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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5863 (S.C. Ct. App. filed October 6, 2021)

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

PETITIONER

APPELLATE CASE NO. 2018-000989

APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Travis Latrell Lawrence, Appellant.

Appellate Case No. 2018-000989

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5863
Submitted May 3, 2021 – Filed October 6, 2021

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General William Frederick Schumacher, IV, both of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

HILL, J.: A jury convicted Travis Latrell Lawrence of attempted murder. He now appeals, raising two grounds. The first is that the trial court erred in ruling his co-defendant who was awaiting trial, Terrell Bennett, was protected by the right against self-incrimination from being forced to testify at Lawrence's trial. The second error Lawrence alleges is the admission of evidence that Bennett was the subject of a traffic stop three months before the attempted murder occurred. We see

no error in the trial court's handling of the self-incrimination issue, but it was error, albeit harmless, to admit the traffic stop evidence. We therefore affirm.

I. FACTS

The victim, Clayton Baxter, testified he was at home when Bennett called asking to borrow money. Baxter told Bennett to come over. Baxter considered Bennett—who called him "Unc"—to be his nephew. They had known each other over twenty years, as Baxter's sister raised Bennett. When Bennett arrived outside Baxter's house, he called Baxter and asked if anyone else was inside (Baxter's pregnant friend was asleep upstairs). When Baxter opened the door to let Bennett in, he noticed someone walking behind Bennett and asked, "Who's that behind you?" The answer was Lawrence, who emerged pointing a .38 revolver at Baxter. Baxter testified he knew Lawrence, having met him through Bennett some six or seven times. Lawrence told Baxter to "give me the money," Bennett closed the door, and the three moved towards the dining room table. Baxter, who is six foot seven inches tall and weighs three hundred pounds, noticed Lawrence lower the revolver. Baxter grabbed Lawrence and slammed him on the table. The fracas soon involved all three men, and at some point, the gun fired, sending a bullet towards the upstairs bedroom, fortunately not striking anyone. Lawrence then went to the kitchen and found a knife, which he used to slice Baxter across the face and stab him in the head, back, and shoulder. Lawrence and Bennett then departed, taking the knife, gun, and seventy dollars cash. Baxter called 911.

Baxter testified he told the responding officers Lawrence and Bennett had attacked him. While cross-examining Baxter, Lawrence tried to establish that Baxter initially identified Bennett as the stabber. Lawrence also insinuated that—due to Baxter's previous drug conviction and the presence of marijuana, scales, and cash in his home—the entire episode had erupted over a botched drug deal. Baxter denied naming Bennett as the stabber, contradicting some evidence from the officers' body cameras, including a clip played to the jury where Baxter stated, "'Rell [Terrell] did it" and "Trav" was with him and that Bennett drove a gold Cadillac. The semantic quibbling on cross continued over what the definition of "it" is, with Baxter clarifying that Lawrence was the one who stabbed him, Bennett had also held the gun on him at one point during the melee, and both Lawrence and Bennett were involved in the attack and robbery. Baxter also picked Lawrence out from a photo array police showed him shortly after the crime.

Over Lawrence's relevance objection, the trial court allowed the State to call a patrolman who testified he had pulled Bennett over for a "simple traffic stop" three months before the attack on Baxter, and Bennett was driving a gold Cadillac Deville.

In his case, Lawrence called one of the responding officers to testify his incident report reflected Baxter stated he was stabbed by "'Rell." Lawrence also subpoenaed Bennett to testify, but Bennett invoked his right against self-incrimination. After hearing *in camera* testimony *ex parte*, the trial court upheld Bennett's right, finding his proposed testimony incriminating. The jury found Lawrence guilty of attempted murder but not guilty of armed robbery and possession of a firearm by a person convicted of a crime of violence.

II. STANDARD OF REVIEW

As to the trial court's ruling on the self-incrimination issue, we have been unable to find any previous South Carolina case establishing a specific standard of review. Our default is the benchmark for criminal cases: we review only errors of law and are bound by the factual findings of the trial court unless they are clearly erroneous. *See State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 200 (2006). We may only reverse the trial court's evidentiary ruling admitting the traffic stop if it amounts to an abuse of discretion, meaning it is unsupported by the law or the record. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

III. DISCUSSION

A. Co-defendant Bennett's Right Against Self-incrimination

Lawrence claims the trial court erred in finding Bennett demonstrated an objectively reasonable fear of incrimination. We disagree, as the trial court's ruling was well supported by the record and correctly applied the law.

