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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN IRA DUNCAN III,

APPELLANT

APPELLATE CASE NO 2019-001919

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

1. **The trial judge erred in admitting State's Exhibit #37, a video containing two separate interviews with a witness, as extrinsic evidence of three purported prior inconsistent statements pursuant to Rule 613(b) when the State failed to lay the proper foundation for one of the statements and the witness did not deny or not recall making another of the statements.**

State's exhibit #37 contains two police interviews with Dontarious Seay. One interview took place on July 20, 2015, and the other took place on July 22, 2015. The State sought to introduce the videos of both interviews pursuant to Rule 613(b). Specifically, the State sought to introduce the video of the interviews with Dontarious, State's Exhibit #37, as extrinsic evidence of three prior inconsistent statements: 1.) a statement that Dontarious did not remember telling the investigators that he heard John say something right after the shooting. (R. p. 425, line 24 – p. 426, lines 1-3); 2.) a statement that Dontarious did not remember telling the investigators that John Duncan "did what he said he was going to do." (R. p. 427, lines 1-23; p. 428, line 22 – p. 429, lines 1-4); and 3.) a statement that John said that he was going to take matters into his own hands and that he would not get robbed again. (R. p. 428, lines 3-21). The State should not have been allowed to introduce State's Exhibit #37 with regard to the first and third statements. Both statements were made during the July 22nd interview. The entire July 22nd interview should not have been included as part of State's Exhibit #37.

Defense counsel objected to the admission of the videos arguing that he did not recall the questions asked and did not remember if the State established a proper foundation for the admission of extrinsic evidence of a prior inconsistent statement pursuant to Rule 613(b). (R. p. 549, lines 7-11; p. 550, line 21 – p. 551, lines 1-15). The prosecutor admitted that the witness only denied two of the above statements. The prosecutor stated, "Two of the statements in particular he said he didn't remember and never did admit to doing it." (R. p. 550, lines 3-4).

Counsel for Appellant asked to review the witness' testimony to determine admissibility pursuant to Rule 613(b). (R. p. 550, line 21 – p. 551, lines 1-15). The State did not ask to review the testimony but instead argued:

> If I may, Your Honor, my notes are very good because I specifically asked this because I knew, in fact, he wouldn't answer the question. I asked did this take place at the Beaufort County sheriff's office, the Hilton Head substation, and then I rephrased that to say the Hilton head station. Did it occur on July the 20th and July the 22nd, the first one at 7:21 a.m. and the second time or sometime around there and the second one at 2:21 p.m. I then asked were you talking to Investigator Reynells and Investigator Lavant, and then I specifically asked do you remember him saying – you telling the officer that Duncan's – you heard Duncan say something after the shot, Duncan shot Dom, had the gun in a purple bag, wasn't going to be robbed, he had been robbed before, but he wasn't going to be robbed again and he was going to take matters into his own hands.
>
> And then the last statement was that Dom – that you told the investigator Dom [sic] did what he said he was going to do. Number one, he could not remember the first one or the last one. He – in fact, the next to the last one where he wasn't robbed again[1], he said I don't remember telling him that, but I remember talking to Dom somewhat about that. So he was kind of vague with that. And then on cross-examination is when the defense counsel crossed him on the fact that – oh, but I was under – I was under duress. He was – he was scaring me and all that too.

(R. p. 551, line 16 – p. 552, lines 1-15). The testimony of the witness was not reviewed by the trial judge or defense counsel, despite the request for review. At that point counsel for Appellant stated, "The solicitor is an officer of the Court. I have to take him at his word just because I don't remember it. I trust that that's, in fact, the questions he asked. Your Honor, regardless of the ruling on that, we still have a huge problem with the playing of any video with a transcript attached." (R. p. 553, lines 2-7). Trial counsel never conceded that the two statements from the July 22, 2015, interview and included in State's Exhibit #37 met the requirements of Rule 613(b).

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[1] This is statement #3 referenced above.

As the proponent of the evidence, the State carried the burden to prove that the statements met the requirements of Rule 613(b). The judge erred in not reviewing the testimony, as requested by counsel for Appellant, to determine if the State could meet their burden. A review of the record reflects that the State failed to meet their burden. As to statement #3, a review of the witness testimony would have shown that Dontarious did not deny telling the officers that John said he was not going to get robbed again and was going to take matters into his own hands. The record reflects that the following took place during the questioning of Dontarious:

> Q: Do you recall telling the officer that John Duncan told you he had been robbed before, but he wasn't going to be robbed again, he would take matters into his own hands?
>
> A: Can you repeat your question?
>
> Q: Do you recall telling the officers that John Duncan had been robbed before and he told you he wasn't going to be robbed again, he was going to take matters into his own hands?
>
> A: I remember having a conversation with John about this and I remember him saying it wasn't going to happen again.
>
> Q: But that's – that's after the first robbery?
>
> A: Correct.
>
> Q: After another robbery, he says it's not going to happen again?
>
> A: (No verbal response).
>
> Q: Do you remember telling the officers - -
>
> THE COURT REPORTER: I'm sorry. He didn't answer.
>
> Q: -- that?
>
> A: Correct.
>
> Q: Okay. I'm sorry. I interrupted. Correct. And that he was going to take matters into his own hands, that he would not get robbed again; is that correct?

