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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DIANTE JA QUAN ROGERS,

APPELLANT.

APPELLATE CASE NO. 2020-000135

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in refusing to allow the defense to use a written statement by a witness who heard the State's key witness, Juwan Smith, admit to shooting the victim because it violated **the State's** right to confront witnesses, citing Crawford v. Washington, 541 U.S. 36 (2004)?

2.

Whether the trial court erred in refusing to allow the defense to use a video from the robbery of a convenience store that occurred on the same day as the murder in this case showing the robber as someone who resembled Juwan Smith after Smith told the police that appellant committed the robbery and shot at the clerk?

STATEMENT OF THE CASE

A Florence County grand jury indicted appellant Diante JaQuan Rogers for murder, criminal conspiracy, carjacking, kidnapping, discharging a firearm into a vehicle, and possession of a firearm during a violent crime. R. 489. On January 13, 2020, appellant was tried before the Honorable Thomas A. Russo and a jury. R. 1. Edgar L. Clements, III, represented the State. R. 1. William Vickery Meetze and Tamara Greer represented appellant. R. 1. The jury convicted appellant. R. 467, l. 3 – 25. Judge Russo sentenced appellant to life imprisonment for murder and concurrent terms on the other convictions. R. 487, l. 16 – 488, l. 12. This appeal follows.

STANDARD OF REVIEW

Both issues on appeal concern the exclusion of evidence and are governed by the abuse of discretion standard. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” State v. Arrowood, 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007).

ARGUMENT

1.

The trial court erred in refusing to allow the defense to use a written statement by a witness who heard the State’s key witness, Juwan Smith, admit to shooting the victim because it violated the State’s right to confront witnesses, citing *Crawford v. Washington*, 541 U.S. 36 (2004).

On the afternoon of August 28, 2017, eighty-eight year-old Katherine Wilson (“Wilson”) pulled her car into her neighbor Lindwood Timmons’ driveway and began honking her horn. R. 29, l. 11 – 32, l. 11. Timmons came out of his barn and found Wilson in her running car with a gunshot wound. R. 29, l. 11 – 32, l. 11. Wilson told Timmons that she was at a stop sign when two men approached her car with a gun. R. 29, l. 11 – 32, l. 11. She “floored it” and did not stop until she got to Timmons’ house. R. 29, l. 11 – 32, l. 11. Timmons saw bullet holes in the car. R. 35, l. 16 – 38, l. 2. He called 911. R. 37, l. 19 – 38, l. 4. Six weeks later, Wilson died from complications from the gunshot wound. R. 146, l. 14 – 149, l. 19.

The State’s prosecution of appellant Diante Rogers (“Rogers”)¹ for Wilson’s death depended on the testimony of two witnesses of low credibility. These two key witnesses for the State were Juwan Smith (“Juwan”) and Alfred “Fredo” Lamar (“Fredo”), who both faced charges from the victim’s death. R. 275, l. 16 – 20. R. 289, l. 10 – 12. Fredo admitted he told multiple lies to the police. R. 230, l. 9 – 18. Juwan’s testimony about what he told the police was contradicted by the lead investigator. R. 362, l. 21 – 365, l. 4.

Fredo testified that after he left work from the Huddle House, he, Juwan, Rogers, Ingleque “Gleek” McKay, and Javarius “Gooney” Smith rode around in his girlfriend’s white BMW. R. 208, l. 2 – 209, l. 8. The five men drove to Timmonsville to drop off Gleek because

¹ Rogers’ nickname was “Little Bill.”

“he had a truancy charge and his mother was calling.” R. 209, l. 11 – 20. Juwan, Gleek, and Gooney were cousins. R. 206, l. 1 – 9.

Fredo denied being in a gang with Juwan, denied that he told police that Juwan was a high ranking “big homie” and denied that Juwan’s nickname was “RatchetRu,” with the “Ru” signifying he was in the Piru sect of the Bloods. R. 233, l. 13 – 234, l. 6. A police officer contradicted Fredo’s denials about Juwan being called “Ratchet Ru” and a “big homie.” R. 374, l. 16 – 375, l. 12. When confronted with a photograph of himself wearing a “red flag” and making a complicated gesture with the fingers of both hands, Fredo said he was making a peace sign. R. 235, l. 2 – 24. Defendant’s Ex. 1.

