

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY HAYGOOD,

APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

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JUN 17 2013
SC Court of Appeals

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ARGUMENTS IN REPLY

- I. The issue is properly preserved for appellate review where Counsel presented her arguments to both the Magistrate at trial and the Circuit Court on appeal, and where both the Magistrate and Circuit Court improperly conflated Counsel's Sixth Amendment Confrontation Clause argument with the excited utterance hearsay exception.**

The State asserted that the issue of whether Appellant Henry Haygood's Sixth Amendment confrontation clause right was violated because the magistrate allegedly never ruled upon the issue pursuant to Crawford v. Washington.¹ Brief of Respondent, p. 4—p. 6). This is incorrect under both the facts of the case, and the law of South Carolina.

Rules of preservation simply require an issue to be raised to and ruled upon by the trial court it to be asserted on appeal. See, e.g., State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Additionally, when the Circuit Court acts in an appellate capacity, the appellant must again raise the issue for it to be preserved. See, e.g., Rogers v. State, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (2004).

When making arguments, a matter is deemed preserved even though the exact words of a legal issue are not used so long as the ground for the motion is apparent from a review of the record. See, e.g., State v. James, 608 S.C. 455 (Ct. App. 2004) (citing State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001)). In other words, “[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appeal.” State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). “Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it *an opportunity* to rule on the issue.” Id. 388 S.C. at 502, 697 S.E.2d at 595-96 (emphasis added) (holding issue preserved); see also State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008) (finding

¹ 541 U.S. 36, 124 S.Ct. 1354 (2004).

defense counsel preserved his objection under the Confrontation Clause where he objected to the introduction of a written statement at trial on the grounds that he could not cross-examine the statement). Further, once a trial court rules on an objection, defense counsel is neither required by law, nor permitted by rule, to object again or argue further on the matter. See State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 161-62 (1978) (finding counsel is not required to repeat objection to line of questioning once trial court ruled upon objection); Rule 18(a) and (b), SCRCrimP (“Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.”) and (“No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court.”).

Simply stated, the rules of preservation are “not a ‘gotcha game’ aimed at embarrassing attorneys or hammering litigants. . . .” Atl. Coast Builders & Contractors, LLC. v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Thus, it is “good practice for [the Court] to reach the merits of an issue when error preservation is doubtful,” and longstanding precedent of resolving an issue on preservation grounds is permissible only “when it clearly is unpreserved.” Id. 398 S.C. at 330, 730 S.E.2d at 285; see also State v. Price, 400 S.C. 110, 113, 732 S.E.2d 652, 653 (Ct. App. 2012) (addressing the merits of the issue where “there is a substantial question as to whether [Appellant] preserved this issue for appeal.”).

In the present case, although the magistrate’s return does not specifically state the case name of Crawford, it clearly indicated that Haygood objected to the verbal statement of the investigating officer, and to the “statements pertaining to allegations of what the defendant’s [sic] did on the date of [sic] question.” R. * (Magistrate’s Return, p. 3; p. 4). Further, the magistrate unequivocally indicated that its ruling was to agree with the State’s argument.

Specifically, the magistrate wrote the following in its return regarding its ruling on the motions before it at trial:

The court overruled the defendants [sic] objections *and agreed with the State* that in some criminal domestic violence [sic] the investigating officer of the alleged incident should be allowed to testify as to the finding of facts during his investigation.

R. * (Magistrate's Return, p. 3) (emphasis added). Thus, the Magistrate's Return itself indicated that Counsel for Haygood objected to the officer's testimony regarding "findings of fact during his investigation" that pertained "to allegations of what the defendant's [sic] did on the date of [sic] question." Further, the objectionable content of the officer's testimony was readily apparent under the "Summary of the State's Witness Testimony at Trial," wherein the entirety of the officer's testimony constituting Haygood's alleged conduct was all premised on the out-of-court testimonial statements given by the accuser to Haygood after the incident occurred and the officer interviewed her apart from Haygood in the course of investigating the allegations to form his "findings of fact."

Additionally, any possible ambiguity of whether the Haygood's argument was based upon his Sixth Amendment Confrontation Clause right or hearsay was clarified before the Circuit Court when the State agreed with Counsel for Haygood that the case specifically turned on whether or not this statement's testimony." R.* (Cir. Ct. Tr. 7, lines). The State further conceded, "[T]hat's what this case turns on," and again asserted the magistrate decided the issue "based on whether or not the testimony of the officer was giving was that of the testimony of variety." R.* (Cir. Ct. Tr. 7, lines). As such, the issue regarding whether Haygood's Sixth Amendment right to confront his accusers was violated by permitting the officer to testify as to the statements given to him by Haygood's accuser during the officer's investigation was indeed raised to and ruled upon by the Magistrate. See, e.g., State v. Humble, Op. No. 5108 (S.C. Ct.

App. filed March 27, 2013) (holding issue preserved where no tape or transcript from the summary court proceeding was available, where review was based upon the summary court's return, and where the government conceded before the Circuit Court a matter it tried to re-assert before the Court of Appeals) (citing State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007)).