Lawrence subpoenaed Bennett to testify because he believed Bennett could help him prove Baxter initiated the fight and, therefore, Lawrence had acted in self-defense. At the second day of trial, after the State had presented Baxter and other witnesses, Bennett appeared and invoked his right against self-incrimination. The trial court conducted a hearing on the record *in camera* with only Bennett, his lawyer, and essential court personnel present. The trial court also took *in camera* testimony from a police investigator who was present on several occasions when Bennett was interviewed. The trial court ruled Bennett would face a "hazard of incrimination" if compelled to testify and, therefore, had the right not to testify.

The right against self-incrimination is enshrined in both the South Carolina and the United States Constitutions. *See* U.S. Const. amend. V; S.C. Const. Art I, §12. Our Supreme Court has assumed the analysis of our state constitutional right is in lockstep with federal precedent. *Grosshuesch v. Cramer*, 377 S.C. 12, 23 n.2, 659 S.E.2d 112, 118 n.2 (2008). The right, which is also ensured by statute, S.C. Code Ann. § 19-11-80 (2014), "protects the innocent as well as the guilty." *Ohio v. Reiner*, 532 U.S. 17, 18 (2001). It protects the innocent because an innocent witness' truthful answers may, in ambiguous circumstances and when combined with other evidence, furnish the government with incriminating proof "from the speaker's own mouth." *Id*. at 21; *see* Akhil Amar, *The Bill of Rights* 116 (1998) (Fifth Amendment protects "the innocent but inarticulate defendant, who might be made to look guilty if subject to crafty questions from a trained inquisitor"). It protects a person from being forced to testify against himself, a basic liberty that embodies many of our country's values and aspirations and is a monument to man's struggle to greater dignity and freedom. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see also State v. Thrift*, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). The framers placed the guarantee in the federal bill of rights, constitutionalizing a common law right that had developed in England over the centuries and was designed to shield citizens from the debasing horrors of forced confessions obtained by such infamous tyrannies as the Star Chamber and the Spanish Inquisition (which no one expected). *See generally Tucker*, 417 U.S. at 440; Leonard Levy, *Origins of the Fifth Amendment* (1968).

"[N]o rule, on the subject of evidence, is better established then that a witness shall not be bound to criminate himself. The only difficulty arises in the application of the rule." *State v. Edwards*, 2 Nott & McC. 13, 14, 11 S.C.L. 13, 14 (Const. Ct. App. S.C. 1819). When a criminal defendant calls a witness who invokes the right against self-incrimination, competing interests of justice collide. A criminal defendant's right to present evidence "has constitutional dimensions," drawing from the Sixth Amendment rights to confrontation and compulsory process. *United States v. Nixon*, 418 U.S. 683, 711 (1974); *Washington v. Texas*, 388 U.S. 14, 19 (1967). Layered upon this is the common law command that, in general, parties have a right to "every man's evidence." *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). When a witness stakes his constitutional right not to testify against these weighty interests, the trial court must strike the balance, at times a tricky task. The trial court must be mindful that the right against self-incrimination is to be broadly drawn, *see Hoffman v. United States*, 341 U.S. 479, 486 (1951), and the defendant's right to confrontation and to present evidence must yield to the opposing Fifth Amendment right as long as the witness has a legitimate fear of possible incrimination. *See, e.g.*, *United States v. Khan*, 728 F.2d 676, 678 (5th Cir. 1984).

