STATE OF SOUTH CAROLINA

IN THE 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

FINAL REPLY 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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ARGUMENT IN REPLY

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.

The jury found Appellant guilty in the shooting death of his friend Derrick Barber. During a pre-trial motion Appellant objected to the admission of text messages indicating that Appellant was armed with a gun an hour and a half before the shooting as irrelevant and overly prejudicial. (R. pp. 67 – 81). The challenge to the text messages is preserved for appellate review. The error in allowing the prosecutor to question Appellant about the text messages in not harmless.

The primary text message stated, "Yeah, we strap so don't think it's easy." (R. p. 73, lines 1-7). The "we strap" text message was in response to a thread of other messages that a detective testified were not connected with the shooting. (R. p. 76, lines 22-25; p. 77, lines 7-9). During the pre-trial hearing when asked what these text 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." (R. p. 76, line 22 – p. 77, line 1). The detective confirmed that Appellant's significant other was not involved in the case. (R. p. 77, lines 2-4).

This thread of text messages had nothing to do with the shooting of Barber. The State was unable to connect the text messages to the shooting. The State could not establish who was the intended recipient of the message. The State conceded that they did not know the identity of the person receiving the text messages. (R. p. 69, lines 7-8). The detective confirmed that the

receiving telephone number did not belong to any of the parties involved with the shooting, including the deceased, Barber, the co-defendant Demetrius Young and another individual, Deangelo Milligan, who had an altercation with Appellant prior to the shooting. (R. pp. 77-79). When asked if the telephone number sending and receiving text messages with Appellant was involved with the shooting the detective answered, "No, I do not think so." (R. p. 77, lines 7-9). The trial judge made a preliminary ruling and stated that she would likely not admit the text messages, finding them "highly prejudicial" and finding that "the prejudicial effect would substantially outweigh any probative value it might have." (R. p. 81, lines 12-25).

At trial the State did not move to admit the text messages during their case in chief. The prosecutor, despite the pre-trial objection to the text messages and the judge's preliminary ruling that she would likely not admit the text messages, did not seek a ruling from the judge before questioning Appellant about the text message. Instead, the prosecutor began his cross-examination asking, "Did I just hear your testimony correct in saying that you had no idea that Demetrius Young had a pistol in his possession until he pulled it out at the Rawan Market?" (R. p. 642, lines 5-8). Appellant answered, "Yes, sir." (R. p. 642, line 9). The prosecutor then asked Appellant, "What does it mean when you say you're strapped?" (R. p. 642, line 12). Counsel for Appellant asked to approach and an off the record bench conference was held. (R. p. 642, lines 14-17). After the bench conference the judge said, "Thank you very much. Go ahead." (R. p. 642, 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.

(R. p. 642, line 19 – p. 643, lines 1-14). The cross-examination about the text was taken out of context and improperly implied that Appellant and Young were armed together and Appellant knew Young was armed. Appellant's defense at trial was that Young acted alone as the shooter and Appellant did not know Young was armed.

The bench conference reflects that Appellant did not concede or acquiesce in allowing the prosecutor to question Appellant about the "we strap" text message. As soon as the prosecutor asked about the meaning of "strapped," Appellant knew where the line of questioning was headed and asked to approach the bench. The trial judge knew from the pre-trial hearing that Appellant objected to the "we strap" text message as irrelevant and highly prejudicial. The judge changed her pre-trial ruling and allowed the prosecutor to question Appellant about the

"we strap" text message. The issue was raised and ruled on by the trial judge. The error is preserved.

The trial judge erred in allowing this line of cross-examination when the text had nothing to do with the shooting, did not involve Appellant and Young and did not establish that Appellant and Young were armed at the time of the shooting. The text was irrelevant as it did not have any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. If the text is somehow deemed relevant, the text should still have been excluded because any purported probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . ." Rule 403, SCRE. The cross-examination improperly implied that the text message referred to Appellant and Young as being armed or "being strap."

