Rel: August 10, 2018

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-17-0452

Demarkus C. Robinson

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-16-2015)

KELLUM, Judge.

The appellant, Demarkus C. Robinson, was convicted of robbery in the first degree, a violation of § 13-8-41, Ala. Code 1975, and was sentenced to 25 years' imprisonment.

Because Robinson does not challenge on appeal the sufficiency of the evidence, a brief recitation of the facts is all that is necessary for the disposition of this case. Jon Furman testified that he was leaving a Birmingham nightclub at approximately 2:00 a.m. on June 28, 2015, when he noticed a young black man standing near Furman's parked vehicle. The man "put a gun in [Furman's] face" and ordered Furman to give him his wallet. (R. 125.) Finding the wallet empty, the man demanded money from Furman and told Furman "you're about to die." (R. 126.) At this point, Robinson, who also carried a gun, approached Furman and demanded money. After learning that Furman had no money, Robinson told Furman to give him his car keys. Furman handed over his car keys, and Robinson and the other man drove away in Furman's car. After the incident, Furman telephoned the police and spoke with Officer Torneshia Walker from the Birmingham Police Department.

Jeremy Pierson, a patrol officer with the City of Hoover, testified that he initiated a traffic stop of Furman's vehicle on July 12, 2015. Upon learning that the vehicle was reported stolen, Pierson placed the driver, Jasmine Suggs, in custody and transported her to the Hoover city jail.

Arthur J. Wilder, a detective with the Birmingham Police Department, testified that the Hoover Police Department notified him after they impounded Furman's vehicle. Detective Wilder subsequently spoke with Suggs at the Hoover city jail. During their conversation, Suggs told Detective Wilder that she purchased the car "from a male that she knows as Mark." (R. 211-12.) Detective Wilder searched Suggs's cellular telephone and found a telephone number for a contact named "Mark." (R. 212.) Upon entering the telephone number into Birmingham's Law Enforcement Records Management System, Detective Wilder identified Robinson as the owner of the number. Detective Wilder generated a photographic lineup and presented it to Furman, who identified Robinson as the perpetrator.

After both sides had rested and the circuit court instructed the jury on the applicable principles of law, the jury found Robinson guilty of first-degree robbery. This appeal followed.

On appeal, Robinson's sole contention is that the circuit court erred when it allowed Detective Wilder to testify to information he obtained during his conversation with Suggs --

namely, that she purchased the car "from a male that she knows as Mark" -- because, he says, the statement was inadmissible hearsay pursuant to Rule 802, Ala. R. Evid. (R. 211-12.) Specifically, Robinson argues that Suggs's statement, although admitted as nonhearsay "under the guise of it not being offered for its truth," constituted inadmissible hearsay because, he says, it was "unnecessary to explain why Robinson became a suspect" and was "[likely] misused by the jury in determining Robinson's guilt." (Robinson's brief, pp. 14-15.)

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001). "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000). "'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), Ala. R. Evid. "A statement offered for a reason other

than to establish the truth of the matter asserted therein is not hearsay." Deardorff v. State, 6 So. 3d 1205, 1216 (Ala. Crim. App. 2004) (citing Smith v. State, 795 So. 2d 788, 814 (Ala. Crim. App. 2000)).

We have held:

> "'In D.H.R. v. State, 615 So. 2d 1237 (Ala. Crim. App. 1993), the appellant argued that hearsay had erroneously been admitted when the officers were permitted to testify about what the confidential informant had told them. We disagreed, found that the evidence was not hearsay, and stated, "[The officers'] testimony was received to show the reasons for the officers' actions and how their investigation focused on a suspect. Sawyer v. State, 598 So. 2d 1035 (Ala. Cr. App. 1992)." 615 So. 2d at 1330. In accord, Miller v. State, 687 So. 2d 1281, 1285 (Ala. Crim. App. 1996).'"

Robitaille v. State, 971 So. 2d 43, 59 (Ala. Crim. App. 2005) (quoting Deardorff v. State, 6 So. 3d at 1217-18). In Ex parte Melson, 775 So. 2d 904 (Ala. 2000), the Alabama Supreme Court said:

> "We urge vigilance in evaluating any offer of testimony about an out-of-court declaration 'not for the truth of the matter asserted.' The admissibility of such testimony depends on its being relevant to a proper issue in the case. The first inquiry should be: 'if the out-of-court declaration is not offered for its truth, is whatever the declaration does tend to prove really at issue in the particular proceeding?'"