The men went to Gleek’s cousin “Pawn’s” house and Pawn gave Gleek a gun. R. 224, l. 3 – 8. They also went to a tire shop where a man brought Gooney a gun. R. 210, l. 21 – 211, l. 17. After letting Gleek out of the car, Fredo drove with Gooney in the front passenger seat. R. 212, l. 4 – 17. Juwan sat behind Fredo and Rogers sat behind Gooney. R. 212, l. 4 – 17.

Rogers and Gooney told Fredo to cut off a car they saw, which was Wilson’s car. R. 213, l. 16 – 214, l. 20. Gooney and Rogers got out of the BMW and approached Wilson’s car on foot. R. 215, l. 1 – 24. Initially, Fredo said “they” pointed guns at Wilson. R. 215, l. 1 – 3. Later on direct, Fredo claimed he only saw Rogers pointing a gun at Wilson. R. 219, l. 19 – 220, l. 25. Fredo saw Rogers shoot and he “got scared and took off.” R. 215, l. 1 – 24. He saw Wilson pull away from the scene and turn. R. 215, l. 1 – 24.

Juwan told Fredo “something bad would happen” to him if he did not turn around and get Rogers and Gooney. R. 215, l. 1 – 24. Fredo complied and picked up the two men. R. 215, l. 1 – 24. Fredo claimed they both were in the road with their guns pointed when he stopped and

they got in the car. R. 218, l. 11 – 21. They went to a Walmart in Florence where they stole a truck. R. 218, l. 14 – 23. Fredo followed them back to Mullins. R. 218, l. 14 – 23.

In his first statement to the police, Fredo said that the men took his car and that he did not go with them. R. 244, l. 23 – 245, l. 23. He then gave another statement omitting himself from the car during the shooting. R. 246, l. 5 – 249, l. 4. When the police confronted Fredo with the possibility of phone records showing him in Timmons ville, Fredo claimed Juwan had his phone all day. R. 249, l. 8 – 252, l. 1. Fredo continued to deny going to Timmons ville, but after pressure from the police became “emotional” and told them he only went against his will. R. 252, l. 1 – 254, l. 22. Fredo admitted he told two versions of the shooting—one with Juwan and Gooney with the guns, and the version he told on direct-examination with Rogers and Gooney holding the guns out of the car. R. 256, l. 24 – 257, l. 14. Among other versions, Fredo claimed they punched him and told him to remain silent about the shooting. R. 260, l. 21 – 261, l. 1.

After stealing the truck from Walmart, the men went in both cars to the Brew House, a coffee shop in Mullins. R. 261, l. 6 – 263, l. 6. Defense counsel showed Fredo several pictures from the Brew House’s cameras and Fredo ultimately identified Juwan as a man who entered the coffee shop. R. 262, l. 24 – 270, l. 12. Def. Ex. 2, 3, 4, 6.

Juwan testified that, about six months after he got out of prison, he met Fredo. R. 285, l. 8 – 12. Juwan had prior convictions for shoplifting, third-degree burglary, petty larceny, simple assault and battery, strong-arm robbery, second-degree assault and battery, and first-degree assault and battery. R. 288, l. 8 – 289, l. 9. Juwan identified “Pawn” as Robert Askins. R. 290, l. 18 – 291, l. 7.

Juwan claimed he went to the Huddle House to fill out a job application. R. 295, l. 11 – 23. Juwan borrowed Fredo’s car and picked up Rogers and Gooney. R. 295, l. 24 – 297, l. 3.

When Fredo got off work, they picked him up. R. 297, l. 4 – 7. Juwan’s family told him to bring Gleek home, so they went to Timmonsville. R. 296, l. 18 – 297, l. 7. Gooney suggested they contact Pawn and get some guns. R. 299, l. 24 – 301, l. 23. After some discussion at the tire store, the men waited in a nearby field for Pawn, who eventually brought them two semiautomatic pistols. R. 299, l. 24 – 301, l. 23.

The men then went to Juwan’s brother’s house and smoked marijuana. R. 302, l. 18 – 303, l. 2. Rogers asked to hold a gun. R. 303, l. 1 – 4. They left the house and were driving when Wilson drove by in her silver Impala. R. 304, l. 14 – 19. According to Juwan, Rogers said, “I want that right there.” R. 304, l. 15 – 19.

