STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

K'SONE MARQUAIL CAMPBELL,

APPELLANT

APPELLATE CASE NO 2020-000508

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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

Did the trial judge err in allowing cross-examination of the Appellant about a text message to an unknown individual, an hour and a half before the shooting, indicating that Appellant was armed with a gun when the text message was irrelevant, highly prejudicial, the judge preliminarily ruled that the text message was not admissible and Appellant did not open the door to admission?

STATEMENT OF THE CASE

In March of 2019, the Charleston County Grand Jury indicted Appellant, K'sone Marquail Campbell for murder, indictment #2019-GS-10-1423.[1] (R. pp. **, indictment). On March 2, 2020, Appellant proceeded to jury trial before the Honorable Jennifer B. McCoy. Reed W. Mulbry and Meghan Ehrlich represented Appellant at trial. David L. Osborne and Richards Hundley prosecuted the case. The jury returned a verdict of guilty. Judge McCoy sentenced Appellant to thirty-seven (37) years in prison. (R. p. **, sentencing sheet). A timely motion to reconsider sentence was filed on March 12, 2020. (R. pp. **, Motion to Reconsider sentence). In a written order signed March 16, 2020, Judge McCoy denied the motion to reconsider sentence. (R. p. **, Order Denying Motion to Reconsider Sentence.). A timely notice of intent to appeal was served on March 17, 2020. This appeal follows.

[1] It is unclear who testified before the grand jury because the witness is listed as the Charleston City Police Department.

STATEMENT OF FACTS

On May 11, 2017, Appellant finished his job with Plantation Moving at about 7:30 PM and went to Demetrius Young's grandmother's house at 943 King Street in downtown Charleston. (Tr. p. 671, line 7 – p. 672, 673, lines 1-6). Appellant testified that at some point he and friends Kris and Trey decided to walk to the Rawan Market at 949 King Street. (Tr. p. 673, lines 7 -14). On their way to the Market they saw Deangelo Milligan, a childhood friend of Appellant. (Tr. p. 673, line 14 – p. 674, 675, lines 1-6). On this evening, however, Appellant and Milligan had a disagreement. (Tr. p. 675, line 7 – p. 676, lines 1-10). The disagreement turned into a physical scuffle inside the store where the events were captured on video surveillance and introduced in evidence without objection as State's exhibit #105. (Tr. p. 443, lines 13-25). An employee of the store testified that two guys were talking loudly and then they started wrestling and a third guy joined. (Tr. p. 441, lines 12-25). At trial the employee testified that after watching the surveillance video he noticed that the third guy had a gun. (Tr. p. 452, line 22 – p. 453, lines 1-4). Appellant testified that Demetrius Young was the third person who intervened in the fight with Milligan. Appellant testified that Young was armed with a gun. (Tr. p. 678, line 1 – p. 679, lines 1-20). Appellant was unaware that Young was armed. (Tr. p. 678, lines 13-25).

After the scuffle was broken up Appellant told Young to put the gun away. (Tr. p. 683, lines 11-13). Appellant testified that Young went back to his grandmother's house to put the gun away, then got in Appellant's car and they drove away. (Tr. p. 683, line 17 – p. 684, lines 1-11). Appellant testified that he decided to return and try to work things out with Milligan. (Tr. p. 685, lines 9-25). Appellant testified that he could not find Milligan but he saw Derrick Barber and stopped to talk with him. (Tr. p. 687, line 3 – p. 688, lines 1-25). Appellant grew up with Barber

and he was like a big brother. (Tr. p. 688, lines 1-14). Appellant testified that Barber got out of his car and told him he was not getting involved in the dispute with Milligan. (Tr. p. 689, lines 4-15). Appellant testified that Milligan approached the cars and then Young shot out of the driver's side window. (Tr. p. 689, line 16 – p. 690, 691, lines 1-24). Barber was fatally shot.

