STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMARCUS OBRIEN FOSTER,

APPELLANT.

APPELLATE CASE NO. 2019-000543

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred, under the excited utterance rule, in allowing a witness to testify to the hearsay statement of a man who told her appellant shot the decedent?

STATEMENT OF THE CASE

A Lancaster County grand jury indicted appellant DeMarcus Foster for murder, possession of a weapon during the commission of a violent crime, and possession of a weapon by a convicted felon. R.___. On March 18, 2019, appellant was tried before the Honorable Roger E. Henderson and a jury. Tr. 1. By agreement of the parties and with appellant's consent, the possession of a weapon by a convicted felon charge was tried by the court. Tr. 23, ll. 3 – 9. Mark Grier represented appellant. Tr. 1. Jarrod Fussnecker and Heather Weiss, from the Attorney General's Office, represented the State. Tr. 1. The jury convicted appellant of murder and the weapons charge. Tr. 667, ll. 19 – 22. Judge Henderson convicted appellant on the felon in possession charge. Tr. 671, l. 17 – 672, l. 3. Pursuant to South Carolina's recidivist statute, Judge Henderson sentenced appellant to life imprisonment without the possibility of parole for murder, and concurrent sentences of five years' imprisonment on the two weapons charges. Tr. 677, l. 17 – 678, l. 13. This appeal follows.

STANDARD OF REVIEW

The issue in this case concerns the admission of evidence, which is governed by an abuse of discretion standard. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Arrowood, 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007).

ARGUMENT

The trial court erred, under the excited utterance rule, in allowing a witness to testify to the hearsay statement of a man who told her appellant shot the decedent.

The State admitted in closing argument it had no theory of motive for the shooting of Joel McLemore. Tr. 614, ll. 10 – 12. Tr. 646, l. 25 – 647, l. 5. The Attorney General told the jury, "Demarcus Foster is the only one who knows why he shot Joel McLemore." Tr. 646, l. 25 – 647, l. 5. Appellant testified in his own defense and said he did not know McLemore and proclaimed his innocence. Tr. 493, ll. 7 – 8. Tr. 513, ll. 1 – 4. McLemore was the only white person attending a party of all black people on the night of September 27, 2017, and appellant said he never even saw a white person at the party. Tr. 221, ll. 1 – 6. Tr. 493, ll. 5 – 6.

The shooting took place at a party in the 16th Street area of Lancaster, which one witness described as "the worst neighborhood in Lancaster." Tr. 80, ll. 19 – 21. Tr. 116, ll. 14 – 18. This witness, Kaneisha Young, "didn't think nothing about it" when she heard the gunshot from her house that evening, adding, "It's 16th Street. You hear gunshots every other day." Tr. 116, ll. 1 – 3.

Kristavius "Bree" Stevens testified consistently with the State's description of the shooting in opening statements. Tr. 158, ll. 7 – 20. Tr. 166, l. 1 – 171, l. 24. Bree had pending charges and was facing a potential fifty years' imprisonment. Tr. 161, ll. 4 – 12. He also had prior convictions for cocaine possession. Tr. 161, ll. 4 – 6. When defense counsel asked him why he was testifying, Bree responded, "Because somebody put me in it." Tr. 173, ll. 2 – 4.

Bree claimed he saw appellant arrive at the party in a white Honda driven by Maryam Rivera. Tr. 166, ll. 1 – 21. Quinterius "Tweak" Truesdale was in the Honda with them. Tr. 166, ll. 16 – 17. Only appellant got out of the car. Tr. 166, l. 25 – 167, l. 3. McLemore was standing

near some porch steps. Tr. 165, ll. 18 – 20. Among those already present at the party when appellant arrived were Ladario Jones, Quaterious "Damu" Peay, and Lashawn "Deuce" White. Tr. 164, ll. 1 – 4. Bree had never seen appellant around 16th Street before that evening. Tr. 178, ll. 17 – 18. Appellant had been at the party earlier in the evening, left, then returned. Tr. 170, ll. 7 – 10.

Appellant spoke to the people at the party, saying, "What's up?" Tr. 168, ll. 6 – 16. Nobody at the party was fighting or arguing. Tr. 169, ll. 20 – 24. Appellant said he missed his deceased brother and was drinking a beer favored by his brother (Yuengling). Tr. 169, ll. 14 – 19. Appellant then pulled out a gun, lifted it, and said, "You-all ain't seen nothing." Tr. 171, ll. 1 – 6. Bree ran and heard a gunshot, but did not see appellant fire. Tr. 171, ll. 3 – 6. Tr. 178, ll. 1 – 2. Bree said the gun was a revolver. Tr. 171, ll. 11 – 14.

