STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Dillon County

Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREEK DASHAWN HAYES,

APPELLANT

APPELLATE CASE NO. 2019-001303

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the state's case?

STATEMENT OF THE CASE

On December 8, 2016, a Dillon County grand jury indicted Appellant for two counts of attempted murder (2016-GS-17-0875; -0879), kidnapping (2016-GS-17-877), possession of a weapon during the commission of a violent crime (2016-GS-17-0878), and criminal sexual conduct in the first degree (2016-GS-17-0876). R. *(indictments). The state, represented by Megan B. Burchstead and Joel Kozak from the Attorney General's Office, called the case to trial on July 23-26, 2019, before the Honorable Roger E. Henderson and a jury. Tr. 1. Matthew Swilley represented Appellant. Tr. 1.

At the conclusion of the presentation of evidence and argument, the judge instructed the jury on the law. However, his charge was confusing, at best. At one point, the judge instructed the jurors that "[a]n attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended." Tr. 583, ll. 6-8. He told the jurors that "[i]ntent means intending the result which actually occurs." Tr. 583, ll. 11-12. Then, when instructing on attempted murder, he informed the jurors that "[a] specific intent to kill [was] not an element of attempted murder." Tr. 585, ll. 18-19. Instead, all that was required was for the state to prove "a general intent to commit serious bodily injury." Tr. 585, ll. 18-20. Then, he reminded the jurors that "[i]ntent means intending the result which actually occurs." Tr. 585, ll. 20-22. Finally, he permitted the jurors to infer intent for purposes of attempted murder. Tr. 585, l. 22 – Tr. 586, l. 7.[1]

During deliberations, the jury asked numerous questions. Tr. 595, l. 18 – Tr. 599, l. 19. The final question posed by the jury was to ask what would happen if they were unable to agree

[1] Trial counsel did not object to the instruction. Tr. 595, ll. 11-13. But see State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 22 (2017) (holding that attempted murder requires a specific intent to kill).

on one of the charges, and the judge instructed them pursuant to Allen v. United States, 164 U.S. 492 (1896). Tr. 598, l. 23 – Tr. 607, l. 25. Shortly thereafter, the jury returned with its verdicts, finding Appellant not guilty of criminal sexual conduct in the first degree, but guilty of kidnapping, two counts of attempted murder, and possession of a weapon during the commission of a violent crime. Tr. 609, ll. 2-17. Judge Henderson sentenced Appellant to thirty years for each county of attempted murder, to fifteen years for kidnapping, and to five years for the weapon. Tr. 619, l. 19 – Tr. 620, l. 12; R. *(sentence sheets). He ordered all sentences to be served consecutively for a total of eighty years imprisonment. Tr. 619, l. 19 – Tr. 620, l. 12; R. *(sentence sheets).

On August 2, 2019, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

In August or September 2016, Appellant and Candace Simpson began a romantic relationship online. Tr. 104, ll. 17-19; Tr. 106, l. 25 – Tr. 107, l. 17; Tr. 495, ll. 20-21; Tr. 496, ll. 3-21; Tr. 498, l. 22 – Tr. 499, l. 9. On September 30, 2016, Simpson informed Appellant that she was going to a nightclub called Strikers. Tr. 499, ll. 15-22. Appellant went to the nightclub as well, and met up with Simpson. Tr. 500, ll. 21-24. When Strikers closed, he went to T. Lee's, an after-hours bar. Tr. 501, ll. 6-8. While there, he ran into Simpson again. Tr. 111, ll. 7-9; Tr. 113, ll. 2-5; Tr. 501, ll. 21-23. After spending some time together at the bar, Appellant and Simpson rode with Simpson's friend, Tonya Moore, to Simpson's home. Tr. 113, l. 7 – Tr. 114, l. 2; Tr. 501, l. 25 – Tr. 502, l. 3. Moore lived directly across from Simpson. Tr. 114, ll. 12-14; Tr. 502, ll. 16-21. Appellant asked Simpson if he could join her in her apartment, and Simpson readily agreed. Tr. 115, ll. 7-10; Tr. 502, ll. 18-20.

In the apartment, Appellant and Simpson talked until Simpson decided she wanted to take a shower. Tr. 116, ll. 1-4; Tr. 502, l. 25 – Tr. 503, l. 10. When Simpson got out of the shower, she returned to Appellant, sitting on his lap. Tr. 503, ll. 11-18. When Appellant kissed Simpson, she responded by kissing him back in a rough way and placing her arm around him. Tr. 503, l. 21 – Tr. 504, l. 5. Appellant and Simpson then went to the bedroom. Tr. 504, ll. 9-10. The two undressed, and Simpson asked Appellant if he had condom. Tr. 504, ll. 11-18. When Appellant indicated he did not, Simpson provided him with one from her closet. Tr. 504, ll. 18-21. After Appellant put on the condom, the two had intercourse. Tr. 504, ll. 21-25.

