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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Perry H. Gravely, Circuit Court Judge
Appellate Case Tracking No. 2021-001533

The State, Respondent,

vs.

Randy Doyle Marchbanks, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In June 2021, the Pickens County Grand Jury issued indictments for discharging a firearm into a dwelling and pointing and presenting a firearm. (Indictments; R.___). Appellant proceeded to trial before the Honorable Perry H. Gravely and a jury on December 13-15, 2021. The jury found Appellant guilty as charged. Judge Gravely sentenced him to concurrent sentences of four years in prison, suspended on time served and three years of probation. (Sentencing Sheets; R.___).

STATEMENT OF FACTS

Appellant's daughter, Melissa Karr, was in a relationship with Casey Nalley. Nalley lived with Appellant and Karr up until Friday, September 7, 2018, when he was asked to leave by Appellant. (T.105; 107; R.___). He testified Appellant told him it was nothing against Nalley, "just didn't want nobody to live there no more." (T.108; R.___).

On Monday, September 10, Nalley arrived at the home to pick Karr up for work. She was not ready, so she told him to come in the house and wait for her by the bathroom. (T.108-109; R.___). While waiting for Karr, Nalley heard a gun cock in the back of his head and when he turned Appellant had a gun. (T.109; R.___). Nalley testified Appellant fired a shot and said "that was my one shot, the next one would go in [Nalley's] head." (T.109; R.___). Nalley left the house and Appellant followed him still holding the gun.

Nalley told Appellant to drop the gun and fight like a man. Appellant either dropped the gun or turned it away, but when Appellant got close enough, Nalley hit him and tossed the gun to the side. (T.109; R.___). After trying to get Karr to leave with him, Nalley left and ultimately went to the police department. (T.110; R.___).

Karr told a similar version of events. She indicated Nalley came in to wait on her prior to taking her to work. While waiting, Appellant pulled a gun on Nalley and told Nalley to get out of the house or Appellant would "blow his brains out." (T.77; R.___). Nalley went to leave and while trying to leave, Appellant fired a shot near Nalley's ear. (T.78; R.___). Karr testified Nalley left the house followed by Appellant who pointed the gun at Nalley while screaming obscenities and threatening Nalley. (T.79; R.___). Appellant threw down his gun, and Nalley hit him breaking Appellant's glasses. When Appellant got up, Nalley hit him again and ultimately broke Appellant's rib. (T.79; R.___).

She testified after Appellant and Nalley were separated, Appellant punched her in the mouth. A neighbor tried to get a hold of Appellant, but he swung again at Karr and broke two of her ribs. (T.80; R.___). She headed toward the house when she heard gun shots that hit the ground.(T.80; R.___). Karr reached the front screened porch, and Appellant started shooting again at the porch. (R.81; R.___).

A neighbor testified she witnessed the fight in the middle of the road between Appellant and Nalley. She did not witness the break-up of the fight, but after some of the people began heading toward the house, she heard several gunshots. (T.153-154; R.___).

A second neighbor also testified to seeing the fight from her house. She testified Appellant approached the road with a gun and threw it down. Then she heard the altercation occur. (T.160-161; R.___). Once the fight was over, she saw Appellant pick up the gun, start walking back toward the house, and fire the gun at the house. She testified he may have shot 3-4 shots. (T.161; R.___).

Two shell casings were originally found outside the house. (T.166-167; R.___). After the lieutenant of the forensic division, Anthony Raines, arrived, he located three additional shell casings in the yard.[1] On the screen porch, three recent bullet holes were located. Raines could identify recent holes from older holes based on the color of the exposed insulation behind the vinyl siding. (T.166-168; R.___). Raines used rods to trace the trajectory of the bullet determined by the bullet holes in the screen porch. Raines was able to determine the shots originated in the direction of the three shell casings he previously located lying in the grass. (T.170; R.___). At least one of the bullets went through the outer wall of the screen porch and stuck the inner wall of the house. (T.175; State's Exhibit 25; R.___).

