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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMION SHANTELL MAYERS,

APPELLANT

APPELLATE CASE NO. 2021-000927

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it admitted testimony from the only alleged eyewitness to the crime that the witness had received phone calls from Appellant's friends or family members prior to the trial, since any probative value of such evidence was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On October 21, 2019, an Orangeburg County Grand Jury indicted Appellant, Damion Mayers, for murder and possession of a handgun by a person convicted of a crime of violence. R. * (Indictments). Appellant proceeded to trial before the Honorable Edgar W. Dickson and a jury, from August 16 – 17, 2021. Appellant was represented by Thomas Sims, Sr. Thomas Scott, III, and Chelsea Glover prosecuted the case. Tr. 1.

Appellant was convicted as indicted, and he was sentenced to imprisonment for life without the possibility of parole for murder and a concurrent five-year term for the weapons charge. Tr. 365, l. 22 – 366, l. 6; Tr. 373, ll. 11-20; R. *(Sentence Sheets).

This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The court erred where it admitted testimony from the only alleged eyewitness to the crime that the witness had received phone calls from Appellant's friends or family members prior to the trial, since any probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

Relevant facts

On June 30, 2019, Harold Langley (Decedent) was shot and killed during a break in a dice game. Decedent had been shooting dice at the home of Wanneshia Perry (Perry). Tr. 92, l. 24 – 95, l. 13; Tr. 104, l. 18 – 107, l. 7; Tr. 303, ll. 10-13. The State alleged that Perry, Decedent, Appellant, and Abraham Williams (Williams) had been shooting dice for about an hour and a half before they took a break so that Appellant could get more money from his car. According to Perry, it was a friendly game, but Appellant had lost several hundred dollars to Decedent. Tr. 104, l. 18 – 106, l. 14.

Perry claimed that when Appellant stepped out to his car, she went into her bedroom and she heard the door being opened and shots being fired a couple of minutes later. According to Perry, she heard Decedent say, "You got me" or "[Y]ou got it." Tr. 106, l. 15 – 107, l. 22. Perry hid behind her bed. Perry claimed that Williams came into the bedroom and he told her that Appellant shot Decedent. Perry also said Williams told her that Decedent tried to use Williams as a shield. Tr. 108, ll. 1-6; Tr. 135, l. 5 – 136, l. 9. Perry did not visually witness the shooting. Tr. 132, ll. 6-8. When Perry came out of the bedroom, Appellant and his car were gone. Tr. 109, ll. 3-12. Appellant's phone was left in the apartment. Tr. 110, l. 21 – 112, l. 25.

Williams testified in jail garb and said he was in jail because he was subpoenaed and missed court. Williams said he did not want to appear at the trial. Tr. 166, l. 21 – 167, l. 24. Williams

claimed that after Appellant went to his car, Appellant came back in with a Draco "mini AK"-type gun. Tr. 171, l. 11 – 173, l. 13. According to Williams, Appellant told Decedent to give him his money back and Decedent said, "[Y]ou can have it," and dropped the money. Nevertheless, Williams claimed Appellant shot Decedent. Tr. 174, l. 13 – 175, l. 1. According to Williams, Decedent tried to use Williams as a shield before Williams ran into the bedroom. Decedent ran out of the apartment. Tr. 175, l. 23 – 177, l. 19. Williams was the only witness alleged to have seen the shooting.

Williams quickly left, driving off in his white Ford Fusion. Tr. 169, ll. 17-18; Tr. 177, ll. 21-25. Perry stayed in the apartment; she did not call 911. Tr. 137, ll. 19-24. Decedent made his way to a parking lot where he was surrounded by people. Tr. 147, l. 4 – 150, l. 8.

Demarcus Fields (Fields), who lived nearby, claimed that he saw a black man go to the trunk of a gray or white Cadillac and get a "baby Draco" gun out of the trunk before entering Perry's apartment. Fields claimed he then heard gunshots. Fields's sister called 911. Tr. 220, ll. 14-16; Tr. 222, l. 2 – 223, l. 11. The defense stipulated that Appellant drove a gray or silver Cadillac. Tr. 94, ll. 19-21.

Decedent was alive when police arrived, and he told an officer that "somebody over there" had shot him. Decedent generally directed officers to "her house." Officer Hardison's body-worn camera captured Decedent's remarks. *See* State's Exhibit #27.[1] When asked, "Do you know who the guy is that shot at you?" Decedent said, "No, I don't." State's Exhibit #27.

Williams was a problematic star witness for the State. As seen, Williams left the crime scene before law enforcement or EMS arrived. Williams also gave multiple, differing statements

[1] State's Exhibit #27 is an audio recording from Officer Hardison's body-worn camera and is on file with this Court.

to law enforcement. Williams was interviewed by Investigator Stokes the day after the shooting and Williams simply said that "a guy in a white shirt" came in shooting. In a subsequent interview that day, Williams told Investigator Stokes that he "didn't think" the shooter was the man they were shooting dice with (Appellant), although Williams said he "couldn't be sure." It was only during a third interview, two days after the shooting, that Williams claimed the shooter was Appellant. Tr. 190, l. 6 – 197, l. 23; Tr. 269, l. 2 – 273, l. 16. The jury heard that Williams had a conviction for second-degree burglary. Tr. 184, l. 24 – 185, l. 1.