Ex parte Melson, 775 So. 2d at 907 n.2. In Ex parte Toney, 854 So. 2d 37, 41 (Ala. 2002), the Alabama Supreme Court held that a probation officer's testimony that non-witnesses saw the appellant in Tennessee -- which would be a violation of the appellant's probation -- served no discernible purpose other than proving that the appellant had been in Tennessee and was therefore inadmissible hearsay. The Court stated that, "[a]lthough 'identification' evidence can sometimes legitimately be admissible for a purpose other than to prove the truth of the matter asserted ... the State has not suggested any 'other' purpose for which the statements by the [non-witnesses] were offered into evidence." Ex parte Toney, 854 So. 2d at 41; See also Spradley v. State, 128 So. 3d 774, 786 (Ala. Crim. App. 2011) ("[Detective] Edge's testimony was neither relevant to show nor offered to prove anything other than the truth of the matter asserted, i.e., that Jason's credit cards were used after her murder at specific times and specific places.").

> "The judicial opinions have not accepted all prosecution attempts to characterize an out-of-court statement as relevant and admissible for a purpose other than the truth of the matter asserted. One situation where this characterization has been questioned involves prosecution attempts to offer

> testimony from a police officer relating out-of-court incriminating statements made by an absent witness or informant, not for the truth of the incriminating statements, but, to explain why an arresting or investigating officer conducted the investigation as they did.
>
> "The danger, of course, is that if all accusatory out-of-court statements were admissible to explain why the police arrested the defendant or conducted the investigation as they did it would eviscerate the constitutional right to confront and cross-examine one's accuser. The reason for police presence at a particular scene, or for the way police conducted an investigation may very well be relevant evidence within the context of a particular case. Where there is a possibility that the jury may be misled, police officers should be allowed to explain why they were present at a particular scene, or why they conducted an investigation in a certain manner. [Footnote omitted.] On the other hand, accusatory details contained in out-of-court statements are rarely necessary for this purpose, and the likelihood that such testimony will be misused by the jury and considered for its truth is not insignificant. Often an explanation that an officer acted 'upon information received,' or words to that effect, would be sufficient to explain police presence and conduct without necessitating the disclosure of historical or accusatory facts under the pretext that the details are not being offered for their truth."

McElroy's Alabama Evidence § 242.03(4)(e) (6th ed. 2009)(footnotes omitted).

During the testimony of Detective Wilder, the following occurred:

"Q. Okay. During the course of your investigation, did -- was Ms. Suggs able to tell you how she got the vehicle?

"A. Yes, sir.

"Q. What did she tell you?

> "[Defense Counsel]: Objection, Your Honor. Hearsay involving the confrontation clause.
>
> "THE COURT: Overruled.

"Q. ... What did she tell you as it relates to --

> "[Defense Counsel]: Your Honor, we would ask for an instruction.
>
> "THE COURT: Okay. Ladies and gentlemen, the question about what Ms. Suggs told him is obviously hearsay because hearsay is an out-of-court statement that is offered into evidence to prove the truth of the matter asserted.
>
> "However, there are exceptions to the hearsay rule, one of which is if the statement is simply offered to show why the person did what they did next. Okay? It's not offered for the truth of it, but simply to show you why the detective did what he did next. Okay?
>
> "Thank you. Go ahead.

"Q. ... Detective, what did she tell you in relation to how she got the car?

"A. She told me that she bought it from a male that she knows as Mark."

(R. 210-12.)

Here, unlike in Ex parte Toney, supra, and Spradley v. State, supra, there was a discernible, relevant purpose for the State to elicit testimony of Suggs's statement to Detective Wilder other than proving that Suggs bought the stolen car "from a male that she knows as Mark." (R. 212.) Absent testimony of Suggs's statement, Detective Wilder could not have explained, without confusing the jury, his search of Suggs's cellular telephone, his identification of a telephone number belonging to "Mark," his subsequent decision to cross-reference that number with the Law Enforcement Records Management System, and, ultimately, his generation and administration of the photographic lineup whereby Furman identified Robinson as the perpetrator. (R. 212.) Indeed, the facts in this case make it clear that Suggs's statement was introduced to "show the reasons for the officers' actions" -- the reasons that led Detective Wilder to pursue Robinson as a suspect -- and not to prove that Suggs had purchased the car from a man named "Mark." Robitaille, 971 So. 2d at 59.

To the extent that Robinson argues that Suggs's statement "was [likely] misused by the jury in determining Robinson's

guilt," there is little evidence supporting this claim in the record. (Robinson's brief, p. 14.) Other than Suggs's statement, there was no testimony indicating that Robinson was commonly known as "Mark." Since "Mark" is a commonplace name, the substance of the statement -- that Suggs purchased the car "from a male that she knows as Mark" -- does not amount to the type of statement that could have a prejudicial effect if "misused by the jury and considered for its truth." See McElroy's Alabama Evidence § 242.03(4)(e), supra. Because Suggs's statement was integral to the actions taken by Detective Wilder in his investigation and was introduced to show his reasons for pursuing Robinson as a suspect, the statement was not hearsay. Accordingly, Robinson is entitled to no relief on this claim.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., concurs. Joiner, J., concurs in the result, with opinion, which Burke, J., joins. Welch, J., dissents, with opinion.