The task is made more difficult by the lack of guidance as to the procedure the trial court should use. *See United States v. Dalton*, 918 F.3d 1117, 1130 (10th Cir. 2019) (noting no standard procedure exists). While a trial court cannot, except in exceptional circumstances, uphold a witness' blanket assertion of a self-incrimination claim, it likewise cannot interrogate the witness to an extent that would expose the very incriminating evidence the right is designed to safeguard. The proceeding, which the trial court here held on the record, *in camera*, and *ex parte*, should be designed to permit the witness or his lawyer to explain in general terms his legitimate fear of incrimination, after which the trial court may probe further, by examination if necessary, to determine if the witness' fear of prosecution is genuine, objectively reasonable, and meets the low threshold of *Hoffman* and *Grosshuesch*. We are not presented with a challenge to the procedure the trial court used but note *in camera* and *ex parte* self-incrimination hearings present many pros and cons. *See United States v. Melchor Moreno*, 536 F.2d 1042, 1047 n.7 (5th Cir. 1976) (cataloging advantages and disadvantages of *in camera, ex parte* inquiry of a witness' Fifth Amendment claim).

A witness' claim to his right against self-incrimination must be upheld unless it is "perfectly clear" the testimony sought has no possible tendency to incriminate. *Malloy v. Hogan*, 378 U.S. 1, 12 (1964). But a "witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. Instead, the court makes the call, and it must uphold the privilege as long as it is "evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id*. at 486–87. In making this assessment, the trial court considers the facts and peculiarities of the case and uses its wisdom and practical experience to imagine how the witness' own words might ensnare him in the teeth of a criminal law.

The right protects answers that are incriminating on their face, as well as any that might form a "link in the chain" needed to prosecute the witness for a crime. *Id*. at 486. Accordingly, the privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The hazard of prosecution need not be certain, nor even likely; the possibility of prosecution is enough. *First Union Nat'l Bank v. First Citizens Bank & Trust Co. of S.C.*, 346 S.C. 462, 467, 551 S.E.2d 301, 303 (Ct. App. 2001); *United States v. Johnson*, 488 F.2d 1206, 1209–10 (1st Cir. 1973). Because of the

fundamental importance of the right, a trial court may not be unduly skeptical of the witness' fear, for it may be the witness cannot explain his need for the right without surrendering it. *Hoffman*, 341 U.S. at 486–87. At the same time, the court is not bound to uphold the right if the witness' danger of incrimination is "imaginary and unsubstantial." *Reiner*, 532 U.S. at 21 (quoting *Mason v. United States*, 244 U.S. 362, 366 (1917)). In the past, many courts required assertion of the privilege on a "question by question" basis, but a more enlightened view is that when the hazard is openly apparent, the witness "need not be tested by the rote recitation of questions that have obvious answers of which the judge is already aware." *United States v. Stewart*, 907 F.3d 677, 685 (2d. Cir. 2018).

Though the trial court's examination of Bennett may have been too specific (and involved unnecessary inquiry of the police witness), we affirm the upholding of Bennett's right to not testify. The hazard of incrimination was openly apparent. Bennett was not facing just a risk of prosecution; he was already being prosecuted as Lawrence's indicted co-defendant. Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial. The trial court well understood the situation and also knew Bennett's proposed testimony was at odds with what the State was contending was the truth. *See United States v. Mares*, 402 F.3d 511, 514–15 (5th Cir. 2005) (affirming trial court's refusal to allow defendant to examine co-perpetrator outside presence of jury and rule on co-perpetrator's Fifth Amendment right on a question by question basis; by the time issue surfaced at trial, trial court had heard enough evidence of co-perpetrator's actions exposing him to robbery and other charges to understand the implications of the proposed testimony and the corresponding scope of co-perpetrator's Fifth Amendment privilege).

B. Admission of the Pre-trial Traffic Stop of Co-defendant Bennett

At trial, the State argued the traffic stop evidence was relevant because it corroborated Baxter's identification of Bennett. The trial court agreed, a decision we review for abuse of discretion. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

To be sure, Baxter testified Bennett drove a gold Cadillac to his house that day, and he told the responding officers Bennett drove a gold Cadillac. But Bennett's identity was not an issue at Lawrence's trial. Nor was the ownership of the gold Cadillac. The only identity of consequence was who stabbed Baxter, a fact the gold Cadillac evidence could not illuminate.

The State maintains the evidence was relevant because it bolstered Baxter's credibility. We must, however, take a rational approach to the impact of this evidence. To call its probative value weak would be a monstrous understatement.