A: Correct.

(R. p. 427, line 24 – p. 428, lines 1-21).

The judge erred in admitting the portion of the July 22nd video as a prior inconsistent statement pursuant to Rule 613(b) when the statement was not inconsistent. "Rule 613(b), which governs the admissibility of extrinsic evidence of a prior inconsistent statement by a witness, "first requires that a prior statement be inconsistent." United States v. Young, 248 F.3d 260, 267 (4th Cir.2001)." United States v. Barile, 286 F.3d 749, 755 (4th Cir. 2002). Although trial counsel asked to review the testimony, the judge failed to review the testimony before ruling. The prosecutor admitted that the witness only denied two of the three statements. The judge understood the objection and erred in admitting that portion of State's Exhibit #37. The issue is preserved for review.

As to statement #1, Dontarious' testimony that he did not remember telling the investigators that he heard John say something right after the shooting, is inconsistent with the prior statement to police. The State, however, failed to lay the proper foundation for admission of this inconsistent statement pursuant to Rule 613(b). The following took place during the questioning of Dontarious:

Q: Did you hear him say – did you hear John Duncan say anything to Dominique before he shot him?

A: No, sir.

Q: Did you hear him say anything afterwards?

A: No, sir.

Q: Do you recall telling officers that you heard him say something afterwards?

A: Not at all.

(R. p. 425, line 21 – p. 426, lines 1-3). The State failed to advise the witness of the time and place the statement was made. Also, the general reference to officers does not satisfy the requirement that the witness be advised to whom the statement was made. The portion of the video of the interview when Dontarious tells the investigators he heard John say something after the shooting should not have been admitted because the State failed to lay the proper foundation pursuant to Rule 613(b).

The Respondent argues in a footnote, "Shortly thereafter, [Dontarious] Seay was specifically asked about the second statement which he made to officers during interviews that took place. He was given specific dates, times, and locations. It is clear that Seay would have understood the questions about both the first and second statements related o the interviews with officers after the shooting. There is no other logical time which could have been referenced. As a result, he was provided sufficient notice as required under Rule 613."

The record reflects that **after** questioning Dontarious about telling the investigators that he heard John say something right after the shooting, the prosecutor asked Dontarious about telling police officers that John did what he said he was going to do. (R. p. 427, lines 1 – 2). This is the second statement referenced above, is included in the July 20th interview and not challenged on appeal. Dontarious answered that he had no recollection. At this point the prosecutor, referencing both the July 20th and July 22nd interviews, advised about the time and place it was allegedly made, and the person to whom it was made[2]. The subsequent questioning does not provide the proper foundation for the earlier questioning. In State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), the South Carolina Court of Appeals wrote:

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[2] The prosecutor mentions both investigators and does not distinguish the two separate interviews although the video shows two investigators present for the July 22nd interview and only shows one investigator present for the July 20th interview.

> The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. Under Rule 613(b), extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. Rule 613(b) explicates the procedure for impeachment by a prior inconsistent statement and requires laying the foundation. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct.App.1999).

In State v. Sierra, 337 S.C. 368, 372–73, 523 S.E.2d 187, 189 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> Rule 613(b), SCRE, is the general rule for impeachment by a prior inconsistent statement and requires laying the foundation for the question by advising the witness of the substance of the prior inconsistent statement, the time and place it was given, and the person to whom it was made. Only if the witness denies having made the prior inconsistent statement is extrinsic evidence admissible. With this requirement, the witness is presented with sufficient information to admit the prior statement, deny it, or explain it. See State v. Hampton, 79 S.C. 179, 60 S.E. 669 (1908).

As the proponent of evidence, the State was required to lay a proper foundation by advising Dontarious of his statement to police that John said something after the shooting and reminding him of the time and place it was given and the person to whom it was made. The State failed to lay the proper foundation with regard to this specific prior statement. The trial judge erred in admitting the video of the July 22nd interview as extrinsic evidence of a prior inconsistent statement. The error is not harmless in light of the fact that Appellant testified that he acted in self-defense. The error requires reversal.

2. **When State's Exhibit #37, the video containing two separate interviews with a witness, was published to the jury at trial, the trial judge erred in allowing the State to edit the Exhibit to include a purported subtitle transcript of the interviews prepared by an employee of the prosecutor's office, as the State argued that the added subtitle transcript portion was only for demonstrative purposes and would not be admitted in evidence and sent back to the jury.**

The State did not simply provide the jury with a transcript of the police interviews with Dontarious Seay. Instead, the State violated the best evidence rule by altering the original videos and adding subtitle transcript at the bottom. The best evidence of the interview is the interview itself, unaltered. The trial judge abused his discretion in allowing the State to alter the original videos by adding subtitles.