Rogers told Fredo to cut off Wilson’s car. R. 304, l. 20 – 25. Gooney and Rogers got out. R. 304, l. 20 – 25. Rogers approached Wilson’s car. R. 304, l. 20 – 25. Juwan said, “I guess she told him no and she was about to drive off, but I witnesses with my own two eyes him shoot into the car.” R. 304, l. 20 – 25. Rogers chased the car and continued to shoot. R. 306, l. 22 – 307, l. 9. Juwan did not know whether Gooney pointed a gun. R. 306, l. 22 – 307, l. 9.

Differing from Fredo, Juwan claimed Fredo turned around of his own free will. R. 308, l. 1 – 19. Also differing from Fredo, Juwan said all of them were in a gang. R. 314, l. 12 – 23. Juwan said he was not promised anything for testifying and only wanted to “give justice to Ms. Wilson.” R. 315, l. 8 – 22.

On cross-examination, Juwan admitted that during his most recent incarceration since the shooting he had spoken to Robert Askins. R. 336, l. 20 – 337, l. 23. He specifically denied that he told Askins that he shot and would take the blame in this case. R. 337, l. 3 – 7. The State rested after the conclusion of Juwan’s testimony. R. 337, l. 2 – 23.

The next morning, when court resumed, defense counsel informed Judge Russo that his next witness would be Victor Cooper (“Cooper”), a federal inmate. R. 342, l. 16 – 343, l. 3. While Cooper was housed at Effingham, he had the cell next to Robert “Pawn” Askins. R. 343, l. 4 – 344, l. 6. Cooper contacted the State and told them that he overheard Juwan tell Askins that he did the shooting and would take the blame. R. 343, l. 4 – 344, l. 6. Defense counsel informed the court that Cooper intended to invoke the Fifth Amendment if called to testify. R. 343, l. 4 – 344, l. 6. Defense counsel said he intended to enter Cooper’s statement as a prior inconsistent statement through extrinsic evidence through the officers that took his statement. R. 343, l. 4 – 344, l. 6.

Judge Russo said, “Okay. I think my reading—I think that’s—with nothing more than what you’ve shared, I think that’s a direct violation of the confrontation clause that they speak to under Crawford v. Washington.” R. 344, l. 7 – 345, l. 14. Judge Russo found that Cooper’s statement testimonial and that “unless the other side has had an opportunity to cross-examine or challenge the statement, then it’s a violation of the confrontation clause.” R. 343, l. 4 – 344, l. 6. The court refuted the notion that the State took the statement, distinguishing taking a statement from using it at trial. R. 343, l. 4 – 344, l. 6. “In this case, the witness, Mr. Cooper, and the statement he gave **would be against the State, and the State has the same rights as the defense has.**” R. 343, l. 4 – 344, l. 6. (emphasis added). The court ruled that if Cooper were unavailable because of the Fifth Amendment, it would then be a violation of Crawford and that the defense could not use extrinsic evidence of Cooper’s statement. R. 343, l. 4 – 344, l. 6.

Appellant called Cooper to the stand and he confirmed that he was housed at Effingham. R. 346, l. 24 – 347, l. 17. Cooper then said he “would like to remain silent” to appellant’s remaining questions about whether he met with the lead investigator, Mark Strickland and

whether he overheard any comments made by Juwan. R. 347, l. 18 – 348, l. 11. At this point, Judge Russo called the attorneys to the bench and forbade defense counsel from asking Cooper about the substance of the statement he overheard, ruling that meant “putting the statement in” and that it “just eviscerates Crawford.” R. 348, l. 12 – 351, l. 8. Appellant again asked that his objection be noted for the record. R. 348, l. 12 – 351, l. 8.

The trial judge erred in refusing to allow appellant to use Cooper’s statement because the confrontation clause does not apply to the State. The Sixth Amendment states, in relevant part, “In all criminal prosecutions, **the accused** shall enjoy the right to . . . be confronted with the witnesses against him.” U.S. Const. amend. VI (emphasis added). The Sixth Amendment, by its plain language, does not apply. The analysis of whether a statement is testimonial in Crawford does not apply.

The South Carolina Rules of Evidence, however, do apply, and allow admission as sought by appellant. Rule 613(b) provides that extrinsic evidence of a prior statement cannot be used unless the witness is first advised of its substance, the time and place it was made, to whom it was made, and given the opportunity to explain or deny the statement. Rule 613(b), SCRE. Appellant asked these foundation questions and was stopped by the trial judge. Rule 613(b) then states, “If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.” Rule 613(b), SCRE. Cooper asked to remain silent. He therefore did not admit making the prior statements and evidence concerning the statements was admissible.

It is also unclear whether Cooper could properly assert any Fifth Amendment privilege. The Fifth Amendment only protects individuals against incriminating statements. “That a party has invoked the privilege against self-incrimination, however, does not end the matter. Instead,

it is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer.” Grosshuesch v. Cramer, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008). The question of what Cooper overheard Juwan say in no way incriminated Cooper in any crime. Id. Nor, by context, does it seem that questions about what Cooper overheard were incriminating. Id.

Furthermore, by telling the police what he heard, Cooper waived any Fifth Amendment privilege he may have had. Defendants’ statements are routinely admitted through police officers even though defendants do not testify because they waived their Fifth Amendment privileges by speaking to the police. Cooper’s testimony is no different. The State would be free to cross-examine its lead investigator, Strickland, on the taking of Cooper’s statement just as defendants cross-examine police officers who testify regarding the fruits of their interrogations.

Had the jury heard that Juwan admitted to shooting Wilson, it would have cast grave doubt on the State’s key, final witness. The defense was able to show that Juwan was a “big homie” ranking member of a gang. His criminal record was long and violent. The jury could have believed that Juwan used his position in the gang to deflect blame for Wilson’s death from himself to Rogers. This Court should reverse.

2.

The trial court erred in refusing to allow the defense to use a video from the robbery of a convenience store that occurred on the same day as the murder in this case showing the robber as someone who resembled Juwan Smith after Smith told the police that appellant committed the robbery and shot at the clerk.

During the break between Juwan’s direct and cross-examination, trial counsel put the substance of a chambers conference on the record. R. 316, l. 8 – 327, l. 4. Juwan told Strickland in a written statement and on a body camera video that Rogers committed an armed robbery at a convenience store in Marion County the same evening and “tried to smoke the clerk.” R. 316, l. 8 – 327, l. 4. Video of the robbery excluded Rogers as the person who went into the store and fired the gun. R. 316, l. 8 – 327, l. 4. According to defense counsel, the robber in the video was “somebody wearing the same clothes with the same wristbands” as Juwan wore in the pictures from the Brew House as identified by Fredo. R. 316, l. 8 – 327, l. 4. Appellant argued that showing Juwan trying to falsely pin another crime on appellant would profoundly impeach Juwan’s credibility. R. 316, l. 8 – 327, l. 4.

Judge Russo ruled that appellant could offer evidence about Juwan’s claim and testimony from officers that Rogers was not the one who entered the convenience store and fired, but refused to allow the video showing the man resembling Juwan into evidence. R. 316, l. 8 – 327, l. 4. The court ruled that introducing the video would be asking the jury to “decide an armed robbery case based on a photograph” with no other evidence and it would be confusing. R. 316, l. 8 – 327, l. 4.

On cross-examination, Juwan admitted telling the police that Rogers robbed a gas station, but denied saying that Rogers tried to “[s]moke the clerk.” R. 334, l. 14 – 335, l. 7. Officer Strickland testified that Juwan told him that appellant told a girl that he “just hit a lick for \$40

and tried to smoke the clerk.” R. 364, l. 25 – 366, l. 8. While defense counsel mixes up the names during his questioning, the solicitor clarified that Juwan meant Rogers robbed the store. R. 367, l. 4 – 368, l. 14. The defense called Officer Bobby Bethea who investigated the armed robbery. R. 367, l. 4 – 368, l. 14. Officer Bethea testified that Rogers was excluded from the “the gun situation.” R. 367, l. 4 – 368, l. 14.

The trial court erred in only letting the jury hear half of the story regarding the robbery and Juwan’s attempt to pin it on Rogers. “Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE. This evidence is analytically similar to the evidence wrongfully excluded in State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001). In Jones, the defendant tried to cross-examine a witness about his prior dealings with the solicitor’s office to show his knowledge of the system and how it could be manipulated. Id. Just like in this case, the evidence in Jones supported the defense’s contention that the witness could have been the perpetrator of the crime. Id. Citing the defense’s right to cross-examine for bias, the Court reversed, citing Rule 608(c). Id.

Per defense counsel’s proffer, the video from the convenience store showed a man resembling Juwan robbing the store and firing a gun. The video was relevant to impeach Juwan’s credibility by showing him potentially committing a violent crime the same night as Wilson’s death and trying to pin it on Rogers. Had the jury seen this powerful evidence of Juwan’s bias and his willingness to falsely lay all blame on Rogers, the outcome of this case would have been different. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of May, 2021.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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.”

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