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[1] An additional shell casing was located in the kitchen but was apparently never collected. (T.142; R.___).

ARGUMENT

I. The trial court did not abuse its discretion in denying Appellant's request to have a witness testify via WebEx, especially in light of the numerous technological concerns raised and left unanswered. Significantly, Appellant never proffered or even attempted to proffer the witness's testimony via WebEx so the issue should not be considered preserved for review on appeal. Finally, even if the court abused its discretion in denying Appellant the ability to use WebEx, the testimony as described by Appellant's counsel would not have been admissible so he cannot prove he was prejudiced.

Appellant contends the trial court erred in denying his request to allow an unavailable witness, Karr's son, to testify via WebEx. Initially, the issue is not preserved because Appellant never proffered or attempted to proffer the testimony of the witness, as a result all we have are conflicting statements over what his testimony might be at trial and no indication of his ability to even participate via WebEx. On the merits, the circuit court properly denied the request to have the witness participate via WebEx when Appellant's counsel could not ensure the witness even had the ability to use WebEx or a connection sufficient to allow participation. Finally, the witness would not have been allowed to testify to the substance provided by Appellant's counsel because it was not admissible under Rule 404(b), SCRE as argued at trial or under Rule 608, SCRE as asserted on appeal.

Lack of Proffer

When an issue arises during trial involving the exclusion of evidence or testimony, a party is required to proffer the evidence or testimony sought to be admitted in order to preserve any issue related to its exclusion for appellate review. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error

alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."); State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984) ("Failure to make an offer of proof precludes the appellant from raising the issue on appeal."). The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice. State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005) (citing State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990)). The rule requiring a proffer has only been relaxed "where the record **clearly** demonstrates prejudice." Id. (emphasis added).

In the instant case, counsel for Appellant waited until the morning the jury was selected to raise a motion for continuance based on a witness's unavailability even though he knew the prior week the witness was likely not to be present. (T.47-48; R.___). Counsel explained what he believed the witness would testify to if allowed to testify. (T.43-44; R.___). Significantly, the State considered the possibility of having the witness testify as part of the State's case in chief based on statements previously given by the witness. In order to provide testimony beneficial to Appellant he would have to recant a prior statement to law enforcement. (T.48-50; R.___). As a result, at best there is conflicting evidence in the record regarding exactly what the witness's testimony would have been if he was actually called at trial.

Further, and perhaps most significant in this case, a proffer would have demonstrated whether the witness even had the ability to participate via WebEx or other remote means. Nothing in this record establishes the witness was available, had an internet connection available, had access to a computer or other device to utilize WebEx or other remote communication, or had the technological knowledge to handle setting up everything satisfactorily to not cause problems with the proceedings. Counsel for Appellant both at trial and on appeal merely speculate on all of these issues. They presume because he was last known to be at a hotel that he had to have access to the

internet. (App.Br.10). On appeal, the rank speculation goes even deeper asserting: "Being a grandson, he likely would have been technologically savvy enough to use WebEx to testify on his grandfather's behalf . . . ." (App. Br. 8). Additionally, Appellant opines: "There existed means to provide the witness with the documents the [S]tate intended to use to cross-examine him." (App. Br. 10). Nothing in the record supports either statement.

