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Apr 26 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID MELVIN GRAVES,

APPELLANT

APPELLATE CASE NO. 2021-000866

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing the jury to hear a 911 recording where the dispatcher, who did not testify as to the substance of the recording, commented on facts beyond her personal knowledge, editorializing about what she believed was occurring?

STATEMENT OF THE CASE

In a multi-count indictment, a Marion County grand jury indicted Appellant for murder and possession of a weapon during a violent crime on July 30, 2020. R. 258. The state, represented by Todd Tucker, called the case to trial before the Honorable Michael G. Nettles and a jury on July 26-28, 2021. R. 1. William V. Meetze represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 249, l. 25 – R. 250, l. 9. Judge Nettles sentenced Appellant to forty years imprisonment for murder and five years imprisonment for the weapon. R. 255, l. 22 – R. 256, l. 6; R. 258. He ordered the sentences to be served consecutively. R. 255, l. 25; R. 256, ll. 5-6; R. 258.

On July 28, 2021, Appellant served his notice of appeal. This brief 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 trial judge erred by allowing the jury to hear a 911 recording where the dispatcher, who did not testify as to the substance of the recording, commented on facts beyond her personal knowledge, editorializing about what she believed was occurring.

Relevant facts

Immediately prior to trial, the state moved to admit two 911 calls purportedly made by the deceased. R. 41, ll. 24. The first call was made on December 29, 2019, at 10:20 p.m. R. 41, l. 25 – R. 42, l. 4. According to the state, “[t]he purpose of the 911 call was not to report an existing emergency right at that moment, but her purpose was to let 911 know that they could send units to her house.” R. 42, ll. 4-7. The deceased “anticipated ... there would be trouble and she wanted for her safety for law enforcement to be present.” R. 42, ll. 7-9. During the conversation with the 911 operator, the deceased described “an incident that occurred on December 24th between [her] and [Appellant] in which [Appellant] is alleged to have assaulted her.” R. 42, ll. 13-15. The state explained the deceased’s “primary purpose for making that call was that she thought she might need law enforcement’s assistance based on what happened on December 24th.” R. 43, ll. 1-5. The state argued the first 911 call was non-testimonial. R. 43, ll. 5-6.

Defense counsel moved to exclude the first 911 call as a violation of Appellant’s right to confront his accusers. Defense counsel explained the phone call was testimonial. R. 45, ll. 10-11. Relying upon State v. Bratschi, 413 S.C. 97, 775 S.E.2d 39 (Ct. App. 2015), defense counsel argued that the phone call concerned events that were “several days old, at least four or five days old.” R. 46, ll. 3-7. As noted by defense counsel, the deceased made the first “911 call in the car on the way back to her house when there’s absolutely zero threat of any kind of imminent harm

or danger at that point in time.” R. 46, ll. 13-16. “[A]t the time she made the call there was no imminent threat of harm or danger to her whatsoever,” which was “the distinguishing characteristic.” R. 46, ll. 18-20.

Judge Nettles quoted State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017) for the proposition that “[s]tatements are non-testimonial and made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” R. 45, ll. 2-8. He asked the state “whether or not there’s an ongoing emergency” at the time of the call. R. 48, ll. 21-22. The state argued there was because the deceased feared Appellant would harm her. R. 48, ll. 23-25.

Ultimately, Judge Nettles concluded the first 911 call was testimonial, and in light of Appellant’s inability to cross examine the decedent, the first 911 call was inadmissible. R. 53, ll. 7-8. He noted that there was not an “emergent situation” as the deceased was “talking not [about] this event but what took place on Christmas Eve and sort of in a discussion calculation about what might become an emergent situation.” R. 53, ll. 1-5.

The state also sought the introduction of a second 911 call purportedly made by the deceased. During the call, “you can clearly hear her screaming” and, according to the state, “she’s under attack.” R. 52, ll. 13-14. The state argued that one of the purposes of the call was to establish that the cell phone was in the deceased’s custody just before she died, and yet, the police seized it from Appellant when he was arrested. R. 51, ll. 7-16. More precisely, after Appellant’s arrest, a police officer called the phone number for the deceased and a phone in Appellant’s possession began to ring. R. 51, ll. 9-14. Judge Nettles determined the second 911

call was non-testimonial; therefore, he ruled the state could present the second call during its case-in-chief. R. 52, ll. 11-20.

During a discussion regarding whether the judge would allow testimony about two calls being made without getting into the substance of the first call, the state noted that during the second call, “there’s a comment by the operator, this is a lady that just called in.” R. 55, ll. 2-3. Relatedly, defense counsel “object[ed] to the admissibility of the second call, primarily, because “there was some editorializing from the dispatchers.” R. 56, l. 15-19. The judge believed the dispatchers “were talking about something happening there.” R. 56, ll. 20-21. He did not “think there [was] any editorializing that’s inadmissible on that.” R. 57, ll. 2-5. Thus, Judge Nettles ruled that the jury could hear the second 911 call in its entirety. R. 53, l. 8.

