

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
May 06 2022
SC Court of Appeals

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY MORROW FORTSON,

APPELLANT.

APPELLATE CASE NO. 2021-000566

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the denial of appellant's right to be present at the selection of her jury requires the reversal of this case where appellant testified that she had no involvement in the crime?

STATEMENT OF THE CASE

On July 19, 2017, a Richland County grand jury indicted appellant Mandy Morrow Fortson for attempted murder, discharging a firearm into a dwelling, and breach of peace of a high and aggravated nature. R. _____. On May 17, 2021, Fortson's jury was selected and pre-trial motions were heard despite her absence due to illness. May 17, 2021, Tr. 1 – 4, 57, l. 3 – 59, l. 20. After recessing May 18 because of her illness, Fortson's trial resumed on May 19, 2021, and she was present. Tr. 1, 13, l. 10 – 21. The Honorable Robert E. Hood presided over Fortson's jury trial. Tr. 1. Byron E. Gipson, April W. Sampson, and Emily M. Nellermoe represented the State. Tr. 1. Theo Williams and Anna Maria Williams represented Fortson. Tr. 1. The jury convicted Fortson. Tr. 695, l. 20 – 696, l. 15. Judge Hood sentenced Fortson to a total of twenty years' imprisonment (concurrent five-year terms of imprisonment for breach of peace and the gun charge set to run consecutive to a fifteen-year term of imprisonment for attempted murder). Tr. 708, l. 15 – 24. This appeal follows.

STANDARD OF REVIEW

Appellant submits that the constitutional deprivation in this case is a question of law and is subject to de novo review.

ARGUMENT

The denial of appellant's right to be present at the selection of her jury requires the reversal of this case where appellant testified that she had no involvement in the crime.

Factual and Procedural Background

Fortson's Testimony

The jury heard three versions of a shooting that took place in Columbia on February 22, 2017. Appellant Mandy Morrow Fortson ("Fortson"), who lived alone in a single-family residence, testified that she was awakened by the sound of breaking glass. Tr. 529, l. 2 – 16. She heard people talking in her kitchen. Tr. 529, l. 12 – 16. She pulled a revolver that had belonged to her grandfather from under her mattress. Tr. 529, l. 25 – 530, l. 7. Tr. 625, l. 23 – 24.

Fortson had not fired the gun for at least two years. Tr. 530, l. 16 – 20. She fumbled with the gun and the ammunition in her dark bedroom. Tr. 530, l. 21 – 531, l. 18. Some of the ammunition she found was only spent shell casings and she attempted to load the gun with live ammunition. Tr. 530, l. 21 – 531, l. 18.

Fortson left her bedroom and confronted three Black males in her kitchen. Tr. 532, l. 11 – 533, l. 6. In a loud voice she repeatedly told the men, "get out of here." Tr. 530, l. 21 – 531, l. 18. She heard one of the men say something like "that crazy white lady" when they "took off out the door." Tr. 533, l. 1 – 18. Fortson followed the men outside and watch them run to the back of her property which was swampy and wooded. Tr. 533, l. 17 – 534, l. 12. Tr. 561, l. 3 – 25. She kept yelling "get out of here" when she heard gunfire and saw muzzle fire. Tr. 534, l. 11 – 535, l. 3.

Fortson then went back inside her home and tried to secure the door where the men had broken in. Tr. 535, l. 4 – 15. She went to bed and fell asleep without calling the police. Tr. 535, l. 18 – 536, l. 3. Fortson did not call the police because the police had done nothing in the past

when she called them about four other attempted break-ins. Tr. 525, l. 2 – 11. Fortson never fired her gun that night. Tr. 535, l. 16 – 17. She did not wake up until the police knocked on her door. Tr. 536, l. 1 – 15.

The State's Theory – Antonio Jones and Roman Cruz

The second version of events heard by the jury was the State's case in which a racially-motivated, crazed Fortson shoots a Black man outside of his apartment, shoots at a Latino man's house, and resisted arrest. Tr. 617, l. 12 – 618, l. 13. The Black man who was shot in the wrist and hip was Antonio Jones ("Jones") who lived in an apartment building that backed up to Fortson's property. Tr. 279, l. 7 – 21. Tr. 288, l. 7 – 13. Tr. 292, l. 1 – 16. The Latino man whose house received gunfire that night was Roman Cruz ("Cruz") and his property also backed up against Jones' apartment building and Fortson's property. Tr. 379, l. 5 – 382, l. 6.