Moreover, this issue likewise formed the heart of the argument before the Circuit Court by both Counsel for Haygood and Counsel for the State. In fact, after first erroneously indicating Hayward's objection was based upon hearsay, the Circuit Court nonetheless acknowledged that Hayward argued the officer's testimony was inadmissible pursuant to Crawford v. Washington, the seminal modern United States Supreme Court case interpreting the proper test for whether the Sixth Amendment right to confront one's accusers is applicable. R.* (Cir. Ct. Order, p.1—p. 2). Notably, the test established by Crawford hinges upon whether the out-of-court statement by an individual is deemed "testimonial" in nature—language which resounds in the State's arguments to the Circuit Court, and which it conceded was argued to the Magistrate. Accordingly, despite the rulings by both the Magistrate and Circuit Court—which Haygood asserts are erroneous—the issue of whether Haygood's Sixth Amendment right to confront his accuser was violated by permitting the investigating officer to testify as to the statements given to him by Haygood's accuser without opportunity for the defense to cross-examine the accuser is preserved for appellate review.

II. The facts properly before the court do not objectively show an ongoing emergency occurred at the time the Accuser gave her statement to law enforcement.

The State also asserts that the accuser's out-of-court statements to the investigating officer after he arrived at the home and separated the accuser and Haygood were non-testimonial based upon its unsupported assertion that objective circumstances distinguished the present case from the clear precedent of Davis v. Washington.² Brief of Respondent, p. 6—p. 12.

First and foremost, the information relied upon by the State in its argument on this issue is derived largely from documents that were never presented to the Magistrate during Haygood's trial. Because such information was never presented to the Magistrate at Haygood's trial, it would be erroneous as a matter of law for the appellate court to rely upon these extraneous facts.

A magistrate's return is the official record of the trial proceedings, and an appellate court *may not* consider facts not included within the return. State v. Brown, 358 S.C. 382, 387-88, 596 S.E.2d 39, 41 (2004); see also Humble, Op. No. 5108 (S.C. Ct. App. filed March 27, 2013) ("Thus, we base our review upon those facts in the municipal court's return.") (citing Brown, 358 S.C. at 387, 596 S.E.2d at 41). Further, the Rule 209 of the South Carolina Appellate Court Rules mandates what may be designated as matter to be included in the Record on Appeal. Specifically, Rule 209(b) limits what may properly be included designated for appellate review as follows:

The Designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation *may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal*. [See Rule(c)]. . . .

²

Rule 209(b), SCACR (emphasis added). Further, Rule 210(c) of the South Carolina Appellate Court Rules, titled “Content” limits the content of the Record on Appeal in pertinent part as follows:

(c) Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record *shall not*, however, include *matter* which was *not presented to the lower court* or tribunal.

Rule 210(c), SCACR (emphasis added). Therefore, the South Carolina Rules of Appellate Court specifically forbids inclusion in the Record on Appeal of any matter that was not presented to the lower court, and South Carolina common law further forbids any consideration of extraneous documents that were not presented to the summary court as indicated in the Return.

In the present case, the State specifically cites to such forbidden extraneous documents in an attempt to support its arguments that the accuser’s out-of-court statement to the investigating officer were non-testimonial. Specifically, the State cites to the Incident Report, and Supplemental Incident Report by the investigating officer in the case. However, the Magistrate’s Return readily indicates that these reports were neither proffered nor admitted into evidence at Haygood’s trial. R. * (Magistrate’s Return, p. 5). Specifically, under the section of the Magistrate’s Return titled, “The State Offered the Following Items into Evidence,” only the following is listed:

1. One brown in color shotgun, as States [sic] exhibit #1 and tagged as item # 2008-004815.
2. Testimony of Lt. Lacro Jenkins of the Orangeburg County Sheriff’s Office.

R. * (Magistrate's Return, p. 5). Further, the Return also shows that "The Defense Introduced No Evidence." R. * (Magistrate's Return, p. 5). Noticeably absent from the items offered into evidence is either the Incident Report, or the Supplemental Incident Report. Thus, it is clear from the record that the documents relied upon by the State were never presented to the trial court. Therefore, any reliance upon such extraneous information is improper and erroneous. Further, because the State's argument on the merits of the case is largely built upon the sinking sands of documents that are unreviewable as a matter of law based upon the facts of this case, it has little to no factual support for its argument. Accordingly, the State's argument on the merits that the accuser's out-of-court statements to the investigating officer after he arrived at the home and separated the accuser and Haygood were non-testimonial is without evidentiary support.

CONCLUSION

For the foregoing reasons in reply to the Respondent's brief, as well as those advanced in Appellant's initial brief, Henry Haygood respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,



William D. Ullman
Assistant Public Defender

ATTORNEY FOR APPELLANT

This ¹⁴/~~3~~th day of June, 2013.

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2013.

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Lauren N. Driggers (LS)
Notary Public for South Carolina
My Commission Expires: 3-5-2018



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Edgar G. Dickson, Circuit Court Judge

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CERTIFICATE OF SERVICE

SC Court of Appeals

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Julie Kate Keeney
Office of the Attorney General
Post Office Box 11549
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I further certify that all parties required to be served by Rule have been served this ¹⁴th day of June, 2013.



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June ¹⁴~~13~~, 2013

The Honorable Jenny A. Kitchings
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1015 Sumter St.
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Re: State v. Henry Haygood
Appellate Case No. 2012-211961

Dear Ms. Kitchings :

Enclosed you will find one original and ~~two~~ ^{fourteen} copy each of a Motion to Accept the Initial Reply Brief of Appellant as Filed Out of Time and the Initial Reply Brief of Appellant. I have served the Motion and Reply Brief of Appellant on Asst. A.G. Julie Keeney by putting the copies in the U.S. Mail on June ~~13~~, 2013.

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Sincerely,

ORANGEBURG COUNTY PUBLIC DEFENDER

Jillian D. Ullman, Esq.
Assistant Public Defender

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Enclosures: as stated.
cc: Julie Kate Keeney