STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton B. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENZELL DESHAWN JACKSON,

APPELLANT

APPELLATE CASE NO. 2021-000942

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUE PRESENTED

Did the trial judge err when he excluded testimony from the alleged victim's mother that the alleged victim's father was not worried about the sudden disappearance of their son where (1) the evidence was relevant to whether the alleged victim was actually dead or had simply fled from justice, (2) the evidence was within the mother's personal knowledge as it was based upon the mother's perceptions of the father, and (3) the evidence was either not hearsay because it was based upon the mother's perceptions or it fell within the state of mind exception to the prohibition against hearsay?

STATEMENT OF THE CASE

On November 11, 2019, an Aiken County grand jury indicted Appellant for murder, possession of a weapon during a violent crime, and kidnapping. R. *(indictments). The state, represented by Jacqueline Charbonneau and Ashley Hammack, called the case to trial before the Honorable Clifton Newman and a jury on August 16-20, 2021. Tr. 1. Appellant was tried jointly with Sha'Kel Dixon. Tr. 1. Keith Johnson represented Appellant. Tr. 1. Barry Thompson and William McKellar represented Dixon. Tr. 1. The jury found Appellant guilty as charged. Tr. 809, ll. 17-25.[1] Judge Newman sentenced Appellant to life without the possibility of parole for murder. Tr. 838, ll. 14-16; R. *(sentence sheet).[2] As a result, he did not sentence Appellant on the convictions for kidnapping or the weapon as required under the relevant statutory provisions. R. *(sentence sheets).

On August 27, 2021, Appellant served his notice of appeal. This brief follows.

[1] The jury also found Sha'Kel Dixon guilty as charged. Tr. 809, ll. 8-16.

[2] Judge Newman sentenced Dixon to life without the possibility of parole. Tr. 856, ll. 21-22.

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).

STATEMENT OF FACTS

The solicitor's entire case against Appellant depended upon the jury believing the state's star witness – Shaniyah Toney.

Derrick "60" Curry was the only child of a relationship between Kenya Bush and Victor Curry. Tr. 101, ll. 15-20. On April 30, 2019, Derrick was twenty-years old and lived at home with his mother. Tr. 101, ll. 21-22; Tr. 102, ll. 2-5. According to Ms. Bush, she saw and spoke to Derrick every day. Tr. 102, ll. 6-10. On April 30, 2019, Ms. Bush left her home at 7 a.m. for her job as a home healthcare worker. Tr. 102, l. 23 – Tr. 103, l. 5. Immediately before she left, she popped into Derrick's bedroom to remind him to pull up the carpet in his room so that she could have linoleum installed. Tr. 103, ll. 6-14. After getting off from work at noon, Ms. Bush called Derrick at 12:30 p.m. and learned he had not yet pulled up his carpet. Tr. 103, ll. 20-25. She fussed at him for not having completed the task. Tr. 104, ll. 5-6.

Eventually, Ms. Bush arrived at home only to find Derrick was not there and the carpet was still not removed as she had requested repeatedly. Tr. 104, ll. 7-16. Ms. Bush called Derrick around 1:30 p.m. Tr. 104, ll. 7-9. When Ms. Bush confronted him with his failure to perform the one task she had requested, Derrick said he would "be right back … he's coming home." Tr. 104, ll. 21-24. He also informed her that he was "going to meet Shaniyah." Tr. 104, l. 24.

Between 3 and 4 p.m., Ms. Bush began receiving phone calls saying Derrick was dead. Tr. 105, ll. 13-20. Initially, she "wait[ed] around for a little while" after getting these calls. Tr. 105, ll. 21-22. However, when "the phone calls just kept flooding in," she went to the police department. Tr. 105, ll. 22-24. During this time, Ms. Bush was calling and sending text messages to Derrick's phone, but she received no response. Tr. 106, ll. 3-6. After leaving the

police station, Ms. Bush found Shaniyah Toney on Facebook. Tr. 106, ll. 11-13. Ms. Bush "started calling her through Messenger" and the two sent text messages back and forth. Tr. 106, ll. 14-15. Shaniyah told Ms. Bush that Derrick had her car, and she would tell Derrick to call Ms. Bush when he picked her up from work. Tr. 106, ll. 16-19. However, Ms. Bush never received that call. Tr. 106, ll. 20-21. Instead, Shaniyah told Ms. Bush that Derrick was mad at Ms. Bush because she had told Shaniyah to tell him to call her. Tr. 107, ll. 8-10. Furthermore, Shaniyah claimed to Ms. Bush that she had dropped off Derrick at two different locations, which aroused Ms. Bush's suspicions. Tr. 107, ll. 8-15.

