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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENZELL DESHAWN JACKSON,

APPELLANT

APPELLATE CASE NO. 2021-000942

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

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.

Factual background

The state never found a body that was identified as Derrick "60" Curry. Thus, there was a serious issue presented in the case of whether Derrick died or simply disappeared of his own volition. The state relied exclusively upon circumstantial evidence to establish that Derrick was deceased. Primarily, the state counted on convincing the jury of Derrick's death by presenting his mother and girlfriend as witnesses to say that Derrick was unlikely to disappear voluntarily. Appellant elicited evidence to show that Derrick was highly motivated to disappear at the time because he had a pending armed robbery charge. R. 53, ll. 19-21; R. 378, ll. 1-10. Appellant also showed that Derrick's mother and girlfriend were unaware of this pending charge, which called into question the reliability of their testimony concerning the likelihood that Derrick would have left the area voluntarily. R. 53, ll. 19-21; R. 65, ll. 14-18. In light of the state's exclusive reliance on circumstantial evidence to show an essential element of the offense – the killing of another – it was incumbent upon the defense to present any and all evidence to cast reasonable doubt on the state's evidence related to this element. Whether individuals who knew Derrick believed he was

likely to disappear voluntarily was relevant and probative of whether the state satisfied an essential element of murder.

To this end, on cross-examination, defense counsel asked Derrick's mother, Kenya Bush, if she told police that Derrick's father was not worried. R. 52, ll. 17-21. There was no objection to this question; however, Ms. Bush requested the question be repeated. R. 52, l. 19. Thereafter, defense counsel asked, "Didn't you tell the police that Victor wasn't worried." R. 52, l. 21. Only then did the solicitor object. Specifically, the solicitor objected "to the relevance and no personal knowledge of what [Father] knew or didn't know." R. 52, l. 22 – R. 53, l. 1.

In its brief, the state claimed that *argument* on the objection occurred "[o]utside the jury's presence." BOR at 21. There is *no* indication in the record that the argument on the objection occurred outside the jury's presence. The state is simply in error in its unsupported claim that the argument on the objection occurred when the jury was not present. To the contrary, the transcript makes clear that the objection *and* the argument on the objection occurred *in* the jury's presence. See generally R. 52-53.

Defense counsel argued that the statement was "based on her own senses and her own observations" and that the father's lack of worry was part of the investigation concerning the disappearance of Derrick. R. 53, ll. 4-8. After defense counsel presented his response to the initial objection, the solicitor quickly added, "[I]t's irrelevant and it's hearsay." R. 53, ll. 9-10. Thereafter, the judge asked for the question to be repeated; he did not ask for additional argument on the objection. R. 53, l. 11. In response, defense counsel asked, "didn't Ms. Bush tell investigators, when she spoke with them a day after the incident, that, when she talked to his father, he was not worried and that he asked about insurance also." R. 53, ll. 14-17. The judge, again without asking for additional argument, sustained the objection. R. 53, l. 18.

Error preservation

Appellate courts must be "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner." Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). The rules of error preservation are "not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather [are the] adherence to settled principles that serve an important function." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329-330, 730 S.E.2d 282, 285 (2012).

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Id. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. The rationale of issue preservation is to prevent "a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Further, an appellant may waive his right to appeal a decision by the trial judge through acquiescence. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006).

Generally, the rules of issue preservation are strictly enforced. However, the appellate courts have carved out certain limited exceptions. First, the "lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal." State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). Another exception is the "doctrine of futility." Id. Our courts have recognized "that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." Id. A third "exception exists where the interests of minors or incompetents are involved." Id. at 585, 611 S.E.2d at 282. The final exception is where exceptional circumstances require excusal of error preservation. Id. For example, the Supreme Court found exceptional circumstances existed where failure to review the merits of a sentencing error would result in the defendant remaining incarcerated beyond the legal sentence. State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999); see also State v. Vick, 384 S.C. 189, 203, 682 S.E.2d 275, 281-282 (Ct. App. 2009) (excusing error preservation where the sentencing for kidnapping was in violation of the statute).

The state argued that Appellant's argument on appeal that the question and answer were relevant because the police had not found Derrick's body and the excluded evidence – that Derrick's own father was not worried about Derrick's disappearance – had a tendency to make it less probable that Derrick was dead was not properly before this Court "because it was not presented to the trial judge." BOR at 22. Appellant candidly admits that defense counsel did not say the specific words that father's lack of worry was relevant because it made Derrick's death less probable. However, defense counsel did argue that the information that father was not worried was information available to the police and was a "fact of their investigation." R. 53, ll. 4-8. This is sufficient to preserve for review the argument on appeal that father's lack of worry was relevant as it pertained to the investigation – was Derrick dead due to a criminal act or had he disappeared

of his own free will? Furthermore, defense counsel was not required to make an appellate argument to the trial judge in order to preserve the matter for review. Defense counsel's argument was sufficient to bring to the trial judge's attention that the improperly excluded evidence was relevant to whether Derrick was deceased – an essential element of the offense.

Similarly, the state argued that Appellant's "claim the evidence was not hearsay or, alternatively, that it was admissible under an exception to the rule barring hearsay are likewise not properly before the Court because he did not raise these arguments at trial." BOR at 24-25. First, defense counsel did argue the evidence was not hearsay because defense counsel argued it was information she obtained "based on her own senses and her own observations." R. 53, ll. 4-5. Hearsay "is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is *not* information obtained by a witness based on the use of the witness's own senses, particularly the sense of sight. By arguing that he was eliciting evidence that Ms. Bush had based upon her own observations, defense counsel argued he was not eliciting hearsay as the two things are antithetical.