Two days later on May 13, 2017, officers with the City of Charleston Police Department, after developing Appellant as a suspect, went to his house on Johns Island and asked if he would come downtown for questioning. (Tr. p. 592, line 22 – p. 593, lines 1-20). Appellant agreed and the officers drove Appellant to the police station in an unmarked car. (Tr. p. 593, line 21 – p. 594, lines 1-5). Appellant told the officers he had an attorney but agreed to provide a statement to the police without the attorney present. Appellant's statement was videotaped and admitted over objection as State's exhibit #211. In the video Appellant tells the officers that he talked with his lawyer, Bill Thrower, on the way to the police station and the lawyer advised that it was okay for Appellant to talk with the police without the lawyer present. In the videotaped statement Appellant admitted to being involved in the fight in the store with Milligan but denied being present when the shooting occurred. Appellant was arrested after the interview. On May 19, 2017, Appellant entered into a proffer agreement and named Young as the shooter. (R. p. **, Proffer agreement). Based on inconsistencies with the trial testimony the State was allowed to use the proffer against Appellant at trial. (Tr. pp. 713-714). Young pled guilty to voluntary manslaughter and received a sentence of twenty-two (22) years. Appellant received a sentence of thirty-seven (37) years.

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 trial judge erred in allowing cross-examination of the Appellant about a text message to an unknown individual, an hour and a half before the shooting, indicating that Appellant was armed with a gun when the text message was irrelevant, highly prejudicial, the judge preliminarily ruled that the text message was not admissible and Appellant did not open the door to admission.

Prior to trial Appellant moved to exclude text messages found on Appellant's phone and sent to a phone number ending in 7208. (Tr. pp. 113 – 127). The State conceded that they did not know the identity of the person using the 7208 phone number. (Tr. p. 115, lines 7-8). The detective confirmed that the number did not belong to Deangelo Milligan, the person involved in the fight with Appellant at the store. (Tr. p. 123, lines 17-23; p. 125, lines 1-5). The detective confirmed that the number did not belong to the deceased, Derrick Barber. (Tr. p. 123, lines 24-25; p. 125, lines 6-7). The detective confirmed that the number did not belong to the co-defendant, Demetrius Young. (Tr. p. 124, lines 1-2; p. 125, lines 8-9).

The text message in question was sent at 7:56 PM and reads, "Yeah, we strap so don't think it's easy." (Tr. p. 119, lines 1-7). The shooting took place at approximately 9:30 PM that night. (Tr. p. 119, lines 8-12). The detective was asked what this text message meant and he testified, "This text message to me means that the person sending this message more than likely another person or persons with him are in possession of a firearm since we implies he and at least one other person. And strap during my 12 years of experience commonly refers to a firearm or being in possession of a firearm." (Tr. p. 119, line 24 – p. 120, lines 1-4).

The detective was then asked about text messages received at 7:19 PM, prior to the above sent message. (Tr. p. 122, lines 8-19). One text message read, "I done had a fight with this girl and we been bag and all. She ain't dumb, she know you. Just ain't telling the truth and she believed that he got you." (Tr. p. 122, lines 11-13). Another message read, "If you never would

have fucked with me we wouldn't be going through this you weak ass bitch got the best of me the first time but next time that oh DEA debt." (Tr. p. 122, lines 17-19). When asked what these test messages meant the detective testified, "It sounds like that one female is possibly threatening another female or that someone who is I guess you could say with Mr. Campbell [Appellant] is making threats toward another female; someone being with meaning a significant other or partner." (Tr. p. 122, line 22 – p. 123, line 1). The detective confirmed that Appellant's significant other was not involved in the case. (Tr. p. 123, lines 2-4). The detective did not think the 7208[2] number was involved with this case. (Tr. p. 123, lines 7-9).

Appellant moved to exclude the text messages arguing, "And I will also say it's not really relevant. The State has dropped that possession of a weapon charge. If you do find this relevant I think it's prejudicial, Your Honor. It's just kind of painting K'Sone [Appellamt] as somebody who likes guns or is pro guns or has guns on him. I also think it also may fall under 404(b) as a prior bad act having a gun; that shows he's more likely to have a gun as well." (Tr. p. 126, lines 14-22). The State argued, "It's relevant because it's admitting that there is a gun an hour before the murder. He was murdered by a pistol." (Tr. p. 126, line 24 – p. 127, line 1).

The judge ruled:

> Okay. As a rule I typically don't make final rulings on Motions in Limine until they come up at trial. But based on everything I've heard this far I am most likely not going to admit this evidence at trial. I find it obviously as highly prejudicial. I think the prejudicial effect would substantially outweigh any probative value it might have. Obviously, it's not necessarily illegal to possess a firearm. I don't know the ins and outs of these particular individuals but it's certainly the act of stating you have one doesn't necessarily mean that you do so. So that's the way I am probably going to rule. But like I said I reserve my final ruling until it comes up at trial.

(Tr. p. 127, lines 12-25).

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[2] Counsel incorrectly noted the number as 710 but clarified later that he meant 7208. (Tr. p. 123, line 7 – p. 124, lines 1-25).

The State did not move to admit the text messages during their case. Instead, while cross-examining Appellant about the fact that he did not know Demetrius Young had a gun until he pulled it out during the fight at the store, the prosecutor asked, "What does it mean when you say you're strapped?" (Tr. p. 696, line 12). Counsel for Appellant asked to approach and an off the record bench conference was held. (Tr. p. 696, lines 14-17). After the bench conference the judge said, "Thank you very much. Go ahead." (Tr. p. 696, line 18). The following cross-examination then took place:

> Q. [Mr. Osborne] So you just said that being strapped means you've got a gun.
>
> A. Correct. Yes, sir.
>
> Q. Isn't it true that on the night of the murder at about 11 o'clock you made a text we strapped?
>
> A. No, sir. That was not at 11o'clock, sir.
>
> Q. I didn't say 11. I said 8 pm; an hour and a half before the murder the text went we strapped so don't think it's easy.
>
> A. Yes, sir.
>
> Q. Okay.
>
> A. I said that but that had nothing to do with Derrick or Deangelo, sir.
>
> Q. Of course it didn't.
>
> A. Yes, sir.
>
> Q. But you did have a gun.
>
> A. No, I did not have a gun on me at the time, sir.
>
> Q. We had a gun.
>
> A. No, there is no we, sir.
>
> Q. Strapped means you have a gun.

A. I was coming from work at the time, sir.

(Tr. p. 696, line 19 – p. 697, lines 1-14). The trial judge erred in allowing the cross-examination that improperly implied that the text message referred to Appellant and Young being "strapped." The text message was irrelevant as it was not connected to the case, as confirmed by the detective pre-trial. The text message was highly prejudicial, as noted by the trial judge pre-trial. The text message included improper propensity evidence. The error in allowing the cross-examination requires reversal.

In State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999), the South Carolina Supreme Court wrote:

> All relevant evidence is admissible. Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE; State v. Alexander, supra.

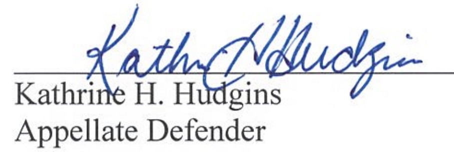
The text message, "Yeah, we strap so don't think it's easy." is not relevant because the State was unable to connect the text message to the shooting. The State could not establish who was the intended recipient of the message. The detective confirmed that the number did not belong to any of the parties involved with the shooting. As the judge noted, the fact that you claim that you are armed does not necessarily make it true.

Alternatively, even if the text message is somehow relevant, it is highly prejudicial. Rule 403, SCRE, provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Any possible probative value is substantially outweighed by the danger of unfair prejudice from the cross-examination that improperly implied that Appellant and Young were armed. Appellant did not open the door to this cross-examination. Appellant's testimony that he did not know that Young was armed

until the fight at the store did not open the door to allow cross-examination about the text message that had nothing to do with the case. The judge properly ruled pre-trial that the text message was highly prejudicial and inadmissible. The State should not have been permitted to circumvent that ruling by cross-examining Appellant about the test message. The error was not harmless. The State argued that regardless of who pulled the trigger, Appellant was still guilty under the hand of one is the hand of all theory. (Tr. p. 785, lines 10-21). Appellant argued that Young acted alone, making the improper cross examination implying that Appellant and Young were armed together even more prejudicial. The error requires reversal.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and sentence and remand the case for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of November, 2020.

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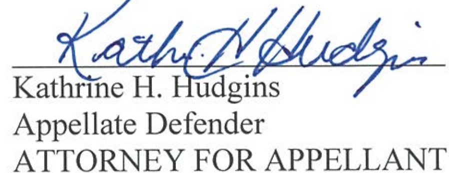
CERTIFICATE OF SERVICE

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 Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on K'Sone Marquail Campbell, #383155, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 23rd day of November, 2020.



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