The best evidence rule, Rule 1002, SCRE, provides that, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Pursuant to the rule, the original unaltered videos were required. The objection in this case, except as discussed above in issue one with regard to the recording of the July 22nd interview, was not to the original recordings of the two interviews. Instead, the objection was to the State adding subtitles not included in the originals. The subtitles should not have been allowed.

The Respondent mischaracterizes the added subtitles as similar to other demonstrative evidence used to assist the jury in its understand of the evidence being admitted. First, the July 22nd interview is clear and the jury would not have needed subtitles to understand the statements made on the video. The July 20th interview is bit more difficult to understand but the jury still did not need the assistance of a transcript to understand the statements made. As the Eighth Circuit Court of Appeals noted in United States v. McMillan, 508 F.2d 101, 105–06 (8th Cir. 1974):

> Because the need for transcripts is generally caused by two circumstances, inaudibility of portions of the tape under the circumstances in which it will be replayed or the need to identify the speakers, see United States v. Bryant, 480 F.2d 785, 790-791 (2d Cir. 1973); Fountain v. United States, supra, 384 F.2d at 632; United States v. Hall, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812, 86 S.Ct. 28, 15 L.Ed.2d 60 (1965), it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes. In the ordinary case this will not be prejudicially cumulative. Fountain v. United States, supra, 384 F.2d at 632. Transcripts should not ordinarily be read to the jury or given independent weight.

The videos in the present case were not inaudible and the identity of the speakers was known. The added subtitle transcript was not necessary.

Second, and more importantly, the added subtitle transcript improperly altered the original evidence. The subtitle transcript placed undue influence on the statements. As the subtitles were displayed with the original videos, the jury, despite the judge's cautionary instruction, may have erroneously believed the subtitle transcript to be credible because it was produced contemporaneously to the filming of the interview.

The video recordings with subtitles added by the prosecution do not constitute demonstrative evidence and violate the best evidence rule. The trial judge abused his discretion in allowing the altered videos to be played for the jury. The error is not harmless in light of the fact that Appellant testified that he acted in self-defense. The error requires reversal.

3. **In this murder case where there was evidence presented that Appellant acted in self-defense, the trial judge erred in instructing the jury that, "The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise."**

Both the State and Appellant initially agreed, pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), that the judge should not instruct the jury that malice can be inferred from the use of a deadly weapon. (R. p. 657, line 8 – p. 658, lines 1-6). The judge then *sua sponte* asked about the malice charge and Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). (R. p. 658, lines 9-12). The judge then suggested the following charge:

> The law says that if one intentionally kills another with a deadly weapon, the implication of malice – the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would simply be an evidentiary factor to be taken into consideration by you, the jury, along with other evidence. You may give it the way [sic] you determine it should receive. Y'all tell me.

(R. p. 658, lines 13-21). Appellant argued that the implication of malice from the use of a deadly weapon language, as stated in the judge's suggested charge above, was overruled by Belcher. (R. p. 658, lines 22-25). The prosecutor, however, changed course and said he had no problem including the implication of malice language in the charge. (R. p. 659, lines 1-11). There was no further discussion about the malice instruction.

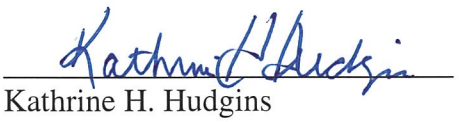
The next morning the judge charged the jury with the law. (R. pp. 740-750). The judge instructed the jury, "Malice may be inferred from conduct showing a total disregard for human life. The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to

be taken into consideration by you, the jury. Along with the other evidence in the case, you give it the weight you determine it should receive." (R. p. 747, lines 2-11). The trial judge erred.

While there was no objection to the implication of malice charge after it was given to the jury, this Court should find the issue preserved because the issue was raised to the trial judge and he had an opportunity to rule on the issue. The error was not harmless in light of the fact that Appellant testified that he acted in self-defense. While the South Carolina Court of Appeals found a Belcher error harmless in State v. Franks, 432 S.C. 58, 81–82, 849 S.E.2d 580, 593 (Ct. App. 2020), reh'g denied (Nov. 24, 2020), the Court noted in that case, "The trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse, or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence concerning the shooter's intent was presented." In contrast, because self-defense was an issue for the jury to decide, the error in the present case was not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse Appellant's conviction and remand the case for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of April, 2021.

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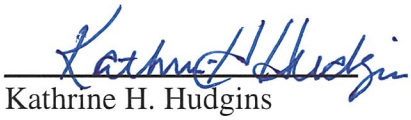
CERTIFICATE OF COUNSEL FOR APPELLANT

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 14th day of April, 2021.