JOINER, Judge, concurring in the result.

I write separately to state that, although I agree with Judge Welch's conclusion that the circuit court erroneously admitted testimony by Detective Arthur J. Wilder about his conversations with Jasmine Suggs because those statements constituted inadmissible hearsay, I respectfully disagree with his conclusion that the admission of those statements was not harmless beyond a reasonable doubt.

In the case before us, the State's evidence against Demarkus C. Robinson included testimony from the victim, Jon Furman. During his testimony, Furman, without hesitation, identified Robinson as the man who robbed him as he was leaving a Birmingham nightclub on June 28, 2015. (R. 127.) Later, when shown the photographic lineup given to him by law-enforcement officers after he reported the incident, Furman once again, without hesitation, identified Robinson as the perpetrator. (R. 133-34.)

This Court has previously held that a prejudicial error may be harmless if "evidence of guilt is 'virtually ironclad.'" Carroll v. State, 215 So. 3d 1135, 1164 (Ala. Crim. App. 2015), judgment vacated on other grounds, 137 S.

Ct. 2093, 197 L. Ed. 2d 893 (2017). Where evidence of a defendant's guilt is not "virtually ironclad" or even "overwhelming," however, a prejudicial error cannot be deemed harmless beyond a reasonable doubt. See, e.g., Rigsby v. State, 136 So. 3d 1097, 1101 (Ala. Crim. App. 2013) (holding that prejudicial error that resulted from prosecutor's violation of defendant's right against self-incrimination was not harmless because the evidence of the defendant's guilt was not overwhelming).

As established above, Furman's in-court identification of Robinson as the man who had robbed him constituted evidence of guilt that is "virtually ironclad," thereby rendering harmless the error of admitting testimony by Detective Wilder about his conversations with Suggs. Therefore, I concur in the result.

WELCH, Judge, dissenting.

I respectfully dissent from the main opinion affirming the conviction and sentence in this case.

Demarkus C. Robinson was convicted of first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975, and was sentenced to 25 years' imprisonment.

The evidence at trial indicated that Jon Furman was robbed by two men outside a Birmingham night club at approximately 2:00 a.m. on June 28, 2015. The men demanded that Furman give them his car keys. Furman handed over his car keys, and the men drove away in his car. Furman telephoned the police, and a report of the incident was made. A couple weeks later, an officer conducted a traffic stop on a vehicle, and, during that stop, he learned that the vehicle had been reported as stolen. The vehicle, belonging to Furman, was being driven by Jasmine Suggs. She was taken into custody and, upon questioning, stated that she had purchased the vehicle from a male named "Mark." Detective Arthur J. Wilder with the Birmingham Police Department entered the telephone number belonging to "Mark" in Suggs's phone into Birmingham's Law Enforcement Records Management System.

Records indicated that the telephone number belonged to Robinson. Detective Wilder generated a photographic lineup including Robinson's photograph and presented it to Furman, who identified Robinson as one of the men who had robbed him.

Robinson argues that the trial court erroneously admitted testimony by Detective Wilder about his conversation with Suggs in which Suggs identified the person she claimed sold her the vehicle. He contends that the testimony was inadmissible hearsay. Robinson first advanced this argument in his motion in limine and again as the prosecutor began to question Detective Wilder about his conversation with Suggs, stating:

> "[Trial counsel]: Objection, Your Honor. Hearsay involving the confrontation clause.
>
> "THE COURT: Overruled.
>
> "....
>
> "[Trial counsel]: Your Honor, we would ask for an instruction.
>
> "THE COURT: Okay. Ladies and gentlemen, the question about what Ms. Suggs told him is obviously hearsay because hearsay is an out-of-court statement that is offered into evidence to prove the truth of the matter asserted.
>
> "However, there are exceptions to the hearsay rule, one of which is if the statement is simply

> offered to show why the person did what they did next. Okay? It's not offered for the truth of it, but simply to show you why the detective did what he did next. Okay?
>
> "Thank you. Go ahead."

(R. 211.)

The main opinion, holds that the testimony was admissible because "there was a discernible, relevant purpose for the State to elicit testimony of Suggs's statement to Detective Wilder other than proving that Suggs bought the stolen car 'from a male that she knows as Mark.'" ___ So. 3d at ___. The main opinion states that, "[i]ndeed, the facts in this case make it clear that Suggs's statement was introduced to 'show the reasons for the officer's actions' -- the reasons that led Detective Wilder to pursue Robinson as a suspect -- and not to prove that Suggs had purchased the car from a man named 'Mark.'" ___ So. 3d at ___. (quoting Robitaille v. State, 971 So. 2d 42, 59 (Ala. Crim. App. 2005). I respectfully disagree.