Jones testified he lived in an apartment with his girlfriend, Tonya Mills ("Mills") and Mills' son. Tr. 275, l. 12 – 276, l. 2. Jones settled in for the evening and began watching a basketball game when he heard gunshots. Tr. 277, l. 20 – 279, l. 24. Jones was used to hearing gunshots. Tr. 280, l. 2 – 10. He heard about eight shots and the shots stopped. Tr. 280, l. 16 – 23.

Mills also heard this first round of gunfire and said she heard "eight to ten" shots. Tr. 157, l. 20 – 24. The police took Fortson's grandfather's gun, a Smith and Wesson .41 caliber revolver, when they searched her house. Tr. 255, l. 12 – 18. It held "five to six" rounds according to the police's crime scene investigator. Tr. 268, l. 1 – 4.

Both Mills and Jones agreed there were two separate batches of gunshots. Tr. 158, l. 3 – 9. Tr. 280, l. 16 – 281, l. 14. Mills said the second batch of gunshots began about ten minutes after the first. Tr. 158, l. 3 – 9. She heard "six to eight" shots in this batch. Tr. 158, l. 3 – 9. Jones said it was a 5-7 min break between the batches of shots. Tr. 309, l. 4 – 10. Mills and Jones said

during this second set of gunfire, one of the shots broke the glass of their sliding door. Tr. 158, l. 3 – 11. Tr. 281, l. 11 – 16.

Jones went outside and heard “a bunch of commotion, fussing.” Tr. 284, l. 1 – 4. Jones saw Fortson standing in her yard by a shed “hollering.” Tr. 286, l. 1 – 13. He told Fortson to “chill out” and stop making so much noise, warning her that kids were in the apartment. Tr. 286, l. 8 – 13. Jones thought there was more than one person, but only saw Fortson. Tr. 286, l. 14 – 20.

Fortson replied that she did not care. Tr. 288, l. 3 – 6. Jones said he cared and then felt that he had been shot. Tr. 7 – 23. He went back into his apartment and waited on help. Tr. 290, l. 22 – 291, l. 12. Jones did not hear Fortson make any racist statements. Tr. 293, l. 11 – 15.

Cruz, his wife, and kids were eating dinner in their single-family residence when Cruz heard a gunshot. Tr. 383, l. 21 – 384, l. 17. He looked out the window and saw Fortson, who he knew as his neighbor, talking with someone at the apartments. Tr. 384, l. 10 – 17. Tr. 387, l. 1 – 11. Cruz testified, “Well, then I heard this guy screaming, like, he wasn’t paying or something like that, and then I, I heard this woman talking, you know. She said she’s going to kill Mexican and the blacks and, and the dog.” Tr. 384, l. 21 – 385, l. 3. In the Spanish version of his statement, Cruz quoted Fortson as using the n-word instead of saying “blacks.” Tr. 417, l. 1 – 6. Cruz had a German Shephard. Tr. 385, l. 1 – 3.

Cruz heard more gunshots and one of them broke a window in his house. Tr. 385, l. 13 – 22. He watched from inside his house and saw Fortson “on the fence line with a gun in her hand and, and shooting, like through my house and, and, and the neighbor apartment complex.” Tr. 386, l. 20 – 25. He saw Fortson fire “multiple times.” Tr. 389, l. 5 – 13.

Cruz's wife called 911 and handed the phone to him. Tr. 418, l. 6 – 419, l. 10. Cruz said he was on the phone with the 911 operator during the time he saw Fortson screaming and shooting. Tr. 419, l. 13 – 423, l. 11. Cruz testified on cross-examination, and over the solicitor's objection, that the 911 operator should have been able to hear the shots being fired. Tr. 422, l. 7 – 15.