The state’s first witness was April Walters, who was employed by Marion County 911 dispatch. R. 77, ll. 24-25. Immediately before she testified, defense counsel renewed his objection to the second 911 call. R. 76, ll. 1-15. Specifically, defense counsel objected to the dispatcher stating on the call that the caller “called back,” which was an indication of an earlier call. R. 76, ll. 3-5. This reference was an obvious referral to the prior 911 call, which the judge had excluded. R. 76, ll. 5-7. Furthermore, the dispatcher stated on the call that she heard people fighting. R. 76, ll. 8-9. Defense counsel noticed “the background voices” throughout the 911 call. R. 76, ll. 9-10. Judge Nettles overruled the objection. R. 76, ll. 16-18.

Walters was working as a 911 dispatcher on December 29, 2019. R. 79, ll. 18-21. Around 10:30 p.m., Walters received a call “that was associated with [the deceased], Wanda Reeves.” R. 79, ll. 22-25. Walters testified that when she answered the call, “all [she] could hear was noise in the background.” R. 80, ll. 1-4. After laying the foundation, the state introduced the 911 call. R. 81, ll. 1-7; State’s Exhibit #2. Defense counsel contemporaneously

objected, but his objection was overruled. R. 81, ll. 5-7. On the 911 call recording, the jurors heard a woman screaming. State's Exhibit #2 at 0:14. Soon thereafter, the screaming stops. State's Exhibit #2 at 0:25. Then, the dispatcher, Walters, states: "Central Mullins Unit be advised female calling back from XXX Pat Mar Square. You can hear a lot of fussing and arguing in the background. Sounds like fighting and she's not answering the phone while I'm talking." State's Exhibit #2 at 0:27. Then, a male voice in the background mentions a ".40 caliber." State's Exhibit #2 at 0:38.

In addition to the 911 call, the state presented testimony from Alexis Coleman, who worked with the deceased at Family Dollar. R. 84, l. 14 – R. 85, l. 5. According to Coleman, the deceased and Appellant were romantically involved. R. 85, l. 12 – R. 86, l. 1. On December 29, 2019, Coleman and the deceased worked together until closing at 10 p.m. R. 86, ll. 5-12. After completing their closing procedures, the two women left "about 10:20, 10:25." R. 86, ll. 12-13. As usual, Coleman drove the deceased to her home, arriving at 10:30 approximately. R. 86, l. 21 – R. 87, l. 4. When the deceased got out of Coleman's car, she had her phone and purse with her. R. 87, ll. 5-7.

Responding to the 911 call discussed supra, police officers found the deceased lying facedown in the street in front of her home. R. 90, l. 16 – R. 91, l. 3. The police also found an open purse "just sitting on the front porch." R. 92, ll. 17-22. No cell phone was found. R. 93, ll. 5-9. However, the police found Marcus Crowner, who was visiting a woman who lived near the deceased on December 29, 2019. R. 111, l. 7 – R. 112, l. 22. While Crowner was on the side porch of the woman's home, he heard a woman scream loudly. R. 113, ll. 1-7. Upon looking up, he saw what "could have been a silhouette of a man and woman." R. 113, ll. 9-11. He saw what "looked like a ... stabbing motion." R. 113, l. 12. When he went to the door, Crowner saw a

woman on the ground. R. 113, ll. 13-14. Crowner also saw the man leave, using the light from a cell phone to light his escape. R. 114, ll. 2-8. Crowner was unable to identify the man, however. R. 115, l. 5 – R. 116, l. 20.

The following day, the police arrested Appellant. R. 135, ll. 11-14. Appellant told the police that when the deceased arrived at home, the two got into an argument. State's Exhibit #20 at 3:25. During the argument, the deceased pulled a knife on Appellant. State's Exhibit #20 at 3:26; at 3:33. Appellant took the knife from the deceased. State's Exhibit #20 at 3:33. Appellant swung the knife at the deceased, but he did not strike her. State's Exhibit #20 at 3:38. Appellant swung the knife again, hitting the deceased on her left shoulder. State's Exhibit #20 at 3:38. As Appellant walked away, he heard the deceased gasp. State's Exhibit #20 at 3:39. Upon further questioning by the police, Appellant stated he stabbed the deceased once in the arm.¹ State's Exhibit #20 at 4:02.

Discussion

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Rule 602, SCRE. Similarly, “[i]f the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.” Rule 701, SCRE. In other words, “[m]ost witnesses may not testify about things outside their first-hand knowledge.” State v. Gibbs, 431 S.C. 313, 320, 847 S.E.2d 495, 499 (Ct. App. 2020).