"It is well settled that 'a determination of admissibility of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion.'" State v. Mason,

675 So. 2d 1, 3 (Ala. Crim. App. 1993) (quoting Jennings v. State, 513 So. 2d 91, 95 (Ala. Crim. App. 1987)). "'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), Ala. R. Evid. "Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute." Rule 802, Ala. R. Evid.

I recognize that this Court has found evidence not to be hearsay when received to show the reasons for the officers' actions and how their investigation focused on a suspect. See Robitaille v. State, supra. However, as quoted from the main opinion:

> "The danger, of course, is that if all accusatory out-of-court statements were admissible to explain why the police arrested the defendant or conducted the investigation as they did it would eviscerate the constitutional right to confront and cross-examine one's accuser. The reason for police presence at a particular scene, or for the way police conducted an investigation may very well be relevant evidence within a particular case. ... On the other hand, accusatory details contained in out-of-court statements are rarely necessary for this purpose, and the likelihood that such testimony will be misused by the jury and considered for its truth is not insignificant. Often an explanation that an officer acted 'upon information received,' or words to that effect, would be sufficient to explain

> police presence and conduct without necessitating the disclosure of historical or accusatory facts under the pretext that the details are not being offered for their truth. [Footnote omitted.]"

McElroy's Alabama Evidence § 242.03(4)(e)(6th ed. 2009)(footnote omitted).

The Alabama Supreme Court has urged vigilance in evaluating out-of-court statements not offered for the truth of the matter asserted. The Court stated:

> "The admissibility of such testimony depends on its being relevant to a proper issue in the case. The first inquiry should be: 'if the out-of-court declaration is not offered for its truth, is whatever the declaration does tend to prove really at issue in the particular proceeding?'"

Ex parte Melson, 775 So. 2d 904, 907 n.2 (Ala. 2000)(emphasis added).

I am hard-pressed to imagine any other relevant reason the State offered Suggs's statement via Detective Wilder than to prove that Suggs bought a car from a male she knows as "Mark" and that his telephone number was identified as belonging to Robinson. While this information did show how Detective Wilder came to include Robinson in his photographic lineup, this information was unnecessary to the proceeding. Further, this testimony did not merely encompass the fact that

Detective Wilder included Robinson in the photographic lineup; the testimony indicated that Robinson had had possession of Furman's vehicle, bolstering Furman's identification of Robinson as one of the robbers. The trial court erroneously allowed Detective Wilder's testimony about Suggs's statement identifying the person who she claimed sold her the vehicle.

Even though I find that the testimony in the present case constituted inadmissible hearsay, the conviction need not be reversed if the error was harmless. I, however, cannot say that this error was harmless.

> "'The standard for determining whether constitutional error is harmless is whether the court can "declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In determining whether constitutional hearsay error is harmless, a court may consider numerous facts, including
>
> > "'"'the importance of the [declarant's] testimony in the prosecution's case whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the [declarant] on material points, ... in the overall strength of the prosecution's case.' Delaware v. Van Arsdall, 475 U.S. [673],

> 684, 106 S. Ct. 1431, 889 L. Ed. 2d 674 [(1986)]."
>
> "'James v. State, 723 So. 2d 776, 781 (Ala. Crim. App.), cert. denied, 723 So. 2d 786 (Ala. 1998).'
>
> "Ex parte Dunaway, 746 So. 2d 1042, 1050 (Ala. 1999) (Lyons, Justice, concurring in the judgment and concurring in part and dissenting in part as to the rationale)."

Baker v. State, 906 So. 2d 210, 240 (Ala. Crim. App. 2001), rev'd on other grounds, 906 So. 2d 277 (Ala. 2004).

The main opinion states that "[s]ince 'Mark' is a commonplace name, the substance of the statement -- that Suggs purchased the car 'from a male that she knows as Mark' -- does not amount to the prejudicial effect if 'misused by the jury and considered for its truth.'" ___ So. 3d at ___. The testimony that Suggs purchased the vehicle from "Mark" led Detective Wilder to discover and to testify that the telephone number identified in Suggs's contacts as "Mark's" belonged to Robinson. This inadmissible testimony was extremely prejudicial to Robinson, particularly because it served as additional evidence connecting him to the vehicle taken during the robbery and, as stated above, it bolstered Furman's identification that Robinson was one of the robbers. The

issue before us is the existence or nonexistence of a reasonable possibility that the erroneously admitted hearsay might have prompted the jurors to find that Robinson was one of the robbers. See Ex parte Baker, 906 So. 2d 277 (Ala. 2004)("We are not concerned here with whether there was sufficient evidence on which the [defendant] could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Given the sometimes unreliability of eyewitness testimony, I cannot agree that the admission of the testimony was harmless beyond a reasonable doubt.

For the reasons stated above, I would have reversed the judgment of the trial court and remanded this cause for a new trial. Therefore, I dissent.