STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BYRON LABRON RIVERS,

APPELLANT

APPELLATE CASE NO 2019-001253

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that defense counsel opened the door to allowing a detective to testify about the results of a gunshot residue test from the co-defendant in violation of Appellant's right to confront witnesses?

STATEMENT OF THE CASE

In April of 2017, the Charleston County Grand Jury indicted Appellant, Byron Labron Rivers, for the murder of Kirby Fyall, the attempted murder of Antonio Fyall and Johnell Watson, armed robbery of Sanquan Fyall and possession of a weapon during the commission of a violent crime, indictments #2017-GS-10-2174, 2107, 2106, 1891, 2108.[1] (R. pp. 593-600). In April of 2019, the Charleston County Grand Jury indicted Appellant for five additional counts of armed robbery and burglary first degree, indictments #2019-GS-10-1893, 1894, 1890, 1899 1889 and 2143.[2] (R. pp. 601-608). On June 10, 2019, Appellant proceeded to jury trial before the Honorable Jennifer B. McCoy. Benjamin Mack and Teresa Norris represented Appellant at trial. Christopher Lietzow and David Osborne prosecuted the case. The jury found Appellant not guilty of three counts of armed robbery but guilty of the other charges. Judge McCoy sentenced Appellant to life in prison for murder, thirty (30) years concurrent for two counts of attempted murder, thirty (30) years concurrent for three counts of armed robbery, life in prison for burglary first degree, and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on July 25, 2019. This appeal follows.

[1] It is unclear who testified before the grand jury because the witness listed on the indictment is the North Charleston Police Department.

[2] Again, it is unclear who testified before the grand jury because the witness listed on the indictment is the North Charleston Police Department.

STANDARD OF REVIEW

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the [circuit] court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.' State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citation omitted)." State v. McCray, 413 S.C. 76, 90, 773 S.E.2d 914, 921 (Ct. App. 2015).

FACTS

On the evening of July 15, 2016, Sanquan "Mammus" Fyall, his brother, Kirby Fyall, his cousins, Antonio Fyall, Theodore Fyall and Johnell Watson, Johnell's girlfriend, Eleanor Delesline, and their friend, Fredrick "Cam" Smalls were gathered at Sanquan's apartment in the Chicora Cherokee neighborhood in North Charleston also known as "the Makin." In his opening statement to the jury the prosecutor called the neighborhood "one of the most violent neighborhoods in North Charleston." (R. p. 55, lines 4-5). Theodore testified that they were playing video games and Antonio admitted that they were smoking marijuana. (R. p. 124, lines 3-8; p. 287, lines 1-4). Theodore testified that there was a knock on the door and when Antonio answered the door two guys rushed in with guns, ordered everyone face down on the ground and started ransacking the house. (R. p. 124, lines 16-19). Theodore also testified that the men made everyone take their pants off. (R. p. 124, line 20).

Antonio testified that he answered the knock on the door because he thought it was a guy named Percy returning from the store. (R. p. 288, lines 6-17). When the two guys rushed in Antonio knew "something went off" but he did not realize he had been shot. (R. p. 287, lines 9-16). Antonio ran to the kitchen, kicked out the kitchen window and ran around the corner to Antonio Cumming's house to get help. (R. p. 287, line 16 – p. 288, line 1; p. 289, lines 8-15; p. 290, lines 6-17). The others remained in the apartment. Fredrick Smalls testified that Appellant stood by the door and told the other guy to search through the house. (R. p. 110, lines 2-9). Theodore Fyall, however, testified that, "Stacy [the co-defendant] was the guy that had us at gunpoint and the other individual was ransacking the apartment I guess, or whatever." (R. p. 125, lines 9-11).

Smalls testified at trial, "So the young man over there with the dreads, his hair right there with the white shirt on, told the other guy let's lift the couch up. And when he lift the couch up that's when Kirby jump up from behind the couch and pushed the couch on him and that's when he started shooting and he killed my home boy." (R. p. 109, lines 10-15). Kirby Fyall was fatally shot. According to Smalls both men had guns but the other guy did not fire his gun. (R. p. 110, lines 10-12). Smalls testified that Johnell Watson was also shot. (R. p. 110, lines 22-25). Johnell Watson survived but did not testify at trial. Sanquan Fyall, who lived at the apartment and was present at the time of the incident, also did not testify at trial.