During the pre-trial hearing the State argued that the text message was relevant because " . . .it's admitting there is a gun there an hour before the murder." (R. p. 80, lines 24-25). Boasting about being armed in response to an earlier text thread that had nothing to do with the shooting does not establish that Appellant was actually armed at the time of the text or at the time of the shooting. The State argues for the first time on appeal that questioning Appellant about the text message was relevant as impeachment writing, "However, the solicitor mentions this text for impeachment so it should be relevant." (BOR pp. 5-6). The text message, "Yeah, we strap so don't think it's easy" sent an hour and a half prior to the shooting to an unknown person not involved in the shooting is not impeaching of Appellant's testimony that he did not know that Young was armed. At trial Appellant testified that he was not aware that Demetrius Young had a gun until Young pulled the gun out during the altercation between Appellant and

Deangelo Milligan inside the store. (R. p. 644, lines 11-25). Appellant did not even know that Young was coming to the store. (R. p. 623, lines 18-21). After the altercation inside the store Appellant believed Demetrius Young took his gun and left it at his grandmother's house before he got in the car with Appellant. (R. p. 629, line 1 – p. 630, lines 1-11). Appellant testified that he did not know that Demetrius Young still had the gun when he got in the car with Appellant. (R. p. 630, lines 10-11). When Appellant and Young returned so that Appellant could try to work things out and "squash the beef" with Deangelo Milligan they saw Derrick Barber and stopped to talk with him. (R. p. 633, line 3 – p. 634, lines 1-25). Appellant testified that as Milligan approached the cars, Young shot Barber. (R. p. 635, line 11 – p. 636, lines 1-23). The irrelevant prejudicial text was not impeaching. The text does not establish that Appellant knew Young was armed at the time of the shooting. The text is not impeaching.

The State's reliance on State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990), is misplaced because the issue in Major involved whether a prior conviction for simple possession of cocaine could be admitted in evidence. The issue in the present case does not involve a prior conviction. The issue in the present case is the trial judge allowing a misleading cross-examination about an irrelevant prejudicial text message. The State's reliance on State v. Outlaw, 307 S.C. 177, 414 S.E.2d 147 (1992), is also misplaced as the issue in Outlaw was whether the trial court erred in charging the jury on the limiting effect of evidence admissible only for impeachment purposes. There was no challenge to the jury charges in the present case. (R. p. 774, lines 5-9). Additionally, in Outlaw the defendant, charged with second degree criminal sexual conduct with a minor, denied the charge and stated that he had "never done nothing like that to no child." The prosecutor then questioned the defendant about a prior fraudulent check conviction and a separate alleged sexual assault. Appellant in the present case did not deny

sending the "we strap" text message. After the improper cross-examination, on re-direct examination Appellant explained that the "we strap" text message was in response to threats he and his fiancé received from another female and had nothing to do with the shooting or Demetrius Young or Deangelo Milligan. (R. p. 677, line 3 – p. 678, 679, lines 1-6). This is consistent with the testimony given by the detective during the pre-trial hearing.

The error is not harmless. In State v. Reyes, No. 2019-001593, 2020 WL 7380276, at *5 (S.C. Dec. 16, 2020), the South Carolina Supreme Court wrote:

> It is well-established:
>
> > Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."
> >
> > State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." State v. Tapp, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). Put simply, the harmless error rule embodies a commonsense principle our appellate courts have long recognized—"whatever doesn't make any difference, doesn't matter." State v. Jolly, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991) (quoting McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

Under the circumstances of this particular case where Appellant's defense was that he did not know that Young was armed and that Young acted alone when he shot Barber, the error in allowing the misleading cross examination that improperly implied that Appellant and Young were armed together when in fact the text message had nothing to do with the shooting or any of the people involved in the shooting contributed to the guilty verdict and warrants 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 15th day of March, 2021.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Reply Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 15th day of March, 2021.