No one disputes Baxter knew Bennett well. They had enjoyed a close relationship for over twenty years and considered each other family. Corroborating Baxter's knowledge of Bennett was not relevant or probative. On the other hand, testimony that Bennett was stopped by police shortly before the attack was at best a waste of time and, at worst, a deliberate attempt by the prosecution to paint Lawrence as someone who consorted with law breakers. We therefore conclude the traffic stop evidence should not have been admitted as its probative value was dwarfed by the dangers of unfair prejudice to Lawrence, confusion of the issues, misleading the jury, and waste of time. Rule 403, SCRE. Although we have little doubt the State presented the traffic stop simply for its spillover prejudicial effect, the evidence was so feckless it is an easy call for us to deem it harmless. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (error is harmless when it appears beyond a reasonable doubt that it did not contribute to the verdict).

We decide this case without oral argument pursuant to Rule 215, SCACR.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

APPELLANT

APPELLATE CASE NO. 2018-000989

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

Opinion No. 5863

PETITION FOR REHEARING

On October 6, 2021, this Court affirmed Appellant's conviction for attempted murder. State v. Lawrence, Op. No. 5863 (S.C. Ct. App. filed Oct. 6, 2021). This Court affirmed the trial court's finding that Terrell Bennett, who was charged along with Appellant, but was not on trial, could exercise his Fifth Amendment right against self-incrimination even where the proposed testimony would not expose him to criminal sanction. Pursuant to Rule 221(a), SCACR,

Appellant respectfully seeks rehearing of this ruling based on the significant facts and legal doctrines overlooked or misapprehended by this Court in arriving at this conclusion.[1]

The solicitor met with Bennett twice prior to Appellant's trial. R. 148, ll. 1-10; R. 152, l. 25 – R. 153, l. 12. The meetings were not memorialized. R. 147, ll. 19-21. While the first meeting was considered unproductive by the state's investigator, the second meeting bore greater fruit. R. 148, ll. 6-21; R. 149, l. 4 – R. 150, l. 20. When defense counsel learned about these meetings from Bennett's counsel, defense counsel contacted the solicitor. R. 153, l. 23 – R. 154, l. 16; R. 156, ll. 6-8. The solicitor informed defense counsel that he had not taken any notes during the meetings. R. 154, ll. 18-21.

Later, after learning from Bennett's counsel that Eric Melendez, the solicitor's investigator, was present for the meetings, defense counsel contacted the investigator. R. 146, ll. 20-24; R. 155, ll. 3-8. What occurred during this contact was disputed as demonstrated by defense counsel's questioning of the investigator during an *in camera* hearing. Most importantly, the investigator denied telling defense counsel that Bennett stated that the alleged victim, Clayton Baxter, rushed or lunged at Appellant. R. 151, ll. 5-17. The investigator also did not recall telling defense counsel that Bennett's statement indicated Appellant acted in self-defense. R. 151, l. 22 – R. 152, l. 16.

Appellant wanted to call Bennett as a witness. R. 127, ll. 7-9. However, Bennett indicated he wanted to invoke his Fifth Amendment right to silence. R. 128, ll. 4-8; R. 135, ll. 17-19. Therefore, Judge Murphy held an *ex parte*, *in camera* hearing to determine whether Bennett could invoke his right to silence; in essence, the judge inquired whether the proposed

[1] Appellant does not seek rehearing regarding the second issue concerning the erroneous admission into evidence that Terrell Bennett was stopped by the police three months before the alleged incident for which Appellant stood trial.

testimony would be incriminating of Bennett. R. 127, ll. 18-25; R. 129, ll. 1-6; R. 135, ll. 23-24; R. 136, ll. 9-12.

Outside the presence of counsel, Judge Murphy personally questioned Bennett. Bennett explained that he spoke with the solicitor shortly before Appellant's case was called to trial. R. 136, l. 23 – R. 139, l. 17. The judge asked Bennett to tell her what he told the solicitor during that meeting. R. 139, ll. 18-21. Bennett explained that he told the solicitor "the truth of what happened." R. 139, ll. 22-25. Bennett and Appellant went to Baxter's home to buy marijuana. R. 140, ll. 1-2. When the pair arrived, Baxter attacked them. R. 139, l. 25 – R. 140, l. 1. Bennett believed Appellant and Baxter had a "history" because as soon as Bennett and Appellant went into Baxter's house, Baxter "attacked [Appellant] first." R. 140, ll. 2-9. As soon as Baxter saw Appellant, "his whole demeanor just flip[ped] out of nowhere like he was frustrated." R. 140, ll. 17-20.

