IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 23-535
Circuit Court Case Nos. 22-F-234; 23-F-150

Cabell County, West Virginia

RANDY C. CAIN,

Petitioner.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

The victim, the sole eyewitness, testified that most of the abuse alleged in the indictment did in fact occur, but in doing so made specific denials that a firearm was in any way used in these assaults. Petitioner objects to the admission of out-of-court statements without which the state has no evidence of two charges.[1] The state is now employing a scattergun approach seeking to find legal means to attack the testimony of the trial testimony of the victim.

REPLY ARGUMENT

I. Out-of-court statements of the victim, Brenda McClellan were timely objected to and not admissible hearsay pursuant to rule 803 of the West Virginia Rules of Evidence.

A. Defense counsel timely objected to the statements of Anita Vasquez

The first time it appeared that Anita Vasquez was going to discuss what was said to her by the victim defense counsel immediately objected:

Q. At some point did you become concerned?

A. When she called me and told me that she was –

Defense Counsel: I'm going to object, your Honor. This is calling for hearsay, I think.

[1] Use or presentment of a firearm during the commission of a felony and wanton endangerment

The Court: I'll sustain that objection for what I think she is about to say. But you can restate your question.[2]

Several pages later in the transcript the state again tries to bring in this hearsay:

Q. And what – what else in that message made you concerned?

Defense Counsel: Your Honor, I'm going to object. Again this is calling for hearsay.

State's Counsel: It's the effect it had on the listener and why she called 911.

The Court: So far I'll allow what she said. I'll allow her to answer the question.[3]

From this point on the defense several times renewed his objection.[4] As defense counsel was under no obligation to renew a timely and ruled upon objection these renewals were not necessary to preserve error.[5]

Defense counsel was under no obligation to move to strike after this timely objection.

B. Anita Vasquez's statements are inadmissible to show the use of a firearm.

The state at trial presented Ms. Vasquez's hearsay testimony to show the effect it had on Ms. Vasquez and thus not being for the truth of the matter asserted.[6] The trial court, apparently on that basis, permitted Ms. Vasquez to continue. The state, having failed to raise the issue below, now alleges this testimony could have otherwise been allowed under rules 803(1), 803(2) and 807 of the West Virginia Rules of Evidence.

[2] A.R. 0172
[3] A.R. 0174
[4] A.R. 0180,0181
[5] W.Va. R. Evid 103(b) "Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal"
[6] A.R. 0174

1. **Rule 803(1) (Present sense impression)**

A trial court may "admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge."[7] That the statement be proximate to the event is essential as "The truthfulness of the utterance is dependent upon its spontaneity. It must be certain from the circumstances that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. Restated, the utterance must be 'instinctive, rather than deliberate.'"[8]

Importantly, Trooper Render testified that Ms. Vasquez did not arrive at the scene to talk to Ms. McClellan until after he had arrived at the scene and determined it safe, which established that Ms. Vasquez's conversation with Ms. McClellan was some time after Trooper Render questioned her about her injuries.[9] The respondent claims these statements were made immediately after Ms. Vasquez arrived at the scene[10] and leaves unremarked that she arrived at the scene some time after Ms. McClellan had spoken about these events to Trooper Render. As Ms. McClellan had already answered questions from Trooper Render there is no question her later statements were not "the reflex product of immediate sensual impression, unaided by retrospective mental action."[11]

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[7] Syl. pt. 4, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995), *overruled on other grounds by State v. Sutherland*, 231 W.Va. 410, 745 S.E.2d 448 (2013)
[8] *Phillips* at 583, 461 S.E.2d at 89 (quoting *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545, 554 (1976).
[9] A.R. 0213
[10] Respondent Brief at 10.
[11] *State v. Phillips,* 194 W.Va. 569, 583, 461 S.E.2d 75, 89 (1995) (citing *Municipality of Bethel Park v. W.C.A.B.*, 161 Pa. Commw 274, 280, 636 A.2d 1254, 1257 (1994) (other citations omitted)).