Shaniyah then left town. Tr. 248, ll. 16-18. Days later, Shaniyah's lawyer contacted law enforcement with a story to tell. Tr. 248, ll. 22-24; Tr. 294, ll. 19-24; Tr. 308, l. 24 – Tr. 309, l. 14; Tr. 430, ll. 8-16.

Shaniyah claimed that on April 30, 2019, she woke up to Appellant sending her text messages to go to his home. Tr. 182, ll. 11-23. When she arrived at Appellant's home, she saw Sha'Kel Dixon, Christian Barnwell, and someone nicknamed Tiga. Tr. 186, ll. 2-16. According to Shaniyah, Appellant entered the passenger side of her car with a small black handgun. Tr. 187, ll. 3-25. Allegedly, Appellant laid out a plan for Shaniyah to pick up Derrick, take him to her house, where she would pretend to want to have sex with him, and then Appellant and Dixon would "walk in and beat him up." Tr. 188, l. 8 – Tr. 189, l. 6.

Appellant got out of Shaniyah's car and returned a few moments later with Dixon. Tr. 189, ll. 21-24. Dixon also had a gun with him. Tr. 190, ll. 10-11. By this point, Shaniyah had already contacted Derrick. Tr. 190, ll. 21-22. She drove Appellant and Dixon to her house where she dropped them off in her garage. Tr. 191, ll. 11-21. Shaniyah then picked up Derrick from McDonald's. Tr. 191, l. 22 – Tr. 192, l. 7.

Derrick entered the driver's side of Shaniyah's car with a book bag, cell phone, and a big, long gun. Tr. 196, l. 15 – Tr. 197, l. 23. Derrick then drove to Shaniyah's house. Tr. 198, ll. 1-7. The two went to her bedroom where they started "kissing and touching." Tr. 206, ll. 8-17. Derrick went to the bathroom to put on a condom. Tr. 206, ll. 17-18. While Derrick was in the bathroom, Shaniyah walked to her sister's room for a hairpin. Tr. 207, ll. 15-17. She claimed she saw Appellant and Dixon in her sister's closet then. Tr. 207, ll. 18-22. Appellant and Derrick started to get sexual, but "for some reason, [she] just couldn't have sex with him." Tr. 208, ll. 6-9. After telling Derrick of her feelings, she got off the bed and began getting ready to go to work. Tr. 208, ll. 10-15.

The bedroom door then opened. Tr. 209, ll. 7-8. Appellant and Dixon were standing at the door. Tr. 209, l. 8. According to Shaniyah, Appellant shot Derrick in the eye. Tr. 209, ll. 8-9. Appellant fired a second time, but this bullet went into the wall. Tr. 210, l. 23 – Tr. 211, l. 3. Appellant and Dixon then placed Derrick in a plastic tote. Tr. 212, l. 16 – Tr. 213, l. 15. Shaniyah also claimed the two placed her bedding in a trash bag. Tr. 213, ll. 19-23. Thereafter, Dixon and Appellant placed the tote and trash bag in the trunk of Shaniyah's car. Tr. 219, ll. 6-13. The three drove to meet Christian Barnwell and another man. Tr. 219, ll. 19-23.

Appellant and Dixon opened the trunk of Shaniyah's car. Tr. 223, ll. 21-25. The four men then moved the tote and trash bag to Barnwell's car. Tr. 225, ll. 3-16. Appellant, Dixon, and Shaniyah then went to Appellant's house for cleaning supplies. Tr. 227, ll. 6-19. After getting the cleaning supplies, the three went to Shaniyah's house where they cleaned her bedroom. Tr. 228, l. 11 – Tr. 230, l. 17. Thereafter, they went to the home of Barnwell's mother. Tr. 232, ll. 16-21. After staying there for approximately ten minutes, Appellant and Dixon drove Shaniyah to her job at IHOP. Tr. 234, ll. 18-19; Tr. 235, ll. 9-17.

Around midnight, Appellant and Dixon picked up Shaniyah from IHOP. Tr. 237, ll. 11-25. Again, the group went to the home of Barnwell's mother. Tr. 238, ll. 6-7. Shaniyah claimed Appellant cleaned her car and placed items into a fire burning outside. Tr. 238, ll. 8-12; Tr. 239, ll. 1-22; Tr. 241, ll. 4-6. Shaniyah – alone – left in her car. Tr. 247, ll. 3-7. She drove as fast as she could to Greenwood, where her child's father lived. Tr. 248, ll. 12-18; Tr. 294, ll. 2-18.