Bennett's counsel admitted Bennett's testimony would "provide or bolster" a self-defense case for Appellant. R. 143, ll. 6-8. Further, she admitted that she would "probably call" Bennett to testify in his defense at his trial if the state ever called his charges to trial. R. 145, ll. 2-8. However, she argued Bennett would be asked to give information "that could potentially be used against him" if he were to testify on behalf of Appellant. R. 143, ll. 8-10.

Judge Murphy acknowledged that Bennett's testimony showed his actions and Appellant's actions were in self-defense. R. 141, ll. 15-20. Nevertheless, she ruled that Bennett's statement that he was going to Baxter's home to buy marijuana would implicate him in a crime. R. 141, ll. 1-5. She also ruled that Bennett was "putting [himself] at the scene of this alleged crime," implying that such was incriminating of Bennett. R. 141, ll. 11-14. Thus, Judge Murphy found Bennett's answers to the questions *she* posed "would be indicative that would

establish a hazard of incrimination for him." R. 159, ll. 2-5. She further determined "his silence [was] certainly justified in this matter" because "if he were allowed to testify, that he would incriminate himself." R. 159, ll. 5-8. She concluded that even if "those specific single questions may not be overtly incriminating" they "would be incriminating through any further confessional proof." R. 159, ll. 8-11. Thus, she permitted Bennett to assert his Fifth Amendment right to silence *in toto* and prohibited Appellant from calling him as a witness. R. 159, ll. 11-13.

This Court affirmed Judge Murphy's determination. With no details, this Court concluded "[t]he hazard of incrimination was openly apparent." State v. Lawrence, Op. No. 5863 (S.C. Ct. App. filed Oct. 6, 2021). Further, this Court held "Bennett was not facing just a risk of prosecution; he was already being prosecuted as [Appellant]'s indicted co-defendant." Id. Boldly, this Court declared, "Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial." Id. Although this Court recognized that "Bennett's proposed testimony was at odds with what the State was contending was the truth," which implicitly acknowledged that Bennett's testimony would have supported Appellant's claim of self-defense, this Court appeared to reason that this fact supported a finding that Bennett's testimony was self-incriminating. This is simply not the test.

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[2] "The essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406 U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and

[2] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12.

aspirations, and marks an important advance in the development of our liberty"). The privilege is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his

claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to the South Carolina Supreme Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118. "[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119.

This Court affirmed Judge Murphy's finding that Bennett could invoke his right against self-incrimination and refuse to testify because his proposed testimony (1) placed him at the scene of a crime and (2) was an admission that he was going to buy marijuana. While this Court's opinion provided no information regarding the proposed testimony or explained what portions of the proposed testimony would be incriminating, it must be assumed this Court agreed with the trial judge that these two areas posed the risk of self-incrimination for Bennett. Petitioner respectfully requests this Court rehear this matter because Bennett's proposed

testimony was not self-incriminating as demonstrated when his actual proposed testimony is examined.

Presence at the scene of a crime

Bennett admitted to being present when Appellant acted in self-defense against Baxter's unprovoked attack. As Bennett explained, he *and* Appellant acted in self-defense. The only crime committed, according to Bennett's proposed testimony, was Baxter's assault of Appellant and Bennett. Being the victim of a crime is not incriminating of the victim. Furthermore, merely being present at the scene of a crime is not incriminating, even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). The trial judge – and this Court – erred in finding Bennett's mere presence at the scene of a crime, especially if the only crime was the one for which Bennett was the victim, was somehow incriminating of Bennett.

Attempting to purchase marijuana

Likewise, the conclusion that Bennett's testimony that he went to Baxter's residence to purchase marijuana exposed him to criminal liability was legal error. Bennett did not admit to buying or possessing marijuana; thus, the only consideration left is whether his testimony incriminating him in attempting to purchase marijuana in violation of section 44-53-370 of the South Carolina Code. Under South Carolina law, it is unlawful for a person to attempt to purchase a controlled substance. S.C. Code Ann. § 44-53-370(a)(1).

"Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." State v.

Reid, 383 S.C. 285, 292, 679 S.E.2d 194, 198 (Ct. App. 2009) (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "'In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.'" Id. (quoting State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). Additionally, "the defendant's specific intent" must be "accompanied by some overt act, beyond mere preparation, in furtherance of the intent." Id.

In Reid, this Court discussed how "[c]ourts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage." Id. at 293, 679 S.E.2d at 198. Further, "[c]ases in South Carolina do not clearly establish any absolute guiding test for our trial courts to employ in resolution of this issue." Id. After discussing other tests used by other courts, this Court looked to *dicta* from the South Carolina Supreme Court in State v. Quick, 199 S.C. 256, 259-260, 19 S.E.2d 101, 102-103 (1942). Id. at 296, 679 S.E.2d at 199. This Court relied upon the Supreme Court's notation that "'preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.'" Id. (quoting Quick, 199 S.C. at 260, 19 S.E.2d at 103). Further, the Supreme Court, as explained by this Court, "went on to articulate 'the act' is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation." Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102). Finally, this Court noted that according to the Supreme Court, "'the act need not be the last proximate step leading to the consummation of the offense.'" Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102).

According to this Court, "no definite rule as to what constitutes an overt act for attempt purposes can safely be laid down and each case is dependent upon its particular facts and the inferences which the jury may reasonably draw therefrom." Id. at 298, 679 S.E.2d at 200. The only self-incriminating evidence gained from Bennett's testimony was that he went to Baxter's house to buy marijuana. There was no evidence from his testimony that he acted in any way in furtherance of that act. At most, his testimony indicated that his purpose in going to Baxter's house was to purchase marijuana, but that is far cry from an overt act. Perhaps going to Baxter's home could be preparation as it may be "arranging the means or measures necessary" to purchase the marijuana, but it was not a direct movement toward the commission of a crime. In light of Baxter's testimony that he did not sell drugs and the officer's testimony that less than one ounce of marijuana was found in Baxter's residence, there seems to have been no pre-arrangement made by Bennett in hopes of buying marijuana from Baxter – there was none to buy and he did not sell it.

This Court erred in affirming the trial judge's finding that Bennett's proposed testimony would expose him to criminal liability, and therefore, allowing him to invoke his right not to incriminate himself. Being merely present at the scene of a crime is not a crime, and there was no evidence of an overt act for an attempt to purchase marijuana. Quite simply, the judge erred, and Appellant was denied the opportunity to present testimony from an eyewitness that Appellant acted in self-defense. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing to address the specific facts presented in this case, particularly in light of this Court's opinion's omission of any discussion of Bennett's proposed testimony, and the application of the controlling case law to those facts.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 21st day of October, 2021.

RECEIVED
Oct 21 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

APPELLANT

APPELLATE CASE NO. 2018-000989

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) which is bschumacher@scag.gov; and Travis Latrell Lawrence, #342217, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of October, 2021.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2018-000989

THE STATE, ...RESPONDENT,

v.

TRAVIS LATRELL LAWRENCE, ...APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On October 6, 2021, this Court issued a published opinion in which it affirmed Appellant's convictions for attempted murder. State v. Lawrence, Op. No. 5863 (S.C. Ct. App. Filed October 6, 2021). While it affirmed Appellant's conviction, this Court found the trial court improperly admitted evidence pertaining to the codefendant's ownership of a gold Cadillac through the testimony of an officer who stated he pulled over the codefendant in that vehicle during a routine traffic stop weeks before the charged crime took place. Finding error, the majority's opinion concluded the probative value of such evidence weak and "not relative or probative." Furthermore, and even more troublingly, the majority opinion assumed the State had sinister intentions in admitting the evidence.

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent, the State, respectfully petitions for rehearing because the Court's opinion is incorrect on three

critical points: (1) it failed to defer to the trial judge's discretion on its Rule 403, SCRE analysis and instead improperly relies upon its own de novo view of the evidence in reaching its conclusion; (2) it failed to recognize admission of the traffic stop was proper evidence corroborating the Victim's testimony and identification of Appellant and codefendant as his attackers; and (3) it presupposed that the State sought to admit evidence of the traffic stop for what the characterizes as "spillover prejudicial effect" is incorrect, especially given the State's decision to, without prompting, introduce the incident as a "simple traffic stop" and without any reference to the purpose or reasons for the stop.

