) ("Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.") Regardless of whether Gregory's statement was admissible under Rule 613(b), its entry coupled with Gregory's testimony of a lack of memory about the subject-matter of the statement denied Appellant the opportunity for cross-examination in violation of the Confrontation Clause.

The United States Supreme Court addressed a witness' lack of memory in the Confrontation Clause context in *United States v. Owens*, 484 U.S. 554 (1988). In *Owens*, John Foster, a correctional employee, was brutally attacked and beaten with a metal pipe, fracturing his skull, requiring extensive hospitalization and resulting in memory impairment. *Id.* at 556. Law enforcement interviewed Foster in hospital, where he was able to describe the attack, name Owens as his attacker, and pick Owens from a photo array. *Id.* At trial, Foster recounted his activities before the attack, and described feeling blows to his head and seeing blood on the floor. *Id.* He testified that he clearly remembered identifying Owens as his assailant during his interview at the hospital by law enforcement, but admitted that now he could not remember seeing his attacker. *Id.*

The Court said the Confrontation Clause guarantees only the opportunity for cross-examination, and "that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief." *Id.* at 559. The Court noted it had found no Confrontation Clause violation in *Delaware v. Fensterer*, "when an expert witness testified as to what opinion he had formed, but could not recollect the basis on which he had formed it." *Owens*, 484 U.S. at 558 (citing *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

The Court in *Owens* said: "We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." *Id.* at 560. It reasoned that a witness' statement that: "'I believe this to be the man who assaulted me, but can't remember why' and the statement 'I don't know whether this is the man who assaulted me, but I told the police I believed so earlier,'" could both be impugned through cross-examination, and thus did not violate the Confrontation Clause. *Id.* at 559.

Although the Court found no Confrontation Clause violation in *Owens,* the case at hand is distinguishable. In the examples given by the Court in *Owens*, the witness admitted that he either currently espoused the accused to be the perpetrator, or acknowledged that he had previously espoused the accused to be the perpetrator. Here, Gregory did neither. Gregory never said at trial that he believed Appellant was involved in the burglary, nor did he acknowledge that he previously told police Appellant was involved in the burglary. Gregory never manifested a belief that Appellant participated in the burglary at trial.

In *State v. Pfirman*, this Court found that when a witness refuses to admit the statement imputed to him, an accused is denied effective cross-examination in violation of his confrontation rights. *State v. Pfirman*, 300 S.C. 84, 86, 386 S.E.2d 461, 462 (1989), *overruled by*

State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). Pfirman was accused of armed robbery, and his cousin gave a statement implicating Pfirman to the police. *Id.* at 85, 386 S.E.2d at 461. The cousin testified he did not remember the night in question because he was intoxicated, and he did not remember giving a statement to police. *Id.* The state entered the cousin's statement into evidence through the testimony of the police officer who questioned him. *Id.* This Court found Pfirman's confrontation rights were violated and that it was error to admit the statement as substantive evidence under *Copeland*. *Id.* at 86, 386 S.E.2d at 462.

In *Simpkins v. State*, expert medical testimony indicated the child had been a victim of sexual abuse. *Simpkins v. State*, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991), *overruled by State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009). However, the child gave no response or responded negatively to the solicitor's questions about a sexual assault by Simpkins. *Id.* at 366, 401 S.E.2d at 142. The child's guardian ad litem was allowed to testify that the child previously identified Simpkins as the perpetrator. *Id.* at 366-67, 401 S.E.2d at 143. This Court found Simpkins was denied effective cross-examination of the victim as the guardian ad litem's testimony fell outside the limited exception for corroborative testimony in criminal sexual conduct cases. *Id.* at 367-68, 401 S.E.2d at 143-44.

In *State v. Stokes*, this Court held the admission of extrinsic evidence of a witness' prior inconsistent statement did not violate an accused's Sixth Amendment right of confrontation even though the witness denied making the statement, overruling *Simpkins* and *Pfirman*. *State v. Stokes*, 381 S.C. 390, 403-04, 673 S.E.2d 434, 441 (2009). Stokes kicked in the door to the decedent's home and shot him in the head. *Id.* at 393, 673 S.E.2d at 435. A SLED firearms expert definitively matched the bullet that killed the decedent to Stokes' gun. *Id.* at 394, 673 S.E.2d at 435. Stokes' uncle gave police a written statement implicating Stokes. *Id.* at 395-396,

673 S.E.2d at 436. At trial, the uncle denied giving the statement to police; the statement was admitted pursuant to Rule 613(b), SCRE. *Id.* at 394-95, 673 S.E.2d at 436. Stokes' counsel rejected the court's offer to recall the uncle for further cross-examination on the statement. *Id.* at 395, 673 S.E.2d at 436.

This Court found Stokes was not denied his right of confrontation, because after *Crawford*, the "Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* at 401, 673 S.E.2d at 439. (internal quotations omitted) (citing *Crawford*). This Court found that "it is the **opportunity** to cross-examine that is constitutionally protected," so the fact Stokes' counsel chose not to cross-examine was of no consequence. *Id.* at 402, 673 S.E.2d at 440. (emphasis in original). This Court stated: "to the extent *Pfirman* and *Simpkins* hold that where a declarant refuses to admit the statement imputed to him, the accused is denied effective cross-examination in violation of his confrontation rights, we overrule these two cases." Id. at 403-404, 673 S.E.2d at 441.

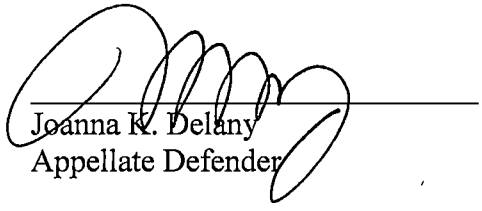
Stokes is distinguishable from the case at hand, as the witness here never refused to admit making the statement, and instead said his "mind [was] gone," and he did not remember the event or the statement. Although *Stokes* acknowledged that prior inconsistent statements could be used substantively, other evidence incriminated Stokes, unlike the case here.

Appellant was denied the opportunity to probe and expose the infirmities of the witness' accusations through cross-examination because Gregory denied any memory of the event or the purported statement about the event. Gregory's prior inconsistent statements were offered as the sole evidence identifying Appellant. Gregory's statements were not credible—they were inconsistent with each other. Appellant submits that where the only evidence of guilt is the prior

inconsistent statement of a person with complete memory loss, he is denied his constitutional rights to confrontation.

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 4th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DARRELL HEYWARD,

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V.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darrell Heyward states:

1. She is an 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 Diane Schafer Goodstein, which was held on June 9, 2017, 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 Darrell Heyward.

Respectfully Submitted,

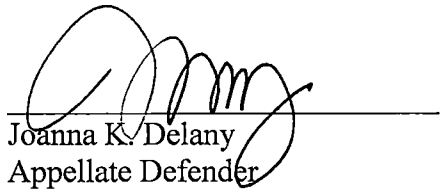
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 4th day of April, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

April 4, 2018.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant pursuant to White v. State and Designation of Matter in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant pursuant to White v. State and Designation of Matter have been served on Darrell Heyward, 170239, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 4th day of April, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.