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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2021-000566

The State, Respondent,

vs.

Mandy Morrow Fortson, Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Appellant's issue regarding her failure to be present for jury selection is not preserved for review on appeal. Further, she has failed to demonstrate any legitimate prejudice from her absence during jury selection.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. Appellant's issue regarding her failure to be present for jury selection is not preserved for review on appeal. Further, she has failed to demonstrate any legitimate prejudice from her absence during jury selection.

Appellant contends the trial court reversibly erred in proceeding with jury selection without her being present. Significantly, the issue is never raised on the record to the circuit court. While counsel moved for a continuance of the trial, there is no indication he informed the court of his client's constitutional right to be present during jury selection or asked that jury selection not be performed until Wednesday when she could return. Additionally, Appellant has not demonstrated any prejudice from her failure to be present during the jury selection.

Preservation

In order to properly preserve an issue for review on appeal, the process has been succinctly stated with four basic requirements: "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). "An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (italics in original). This Court further announced: "imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id. at 422, 526 S.E.2d at 724; see also, State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) ("Preservation rules are intended to ensure that appellate courts

review considered decisions of our trial courts and that issues are not being raised for the first time on appeal.").

"Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011); see also, In re Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."); State v. Owens, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial); Beaufort County v. Butler, 316 S.C. 465, 451 S.E.2d 386 (1994) (observing that constitutional issues must be timely raised to be preserved for appeal).

On May 17, 2021, the State called this case to trial. Prior to jury selection or pre-trial hearings, the circuit court noted the parties discussed a matter in chambers and that the matter would be put on the record after jury selection. (5/17T.3-4). The court stated: "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 for the record on that issue. We'll flesh it out a little bit once we're outside the presence of the jury." (5/17T.4). Neither the court nor Appellant's counsel noted the nature of the motion at that time. (5/17T.4).

The court then proceeded to jury selection. Again, Appellant's counsel never noted for the record any objection to going forward with jury selection without his client present. (5/17T.4-43). Once jury selection was complete, the court asked counsel: "Any exceptions to the jury selection process?" Counsel for Appellant did not reiterate her constitutional right to be present as raised on appeal. Instead, he responded "None from the Defense, Your Honor." (5/17T.43). After giving specific instructions to the selected jurors, the court again asked if there

was anything before the jury was excused and counsel again indicated: "Nothing from the Defense, Your Honor." (5/17T.56).

Once the jury left, the court put on the record the circumstances surrounding why the discussion was in chambers and not on the record in the courtroom that morning. He then asked for information from Appellant's counsel who specifically stated: "And, Your Honor, that argument would have been for a continuance, if I had done a motion that was made on the record at that time." (5/17T.58). Again, counsel did not indicate he told the trial court that his client had a constitutional right to be present for jury selection and that jury selection needed to be postponed. He merely indicated he requested a continuance.

After a discussion of his client's health concerns, counsel for Appellant explained she was cleared to return to work—or to court—on Wednesday, May 19. (5/17T.58-59). The court asked for the State's position, and the State never mentioned anything about jury selection. It solely discussed its readiness to go to trial. (5/17T.59-60). After the State's presentation, the court specifically asked: "What is it you're requesting, Mr. Williams?" (5/17T.60). Appellant's counsel responded: "Judge, obviously, on behalf of my client, I request that we start Wednesday morning so that she can be present during the trial." (5/17T.60). Once again, he did not make a single mention of the need to conduct jury selection while his client was present or ask the judge to do jury selection over on Wednesday.

The State noted the ability to do a Neil v. Biggers hearing prior to trial. The court asked whether they could proceed with the Biggers hearing and counsel stated: "Judge I think that's probably fine. I don't know that she needs to be present." (5/17T.62). Ultimately, the court ruled: "Well, I say we go ahead and do the Biggers this afternoon and then we'll start Wednesday morning. And Ms. Fortson needs to be told if she ain't here, we're going forward

without her." (5/17T.63). Again after the ruling, Appellant's counsel never mentioned the constitutional requirement for jury selection to be done in her presence.[1]

The court clearly indicated a willingness to move trial to Wednesday, and it is entirely logical that, had counsel argued jury selection could not constitutionally proceed without Appellant present, the court would have continued it to Wednesday morning as well. The record demonstrates counsel made a general motion for a continuance, which he later indicated was a continuance so that his client could be "present during the trial." It does not indicate that he raised the issue presented on appeal, that it was constitutionally required that his client be present for jury selection.