The State directly questioned whether it would be possible and how it would work. (T.52; R.___). Counsel for Appellant responded, not with an offer of proof or evidence indicating WebEx was a viable option wherever the witness was located, but instead stating: "WebEx doesn't seem like it's a very difficult thing for us to get in place for him . . . So I don't really know if it's that much of a burden." (T.53; R.___). Appellant's counsel admitted he did not know the burden it would be to have a working WebEx connection that would allow proper examination and cross-examination and he never addressed whether the witness would actually be available by WebEx. Prior to the circuit court determining he would not allow WebEx, the State placed its primary concerns on the record: "As we stated yesterday, my main concern is I don't know -- we don't know where this witness even is and what his technological capabilities are." Counsel for Appellant never responded or provided any evidence that the State's concerns were unfounded. (T.57; R.___). Had a proffer been made, questions could have been answered and this Court could have been able to properly review any decision of the circuit court without reliance on age-based assumptions and other conjecture or guessing. At a minimum, hearing from the witness regarding his ability to even be contacted by WebEx and what version of testimony he was prepared to offer would give this Court something to consider on appeal. More significant, the State, after seeing WebEx working and knowing the witness can fully participate may have granted its consent which

would have placed the consideration in a whole new status. As a result, this Court should find the issue not properly preserved for review on appeal.

Merits

On the merits, the circuit court properly denied the request to allow the witness to participate via WebEx given the facts and circumstances presented to the court and the many open questions regarding the ability of all parties to participate via remote technology. The court noted his concerns regarding the technological capabilities at the courthouse as well as with the witness. As a result, he properly considered the possibility and determined without consent of all parties he would not be willing to go forward with WebEx when there could be significant technological constraints and problems that arise during the witness's testimony.

Pursuant to Rule 612 of the South Carolina Appellate Court Rules[2], the South Carolina Supreme Court promulgated an order "to provide guidance on the use of remote communication technology by the trial courts . . . ." See Section (a), RE: Use of Remote Communication Technology by the Trial Courts (As Amended September 21, 2021): Order of the Supreme Court dated September 21, 2021.[3] Under Section (c)(1) of the Order, the Supreme Court provides: "In various provisions of this order, the decision to allow RCT to be used rests in the discretion of the judge." Importantly, and notably omitted from Appellant's discussion, the same section of the Order specifies some of the primary considerations for the use of discretion by judges:

> Even when the language in this order indicates RCT may be used, the facts and circumstances in a particular case or matter may

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[2] "By order, the Supreme Court of South Carolina may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules." Rule 612, SCACR.

[3] Located at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2628 (last accessed January 27, 2023).

> indicate that the use of this technology is inappropriate. To some extent, the exercise of this discretion will necessarily be influenced by the technical skill of the judge, attorneys, other case participants and any supporting staff who will be using this technology.

Additionally, the same section of the Order concludes by explaining: "Finally, for some proceedings, this order may restrict this discretion. . . . Another example is that for some types of proceedings the consent of the parties or a sufficient justification must exist before RCT of any type may be used."

The Order in Section (c)(6) also provides:

> Except as restricted by the guidance in this order, including the limits on the use of RCT in jury trials under section (d)(11) below, **a judge may use RCT to the extent consented to by the parties.** Even when the parties have consented, the judge may find it is inappropriate to use RCT based on the specific facts and circumstance of the case . . . .

(Emphasis added). This provision clearly anticipates RCT generally being used only in those instances when parties have consented. Even when parties consent, the trial court retains the discretion to prohibit the use when facts and circumstances—such as the highly questionable ability of the witness to maintain a proper internet connection and participate fully through the use of WebEx—demonstrate it is best to require all person to appear in court.

In Section (d)(10) of the Order, the Supreme Court discusses the use of RCT in trials generally. The Court provided:

> As a general rule, trials, whether jury or non-jury,should be conducted with all the necessary participants (i.e., judge, jury (if applicable), criminal defendant, counsel, self-represented litigant, etc.) being present in the courtroom, with witnesses appearing in the courtroom to testify. In addition to being consistent with our longstanding practice and tradition in this State, this Court continues to believe there is great value in conducting trials live and in-person.

The Court noted the provisions that followed, including Section (d)(11) related to jury trials, "**restrict** the use of RCT in these trials." (Emphasis added). As a result, the Supreme Court has announced a clear preference for **in-person** testimony in the courtroom by all participants.