After the two had sex, a man entered the bedroom. Tr. 505, ll. 22-24. The man confronted Simpson about Appellant's presence in the bedroom. Tr. 506, ll. 21-24. Then, the man turned violent and threatened Appellant. Tr. 507, ll. 1-3. The man briefly left the bedroom.

Tr. 507, l. 3. Simpson followed the man, calling him "babe." Tr. 507, ll. 5-8. While Appellant was putting on his clothes so he could leave, he heard the man and Simpson arguing in the kitchen. Tr. 508, ll. 7-19. As he was walking to the door, he heard Simpson "gasping" and asking for his help. Tr. 508, ll. 21-24. He knew he could not leave her there with the violent and angry man. Tr. 508, l. 24 – Tr. 509, l. 1. Appellant kicked the man off of Simpson. Tr. 509, ll. 1-2. Just as Appellant was going to charge the man, he saw the man had a knife. Tr. 509, ll. 3-4. Appellant then jumped behind Simpson. Tr. 509, l. 5.

Wildly, the man swung the knife, mostly cutting Simpson, but injuring Appellant as well. Tr. 509, ll. 7-13. Suddenly, there was a knock at the door, and Simpson's sister, Ann Covington, and two children entered the small apartment. Tr. 509, ll. 20-25. When Covington demanded answers from the man about his conduct, the man grew angry with her. Tr. 510, ll. 1-9. Nevertheless, Covington pushed the man. Tr. 510, ll. 10-15. The man and Covington began fighting. Tr. 510, l. 23 – Tr. 511, l. 3. The man, still armed with the knife, cut Covington as well. Tr. 511, ll. 3-4. Eventually, Covington and the two children ran out the front door, which allowed Appellant to run out of the back patio door. Tr. 511, ll. 4-7.

Simpson claimed her evening with Appellant progressed differently, however. According to Simpson, when she got out of the shower, she agreed to sit beside Appellant on the sectional. Tr. 116, ll. 5-9. When Appellant "tried to start kissing" her, she refused. Tr. 116, ll. 9-11. She claimed she told him to go. Tr. 116, ll. 10-14. According to Simpson, Appellant refused to leave and pulled her into her bedroom. Tr. 116, l. 23 – Tr. 117, l. 3. She further claimed that she "tried to scream and hit the wall for [her] next door neighbor but he choked [her] instantly." Tr. 117, ll. 3-4. Simpson asserted that she "just asked him to stop … choking [her]," but she thought "it was obvious that he just wanted what he wanted." Tr. 118, ll. 2-3.

Simpson asked Appellant to use a condom, and Appellant agreed. Tr. 118, ll. 6-10. Other than Appellant penetrating her vagina with his penis, Simpson did not "remember too much" after that. Tr. 119, ll. 8-15. She only remembered waking up later in the morning. Tr. 119, ll. 14-15.

When she awoke, Appellant wanted to have sex again, but she did not. Tr. 120, ll. 11-14. She "wasn't in the mood for anything." Tr. 120, ll. 21-25. Appellant asked her for oral sex and she complied. Tr. 120, ll. 15-16. Oddly, Simpson claimed that the oral sex stopped because Appellant choked her again. Tr. 121, ll. 9-15. According to Simpson, Appellant was "worried about [her] telling." Tr. 121, ll. 14-17. Simpson passed out again, and when she woke her legs were so weak she could barely walk. Tr. 121, ll. 22-24. She told Appellant she needed to use the bathroom, and he assisted her into the bathroom. Tr. 121, l. 25 – Tr. 122, l. 4. Shortly after the two returned to her bed, Simpson's sister, Ann Covington, walked in. Tr. 122, ll. 18-22; Tr. 123, ll. 11-13. Covington believed she had walked in on a sexual encounter and excused herself from the bedroom as a result. Tr. 208, ll. 17-22. Simpson ran out of the room to see who had entered. Tr. 122, ll. 21-22. When she saw it was her sister, she "fell to [her] knees and [she] told her he raped [her]." Tr. 122, ll. 22-23. Covington contradicted Simpson on this key point. According to Covington, Simpson said, "he's tried to kill me." Tr. 196, ll. 6-7; Tr. 209, ll. 5-8. Hearing this, Appellant denied Simpson's accusation. Tr. 196, ll. 7-8.