The trial court never specified that it was admitting AV's testimony as a present sense impression and accordingly never performed that analysis. The state was not seeking to admit these statements as present sense impressions and did not lay a factual basis for such admission. Had the issue been developed it is clear that the trial court would have not found these statements to be admissible under 801(1) as they were made subsequent to questioning by at least one other person.

2. Rule 803(3) (Then existing physical condition)

Respondent claims the statements about the use of a firearm would have been admissible as a "then existing physical condition" under rule 803(3).[12] The state ignores the part of the rule that says "but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."[13]

A"statement" under rule 801 et seq. is "'a single declaration or remark,' rather than 'a report or narrative.'"[14] This requires a trial court to "break down the narrative and determine the separate admissibility of each 'single declaration or remark.'"[15]

Ms. McClellan expressing that she was in pain and/or injured appears to be within the scope of these rules, but Ms. McClellan stating she was struck with a gun or that a gun was fired is not a statement of a condition such as "mental feeling, pain, or bodily health" but rather a statement of memory seeking to prove a fact.

Rule 803(3) is a narrow rule that excludes from hearsay a declarant expressing mental and physical feelings such as pain or anguish. By specifically excluding statements "to prove the

[12] Resp. Brief at 10.
[13] W.Va. R. Evid. 803(3).
[14] *Phillips* at 585, 461 S.E.2d at 91 (quoting Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)).
[15] *Id.*

fact remembered or believed" it is clear this rule is not a pretense to admit into evidence an extrajudicial narrative on the basis that it included statements about pain and descriptions of injury.

3. Rule 807 (Residual exception)

The state's attempt to invoke rule 807 likewise includes a self-serving truncation of the rule. Part of this residual exception requires not that the statement "be more probative… than any other evidence."[16] It requires that the statement be "more probative *on the point for which it is offered* than any other evidence *that the proponent can obtain through reasonable efforts.*"[17]

Ms. McClellan testified in this case. The state moved for an evidentiary deposition in order to obtain this testimony because it would be more probative than this out of court statement. There is trial testimony by Ms. McClellan that there was no use of a gun. The state did not challenge this testimony by confronting Ms. McClellan with her earlier statements about a gun.

The state now claims this (favorable to the state) out of court statement was the most probative evidence they could have reasonably obtained even though they actually obtained more probative evidence. That this more probative evidence does not help their case does not mean it does not exist.

C. Trooper Dakota Render's testimony about the out of court statements of the victim were not admissible evidence to show the use of a firearm.

[16] Response brief at 11.
[17] W.Va. R. Evid 807 (emphasis added),

Trooper Render twice testified over a timely objection about the out-of-court statements of the victim. The first was a description of the voicemail purportedly by the victim. The second was about his questioning of the victim. Neither are admissible under rule 803(1) or (3).

1. The voicemail

The trial court ruled the voicemail inadmissible hearsay in a pretrial ruling.[18] When Trooper Render seemed about to testify about the contents of that voicemail, defense counsel objected.[19] The state asked that it be admitted for "the effect on the listener."[20] The court allowed the witness to continue.[21] Trooper Render then described the contents of the voicemail.[22] The defense again objected and the state moved on to asking what Trooper Render did next.[23]

The trial court, much later after the end of the whole of Trooper Render's direct examination and just before cross examination remarked without detail or analysis that "**some** of these objections in my prior rulings were under 803 subsections 1 and 3."[24]

It is uncertain what trial rulings the court was including in this blanket declaration, but by use of the word "some" it can be assumed it didn't apply to all rulings. Given the circumstances, it is clear that the court was not referring to statements about the voicemail.

First, the trial court had already ruled the voicemail to be inadmissible hearsay. Second, the context as to how this testimony was used could not have been clearer. The state wanted to show why Trooper Render rendered a welfare check on the victim. Either the court was permitting this use of the out-of-court statement for purposes other than the truth of the matter

[18] A.R. 0012
[19] A.R. 0208
[20] A.R. 0208
[21] A.R. 0208
[22] A.R. 0209
[23] A.R. 0209
[24] A.R. 0215 (emphasis added)

asserted or the trial court decided *ex nihilo* without warning, comment, argument, analysis, or clarity to reverse its pretrial ruling when doing so would suddenly give rise to a whole additional set of admissibility issues.