The 911 Calls

The third version of the night's events came from the State's admission of eleven calls to 911 from that night.¹ State's Ex. 65. The 911 custodian said she received a request to pull 911 calls associated with the case. Tr. 84, l. 7 – 24. None of the calls are from Cruz. State's Ex. 65. Tr. 502, l. 3 – 510, l. 7. The solicitors tried to recall the 911 operator after Cruz testified, but Judge Hood would not allow it because the testimony would be either speculation or pose a discovery problem if Cruz's call, in fact, existed. Tr. 502, l. 3 – 510, l. 7.

The third version of the shooting from the 911 calls is disparate and chaotic. The calls cover a timespan of over forty minutes. State's Ex. 65. The calls begin at 9:20:19 PM and the last call, from Tonya Mills, is at 10:02:44 PM. Mills says on her call, Call #11, that Jones had been shot and that the shooting had been going on for the past thirty minutes. State's Ex. 65. She also says "They were out there shooting," but it is not clear who "they" are. State's Ex. 65. The operator tells Mills that the police are en route and the officers can be heard arriving on the end of the call. State's Ex. 65.

Call #3 and Call #8 could be from the same man. He is anonymous. In Call #3, at 9:31:25 PM, the man says there is a big party going on outside and that "People out pissing on the road

¹ State's Exhibit 65 is an unusual piece of evidence. It contains eleven separate calls. Of the eleven calls, only two people are identified and the rest are anonymous. The woman on Call #9 gives her name as "Lindsey" and also gives her phone number. The woman on Call #11 is Tonya Mills. State's Ex. 65. Mills is the only person who testifies at the trial whose call appears on State's Exhibit 65.

and shit like that.” State’s Ex. 65. He says people are out firing off guns in front of the apartment building on Thornwell Court. State’s Ex. 65. He thought it was a revolver. State’s Ex. 65. If it is the same man on Call #8, which is twenty-eight minutes later at 9:59:32 PM, he says the big party is still going on, “and on, and on.” State’s Ex. 65. He says the gunshots are still going on. State’s Ex. 65.

The anonymous woman on Call #7 said she heard six shots and identifies Fortson as the shooter. State’s Ex. 65. A woman named “Lindsey” who gives her phone number and address on Call #9, but does not testify, says she believes a white woman just shot a black man “from what she was saying.” State’s Ex. 65.

The male caller on Call #4 described three shots coming from the front of the apartments. The female caller on Call #1 describes a lot of neighbors going inside and seeing a bunch of guys walking around and hanging around in front of the apartments. She heard four or five shots. State’s Ex. 65. Her anonymous call was at 9:20:19 PM. The woman on Call #6, at 9:53:58 PM, said she called fifteen minutes ago, that somebody was “shooting off a damn gun” and that it just happened again three more times. State’s Ex. 65. She also says there was a large party and that she heard a woman yelling “y’all better stop that stuff.” State’s Ex. 65.

Jury Selection is Held in Fortson’s Absence

Fortson’s trial began on May 17, 2021, with jury selection. May 17, 2021, Tr. 1 - 3, l. 23. After a few remarks to the potential jurors, Judge Hood said the following. “So, [defense counsel], we will put that pre-trial issue that we just discussed in chambers on the record after jury selection. But I will put on the record that you have made that motion at the appropriate time and do so at the appropriate time and you’re protected on that issue.” May 17, 2021, Tr. 3, l. 24 – 4, l. 4. The court then proceeded with voir dire and jury selection. May 17, 2021, Tr. 4, l. 7 – 57, l. 2.

Once the jurors departed, the court said “let’s go ahead and knock out this issue of Ms. Fortson’s lack of presence.” May 17, 2021, Tr. 57, l. 3 – 5. Defense counsel learned that morning that Fortson had food poisoning and went to the doctor. May 17, 2021, Tr. 57, l. 3 – 63, l. 17. The trial judge then told the jurors to return at 2:00 which was when jury selection took place. May 17, 2021, Tr. 57, l. 8 – 13.