Covington told Appellant to leave. Tr. 123, ll. 14-16. Simpson recalled Covington and Appellant "fussing." Tr. 123, l. 16. Simpson believed Appellant was punching Covington. Tr. 123, ll. 16-17. Simpson jumped on Appellant, which allowed Covington to run to a room with the children with whom she had arrived. Tr. 123, ll. 18-19; Tr. 125, ll. 4-6. Covington contradicted Simpson on this point as well. Covington indicated that she and the children left the apartment at this time; she denied locking herself into a room as Simpson insisted. Tr. 199, ll. 7-

18; Tr. 210, ll. 13-15. When Simpson tried to run to the front door, Appellant tried to cut her neck, but she blocked him with her hands. Tr. 123, ll. 20-21. Simpson claimed Appellant dragged her to the kitchen, where he stabbed her. Tr. 123, ll. 20-22. According to Simpson, while Appellant was stabbing her, she heard the front door open. Tr. 126, ll. 7-11. When Appellant went to the front door in response to the sound, Simpson ran out the back door, which was open. Tr. 126, ll. 12-13. Simpson ran to her neighbor's house. Tr. 127, ll. 6-10.

ARGUMENT

The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the state's case.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 429–30, 632 S.E.2d at 848.

Relevant facts

Lorie Tyler was a patrol officer with the Dillon Police Department when she responded to a 911 call involving Simpson and Covington. Tr. 241, l. 21 – Tr. 242, l. 20. Tyler explained that when she arrived, she spoke to Simpson and Covington. Tr. 243, ll. 12-13. The solicitor asked if Simpson said "who had done this to her" in reference to injuries that Tyler described observing on Simpson. Tr. 243, l. 25. When Tyler responded that Simpson had, defense counsel objected to hearsay. Tr. 244, ll. 1-2. The solicitor responded that the testimony fit within the "[e]xcited utterness" exception. Tr. 244, ll. 3-5. The judge agreed, noting it was "the victim herself." Tr. 244, l. 6. Thus, the judge overruled the objection. Tr. 244, l. 7. Tyler then told the jurors that Simpson claimed "Reedy All Boss" was the name her assailant used on Facebook. Tr. 244, ll. 8-9. Later, Tyler repeated that Simpson alleged "Reedy All Boss" assaulted her. Tr. 264, l. 23- Tr.

265, l. 1. Tyler informed the jurors that based upon Simpson's information, she searched Facebook for the name and found Appellant's page. Tr. 265, ll. 1-2.

Discussion

"Hearsay is not admissible." Rule 802, SCRE. "'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 asserted." Rule 801(c), SCRE. However, the Rules of Evidence provide multiple exceptions to the exclusion of hearsay. One of those exceptions allows for the admissibility of excited utterances. An excited utterance is 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" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. "The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006) (citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)).

The Supreme Court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). "[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule." State v. Davis, 371

S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)).

In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." This Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." Id. This Court also noted that the statements did not amount to an excited utterance because there was "a great deal of time for reflection" before the victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413. In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), this Court held the admission of the victim's statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. This Court further held the stepmother's testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim's story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

In State v. Davis, 371 S.C. 170, 178-81, 638 S.E.2d 57, 61-63 (2006), the Supreme Court found that the trial court committed reversible error in admitting the co-defendant's statements, as an excited utterance, that his brother had shot the victim because the victim had taken a swing at his brother. In addition to a lack of evidence that the co-defendant was under the stress or excitement of the shooting when he made the statement, the Davis Court found that the record did not support the conclusion that Hill witnessed the shooting. 371 S.C. at 180, 638 S.E.2d at 63. Thus, the Court ruled: "Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule." Id.

The judge erred in permitting the solicitor to elicit hearsay testimony from the police officer regarding the identity of the alleged perpetrator. There was simply no evidence that Simpson was under the stress or excitement of a startling event. Importantly, the state asked no questions of Tyler regarding her perceptions of Simpson's mental state, which would have allowed the judge to determine if the statement from Simpson fit within the hearsay exception. Further, the state asked no questions of Simpson when she testified to allow a determination of whether she was under the influence of a startling event when she spoke to Tyler. Instead, the judge simply allowed the state to elicit the hearsay testimony – from a police officer – without any evidence in the record to support an exception to the rule against hearsay.

The entirety of the state's case depended upon the jury believing Simpson. While there was no question that Simpson was injured, the identity of the person who injured Simpson was highly disputed. In light of Simpson giving inconsistent statements regarding specific details, her inability to recall much of what transpired during the night in question, and her testimony conflicting with Covington's on significant aspects, the jury determined Simpson's credibility was questionable, at best, as shown by its verdict of not guilty on the criminal sexual conduct charge, which rested entirely upon Simpson's credibility. Allowing a police officer to inform the jury that Simpson allegedly blamed Appellant for her injuries bolstered Simpson's credibility as it lent the prestige of law enforcement to the accusation. Thus, the improper hearsay testimony was not harmless beyond a reasonable doubt as it helped the state buttress its chief witness's allegations.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial based upon the trial judge's erroneous ruling, which permitted the introduction of improper and prejudicial hearsay testimony.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of July, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Tyreek Dashawn Hayes, #366300, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of July, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT