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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMAA ATO WASHINGTON, JR.

APPELLANT

APPELLATE CASE NO 2019-000859

ANDERS BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial court abused its discretion by admitting the EMS report as
an excited utterance and under the business record exception
because the statement was responsive, not spontaneously uttered,
and the statement was unreliable.4

Relevant Facts.....4

The Report5

Discussion.....7

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL11

TABLE OF AUTHORITIES

Cases

State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017)..... 8

State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) 3

State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999)..... 7

State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) 7

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) 3

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007)..... 7

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 3

State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008) 7

Rules

Rule 803(2), SCRE7

Rule 803(6), SCRE8

STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion by admitting the EMS report as an excited utterance and under the business record exception where the statement was responsive, not spontaneously uttered, and the statement was unreliable?

STATEMENT OF THE CASE

On November 7, 2017, a Charleston County grand jury indicted appellant for attempted murder and possession of a weapon during the commission of a violent crime. R. 336. Appellant's case was called to trial on May 13, 2019, before the Honorable R. Scott Sprouse and a jury. R. 1. Jason King and Robert Wehrman represented appellant. Assistant solicitor Thomas Waring and assistant solicitor Jason Heggelke represented the state. R. 1.

On May 15, 2019, the jury found appellant guilty of attempted murder and possession of a weapon during the commission of a violent crime. R. 310 – 311. Judge Sprouse sentenced appellant to consecutive terms of seven years' and five years' imprisonment. R. 327; R. 340.

This appeal follows.

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 court abused its discretion by admitting the EMS report as an excited utterance and under the business record exception because the statement was responsive, not spontaneously uttered, and the statement was unreliable.

Relevant facts

Appellant's mother, Tanisha Powell (Powell), and her boyfriend, Timothy Haynes (Haynes), started dating in 2015 when appellant was fifteen. R. 100, ll. 5-7. According to Haynes he and appellant had a close relationship. Haynes supported appellant both financially and emotionally. R. 100, l. 9-102, l. 1. At the time of the incident Powell and Haynes lived in a high crime neighborhood in Charleston. R. 247, l. 21-122, l. 7. Sometime before the incident in this case, appellant was shot in the back of the head in the same neighborhood. R. 223, ll.1-18.

On June 27, 2017, appellant came home in the morning, to Powell's residence, inquiring about a gun he left at the home and claimed he needed. Haynes previously discovered the gun hidden under Powell's home. Haynes, unaware of where the gun came from, moved it and planned to turn the gun over to police. R. 224, l. 10-99, l. 25. On the day of the incident, appellant declared he needed the gun back. When Powell and Haynes refused to return the gun, appellant started being "disrespectful" and "disruptive" and Powell eventually called 911. R. 226, l. 6-101, l. 20.

When police arrived, an officer saw appellant in the yard outside Powell's home with his younger sister and Powell. Haynes was across the street in a neighbor's yard. Shots were fired and Haynes was struck multiple times in the back of his legs. The officer did not see who fired the shots. Emergency medical service (EMS) arrived and a paramedic, Diana Alvarez, asked Haynes what happened. In a report Alvarez wrote, "[Haynes] state[d] he was trying to mentor

[his] significant other's son but when he turned to walk away, he was shot in the back." R. 330; R. 157, ll. 9-16.

Appellant left the scene and was arrested a few weeks later when police pulled him over for a traffic violation. Appellant initially gave a fake name to police because he was driving in violation of his beginner's permit. R. 234 – 237.

At trial, Alvarez testified regarding her conversation Haynes and state's exhibit #27, the EMS report, was admitted into evidence over defense counsel's objection. R. 154 – 172.

The Report

During its case-in-chief the state called paramedic Diana Alvarez. R. 152, ll. 9-13. Alvarez testified generally about her training and responsibilities as a paramedic. R. 152, l. 15-28, l. 3. The solicitor asked Alvarez if she was required to write reports as part of her job. Defense counsel objected and a bench conference was held. The trial judge sent the jury out so the solicitor could proffer Alvarez's testimony regarding state's exhibit #27, the EMS report. R. 154, ll. 4-21.

Alvarez testified writing reports was part of her job and usually the report included information such as the incident address and patient medications and allergies. R. 155, ll. 10-17. Alvarez stated Haynes appeared to have three gunshot wounds to the back of his right thigh and one to the back of his left thigh. When Alvarez asked Haynes what happened he responded "he was trying to mentor his significant other's son, and I guess things did not go the way he intended, and as he was leaving he was shot from behind." Alvarez included Haynes' response in the EMS report. R. 157, ll. 1-22. At that time, the solicitor moved to have state's exhibit #27, the EMS report, admitted and defense counsel objected. R. 158, ll. 1-10.

Defense counsel asked Alvarez whether the purpose of her question to Haynes was to

determine the physical way in which Haynes was shot and whether she relied on his statement to understand the type of injury sustained. Alvarez indicated she routinely asked patients what occurred that resulted in injury so that she could properly treat the patient. Alvarez admitted motive was not important to her understanding of a patient's injury. R. 158, l. 18-33, l. 19; 160, ll. 13-23.

The state argued the EMS report, state's exhibit #27, should be admitted as a business record, an excited utterance, and a prior inconsistent statement. R. 161, ll. 3-22. Defense counsel argued it was not an excited utterance because there was no foundation laid as to how long after the shooting Haynes made the statement and it was not something Haynes uttered spontaneously. Rather, Haynes was responding to a question asked by Alvarez. R. 162, ll. 4-15. Defense counsel also argued the report should not come in under the business record exception and that the statement was not inconsistent with Haynes' testimony at trial. The statement contained in the EMS report was that he was shot from behind and Haynes' testimony at trial was that he did not see who shot him because he was turned around. R. 162, l. 16-38, l. 15.