Defense counsel Williams stated that his motion “would have been for a continuance” and proffered that he had a note from a doctor on his cell phone stating that Fortson could “return to work/school on May the 19th.” May 17, 2021, Tr. 57, l. 25 – 58, l. 24. Judge Hood responded, “I believe you.” May 17, 2021, Tr. 58, l. 25. Defense counsel elaborated that Fortson “had been throwing up all night. It was both ways.” May 17, 2021, Tr. 59, l. 4 – 7. He instructed her to go to the doctor. May 17, 2021, Tr. 59, l. 15 – 20.

The court asked for the State’s position and the solicitor responded that Fortson had notice and they were ready to proceed. May 17, 2021, Tr. 59, l. 21 – 25. Defense counsel requested that they not resume the trial until Wednesday so that Fortson could be present. May 17, 2021, Tr. 60, l. 16 – 20. The solicitor discussed her logistical problems with witnesses and asked to do a hearing that afternoon and defense counsel agreed that holding the hearing without Fortson was “probably fine.” May 17, 2021, Tr. 61, l. 6 – 62, l. 7. Judge Hood then stated the trial would resume Wednesday morning and for defense counsel to tell Fortson that they would proceed without her if she did not come. May 17, 2021, Tr. 63, l. 5 – 9. Judge Hood then said, “This case is four years old.” May 17, 2021, Tr. 63, l. 11.

Discussion

The trial court erred in selecting the jury when Fortson was not present. One of the most basic rights contained in the Confrontation Clause of the Sixth Amendment of the United States

Constitution is the right to be present at all stages of criminal proceedings. Illinois v. Allen, 397 U.S. 337, 338 (1970). Additionally, the right is guaranteed by the South Carolina Constitution:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Const. art. I, § 14.

As explained by the United States Supreme Court, “[j]ury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice.” Gomez v. United States, 490 U.S. 858, 873 (1989). It is also the time when a court enforces a defendant’s right to be tried by a jury free from “predisposition about the defendant’s culpability.” Id. The United States Supreme Court explained that voir dire is far from a simple administrative process; rather it “represents the jurors’ first introduction to the substantive factual and legal issues in a case[.]” and “[t]o detect prejudices, the examiner ... must elicit from prospective jurors candid answers about intimate details of their lives.” Id. at 874-875. The court “must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury’s impartiality.” Id. at 875.

The Wisconsin Court of Appeals explained that “the interplay between potential jurors and a defendant, while often subtle, is both immediate and continuous.” State v. Harris, 601 N.W.2d 682, 688 (Wis. Ct. App. 1999). The Wisconsin court explained that the gestures and attitudes of jurors must be scrutinized to ensure impartiality and that “no transcript can recapture the atmosphere of the voir dire.” Id. In other words, the court must examine the potential jurors’ reactions to the defendant along with the questions being posed. A potential juror’s visceral reaction to a defendant is more revealing than any question-and-answer session. Similarly, New

Jersey recognized that a defendant “is entitled to hear questions intended to disclose a juror’s bias, hostility or predisposition to believe or discredit the testimony of potential witnesses, and the juror’s answers so that he has the opportunity to assess the juror’s facial expressions and demeanor.” State v. Dishon, 687 A.2d 1074, 1081 (N.J. Super. Ct. App. Div. 1997).

In State v. Rivers, 294 S.C. 123, 363 S.E.2d 105 (1987), the Court reversed because a defendant was excluded from the judge’s in-chambers interview of jurors after a juror had been approached by a third party. Neither counsel nor the defendant was present and the Court stated the denial of the right to be present deprived the defendant of the ability to challenge the sufficiency of the trial judge’s inquiry. Id.

In State v. Whaley, 290 S.C. 463, 351 S.E.2d 340 (1986), the Court refused to reverse because of a defendant’s absence from a portion of voir dire. Without much discussion, the Court held the error was harmless. Unlike Whaley, Fortson missed all of voir dire and the selection of the jury. Also without much discussion, the Court in In the Interest of Dwayne M., 287 S.C. 413, 339 S.E.2d 130 (1986) reversed because the defendant was not present during examination of the victim. The Court stated that “under the facts of this case,” the defendant’s exclusion “cannot be regarded as harmless.” Id.