Antonio Cummings testified that Antonio Fyall came to his door bloody stating that they were robbing Sanquan "Mammus" Fyall. (R. p. 89, lines 19-25). Cummings testified that he and Percy went to Sanquan's apartment and Percy knocked on the door. (R. p. 90, lines 9-16). As soon as Percy knocked on the door they heard gunshots. (R. p. 90, lines 16-19). Cummings testified that, "The guy came out the door with his friend on his back and a pillow case in one hand and a gun in the other hand. And Mammus [phonetic] Sanquan Fyall he was behind him and as soon as he seen me he started screaming my name and was like Tony, Tony he killed Kirb; don't let him get away." (R. p. 90, lines 20-25). According to Cummings he prevented the two men from getting into a white Chrysler. (R. p. 91, line 7 – p. 92, lines 1-20). Cummings testified that the Chrysler left upon hearing sirens and Cummings continued to follow the two men on foot. (R. p. 92, lines 19-21). Cummings saw the man who was carrying the other man put the man down on the ground, put the pillow case down, throw the gun and run. (R. p. 92, line 22 – p. 93, lines 1-15). Cummings chased him, hit him with the baseball bat and kept him until the police arrived. (R. p. 93, lines 16-22).

Officer Sara Fortier with the North Charleston Police Department was one of the first officers to arrive. She saw many people in the street and the Appellant laying on the ground. (R. p. 67, lines 20-25). Officer Fortier also observed Cummings chasing Stacy Green (the co-defendant) and she pursued them on foot. (R. p. 68, line 2 – p. 69, lines 1-3). When she caught up with Cummings and Green they were both in a ditch. (R. p. 72, lines 19-25). Officer Fortier arrested Green and another officer searched him. (R. p. 73, lines 17-20). Green had Theodore Fyall's wallet and a TWIC card belonging to Fredrick Smalls. (R. p. 73, line 21 – p. 74, lines 1-11). Officer Fortier testified that Green was wearing a glove on his right hand. (R. p. 79, lines 2-10).

Officer James Greenawalt with the North Charleston Police Department was also one of the first officers to arrive. He testified that the scene was chaotic and he saw Appellant on the ground. (R. p. 186, lines 14-24). Officer Greenwalt found a Walther firearm on the ground by a trash can about eight yards from Appellant. (R. p. 187, lines 12-22). The Walther firearm, State's Exhibit #126, was a 40 caliber Smith and Wesson. (R. p. 428, line 2 – p. 429, lines 1-8). The pillow case that Antonio Cummings claimed to have seen dropped with the gun was not recovered that night. Another North Charleston Police Officer, Kyle Decedue, testified that he saw a black knit glove on Appellant's right hand. (R. p. 198, lines 2-24). EMS treated Appellant at the scene, removed his pants and discovered that he had a gunshot wound to the top of both thighs, a fractured femur and an unstable pelvis. (R. p. 313, lines 18-22).

Crime scene technician Anita Moore collected the 40 caliber Smith and Wesson and Appellant's pants from the scene. (R. p. 229, line 25 – pp. 230 -235). Moore testified that the gun had one round in the chamber and seven rounds in the magazine. (R. p. 230, lines 8-13). Moore testified that she found a work ticket with Appellant's name, a damaged cell phone and a

projectile in the pockets of the pants. (R. p. 232, line 2 – p. 233, 234, lines 1-23). Moore also testified that there was a bullet hole in the pants. (R. p. 233, lines 1-5). The case agent, Detective Robert Bailey, visited Appellant the next day in the hospital. (R. p. 343, line 3 – p. 344, lines 1-12). Appellant was still in the intensive care unit in critical but stable condition varying by the hour. (R. p. 344, lines 9-12). The State questioned Detective Bailey about gunshot residue [GSR] and the detective testified that he did not believe that a GSR kit was done on Appellant. (R. p. 344, line 17 – p. 345, lines 1-16). The crime scene technician, Anita Moore, testified that she did GSR kits on the deceased, Kirby Fyall, and the co-defendant, Stacy Green. (R. p. 275, line 10 – p. 276, lines 1-23). Moore did not testify about the results of the GSR testing.

Detective Bailey testified that the day after the shooting he received a bag full of items from Rickey Fyall, Anthony Fyall's uncle. (R. p. 346, line 2 – p. 347, 348, lines 1-22). The detective testified that there was a Hi-Point 9 mm silver and black gun, 3 pairs of pants, a TWIC card belonging to Fredrick Smalls and various other items. (R. p. 348, lines 15-22). Rickey Fyall testified at trial that he went to the apartment on the night of the shooting and somebody handed him the bag. (R. p. 373, lines 14-19). When asked who gave him the bag Rickey testified that he did not remember her name. (R. p. 373, lines 20-21). Rickey admitted that he originally told law enforcement that he got the bag from a guy and a girl. (R. p. 373, lines 22-25). He admitted that Nashishi Walker was present when he got the bag and conceded that Nashishi was a crack head. (R. p. 374, lines 1-8). Rickey admitted that he gave somebody keys out of the bag before giving it to the detective. (R. p. 402, lines 1-7). Antonio Fyall admitted that on the night of the shooting he retuned to the apartment and hid cocaine before the police arrived. (R. p. 293, line 21 – p. 294, lines 1-22; p. 304, line 2 – p. 315, lines 1-14).