ARGUMENT

The trial judge erred when he excluded testimony from the alleged victim's mother that the alleged victim's father was not worried about the sudden disappearance of their son where (1) the evidence was relevant to whether the alleged victim was actually dead or had simply fled from justice, (2) the evidence was within the mother's personal knowledge as it was based upon the mother's perceptions of the father, and (3) the evidence was either not hearsay because it was based upon the mother's perceptions or it fell within the state of mind exception to the prohibition against hearsay.

Relevant facts

Although the police never found a body that was identified as Derrick "60" Curry, the solicitor was undeterred and charged Appellant with murder based on the word of Shaniyah Toney. Tr. 82, ll. 9-13; Tr. 484, ll. 2-4. Thus, it was necessary for the solicitor prove Derrick was killed with evidence other than evidence typically collected from a body. To this end, the solicitor called Derrick's girlfriend, Cordajiah Council, as a witness, who said she last spoke to Derrick on April 30, 2019, when the two made plans to see each other later that day. Tr. 162, ll. 1-13. Also, Derrick gave her no indication that he intended to leave town. Tr. 164, ll. 12-14. Yet, Derrick was highly motivated to simply vanish. At the time of his disappearance, Derrick was charged with armed robbery. Tr. 119, ll. 19-21; Tr. 507, ll. 1-6. In fact, the warrant remained active even at the time of Appellant's trial. Tr. 507, ll. 7-10. Despite this very serious criminal charge hanging over his head, Derrick had not shared this information with the two most important people in his life – his mother and his girlfriend. Tr. 119, ll. 19-21; Tr. 169, ll. 14-18.

To counter the evidence that Derrick fled the area due to his pending criminal charge, the solicitor presented testimony from law enforcement witnesses that there was no sign of Derrick in a local hospital, no indication Derrick used any credit or debit cards, and no activity for Derrick in multiple databases, such as license plate reader databases and insurance claim databases. Tr. 426, l. 23 – Tr. 427, l. 1; Tr. 471, ll. 8-16; Tr. 629, l. 2 – Tr. 630, l. 7. However, the evidence presented by law enforcement to support Derrick's death was of limited value because it was undisputed that Derrick did not own a car and had no bank accounts or credit cards. Tr. 105, ll. 4-5; Tr. 195, ll. 2-3; Tr. 510, l. 8 – Tr. 511, l. 5. Therefore, it was absolutely necessary for the solicitor to present other evidence to strengthen its allegation that Derrick was dead as opposed to having simply left on his own accord. For this absolutely necessary evidence, the solicitor turned to Derrick's mother, Kenya Bush.

Ms. Bush told the jury that after April 30, 2019, she never heard from Derrick again. Tr. 107, ll. 22-24. Ms. Bush had no indication that he was leaving. Tr. 108, ll. 1-2. None of his friends or family had mentioned any contact with Derrick. Tr. 108, ll. 3-5. In fact, Ms. Bush had no "indication in any forum whatsoever that [Derrick was] alive." Tr. 108, ll. 6-8.

When Ms. Bush went to file a missing person's report on April 30, Derrick's father asked if she had a life insurance policy for Derrick. Tr. 118, ll. 1-6. When she confirmed that she did, he asked for the insurance money. Tr. 118, ll. 6-7. She refused his request. Tr. 118, ll. 6-7. Ms. Bush insisted this was not an odd question from Derrick's father because they "already knew [Derrick] was deceased" when she went to the police, and Derrick's father wanted to make sure they had enough money to bury him. Tr. 118, ll. 8-16.

Thereafter, defense counsel asked Ms. Bush if she told the police that Derrick's father was not worried about Derrick. Tr. 118, l. 21. The solicitor objected that the answer was not

relevant, beyond the witness's personal knowledge, and hearsay. Tr. 118, l. 22 – Tr. 119, l. 10. Defense counsel argued Ms. Bush's response would be "based on her own senses and her own observations." Tr. 119, ll. 4-8. Furthermore, defense counsel argued the answer concerned the police investigation. Tr. 119, ll. 7-8. Nevertheless, the judge sustained the solicitor's objection. Tr. 119, l. 18. The jury never learned that Derrick's own father was not worried about his sudden disappearance.

Discussion

The trial judge erred in denying the jury the opportunity to consider evidence that Derrick's father was not worried about Derrick because (1) the evidence was relevant to the jury's consideration of whether Derrick was actually dead or was simply a fugitive from justice, (2) the evidence was within the personal knowledge of Ms. Bush as it was based upon her perceptions of Victor Curry, and (3) the evidence was not hearsay as defense counsel did not ask Ms. Bush to testify regarding information received from another source, or if it were hearsay, then it fell within the state-of-mind exception.

Relevance

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly

bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

Here, the state charged Appellant with the killing of Derrick Curry with malice aforethought. Thus, it was necessary for the state to prove that Derrick was in fact dead. However, the police never found Derrick's body, which complicated the state's ability to prove he was actually dead. In other "no body" cases, the state has proven "the corpus delicti of murder or that the victim is dead by the criminal act of another" by showing "the victim's sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships." See State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648 (2006) (commenting upon the evidence offered in State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987)). The solicitor sought to do the same here through the presentation of testimony from Derrick's mother and girlfriend as well as law enforcement testimony concerning public records searches.

Therefore, one of the primary issues for the jury to decide was whether Derrick Curry was even dead. The fact that Derrick's father was not worried about him when his mother reported him as missing to the police was relevant to the jury's consideration of whether Derrick was dead. The solicitor presented evidence that Derrick's disappearance was not voluntary through the testimony of his mother, his girlfriend, and the police, but the defense introduced powerful evidence to show that Derrick's departure was voluntary – he was fleeing justice due to the active warrant for his arrest in connection with an armed robbery. Testimony from Derrick's mother that his father was not worried about his disappearance would have corroborated the defense theory that Derrick was a fugitive from justice. Thus, the evidence had a tendency to make it less probable that Derrick was dead, a necessary element of the murder charge lodged against Appellant.

Personal knowledge

"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. "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Id. Furthermore, if a "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).

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).

This Court 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.

This Court observed that the testimony at issue "concern[ed] the basic function of certain firearms." Id. at 321, 847 S.E.2d at 499. Further, this 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 this 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. This 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. This Court determined the testimony was "nothing more than the most rudimentary explanation of how someone discharges a revolver." Id. Therefore, this Court held it was admissible lay testimony. Id.

The South Carolina Supreme Court addressed a similar issue when an officer testified beyond the scope of his expertise. State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001). A police officer testified that in his opinion, the deceased was "astride the bike when shot." Id. at 177,

547 S.E.2d at 491. The officer was qualified as an expert in crime scene process and fingerprint identification. Id. "As such, he was qualified to testify, as he did, to measurements taken at the scene, to the recovery of shell casings, and to the identification of blood stains." Id. However, "[h]e exceeded the scope of his expertise when he was permitted ... to impart to the jury his conclusion, drawn from these measurements and observations, regarding the location of the victim and the position of his body vis-à-vis the bicycle at the time of the shooting." Id. at 177-178, 547 S.E.2d at 491. The Court held the officer "was allowed to give his opinion on the ultimate issue: Whether [Ellis] was acting in self-defense when he shot and killed the victim." Id. at 178, 547 S.E.2d at 491. "This was error." Id.

Further, the Court held the testimony was not harmless in light of Ellis's assertion that he was acting in self-defense. Id. "An officer's improper opinion which goes to the heart of the case is not harmless." Id. According to the Court, the error in allowing the officer's testimony, which exceeded the scope of his expertise and involved the ultimate issue in the case, was compounded by the solicitor's closing argument in which he repeatedly referred to the scientific testimony offered by the officer. Id.

The Court also addressed an issue similar to the one presented here when the Court tackled the admissibility of a forensic pathologist's testimony regarding the manner of death. State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417-418 (2011). In that case, the pathologist testified the deceased's manner of death was homicide. Id. at 263, 721 S.E.2d at 418. After explaining that pursuant to statutory law, "the testimony that an individual died from 'homicide' means simply that he or she died by the act, procurement, or omission of another without regard to the criminality of the killing or culpability of the killer," the Court noted that it was "well-established in South Carolina that a medical professional, qualified as an expert, may

render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial." Id. at 265, 721 S.E.2d at 419 (internal quotations omitted). The Court concluded that a qualified expert may testify as to cause and manner of death. Id. at 266, 721 S.E.2d at 419.

However, the pathologist relied upon anecdotal history – the information from the police – to form the basis of his opinion. Id. Although the Court held the pathologist could testify about anecdotal evidence and give his opinion on reliance of such evidence, the Court recognized that "in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury." Id. at 267-268, 721 S.E.2d at 420. Thus, the Court held that "an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." Id. at 269, 721 S.E.2d at 421.