Fortson’s absence during jury selection was prejudicial and cannot be harmless in this case. The 911 calls and Fortson’s testimony remove this case from application of the harmless error doctrine. Fortson’s testimony directly contradicted Cruz and Jones and the jury needed to make a credibility judgment.

Fortson’s presence to assist her lawyer during jury selection was also particularly important because of the racially charged evidence in this case. In addition to Cruz’s testimony about hearing Fortson shout racial epithets, the lead investigator testified about offensive racial statements

Fortson made to her. According to the investigator, he told Fortson the police were investigating a shooting when she let him into her house. Tr. 453, l. 4 – 10. Fortson supposedly responded by asking “if any of the porch monkeys had been hit.” Tr. 460, l. 9 – 12. The officer claimed that after he told Fortson a man had been shot, she responded “Good, I hope he dies even though I had nothing to do with it.” Tr. 460, l. 9 – 19.

Fortson said the officer was the first one to use “derogatory racial terms.” Tr. 538, l. 2 – 6. She was angry that the police were insinuating that she had anything to do with the shooting and used the same term back to the officer “just to be a smart ass, quite frankly.” Tr. 538, l. 1 – 8. She was tired of the officer repeating the slur. Tr. 538, l. 1 – 8. She denied saying “porch monkey” on cross-examination and said the exact slur the officer used was “yard ape.” Tr. 577, l. 16 – 24. She also denied saying she wanted to shoot Mexicans and Black people as Cruz claimed. Tr. 580, l. 12 – 15.

The solicitor’s closing argument began by using the theme of racial prejudice. Tr. 617, l. 12 – 618, l. 13. She repeated the word “hate” multiple times during the beginning of her closing and said the neighbors’ fences could not keep out Fortson’s “vile words.” Tr. 617, l. 12 – 618, l. 13. The solicitor said that hate spewed from her mouth and from her gun. Tr. 617, l. 12 – 618, l. 13.

With the racially charged evidence being central to the State’s case, Fortson needed to be at jury selection to see potential bias and attitudes among jurors for herself. Defense counsel only used four of his five peremptory strikes during jury selection. May 17, 2021, Tr. 40, l. 25 – 42, l. 4. Among the jurors seated on whom defense counsel did not use a strike were five jurors who were victims of crime or had family members who were victims of crime. Juror 44’s brother was murdered in Richland County. May 17, 2021, Tr. 24, l. 8 – 25, l. 6. Juror numbers 34, 209, 501,

and 196 all were either crime victims or their family members were crime victims. May 17, 2021, Tr. 25, l. 8 – 20 (Juror 34). May 17, 2021, Tr. 26, l. , l. 3 – 17 (Juror 196). May 17, 2021, Tr. 28, l. 18 – 29, l. 10 (Juror 209). May 17, 2021, Tr. 29, l. 11 – 24 (Juror 501).

Most importantly, Juror 353's son was a police officer in Columbia. May 17, 2021, Tr. 18, l. 21 – 19, l. 9. Defense counsel did not use a peremptory strike on Juror 353. May 17, 2021, Tr. 39, l. 10 – 15. Fortson testified that she knew many police officers and that her father was a deputy for Richland County. Tr. 540, l. 11 – 541, l. 22. The State's allegations against Fortson for breach of peace of a high and aggravated nature were essentially for resisting arrest and shouting and kicking at police officers. Tr. 632, l. 23 – 633, l. 5. Fortson's testimony about the use of racial epithets was pitted directly against that of the lead investigator.

Fortson had a right to be present and assist counsel in the use of his peremptory strikes and assessment of potential jurors, especially jurors who had ties to the police. No issue of waiver of presence exists because the trial judge accepted her illness as the reason for her absence and used it as his reason to continue part of the trial. The judge should not have held the jury selection for the sake of expediency. Expediency must give way to the defendant's fundamental right to be present for jury selection. This error cannot be harmless and 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
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ATTORNEY FOR APPELLANT

This 6th day of May, 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) May 17, 2021, transcript 1 - 63
- (2) Trial transcript pages 1-177, 213-710
- (3) State's Ex. 65

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 SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 6th day of May, 2022.

s/David Alexander
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