The provisions that follow the above stated preference related to jury trials provide:

> **(11) Use of RCT in Jury Trials.**
>
> **(A)** With the consent of all parties, the judge may allow a witness to testify using ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.
>
> **(B)** Without the consent of the parties, a judge may allow a witness to testify using ERCT if the judge finds there is sufficient justification to do so. In a criminal case, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990).

The above provisions must be read in light of the preference established in Section (d)(10) and the fact that section (d)(10) specifically notes the use of RCT is restricted—not expanded—by Section (d)(11).

It is obvious Section (d)(11)(A) does not apply in the instant case to allow the use of WebEx since there can be no argument that the State did not consent to the use at trial. The question is whether Section (d)(11)(B) even applies in the instant case to allow the witness to participate and, if so, whether the trial court abused its discretion in not finding a "sufficient justification" to allow WebEx.

First, it is questionable whether Section (d)(11)(B) applies in the instant situation. The entire Order must be read as a whole in making that determination. As stated above, there is a clear preference for in-person and not remote testimony during a jury trial. The Court made it clear a trial judge could use RCT "to the extent consented to by the parties" in Section (C)(6) and then later acknowledged Section (d)(11) restrict the use of RCT. Section (d)(11)(B) contemplates

a situation in which the defendant opposes RCT and established the requirement that sufficient justification—meaning justification sufficient to meet the standard of Maryland v. Craig, 497 U.S. 836 (1990)—was required to overcome that lack of consent.

Even if use by the defendant over the objection of the State is contemplated by the Order, the defendant would have the burden of establishing a sufficient justification for the use of RCT and the fact it has to rise "to the level" of Craig, demonstrates the sufficient justification is a fairly high burden to meet. In Craig, the State had to demonstrate an adequate level of necessity to protect the welfare of a child during testimony to justify the abridgement of a defendant's right to in-person confrontation. While Craig is not directly applicable to this case, the Order by the Supreme Court clearly requires the justification for going against the consent of one party to be a serious burden when it has to be at the same level of Craig. That level of justification has not been shown in this case.

Appellant asserts the witness was material for his defense. However, the witness would not have disputed that Appellant pointed and presented a firearm, nor would he have disputed that Appellant fired the gun at the house and into the screen porch. Instead, he was being offered merely in an attempt to challenge the credibility of one of the victims by indicating she had fabricated other claims in completely unrelated situations. As a matter of fact, the witness's statements which would have been admissible at trial only supported the State's case indicating Appellant had a gun and fired the gun at the house in anger. (T.49; R.___).

Additionally, as noted previously, the circuit court had many questions regarding the viability of using WebEx. Appellant never established the courtroom where trial would be held could handle WebEx in such a way to allow it to be used at trial. Importantly, Appellant—the party with the burden to establish WebEx was possible—provided zero evidence indicating the

witness had access to a computer, had access to stable and sufficient internet service, had access to WebEx, or knew how to use WebEx. See, e.g., State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) (finding burden on moving party); State v. Gardner, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998) (finding moving party bears the burden of proof); In re Child of Nicholas G., 200 A.3d 783, 788 (Me. 2019) ("The party moving for authorization for contemporaneous transmission from another location has the burden of establishing good cause."). All of these considerations, especially when directly questioned by the court and the State, had to be answered prior to Appellant making a showing of sufficient justification to warrant allowing WebEx over the State's objection.

The State did not consent to the use of WebEx given the complete uncertainty that existed regarding whether its use could be successful. Appellant did not provide a sufficient justification for the circuit court to allow WebEx over the State's objection. As a result, the trial court did not err in denying Appellant's request for his witness to testify via WebEx, especially in light of the failure by Appellant to meet the basic burden that he establish WebEx was even possible for the witness.