Failure to Comply with the Highly Deferential Abuse of Discretion Standard

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added). When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion [.]" State v. Collins, 398 S.C. 197, 209, 727 S.E.2d 751, 757 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented

by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 594. See, e.g., Dickerson, 395 S.C. at 116, 716 S.E.2d at 903.

In this case, the Court's analysis afforded no deference to the trial judge's analysis comparing the probative value and prejudicial effect of the testimony regarding the gold Cadillac. By doing so, this Court failed to correctly apply the standard that must be applied to such issues on appellate review. Therefore, this Court should grant rehearing and defer to the trial judge's ruling and defer to applicable standard of review under the applicable law. If it does so, the Court will correctly find the trial judge's decision was not an abuse of discretion.

The Potential for Unfair Prejudice from Admitting the Evidence of the Traffic Stop Did Not Substantially Outweigh its Probative Value

"Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted). Such evidence includes identifying information about a defendant. See State v. Day, 341 S.C. 410, 422, 535 S.E.2d 431, 437 (2000) ("Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant.").

In Appellant's case, the trial judge did not abuse his broad discretion by admitting the limited testimony regarding the traffic stop because the State omitted any reference for what

Bennett was pulled over. Deputy Williamson referred to his interaction with Bennett as a "simple traffic stop," a common occurrence for citizens nationwide.[1] The trial judge, noting it was a "stretch" to believe a solo traffic stop, which could have an extremely innocent explanation for its occurrence, would lead the jury to assume Bennett was associated with serious criminal behavior prior to the attack on Victim. Notably, our courts have found far more offensive material, such as autopsy photographs, are more probative than prejudicial when used to corroborate a witness's testimony. See State v. Jarrell, 350 S.C. 90, 106-107, 564 S.E.2d 362, 371 (Ct. App. 2002) (finding the trial judge did not abuse his discretion by admitting autopsy photographs because, even though the photographs were "graphic," they corroborated testimony presented during trial by depicting the victim's injuries and by showing the victim's condition); see also State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); see generally State v. Allen, 839 P.2d 291, 302 (Utah 1992) ("Photographs of victims are always sobering and graphic, and indeed, they fit within the adage 'a picture speaks a thousand words.' ").

While the potential for prejudice was minimal, the evidence possessed value to the State's case: establishing Victim's truthfulness and credibility was critical for the State because Victim's testimony and identification of Appellant and Codefendant were the crux of the State's

[1] For example, the U.S. Department of Justice's data indicates that in 2018, U.S. citizens reported 33,250,600 interactions with police concerning traffic-related contacts. Of those, 18,666,000 people, or about 8.1% of the U.S. population 16 or older that year reported being stopped by police as a driver of a vehicle, like Appellant was in this case. Erika Harrell & Elizabeth Davis, Bureau of Justice Statistics, NCJ 255730, Contacts Between Police and the Public, 2018 (2020), p.4.

case. Trial counsel focused his defense of Appellant by impugning the credibility and character of Victim, putting into the record Victim's prior drug offenses and the fact hundreds of dollars were found by officers in his home. As early as his opening statement, trial counsel called Victim's recollection of the event into question, calling him an "alleged victim" and encouraging the jury to question whether Appellant was even at Victim's house on the day of the crime. Counsel did his best to challenge Victim's testimony and his recollection of the attack, questioning him about his history of marijuana usage and his prior conviction for possession of cocaine. Trial counsel also challenged Victim by cross-examining him about statements he believed were inconsistent with Victim's initial description of events to police and that hundreds of dollars in cash were not stolen by his attackers. During his closing, trial counsel continued to assail Victim's credibility and recollection of the events, emphasizing that if the jury did not believe Victim it should find Appellant not guilty because Victim's testimony was the only evidence of Appellant's guilt. Trial counsel noted it seemed ridiculous to believe Bennett would rob or attack someone who knew him so well. (R.pp.6–9; 50–52; 71–72; 202–09). Thus, contrary to the majority's belief, trial counsel's strategy focused on discrediting Victim and *the lack of evidence corroborating his story*. Given trial counsel's emphasis on the value of corroborating evidence, along with its historical importance[2], it was proper for the State to

[2] Notably, from a biblical standpoint, the concept of an absolute need for corroboration before a witness in a criminal case is to be believed could very well be familiar to many of South Carolina's citizens who are selected to serve on juries. See Deuteronomy 19:10 (New International Version) ("One witness is not enough to convict anyone accused of any crime or offense they may have committed. A matter must be established by the testimony of two or three witnesses."); see generally State v. Kelly, 331 S.C. 132, 140, 502 S.E.2d 99, 103 (1998) ("Two other members of the jury indicated they were reading their Bibles on their own."). Furthermore, from the standpoint of South Carolina law, the uncorroborated testimony of a witness has *not* always been legally sufficient to sustain a conviction throughout our state's history. See S.C. Code of 1912 § 389 (Crim. Code) ("[N]o conviction shall be had [for the offense of seduction under promise of marriage] on the uncorroborated testimony of the woman upon whom the

provide evidence corroborating Victim's account of the attack. Additionally, if the majority truly believes evidence of the traffic stop was so "feckless" it could not have prejudiced Appellant, it is illogical to find the probative value of the evidence, when used to corroborate Victim's testimony, was substantially outweighed by the miniscule prejudice to Appellant's case.

The Majority's Characterization of the State's Motives

Notably, the majority has the luxury of reviewing the entirety of the State's evidence and concluding, with the gift of hindsight, that evidence supporting Victim's identification of Bennett and Appellant was ultimately unimportant to the State's case. Not only does the majority's opinion fail to consider the points raised above, but the majority's opinion improperly impugns the State's motives and assumes a malicious motive for introducing evidence of the traffic stop. There is no evidence of any improper motive in the record and the State, from the moment it sought to introduce the traffic stop, removed all reference to the specifics of the traffic stop by its own volition. The majority's improper and unfounded allegations of impropriety stem solely from its own assumptions and conjecture.

Weighed against the probative value of the Williamson's testimony, which corroborated some aspects of the Victim's testimony, the trial judge acted within his discretion when finding the potential prejudicial effect of the evidence did not *substantially* outweigh its probative value.

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seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of the alleged offense, lewd and unchaste[.]"); see also State v. Sharpe, 138 S.C. 58, __, 135 S.E. 635, 640 (1926) (rejecting Sharpe's contention following his conviction for an abortion-related offense he was entitled to a new trial due to the fact the testimony of the "complaining witness" was not corroborated because "there was sufficient corroboration in this case of the complainant's testimony"); State v. Teal, 108 S.C. 455, __, 95 S.E. 69, 72 (1918) (instructing a seduction case should not even be submitted to the jury if the victim's testimony is not corroborated); State v. Whitaker, 103 S.C. 210, __, 87 S.E. 1001, 1001 (1916) (evaluating on appeal the question of "whether there was any testimony corroborating the testimony of the prosecutrix").

Accordingly, the majority opinion incorrectly found evidence pertaining to the traffic stop was improperly admitted at trial.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court to reverse its finding that admission of evidence regarding codefendant Bennett's traffic stop was improper.

Respectfully submitted,

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October 21, 2021

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
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Appellate Case No. 2018-000989

THE STATE, ...RESPONDENT,

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TRAVIS LATRELL LAWRENCE, ...APPELLANT.

PROOF OF SERVICE

I, Leigh Ann Stone, certify that I have served the within Petition for Rehearing on Appellant via electronic email to the address listed by the attorney in AIS:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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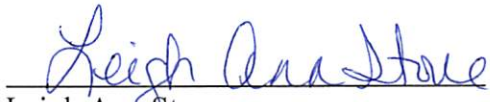
I further certify that all parties required by Rule to be served have been served this 21st day of October, 2020.



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The South Carolina Court of Appeals

The State, Respondent,

v.

Travis Latrell Lawrence, Appellant.

Appellate Case No. 2018-000989

ORDER

After careful consideration of Appellant's and Respondent's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

J.

J.

J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
William M. Blitch, Jr., Esquire
David Michael Pascoe, Jr., Esquire
The Honorable Maite Murphy

FILED
Nov 18 2021