Second, Appellant again candidly admits that defense counsel did not argue that a hearsay exception applied, but defense counsel was never provided with the opportunity to do so. The solicitor did not object on the basis of hearsay until after defense counsel presented his argument to the solicitor's original objection. Defense counsel could not be clairvoyant. When the solicitor added another basis for the objection, the judge asked for the question to be repeated and then ruled. The judge entertained no additional argument despite the solicitor adding a basis for the objection. Not only did defense counsel not have an opportunity to argue that a hearsay exception applied – to the extent the evidence could be construed as hearsay – defense counsel was forbidden

from doing so as "[n]o argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court." See Rule 18, SCRCrimP.

Merits

Quite logically, when the prosecuting a murder case without a body, the prosecution must rely heavily – and often exclusively – on evidence from witnesses who knew the allegedly deceased individual from which an inference could be drawn that the individual was dead as a result of a criminal act. The state did precisely this in the case sub judice. Appellant sought to discredit the state's circumstantial evidence in a variety of ways, including eliciting testimony to show that Derrick's own father was not concerned about his disappearance.

Ironically, in a footnote, Respondent cited to a case argued by Respondent's counsel thirty-five years ago where a defendant was sentenced to death for a murder where no body had been found. BOR at 3 n.3 (citing State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987)).[1] Respondent's citation to Owens without discussion of the case is ironic because Owens supports Appellant's argument for why the excluded testimony was relevant. The Supreme Court explained that "[t]he corpus delicti ... may be proved by circumstantial evidence." Owens, 293 S.C. at 167, 359 S.E.2d

[1] In the same footnote, Respondent accuses Appellant of creating "an obvious red herring" when Appellant remarked that the solicitor was undeterred by the fact that the police never found a body that was identified as Derrick "60" Curry. BOR at 3 n.3. According to Respondent, "[t]his is an obvious red herring, since there was nothing deterring the state's charging decision." BOR at 3 n.3. Respondent is wrong on all accounts. A red herring is something that is intended to be misleading or distracting. Appellant's note that the solicitor was undeterred by the lack of a body in a murder case was not intended to be misleading or distracting. It is a simple fact. The solicitor charged Appellant with murder despite the fact that the solicitor did not have a body to show that Derrick was actually dead. Undeterred means persevering with something despite setbacks. Generally, the lack of a body in a murder case is a setback. See e.g., State v. Baum, 355 S.C. 209, 215, 584 S.E.2d 419, 422 (Ct. App. 2003) (affirming a trial judge's finding of manifest necessity in the granting of a mistrial where the body of the victim was found during the trial because "the discovery of the body of a victim during a murder trial is an extremely important piece of evidence").

at 278. Thereafter, the Court noted that "[o]ther courts considering 'no body' murder cases have allowed evidence of the victim's personal habits and relationships as circumstantial evidence from which an inference could be drawn that the victim's sudden disappearance was the result of death by a criminal act." Id. In Owens, the state presented evidence that the victim disappeared suddenly, which was unlikely to be voluntary in light of his personal habits and relationships. Id. at 168, 359 S.E.2d at 278.

Adding further irony is a subsequent decision issued by the Supreme Court in the line of cases concerning the convictions of Alvin Owens, which Respondent's counsel *also* argued thirty years ago, which was not mentioned by Respondent in its brief, but also aids Appellant's argument. The Supreme Court analyzed whether the state was barred by Double Jeopardy from trying Owens for capital murder because Owens was previously convicted of kidnapping based upon the same set of facts and circumstances. State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992). In deciding that no Double Jeopardy violation occurred in the subsequent murder trial, the Court explained

> [T]he majority of physical evidence linking Owens to [victim]'s disappearance was, or could have been, discovered at the time of the kidnapping trial. However, [victim]'s body was never found and the most tangible evidence of murder became manifest subsequent to Owens' kidnapping conviction. The mere lapse of time from October, 1984 (the date of [victim]'s disappearance) until January, 1986 (the date Owens was indicted for murder) made the fact of [victim]'s death much more probable.

Id. at 406, 424 S.E.2d at 476. See also State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648-649 (2006) (upholding the denial of a directed verdict in a "no body" murder case where the state presented evidence that the alleged victim "had an active social life, was active with friends, at bridge club, and regularly kept in touch with the apartment complex managers, her sister, and her friends" and had not been seen or heard from since a particular date).

Based upon the law as demonstrated in Owens, supra, and Owens, supra, in "no body" murder cases, determining whether the individual who has disappeared has done so as the result of a criminal act or a voluntary act is essential. Therefore, the law allows the presentation and consideration of a wide variety of evidence to show whether the disappearance is criminal or voluntary. Here, there can be little doubt that whether Derrick's own father was worried when Ms. Bush informed him that Derrick was missing was precisely the type of evidence that a jury must consider in determining whether a crime resulted in Derrick's disappearance. The trial judge erred in excluding the evidence.

CONCLUSION

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

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Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final reply brief of appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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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 final reply brief of appellant in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is esalter@scag.gov, this 3rd day of January, 2023.

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