Harmless Error

Even if the circuit court erred in denying Appellant the right to use WebEx to display the testimony of his unavailable witness, the testimony he sought to include would not have been admissible. At trial, Appellant sought to admit the testimony under Rule 404(b), SCRE as part of a common scheme or plan. On appeal, he asserts it is admissible under Rule 608, SCRE. See, e.g., State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal). No matter which Rule is being utilized, the testimony by the missing witness would not have been admissible at trial.

Under the theory advocated at trial, Appellant sought to admit the testimony of prior instances of conduct where one of the victims fabricated stories to get people in trouble. In one situation, she bloodied herself to accuse others of physically harming her. In a second, she allegedly burned herself with a curling iron and claimed to have been hurt and choked by an ex-husband. In the instant case, she is claiming her father threatened to kill her boyfriend, pointed a gun at him, fired a shot near the boyfriend, followed the boyfriend out of the house, got into a fight with her boyfriend, battered her after the fight ended, and then fired shots at the screen porch and house she was trying to enter. None of these circumstances are similar or have a logical connection so as to find them admissible under Rule 404(b). Instead, they would be merely means of backdooring propensity and bad character evidence, which is specifically not allowed.

Under Rule 608, the testimony would also be inadmissible.[4] It clearly does not fall under Rule 608(a), SCRE, because it was not presented in the form of opinion or reputation. It was solely presented as specific incidents of conduct.

Further, a witness is not allowed to testify to extrinsic evidence under Rule 608(b), SCRE. The Rule provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Instead, the Rule only allows the evidence to be used to cross-examine the witness. In the instant case, Appellant used the specific conduct alleged to cross-examine Karr. This was the extent its use was permitted by the Rule.

Also, it was not admissible under Rule 608(c), SCRE. There is no allegation of bias in the testimony by the witness—one of the claims relates to the brother and the other relates to an ex-

[4] It is very telling that Appellant does not indicate how the testimony was admissible or material under Rule 608, but much like the baseless assertions regarding the ability of the witness to use WebEx, merely indicates it is so.

husband. (T.44; R.___). Appellant does not assert on appeal how the testimony demonstrates a bias or motive to lie about what took place.

Significantly, Appellant attempted to enter the same testimony through Deputy Morris. The circuit court allowed some of the testimony to be entered but restricted much of the testimony. (196-199; R.___). The court found some specifics were not admissible under Rule 608, SCRE, and Appellant's counsel responded by indicating he was arguing common scheme or plan, which was also denied. (T.200; R.___).[5] Deputy Morris did indicate he did not believe a crime had been committed after meeting with Karr, the unavailable witness, Karr's brother, and Appellant. (T.200-201; R.___). As a result, the primary substance of the testimony to be offered by the unavailable witness was presented to the jury. Accordingly, the exclusion of the evidence could not reasonably have impacted the jury's verdict in this case. See State v. Reyes, 432 S.C. 394, 405–06, 853 S.E.2d 334, 340 (2020) ("Some errors—when considered in the context of the facts of a particular case—are so insignificant and inconsequential they do not require reversal of a conviction."). As the Supreme Court has noted:

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

[5] No appeal has been taken from the circuit court's ruling the testimony was not admissible under either Rule 608, SCRE, or as a common scheme or plan under Rule 404(b), SCRE. The same ruling would have applied to the testimony of the unavailable witness. See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (explaining an unappealed ruling, whether right or wrong, is the law of the case)(quoting Atl. Coast Builders & Contractors, L.L.C. v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)); State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (noting an unchallenged ruling, right or wrong, becomes the law of the case).

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). Our Supreme Court has articulated:

> "[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." State v. Tapp, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). Put simply, the harmless error rule embodies a commonsense principle our appellate courts have long recognized—"whatever doesn't make any difference, doesn't matter." State v. Jolly, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991) (quoting McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

Reyes, 432 S.C. at 406, 853 S.E.2d at 340. In this case, any error was entirely harmless because much of the testimony came in through other witnesses or would not have been properly admitted under either Appellant's theory at trial or on appeal.

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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