The DNA profile developed from the swabs taken from the trigger and grip of the Hi-Point 9mm that Rickey Fyall provided to the detective the day after the shooting was a mixture of at least three individuals. (R. p. 479, lines 4-6). The partial DNA profile of the major contributor matched the DNA profile of Appellant. (R. p. 479, lines 7-8). The ballistics expert from SLED testified that all of the shell casings collected from the scene and submitted for testing, including a 380 caliber cartridge, were fired by the Hi-Point 9 mm. (R. p. 439, lines 17-20). The testing of the five bullets submitted, however, was inconclusive as to whether fired by the Hi-Point 9 mm submitted. (R. p. 437, lines 2-6). The witness testified that the bullets submitted for testing were too small to have been fired by the only other gun submitted, State's Exhibit #126, the Walther 40 caliber Smith and Wesson found close to Appellant. (R. p. 466, lines 1-3).

ARGUMENT

The trial judge erred in finding that defense counsel opened the door to allowing a detective to testify about the results of a gunshot residue test from the co-defendant in violation of Appellant's right to confront witnesses.

The jury found Appellant guilty of a shooting and robbery of Kirby Fyall and his family and friends at his brother, Sanquan Fyall's apartment. During the direct examination of the case agent, Detective Robert Bailey, the State asked, "Explain to the jury the purpose of GSR, gunshot residue." (R. p. 344, lines 17-18). The detective discussed GSR and then the State asked, "As the case agent were you made aware whether a GSR kit was conducted on Byron Rivers [Appellant]?" (R. p. 345, lines 13-14). The detective answered, "I was not made aware and I do not believe a GSR kit was conducted on Mr. Rivers." (R. p. 345, lines 15-16). On cross examination the detective confirmed that the co-defendant, Stacy Green was tested for GSR. (R. p. 360, line 3 – p. 361, line 1). The detective admitted that neither Green's nor Appellant's clothes were tested for GSR. (R. p. 361, line 2 – p. 362, lines 1-2). On redirect examination of the detective the State asked, "Do you know whether there was gunshot residue particles on Stacy Green?" (R. p. 369, lines 22-23). The detective answered, "I do not." (R. p. 369, line 24). The State then asked, "If I showed you a document would that help refresh your memory?" (R. p. 369, line 25 – p. 370, line 1). Counsel for Appellant objected and stated, "This gentleman is not an expert in the actual testing of GSR kits." (R. p. 370, lines 4-5). The judge said, "I'm not sure that he is being offered as an expert –" (R. p. 370, lines 6-7). The State argued, " . . .I'm not. I'm just asking him if he was made aware. I'm trying to refresh his recollection with this document." (R. p. 370, lines 8-10). The judge ruled, "I'll allow it at this point in time." (R. p. 370, line 11).

The State then asked the Detective, "I'm showing you what has been marked as identification purposes only as State's exhibit 189. Does that refresh your recollection on whether Mr. Green had gunshot residue particles on him?" (R. p. 370, lines 12-16). The detective answered, "It does and he did not." (R. p. 370, line 18).

The next day counsel for Appellant renewed the objection to allowing the detective to testify as to the results of the GSR test on the co-defendant, Green, and moved for a mistrial. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). Counsel argued the questioning violated Appellant's right to confront witnesses and specifically cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). (R. p. 391, lines 11-19; p. 394, lines 7-8). The State argued that Appellant opened the door by asking if he was the case agent and by asking about GSR. (R. p. 392, lines 1-15; p. 393, lines 10-15). Counsel for Appellant replied, "I asked if a kit was done. I didn't ask him what any kit showed. And as far as asking him about being a case agent, I asked him about what was already in evidence, was he aware that drugs were collected at that scene. It was already in. I didn't offer any expert opinion about that." (R. p. 393, lines 16-20).

The judge ruled stating:

> I have taken an opportunity to review the case law the defense handed me as well as my recollection of the testimony that was presented on direct, cross, redirect. I am standing by my ruling yesterday. I find the door was opened by Ms. Norris as to the GSR results. The solicitor ten on redirect merely used the document to refresh the lead investigator's memory as to whether or not in fact these results were obtained. And then he testified they were and they were negative. So I don't find an issue with how that transpired. I do find that the door was opened by defense counsel on cross-examination, so I stand by my ruling. But your objection is more than covered for the record, Ms. Norris.

(R. p. 394, line 17 – p. 395, lines 1-4). The judge additionally noted, "And I will say for the record I find the difference between the Melendez-Diaz – and there is another case that came

actually a couple years after that that discusses the same issue. In both of those cases it was a little bit different because there was – this was all results that were discussed during the direct of the case agent. Again, I think what differentiates our situation is that it was brought up on cross and so the door was opened. So that is my position." (R. p. 395, lines 9-17).

