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Jan 04 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

Honorable Robert J. Bonds, sitting with
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAVAR ANTHONY SMITH,

APPELLANT.

APPELLATE CASE NO. 2021-000431

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting portions of police body camera footage on which a crowd can be heard shouting that appellant shot the decedent in violation of the rules prohibiting hearsay, impugning a defendant's character, and Rule 403, SCRE?

STATEMENT OF THE CASE

On May 9, 2018, a Marion County grand jury indicted appellant for murder and a weapons charge. R. 761. On April 12, 2021, appellant was tried before the Honorable Robert J. Bonds sitting with the Honorable D. Craig Brown. R. 1. Ryan White and Todd Tucker represented the State. R. 1. Chaquez McCall and Robert Stucks represented appellant. R. 1. The jury convicted appellant. R. 702, l. 12 – 23. Judge Bonds sentenced appellant to forty years' imprisonment on the murder charge and a consecutive five years' imprisonment on the weapons charge. R. 717, l. 15 – 25. This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

ARGUMENT

The trial court erred in admitting portions of police body camera footage on which a crowd can be heard shouting that appellant shot the decedent in violation of the rules prohibiting hearsay, impugning a defendant's character, and Rule 403, SCRE.

Police body cameras were used as a conduit for inadmissible hearsay statements from the decedent's neighbors that appellant committed this crime. State's Ex. 2, 3. A police officer arrives on the scene of a shooting and asks, "What was the guy wearing?" and "Who was it?" State's Ex. 2. Multiple people respond with appellant's name and nickname, "Lavar Smith" and "Eli Smith." State's Ex. 2. The State presented no witnesses at trial who saw the shooting.

The decedent, Jahmai "JJ" Ray, was a marijuana dealer. R. 209, l. 3 – 210, l. 14. Ray's friend, Davon Furnace ("Furnace"), whose nickname was "Thug," testified that Ray kept potentially \$15,000.00 in cash in a black duffel bag at his house. R. 217, l. 19 – 218, l. 7. Shermain Ceo ("Ceo"), who can be seen leaning over Ray on the body camera footage, also knew that Ray sold drugs, was successful, and that he "looked out for the community," giving people things they needed. R. 369, l. 7 – 370, l. 2. Jacobi Mills, a friend of Ray's, and Taylor Davis, Ray's girlfriend, also knew about the money in the black bag. R. 380, l. 1 – 15. R. 388, l. 9 – 23. Ray died from a single gunshot wound to the torso. R. 434, l. 20 – 438, l. 25.

Ray's neighbor, Patricia Gerald ("Gerald"), testified that she heard several loud noises in the early morning hours of December 23, 2017. R. 309, l. 12 – 310, l. 11. She went to her front door to get medicine out of her car and heard "something like a gunshot." R. 310, l. 12 – 17. Gerald went on her porch and saw appellant "running away from the house." R. 310, l. 12 – 17. Gerald had known appellant for approximately twenty years and knew appellant's nickname was "Eli." R. 311, l. 6 – 13.

Gerald is on the police body camera footage. State's Ex. 2, 3. She tells the police that she saw a person running away, but could not tell who it was. State's Ex. 2, 3. R. 311, l. 20 – 25. The State attempted to explain away this contemporaneous failure to identify appellant with Gerald's testimony that she was afraid to tell the police what she knew based on the advice of her children. R. 312, l. 1 – 313, l. 17. R. 367, l. 22 – 368, l. 6. Gerald's claim of fear was impeached by defense counsel on cross-examination with her social media posts saying she wished she had gotten up sooner and another post three days after the shooting saying she did not care who saw her posts and they could kiss her ass. R. 333, l. 17 – 338, l. 18.

No statement from appellant was admitted at trial. The lead investigator admitted the police had no DNA evidence, no gun, and no fingerprints. R. 555, l. 20 – 25. In addition to cell phone records, the State's case rested primarily on the trial judge's decision to admit multiple hearsay statements by Ray as dying declarations. R. 128, l. 3 – 130, l. 19. Furnace, Ceo, and two police officers testified Ray told them appellant shot him. R. 213, l. 2 – 8. R. 356, l. 11 – 17. R. 275, l. 22 – 276, l. 10. R. 297, l. 5 – 21. See Rule 804(b)(2), SCRE. See also State v. Brown, 421 S.C. 337, 343-46, 806 S.E.2d 724, 728-29 (Ct. App. 2017) (holding statements were improperly admitted as dying declarations because the declarant was not under a belief that his death was imminent when the statements were made).

Ray's statements to the police officers were recorded on the body camera footage. State's Ex. 2, 3. Appellant moved to suppress the body camera footage in a written motion and extensive argument was heard by the trial court. R. 130; R. 759. R. 130, l. 23 – 144, l. 12. R. 241, l. 7 – 252, l. 23. Appellant argued the body camera footage was inadmissible hearsay because multiple people, none of whom saw the shooting, said that appellant shot Ray. R. 759. Appellant also argued that the crowd's statements on the footage impugned appellant's character

under Rule 404(b), SCRE, and were vastly more unfairly prejudicial than probative under Rule 403, SCRE. R. 759. The trial judge ruled that redacted versions of the videos would be admitted, which included the crowd stating appellant was the shooter at the beginning of the video. R. 130, l. 23 – 144, l. 12. R. 241, l. 7 – 252, l. 23. R. 279, l. 23 – 283, l. 22.

The trial court erred in admitting the body camera footage of the community's opinion that appellant was the shooter. As one of the police officer witnesses stated, "As the body camera shows, there's—everybody was talking. It was very emotional." R. 283, l. 18 – 22. As appellant argued in his motion, the crowd's quick statements that appellant was the shooter even though none of them witnessed the crime implied they knew of appellant having a criminal record or committing other prior bad acts. R. 759. The admission of the crowd's hearsay statements violated Rule 404, SCRE's proscription of evidence of a defendant's bad character. Rule 404, SCRE.

The most analogous case showing this evidence was inadmissible is State v. Brewer, 411 S.C. 401, 768, S.E.2d 656 (2015). The Brewer Court held that admission of a recorded interrogation of the defendant was error because it contained multiple hearsay statements. Brewer at 406-04, 768 S.E.2d at 658-59. The police repeatedly quoted (and misquoted) purported witnesses and lied to the defendant during the interview. Id. Brewer stands for the proposition that recording an event on video does not cure hearsay errors.

The admission of the video also violated Rule 403, SCRE. The State's primary purpose in using the video was to show Ray's statements that appellant shot him. But four witnesses, including two police officers, testified about Ray's statements under the dying declaration exception. The State's need for the video was minimal and its probative value was small. The unfair prejudice of the jury seeing how quickly the crowd believed appellant was capable of

murder was extremely high. It outweighed the limited probative (and needlessly cumulative) value of the video showing Ray's statements. But for the erroneous admission of these videos, the result of this trial likely would have been different. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lavar Anthony Smith states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before the Honorable Robert J. Bonds, sitting with the Honorable D. Craig Brown, Circuit Court Judge which was held on April 12 - 16, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Lavar Anthony Smith.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2022.

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

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

- (1) Trial Transcript dated April 12 – 16, 2021;
- (2) Court’s Exhibit No. 2;
- (3) Court’s Exhibit No. 3;
- (4) Motion to Suppress Video or in the Alternative Redact Video;
- (5) State’s Exhibit Nos. 2 and 3 (police body cam videos – to be transported);
- (6) Indictments; and
- (7) Sentence Sheets.

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

s/David Alexander
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 4th day of January, 2022.