In a case similar to Commander, supra, this Court addressed impermissible opinion testimony from a trial arising out of Spartanburg County. State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). The coroner testified he concluded the manner of death was homicide. Id. at 418, 807 S.E.2d at 705. This Court held the trial court abused its discretion by allowing the coroner's testimony because it was "improper opinion testimony by a lay witness." Id. at 418, 807 S.E.2d at 706. The coroner's opinion as to manner of death "was not based on his perceptions." Id. at 419, 807 S.E.2d at 706. Instead, his opinion "was based on the findings of the pathologist and the investigation of law enforcement." Id. at 419-420, 807 S.E.2d at 706. This Court held the coroner's testimony that the death was a homicide, which he defined as an

intentional act, was an opinion on Westmoreland's state of mind and, thus, his guilt under the circumstances of the case. Id. at 421, 807 S.E.2d at 707.

This Court held the coroner's testimony was not harmless because it "went to the trial's main issue regarding murder and went to the heart of [Westmoreland]'s defense." Id. The error "could reasonably have affected the result of the murder conviction by commenting on the main issue to be decided by the jury and discrediting [Westmoreland]'s main defense." Id. at 422, 807 S.E.2d at 707. Based upon the evidence presented "the main issue for the jury to decide regarding the murder indictment was whether the incident was the result of an intentional act or an accident. Such a determination likely would have been the deciding factor when assessing whether [Westmoreland] acted with malice aforethought, which was an essential element of murder." Id. at 423, 807 S.E.2d at 707. The coroner told the jurors that "any death presents five options: natural, accident, homicide, suicide, and undetermined." Id. He also told the jurors that homicide requires an intentional act. Id. Finally, he testified that he ruled the case a homicide and ruled out the other possible manners of death, which included accident. Id. Thus, the coroner's testimony went directly to the main issue during trial and the heart of [Westmoreland]'s defense that the incident was an accident." Id. at 423, 807 S.E.2d at 708.

Here, defense counsel explained that his question to Ms. Bush regarding whether Victor was worried sought information that Ms. Bush "perceived based on her own senses and her own observations." Tr. 119, ll. 4-5. Defense counsel was not asking Ms. Bush for an expert opinion or information beyond the realm of her perceptions; instead, he sought testimony from Ms. Bush that based upon her observations of Victor, a man with whom she shared a child for over twenty years, Victor was not worried about the sudden disappearance of Derrick. The trial judge erred when he refused to allow Ms. Bush to testify as to her own observations and perceptions.

Hearsay

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. In the instant matter, defense counsel was not questioning Ms. Bush regarding anything Victor Curry may have said to her. Therefore, the question was not seeking the introduction of forbidden hearsay. As discussed above, the question concerned Ms. Bush's observations of Victor Curry regarding his concern for his missing child.

Nevertheless, even if this Court were to construe the question as eliciting hearsay, then the evidence was admissible to show Victor's state of mind. "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is not hearsay. Rule 803(3), SCRE. As an example, the South Carolina Supreme Court held "a statement by the victim that he or she planned to meet the defendant at the time or place of the murder is admissible under Rule 803(3) as evidence of the declarant's then-existing state of mind." State v. Griffin, 339 S.C. 74, 78, 528 S.E.2d 668, 670 (2000).

In State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), the South Carolina Supreme Court explained that "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." This Court held testimony by two witnesses concerning what an alleged sexual assault victim said did not "fit within the exception provided in Rule 803(3)." Vail v. State, 402 S.C. 77, 87, 738 S.E.2d 503, 508-509 (Ct. App. 2013). One witness testified the alleged victim told her Vail was mad at her for telling the witness she and

Vail had sex. Id. at 87, 738 S.E.2d at 508. Another witness testified the alleged victim was very upset Vail had left their church, that everyone would hate her because they would know she was the reason he left, and that she was really upset because she had given her virginity to Vail. Id. at 87, 738 S.E.2d at 508-509.