In response to questioning by the solicitor, Investigator Stokes told the jury that in his eighteen years' experience in law enforcement, it was "[n]ot at all" uncommon for witnesses to "not want to be involved in criminal investigations," particularly in homicide cases. Tr. 273, ll. 20-25.

After eliciting that Williams had not been threatened by police officers into finally inculpating Appellant, the prosecutor asked Williams, "Mr. Williams, over the last two years, have you received any phone calls from any of the Defendant's friends or family members?" Tr. 185, ll. 14-16. Defense counsel objected to the question pursuant to Rule 403, SCRE. Defense counsel noted any alleged calls were not made before Williams gave his third statement (implicating Appellant) to Investigator Stokes and so the calls had no bearing on the witness's claim that Appellant was the perpetrator. Tr. 185, l. 17 – 188, l. 16. Defense counsel also noted the generalized form of the question was prejudicial. Tr. 188, ll. 8-16.

The solicitor argued the information was relevant to why Williams had to be jailed in order to appear for court. Tr. 187, l. 18 – 188, l. 1. The court ruled the questioning was admissible. "I'm going to let him ask that question because that explains to the jury why the witness is in here, essentially locked down. He doesn't want to be here." Tr. 189, ll. 1-5.

The prosecutor then again asked Williams, the only alleged eyewitness to the killing, "Mr. Williams, during the last two years, have you received any phone calls from any of the Defendant's friends or family regarding your participation in this jury trial?" and Williams answered, "Yes." Tr. 189, ll. 20-24.

Petitioner was convicted and sentenced to life without parole for murder and five years for the weapons charge. Tr. 365, l. 22 – 366, l. 6; Tr. 373, ll. 11-20.

Discussion

Rule 403, SCRE provides that, "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." "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

"The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Lyles*, 379 S.C. at 338, 665 S.E.2d at 207 (internal quotations omitted).

A fair reading of the record shows that the danger of unfair prejudice was high here, since the prosecutor's question and Williams's answer suggested that Appellant attempted to intimidate a witness through his friends and family. The form of the question left the jury to speculate about

this matter. The trial judge's ruling demonstrates that he understood the testimony to indicate witness intimidation. Tr. 189, ll. 1-5.

As counsel noted, any alleged calls were not made before Williams implicated Appellant, so they were not probative of the shooter's identity—they were not probative of guilt. Moreover, the purpose for which the prosecution offered the evidence (to provide a reason why Williams did not want to testify) was explained by Investigator Stokes. The solicitor elicited testimony from Investigator Stokes that in his eighteen years' experience in law enforcement, it was a common occurrence that witnesses to homicides did not want to be involved. Tr. 273, ll. 20-25.

In *State v. Edwards*, 383 S.C. 66, 68, 678 S.E.2d 405, 406 (2009), the South Carolina Supreme Court held that "a trial court may admit evidence of witness intimidation when the defendant is established as the source of the intimidation." Although the evidence in *Edwards* was challenged on the basis of reliability rather than Rule 403, the holding is informative, since the probative value of witness intimidation evidence depends upon whether the intimidation can be attributed to the defendant. *Id.*, 383 S.C. at 70, 678 S.E.2d at 407. If the defendant was not responsible for the witness intimidation, the evidence is not probative because it does not show consciousness of guilt. *Id.*, 383 S.C. at 72, 678 S.E.2d at 408 (witness intimidation evidence linked to the defendant may be admitted to show consciousness of guilt).

To be clear, Appellant is not challenging the admission of the evidence on the basis of reliability—he is challenging admission under Rule 403. Nevertheless, the reasoning in *Edwards* is relevant to analyzing the probative value of the evidence under Rule 403. The prosecution did not establish that Appellant's friends or family members had called Williams at Appellant's behest—the phone calls were not attributed to the defendant. Because no causal connection was presented to show Appellant was the source of the apparent witness intimidation, the testimony

was not probative of Appellant's guilt. Rule 403, SCRE; *see also Edwards*, 383 S.C. at 68, 678 S.E.2d at 406. However, the insinuation that Appellant attempted to intimidate the State's key witness was devastatingly unfair and prejudicial, and constituted exceptional circumstances which weigh in favor of reversal. Rule 403, SCRE; *Lyles*, 379 S.C. at 338, 665 S.E.2d at 207.

The error was not harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *Pagan*, 369 S.C. at 212, 631 S.E2d at 267 (internal quotations omitted) (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)).

Only one person, Williams, allegedly witnessed the shooting. Williams gave multiple, conflicting statements to law enforcement and only claimed Appellant was the perpetrator in his third statement to Investigator Stokes. Prior to that, he told Investigator Stokes that he did not think Appellant was the shooter. Because Williams told different stories to Investigator Stokes, the jury knew that Williams lied to Investigator Stokes. Williams's credibility was also doubly suspect given his conviction for second-degree burglary.

Decedent told police he did not know who shot him. The murder weapon was never found. Appellant was never connected to a Draco gun. Appellant did not confess to the crime. Fields did not identify Appellant as the person he saw taking the gun out of the trunk and entering the apartment, and he was unsure of the color of the shooter's car. Guilt was not conclusively proven such that no other decision would be reached. *Pagan*, 369 S.C. at 212, 631 S.E2d at 267.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

s/ *Joanna K. Delany*
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ATTORNEY FOR APPELLANT

This 27th day of January, 2022.