If Trooper Render's recollection was merely to show motives for his further actions then the accuracy of his recollection would not be at issue. Neither would be the authenticity of the voicemail. There would be no best evidence objection. None of these objections were made because they were not appropriate if the voicemail is merely being used to contextualize Trooper Render's actions. They are, however, huge problems were this recollection of a recording admitted to show the truth of the statements of that recording.

It is far more plausible that the court was referring to the rulings made about other out-of-court statements discussed below where there was no pretrial ruling nor are there serious authentication and best evidence issues.

2. Statements Made to Trooper Render.

Trooper Render later testified about going to the residence and questioning Ms. McClellan. The state again argued that the testimony could be admitted to show the effect on Trooper Render. Defense counsel objected and was overruled. Trooper Render then testified that he questioned the victim and Ms. McClellan told him that she had been abused by the petitioner in various ways over the last week. At the time it appeared that the trial court allowed this for the purposes requested by the state, that is not for the truth of the matter asserted. However, at the close of direct testimony and just prior to cross examination the court remarked without detail or analysis that "**some** of these objections in my prior rulings were under 803 subsections 1 and 3."[25]

[25] A.R. 0215 (emphasis added)

a) **These statements are not admissible under rule 803(1) as a present sense impression**.

To be admissible under rule 803(1) as a present sense impression the statement must be made "at the time or shortly after the event." That the statement be proximate to the event is essential as "The truthfulness of the utterance is dependent upon its spontaneity. It must be certain from the circumstances that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. Restated, the utterance must be 'instinctive, rather than deliberate.' "[26]

In this case the response to Trooper Render's questioning came after she had told her story on a voicemail left on Anita Vasquez's phone.[27] Ms. McClellan had at that point already formulated and told her story once, and was when talking to Trooper Render speaking not as "a reflex product of immediate sensual impressions" as she had already told the story once and had ample time to reflect on the story and thus at this point was not "unaided by retrospective mental processes."

b) These statements are not admissible under 803(3) as then existing physical conditions.

As discussed in reference to the testimony of Anita Vasquez, testimony about statements made to Trooper Render likewise do not fall within the "then existing physical condition" exception when the statement is not specifically about the nature of the condition. The text of Rule 803(3) specifically states that it does not include "a statement of memory or belief to prove the fact remembered or believed."

[26] *Phillips*, 194 W.Va at 583, 461 S.E.2d at 89 (quoting *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545, 554 (1976).
[27] A.R. 209

A"statement" under rule 801 et seq. is "'a single declaration or remark,' rather than 'a report or narrative.'"[28] This requires a trial court to "break down the narrative and determine the separate admissibility of each 'single declaration or remark.'"[29]

Ms. McClellan expressing that she was in pain and/or injured appears to be within the scope of these rules, but Ms. McClellan stating she was struck with a gun or that a gun was fired is not a statement of a condition such as "mental feeling, pain, or bodily health" but rather a statement of memory seeking to prove a fact.

Rule 803(3) is a narrow rule that excludes from hearsay a declarant expressing mental and physical feelings such as pain or anguish. By specifically excluding statements "to prove the fact remembered or believed" it is clear this rule is not a pretense to admit into evidence an extrajudicial narrative on the basis that it included statements about pain and descriptions of injury.

CONCLUSION

Crucial evidence used to convict Petitioner of use of a firearm in commission of a felony and wanton endangerment was offered by the state and at that time allowed before the jury on the pretense that it wasn't being used to convict Petitioner. The state now presents alternative rationales for the admission of this evidence, none of which justify the admission of the hearsay statements at issue. Either the statements were evidence showing use of a gun, in which case they were inadmissible hearsay, or they weren't used to show use of a gun and as such the jury should have been properly instructed to not take them into account when deliberating. Petitioner again

[28] *Phillips* at 585, 461 S.E.2d at 91 (quoting Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)).
[29] *Id.*

asks his convictions for use or presentment of a firearm during the commission of a felony and wanton endangerment be vacated.

Respectfully submitted,
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