Bree's cousin, Lashawn "Deuce" White, took the stand twice in the case. Tr. 173, ll. 18 – 21. The first time on the stand, he said he would be surprised to learn that people called him "Deuce." Tr. 185, l. 19 – 23. He claimed not to know whether he was facing up to seventy years in prison. Tr. 184, l. 5 -10. He remembered that "a shot was fired," but did not see who fired it. Tr. 195, l. 10 – 196, l. 5. After repeatedly claiming faulty memory or not knowing any answers, the attorney general had Deuce declared a hostile witness. Tr. 198, l. 9 – 17. Without making headway, the attorney general asked the court to "take a break" and continue Deuce's testimony later in the trial. Tr. 200, l. 11 – 24.

When Deuce returned to the stand, he admitted that people "probably" called him "Deuce." Tr. 354, l. 15 - 16. Deuce's memory troubles continued, but he remembered Peay being at the party. Tr. 358, l. 24 – 359, l. 7. Deuce denied shooting McLemore, but did not see who fired the shot. Tr. 364, l. 20 – 365, l. 6.

Jalissa Stover said she saw a white Honda quickly leaving the scene. Tr. 151, l. 25 – 152, l. 4. Two men and a woman were inside the car. Tr. 152, l. 13 – 18. Maryam Rivera, who was charged with accessory after the fact, drove a white Honda Accord. Tr. 280, l. 22 – 24. Tr. 295, l. 17 – 18. Rivera was appellant's girlfriend. Tr. 280, l.17 – 19. Rivera said she drove Tweak and appellant to the party, but stayed in her car listening to music, smoking, and drinking. Tr. 286, l. 8 – 294, l. 11. Her cousin Mondra was in the car with her. Tr. 294, l. 11 – 13. After Rivera heard a gunshot, appellant and Tweak ran back to the car and told her, "Let's go." Tr. 296, l. 22 – 297, l. 16. Appellant was "kind of calm, but not really." Tr. 297, l. 6 – 10. He still had his beer. Tr. 297, l. 9 – 10.

Ladario Jones testified that appellant returned to the party with Rivera. Tr. 317, l. 5 – 23. McLemore got to the party after appellant. Tr. 318, l. 1 – 2. Appellant walked on to the porch. Tr. 318, l. 19 – 20. Referring to McLemore, Deuce said "This is my friend. He is my friend. I love you boy," and McLemore responded, "I love you back." Tr. 320, l. 21 – 24. Jones claimed that at that point, appellant got off the porch and shot McLemore in the head. Tr. 321, l. 2 – 6. Appellant testified and said he was innocent. Tr. 513, l. 1 – 4. He went to the party to see his niece, but when the drinking started, he told her mother to take the child home. Tr. 485, l. 18 – 22. Appellant did not know McLemore. Tr. 493, l. 7 – 8. He did not remember seeing any white people at the party. Tr. 493, l. 5 – 6.

Someone at the party asked appellant for a beer. Tr. 490, l. 16 – 24. As appellant reached into a box for a beer, he heard a gunshot. Tr. 490, l. 16 – 491, l. 6. Appellant ran to the car. Tr. 492, l. 15 – 19. He told Rivera, "Let's go." Tr. 491, l. 1 – 492, l. 16.

Appellant later learned from phone calls and text messages that someone had been shot. Tr. 505, l. 1 – 15. Appellant called Rivera and had her drive him to the police department to

clear his name. Tr. 507, l. 1 – 19. He was told no warrant existed for him. Tr. 507, l. 20 – 24. Later, when in custody, appellant admitted he told police he knew nothing about a gunshot that night, even though he admitted being at the party. Tr. 509, l. 9 – 22. Appellant was afraid of being caught up in the investigation process. Tr. 509, l. 9 – 22.

Before Kaneisha Young took the stand, the attorney general made the court aware of appellant's objection to Young's testimony that Peay told her appellant shot McLemore. Tr. 103, l. 20 – 24. The attorney general told the court the issue was "excited utterance" and that appellant asked that Young's testimony first be heard in-camera. Tr. 103, l. 20 – 104, l. 3.