As a result, the issue raised by Appellant is not properly preserved for review on appeal. There is no indication in the record the trial court was informed of Appellant's need to be present for jury selection. There is no indication Appellant's counsel ever objected to selection going forward or asked that it be moved to Wednesday. Instead, the only request made was a request for a continuance so she could be present at trial. There is no discussion or argument on the record related to the constitutionality of her presence or absence at jury selection and the only inference that can be made from the record is that the court was considering simply a motion for continuance.[2]

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[1] Counsel's willingness to go forward without Appellant on the pre-trial matters demonstrates his continuance motion based on her need to be present did not relate to all stages of the prosecution, and instead, it only related to the trial itself.

[2] Additionally, even if there can be an inference from the record that counsel originally requested everything occur Wednesday and not proceed Monday, this does not preclude the possibility that he ultimately acquiesced in jury selection going forward just as he agreed to the Biggers hearing proceeding. As a result, this issue would be better addressed in Post-Conviction Relief where all discussions, arguments, and statements by the parties and their counsel in the off-the-record chambers meeting can be addressed.

Accordingly, because the trial court was never asked to consider the constitutionality of proceeding with jury selection in Appellant's absence, the issue is not one which should form the basis of a reversal. As the Supreme Court has explained:

> The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him.

Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970); see also, State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]").

Merits

A defendant has a right to be present to confront witnesses and at any critical stage pursuant to both the United States and South Carolina Constitutions. See U.S. Const. amend V and S.C. Const. art. I § 3. The United States Supreme Court has held:

> The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Although the Court has emphasized that this privilege of presence is not guaranteed "when presence would be useless, or the benefit but a shadow," due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105–106 (1934)). The South Carolina Supreme Court has acknowledged the right: "A criminal

defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001).

The South Carolina Supreme Court had occasion to consider whether prejudice should be presumed by a defendant's absence from a critical stage or whether he must demonstrate the prejudice in that particular case. The Court found "the 'modern trend' to be away from broad and sweeping presumptions to a particularized examination of prejudice in the individual case." State v. Smart, 278 S.C. 515, 524, 299 S.E.2d 686, 691 (1982) (citing State v. Schifsky, 243 Minn. 533, 69 N.W.2d 89 (1955)). The Court has further explained: "Denials of a defendant's right to be present, as well as other constitutional violations, are subject to a harmless error analysis. Although the right to be present is a substantial right, no presumption of prejudice arises from a defendant's exclusion." Shuler, 344 S.C. at 626, 545 S.E.2d at 816; see also, Bourne v. Curtin, 666 F.3d 411, 413 (6th Cir. 2012) (stating that the "right to personal presence at all critical stages of the trial" is "generally subject to harmless-error analysis").

In a case in which the defendant was absent from a portion of voir dire conducted by the court, the Supreme Court acknowledged his right to be present was violated. See State v. Whaley, 290 S.C. 463, 351 S.E.2d 340 (1986). The Court indicated the jury was fair and impartial and that Appellant failed to demonstrate prejudice by his exclusion. The Court ultimately concluded: "Although the trial judge improperly excluded appellant from voir dire, we find the error was harmless beyond a reasonable doubt. A criminal defendant is entitled to a fair trial, not a perfect one." Id. at 465, 351 S.E.2d 341 (citing Rose v. Clark, 478 U.S. 570 (1986)).

In the instant case, Appellant has again failed to demonstrate how the jury was not fair and impartial. She has not identified any witness she knew or who would have needed to be

removed based on connection of the juror to some aspect of her life. She has not shown how any decisions made by trial counsel during selection of the jury would have been different had she been present. Finally, and most significantly, once she was present at trial, she never identified any juror that would have had to be removed or that she would have removed had she been present for jury selection. As a result, she has failed to establish prejudice sufficient to warrant reversal, and this Court should find any error in her exclusion was entirely harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by emailing a copy to her counsel of record, David Alexander, at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 8th day of September, 2022.

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Caroline Collins

From: Caroline Collins
Sent: Thursday, September 8, 2022 11:52 AM
To: 'David Alexander (dalexander@sccid.sc.gov)'
Cc: Matthews, Lindsey; William Blitch
Subject: The State v. Mandy Morrow Fortson (2021-000566)
Attachments: FORTSON Mandy - Initial Brief of Respondent and Designation of Matter - 2021-000566 (03095529xD2C78).PDF

Good Morning Mr. Alexander,

Attached please find the Initial Brief of Respondent and Designation of Matter in The State v. Mandy Morrow Fortson (2021-000566). These documents will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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