The trial judge erred in finding defense counsel opened the door. The State first questioned the detective about whether Appellant was tested for GSR. (R. p. 345, lines 13-16). Counsel for Appellant then properly questioned the detective about whether Green was tested for GSR in order to demonstrate that law enforcement could have tested Appellant but failed to do so. (R. p. 360, line 3 – p. 361, line 1). Counsel for Appellant did not question the detective about the **results** of the GSR test. Allowing the detective to testify about the results of the GSR test, without calling the witness who conducted the test, deprives Appellant of the right to confront witnesses. As noted by counsel for Appellant, "The problem is, Judge, that I can't cross-examine a man who didn't do the test about what the test is, what it does, what it can show, what it can't show." (R. p. 392, lines 17-19).

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the case cited by Appellant at trial, the United States Supreme Court found that the admission of certificates of state laboratory analysts stating that material seized by police and connected to Petitioner was cocaine of a certain quantity violated Petitioner's Sixth Amendment right to confront witnesses. The Court wrote:

> The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In Crawford[3], after reviewing the Clause's historical underpinnings, we

[3] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

> held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S., at 51, 124 S.Ct. 1354. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id., at 54, 124 S.Ct. 1354.

557 U.S. at 309, 129 S. Ct. at 2531.

In State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015), the South Carolina Court of Appeals determined that allowing a DNA analysis expert who simply peer reviewed another DNA expert's report to testify about the DNA results violated the Sixth Amendment's Confrontation Clause guarantee. The testimony "merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify." 413 S.C. at 90, 773 S.E.2d at 922. In McCray the Court of Appeals wrote:

> The Sixth Amendment's Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, the U.S. Supreme Court held the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant. 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." United States v. Palacios, 677 F.3d 234, 243 (4th Cir.2012) (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir.2009)) (internal quotation marks omitted).

413 S.C. at 90, 773 S.E.2d at 921–22.

In the present case, admission of the detective's testimony that a GSR test for the co-defendant was negative violates the Appellant's Sixth Amendment right to confront witnesses in the same way that the admission of the certificates in Melendez-Diaz and the admission of the testimony from the DNA expert who did not conduct the DNA test in McCray violates the Sixth Amendment right to confront witnesses. The detective was merely acting as a transmitter for

testimonial hearsay. Unlike the testimony in McCray, however, the admission of the detective's testimonial hearsay that the co-defendant was negative for GSR was not harmless.

In State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012), the South Carolina Supreme Court wrote:

> A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include the *importance of the witness's testimony* in the prosecution's case, whether the testimony was *cumulative,* the presence or absence of evidence *corroborating* or contradicting the testimony of the witness on material points, the *extent of cross examination* otherwise permitted, and, of course, the *overall strength* of the prosecution's case. Id. at 684, 106 S.Ct. 1431 (emphasis added). *See* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) ("The list of factors as set out in Van Arsdall is not exhaustive.").

The detective's testimony that the co-defendant was negative for GSR was very important in the prosecution's case. The defense theory was that the co-defendant was the shooter. Counsel for Appellant told the jury in opening statement, "Byron Rivers was at [address of Sanquan Fyall's The apartment] for a deal. In his possession was a 40 caliber handgun, a Walther PPS that never fired a shot." (R. p. 60, lines 13-15). The night of the shooting a Walther firearm was found on the ground by a trash can about eight yards from Appellant. (R. p. 187, lines 12-22). The Walther firearm, State's Exhibit #126, was a 40 caliber Smith and Wesson. (R. p. 428, line 2 – p. 429, lines 1-8). The Walther gun had one round in the chamber and seven rounds in the magazine. (R. p. 230, lines 8-13). Counsel for Appellant also stated in opening that, "In this particular case as we hear so often the hand of one is not the hand of all. In this particular case the hand of one is the hand of one and that hand belongs to Stacy Green." (R. p. 60, lines 18-21). The State argued in closing, "And Stacy Green's DNA was not on the murder weapon. He didn't have GSR particles." (R. p. 529, lines 8-9). The Hi-Point 9 mm

linked to shell casings found at the apartment was not recovered by police on the night of the shooting. Instead, that gun was provided to police the next day by a member of the Fyall family. The bullets submitted for testing were too small to have been fired by the Walther 40 caliber Smith and Wesson found close to Appellant. (R. p. 466, lines 1-3). The negative result of the GSR test from the co-defendant was an important part of the State's case. The error in allowing the testimonial hearsay in violation of the right to confrontation was not harmless.

CONCLUSION

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

s/Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of July, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final 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,

s/ Kathrine H. Hudgins

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This 7th day of July, 2020.