Young said she was in her house across the street from the party when she heard a gunshot. Tr. 104, l. 13 – 19. After the shot, Young said, "I seen everyone start running. Quaterious Peay came in the house and said, 'D just shot Joel.'" Tr. 104, l. 20 – 25. She explained that "D" was appellant. Tr. 105, l. 3 – 4. Peay "was shocked" and it was less than five minutes after the shot when Peay came in the house. Tr. 105, l. 1 – 10.

Appellant argued the hearsay statement was inadmissible for several reasons. Tr. 106, l. 25 – 107, l. 12. Young did not testify that Peay was excited. Tr. 106, l. 25 – 107, l. 12. Young's time frame was ambiguous, especially given that Peay had left the scene of the shooting and traveled to a different location. Tr. 106, l. 25 – 107, l. 12. Appellant also argued no "indicia of reliability" existed about the startling event and that it had "no contemporaneous element."

Judge Henderson ruled the statement was an excited utterance. Tr. 108, l. 5 – 19. The court noted appellant's objection. Tr. 108, l. 16 – 19. Immediately after the proffer, Young testified about the hearsay statement before the jury. Tr. 116, l. 21 – 24. Young was Deuce's girlfriend. Tr. 117, l. 3 – 10.

When Peay took the stand, he denied seeing who shot McLemore. Tr. 219, l. 5 – 6. Peay ran into "Deuce's house" after the gunshot. Tr. 219, l. 11 – 17. Contrary to Young's testimony about the so-called excited utterance, Peay denied saying anything when he ran inside the house. Tr. 219, l. 18 – 19. On cross-examination, he specifically denied telling anyone that appellant shot McLemore. Tr. 230, l. 12 – 13. When asked again if he made such a statement to Young, Peay replied, "I told them that I don't know why she made that lie up." Tr. 230, l. 14 – 17.

The trial court erred in admitting this hearsay as an excited utterance. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Rule 801, SCRE. Peay's statement was not made in court and the State offered it to prove appellant shot the decedent. The State did not attempt to argue that the challenged statement was not hearsay.

Rule 803 provides exceptions to the general rule that hearsay is inadmissible. Rule 803, SCRE. The exceptions in Rule 803 apply whether or not the declarant is available. Id. Rule 803(3) defines excited utterance: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(3), SCRE.

Even assuming Peay made the statement (which he called a lie), it does not qualify under this rule. First no evidence existed that the shooting was startling to Peay. Young said Peay was shocked, but that is not does not mean he was startled by the shooting. Young testified that shootings happened all the time in this neighborhood.

Second, trial counsel was correct in arguing that too much time had elapsed and therefore Peay was no longer under the "stress of excitement caused by" the shooting under the rule. In this respect, Peay's statement is similar to the inadmissible hearsay in State v. Hendricks, 408 S.C. 525, 534, 759 S.E.2d 434, 439 (Ct. App. 2014). In Hendricks, the Court found that a

mother's statements concerning her daughter's rape did not fall under the excited utterance exception. Id. The Court found that while finding out about the rape was upsetting, the mother had taken intervening acts between learning of it and making the statement, including driving, which showed she was calm. Id. Similarly, Peay left the scene of the shooting, traveled across the street, and entered another house. The State failed to show he was still under the stress of the event.

The case of State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006), is instructive. Like this case, the State primarily relied on the fact of a murder to qualify as the startling event. Id. However, the Court ruled, "In our opinion, however, relying on the fact that there was a murder, or that the statement was about the weapon used to commit the murder, is inadequate to establish excited utterance. Id. More importantly for this case, no evidence established that the declarant had actually witnessed the shooting. Id. This exception requires firsthand knowledge, and Peay not only denied seeing who shot McLemore, but called Young's claim a lie. Davis shows that the State failed to meet its burden of proving the statement fell within the exception and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.

This 27th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demarcus Obrien Foster states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Roger E. Henderson, which was held on March 18 - 21, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, He asks the Court to relieve him as counsel for Demarcus Obrien Foster.

Respectfully Submitted,

This 27th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript dated March 18-21, 2020
(2) Indictments

I certify that this designation contains no matter which is irrelevant to this appeal.

April 27, 2020

s/David Alexander

Appellate Defender

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ATTORNEY FOR APPELLANT

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 27, 2020.

s/David Alexander

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