¹ According to the pathologist, the deceased suffered three stab wounds to her chest, two of which were fatal. R. 183, l. 25 – R. 185, l. 21.

The Supreme Court held a police officer's testimony in which he drew conclusions and speculated as to the cause of an accident was improper opinion testimony. State v. Kelly, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985). The officer, who was not qualified as an expert, "drew conclusions from his direct observations, and speculated as to the cause of the accident." Id. The Court made clear that "[a] police officer may not give his opinions as to the cause of an accident." Id. In fact, an officer "may only testify regarding his direct observations unless he is qualified as an expert." Id. The Court held the officer's testimony regarding his conclusions about the cause of the accident were improper. Id. See also Fowler v. Nationwide Mutual Fire Ins. Co., 410 S.C. 403, 410, 764 S.E.2d 249, 252 (Ct. App. 2014) (holding a fire chief's testimony as to the origin of a fire was improperly admitted because the fire chief was not qualified as an expert).

The Court of Appeals addressed whether a police officer's testimony regarding the functioning of single and double action revolvers was outside the officer's personal knowledge. State v. Gibbs, 431 S.C. 313, 321, 847 S.E.2d 495, 498 (Ct. App. 2020). The officer testified that he was familiar with single action and double action revolvers. Id. at 319, 847 S.E.2d at 498. Over objection, the officer testified that in order to fire a single action gun, the operator would need to cock it and pull the trigger. Id. To fire a double action, one need only pull the trigger, but the trigger pull was heavy. Id. The solicitor used the officer's testimony in closing to rebut Gibbs' claim that the gun fired accidentally. Id.

The Court of Appeals observed that the testimony at issue "concern[ed] the basic function of certain firearms." Id. at 321, 847 S.E.2d at 499. Further, the Court acknowledged that the "subject matter may have been foreign to some members of the jury." Id. However, the officer "testified he was personally familiar with single action revolvers, double action revolvers,

and with the difference between them.” Id. According to the Court, “[t]he key feature of lay testimony is the witness’s personal knowledge, not whether the subject of the testimony is beyond the jury’s ordinary experience.” Id. The officer “directly stated this testimony was based on his own knowledge.” Id. at 322, 847 S.E.2d at 499. The Court concluded the officer “never offered anything resembling an opinion as to who may have pulled the revolver’s trigger or what caused the revolver to fire.” Id. The Court determined the testimony was “nothing more than the most rudimentary explanation of how someone discharges a revolver.” Id. Therefore, the Court held it was admissible lay testimony. Id.

In the instant case, the 911 dispatcher’s statements on the 911 recording were beyond her personal knowledge and improper lay opinion testimony. The dispatcher’s testimony that there was “fussing,” “arguing,” and “fighting” was beyond the dispatcher’s personal knowledge. She was drawing conclusions as to what was occurring at the scene. The 911 dispatcher was not present at the scene; thus, she was unable to say what was occurring. The jury should not have heard the 911 dispatcher’s opinion that there was “fussing,” “arguing,” and “fighting” on the other end of the call.

In light of Appellant’s statement to police, it was undisputed that Appellant stabbed the deceased. Thus, the only question was whether he did so with malice aforethought, in the sudden heat of passion based on sufficient legal provocation, or in self-defense. Therefore, the 911 dispatcher’s comments during the 911 call regarding “fussing,” “arguing,” and “fighting” were harmful to Appellant’s case. These comments suggested to the jury that Appellant acted with malice aforethought instead of sudden heat of passion based on sufficient legal provocation or in self-defense.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2022.

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IN THE COURT OF APPEALS

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Michael G. Nettles, Circuit Court Judge

THE STATE,

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DAVID MELVIN GRAVES,

APPELLANT

APPELLATE CASE NO. 2021-000866

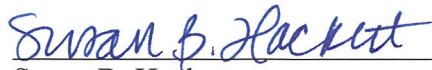
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Melvin Graves states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge Michael G. Nettles, which was held on July 26-28, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for David Melvin Graves.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

This 26th day of April, 2022.

ATTORNEY FOR APPELLANT

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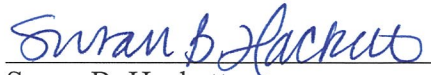
APPELLATE CASE NO. 2021-000866

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

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

- (1) Entire trial transcript dated July 26-28, 2021;
- (2) State's Exhibit #2 (audio recording);
- (3) State's Exhibit #20 (DVD);
- (4) True-billed indictments; and
- (5) Sentence sheets.

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



Susan B. Hackett
Appellate Defender

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This 26th day of April, 2022.

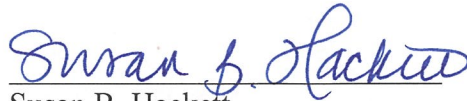
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SC Court of Appeals

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."



Susan B. Hackett
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ATTORNEY FOR APPELLANT

This 26th day of April, 2022.