Perhaps the best known case interpreting Rule 803(3), SCRE, is State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). Weston was charged with killing his mother, whose body was never found. Weston, 367 S.C. at 282, 625 S.E.2d at 643. Mother's friend, Suzanne Allen, testified that prior to Weston moving in with Mother, Mother "was a happy person, cheerful, and fun to be with." Id. at 285, 625 S.E.2d at 644. Allen also testified that Mother was "'very unhappy'" concerning Weston. Id. Finally, Allen testified that Mother told her she intended to ask Weston to leave her home. Id. at 286, 625 S.E.2d at 645. Weston's sister and Mother's daughter, Toni Franchey, testified that Mother seemed "more nervous and anxious than normal" during the two-week period before her disappearance. Id. According to Franchey, Mother "just seemed more anxious and just uncertain," including that she requested no one touch anything in Weston's room because she "was afraid." Id. This Court held the testimony "was properly admitted" because the witnesses "did not give a reason" for Mother's fear. Id. at 287, 625 S.E.2d at 646. Rather, the witnesses "testified only" that Mother "was afraid of Weston." Id. The Court determined that holding "that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid of the defendant" was "simply too constrained a reading of Garcia." Id. at 287-288, 625 S.E.2d at 646.

Recently, this Court had the opportunity to examine Rule 803(3), SCRE. State v. Hughes, 419 S.C. 149, 796 S.E.2d 174 (Ct. App. 2017). Hughes was accused of his killing his mother. Id. at 151, 419 S.C. at 175. Two days before her death, Hughes was released from the county jail after pleading guilty to forging two checks written on the deceased's bank account. Id. He received a

probationary sentence. Id. Margo Green, the deceased's friend, testified that shortly before her death, the deceased was upset that Hughes was released without her knowledge and she would have to be very careful now as a result. Id. at 154, 796 S.E.2d at 177. Green also testified the deceased said she slept better when Hughes was in jail, that she was always afraid and on guard when he was not in jail. Id. at 154-155, 796 S.E.2d at 177. Ben Leaphart testified the deceased "indicated she was uncomfortable around Hughes, had some verbal confrontations with him, and was concerned about his 'drug use and his lifestyle.'" Id. at 155, 796 S.E.2d at 177. Max Few testified that the deceased asked him to watch out for her because Hughes was out of jail and she feared he would kill her. Id. Finally, Marion Beachum testified the deceased was deathly afraid of Hughes and feared he would kill her. Id.

This Court held the trial court "erred in admitting some of the challenged testimony," but determined Hughes was not prejudiced from the inadmissible hearsay. Id. at 156, 796 S.E.2d at 178. This Court explained the statements "were inadmissible because they not only revealed [the deceased]'s state of mind, they described the reasons for her state of mind." Id. at 157, 796 S.E.2d at 178.

Here, Appellant sought to show that Victor Curry, Derrick's father, was not worried about his sudden disappearance by eliciting such testimony from Kenya Bush, Derrick's mother. Even if the proposed testimony was based upon Victor's out-of-court statements, the testimony was not hearsay because it concerned Victor's then existing state of mind, emotion, sensation or physical conduction, such as mental feeling. See Rule 803(3), SCRE. A lack of worry concerns one's state of mind, emotion, sensation or mental feeling. The judge erred by excluding this testimony.

In conclusion, the trial judge erred when he refused to allow Appellant to present evidence to counter the state's evidence that Derrick was dead based upon an allegedly unexplained sudden

disappearance. Appellant offered evidence to explain why Derrick would likely voluntarily disappear – he was wanted by the police for an armed robbery. In all likelihood, Derrick fled the jurisdiction to avoid prosecution. To bolster this theory, Appellant sought to introduce evidence that Derrick's father was not worried about Derrick's allegedly sudden disappearance. This evidence was relevant to the jury's consideration of whether Derrick was actually dead or was simply a fugitive from justice. Furthermore, the evidence was not improper as beyond the witness's knowledge or a form of prohibited hearsay because it was based upon the witness's perceptions of Victor Curry and concerned his then existing state-of-mind.

CONCLUSION

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

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of June, 2022.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton B. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENZELL DESHAWN JACKSON,

APPELLANT

APPELLATE CASE NO. 2021-000942

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 Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov, this 6th day of June, 2022.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: "SC - BROWN MELODY"; Angela Brown
Cc: Hackett, Susan
Subject: Jackson, Denzell - Initial Brief of Appellant and Designation of Matter - 2021-000942
Date: Monday, June 6, 2022 9:52:00 AM
Attachments: Jackson, Denzell - Initial Brief of Appellant - 2021-000942.pdf
Jackson, Denzell - Initial Brief of Appellant - 2021-000942 - AG Cover Letter.pdf

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Good Morning,

Please find attached for service the initial brief of appellant and designation of matter for Denzell Deshawn Jackson's appeal which will be filed with the Court of Appeals today.

If you have any questions, please let me know.

Thank you,

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330