The trial judge overruled the objection finding it was admissible as a business record and as an excited utterance. R. 164, ll. 16-23.

When the jury returned the solicitor asked Alvarez what Haynes said about the incident. She testified Haynes said, "that he was trying to mentor his significant other's son, and as he was walking away, he got shot from behind." R. 168, ll. 5-11. State's exhibit #27, the EMS report, was admitted over defense counsel's contemporaneous objection. Additionally, the solicitor showed the report on an overhead projector and Alvarez repeated the statement to the jury again. R. 171, l. 22.

Discussion

The trial judge erred in admitting Hayne's statement pursuant to the excited utterance exception. Three elements must be met for a statement to be 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. Rule 803(2), SCRE; *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). A court must consider the totality of the circumstances when determining whether a statement is admissible under the excited utterance exception, and the determination is generally left to the sound discretion of the trial court. *Id.*; see also *State v. Burdette*, 335 S.C. 34, 43–44, 515 S.E.2d 525, 530 (1999).

In *State v. Washington*, our Supreme Court held eyewitness' statements to police about a stabbing incident were not admissible pursuant to the excited utterance exception because the statements were responses made in a formal police interview rather than independent assertions or exclamations regarding the event. *State v. Washington*, 379 S.C. 120, 124-25, 665 S.E.2d 602, 604 (2008). While the Court, in that case, ultimately found the error was harmless because of the overwhelming evidence against defendant its reasoning is instructive in the case at hand.

Haynes' statement to paramedic, Alvarez, does not qualify as an excited utterance. Undoubtedly Haynes was distressed when he made the statement and there is no question the statement was made relatively close in time to the incident. However, Haynes was not spontaneously uttering this statement, rather, Haynes was answering a question asked by a

medical professional. Alvarez was trying to elicit information about Haynes' injury in order to properly treat him. Haynes' statement was made in response to Alvarez's questions and was not an independent assertion or exclamation regarding the incident.

The trial judge erred in admitting Haynes' statement pursuant to the business record exception. The rules of evidence provide:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible.* The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE.

In *State v. Blackwell*, our Supreme Court found the trial court correctly excluded the hospital chaplains' notes even though they were kept in the regular course of business because the notes contained subjective opinions and judgments. *State v. Blackwell*, 420 S.C. 127, 160, 801 S.E.2d 713, 730 (2017).

Here, Alvarez verified that the document was kept in the regular course of business. However, the report contained the subjective opinion of Haynes. The statement made by Haynes is not made reliable just because it was found in an EMS report. In fact, the statement was nothing more than speculation on the part of Haynes who admittedly was upset at appellant for his behavior that day. The statement does not help explain what happened to Haynes because he testified at trial that he did not see who shot him. Furthermore, Haynes' injuries, wounds to the

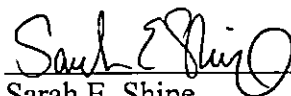
backs of his legs, support that testimony.¹ However, the statement is extremely damaging. Haynes told Alvarez he was “trying to mentor [his] significant other’s son.” Putting that portion of the statement before the jury invites it to speculate that Haynes believed appellant shot him.

The state sought to admit the suggestive EMS report to bolster a flimsy case and distract the jury from the state’s lack of evidence with an extraneous statement Haynes made in response to Alvarez. The state’s theory of the case was that appellant was so upset that Haynes would not return a gun that he tried to kill him. However, according to testimony at trial appellant had no motive to kill Haynes. No one testified they saw appellant shoot at Haynes. The weapon used to shoot Haynes was never recovered. There was no evidence linking appellant to the spent shell casings found at the scene. The trial judge erred in admitting the EMS report containing Haynes’ misleading statement.

¹ For this reason, the statement is also not a prior inconsistent statement of Haynes.

CONCLUSION

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



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2020.

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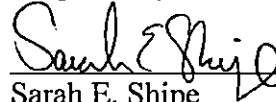
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamaa Ato Washington states:

1. She is 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 R. Scott Sprouse, which was held on May 14 - 15, 2019, 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 Jamaa Ato Washington.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender
ATTORNEY FOR APPELLANT

This 3rd day of February, 2020.

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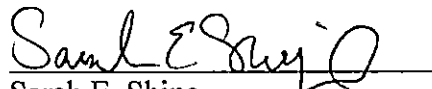
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s) and sentencing sheet;
- (2) Trial transcript dated May 13, 2019: cover page, p. 2, pp. 39-125;
- (3) Trial transcript dated May 14 – 15, 2019: cover page, pp. 5-137, p. 139, pp. 145-177, pp. 179-181, pp. 184-185, p. 201;
- (4) State's Exhibit #27 (EMS report)

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

February 3, 2020



Sarah E. Shipe
Appellate Defender

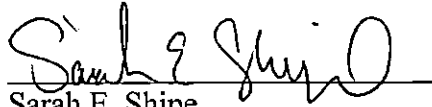
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(803) 734-1330

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."

February 3, 2020.



Sarah E. Shipe
Appellate Defender

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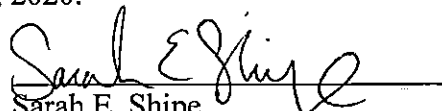
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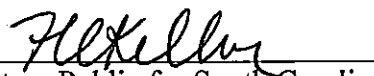
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jamaa Ato Washington, 380066, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 6th day of January, 2020.


Sarah E. Shipe
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: December 31, 2029.