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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

THE STATE,

RESPONDENT,

V.

RANDY D. MARCHBANKS,

APPELLANT

APPELLATE CASE NO. 2021-001533

FINAL BRIEF OF APPELLANT

TAYLOR D. GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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Whether the trial court erred in disallowing virtual testimony during a time period affected by COVID-19, where the out-of-state witness would have offered vital testimony in accordance with Rule 608, SCRE, and where there was no rational basis for denying the WebEx appearance?

STATEMENT OF THE CASE

On June 22, 2021, a Pickens County Grand Jury issued two indictments against Appellant: discharging a firearm into a dwelling and pointing and presenting a firearm. R. 269-270, 273-274 (Indictments). Appellant proceeded to trial before the Honorable Perry Gravely and a jury in December 2021. Represented by Aaron Debruin, Appellant testified in his own defense. Blain Pleming appeared on behalf of the state.

Following numerous questions from the jury during deliberations, including two notes indicating they were unable to reach a unanimous verdict, Judge Gravely read them an Allen[1] charge. R. 248, l. 2 – R. 252, l. 23. Over an hour later, the jury convicted Appellant of both offenses. R. 254, ll. 9 – 14. Judge Gravely sentenced Appellant to four years on each of the offenses, concurrent, suspended to time served, with three years of probation. R. 267, ll. 1 – 5. He also ordered mental health counseling for Appellant. Id.

A Notice of Appeal was filed with this Court, and this is the Final Brief of Appellant.

[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

STANDARD OF REVIEW

A motion for continuance is addressed to the sound discretion of the trial court, and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). In South Carolina, "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). "'The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.'" State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)).

"'An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.'" Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Even if there was no evidentiary support, "'[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.'" Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995) (stating that error without prejudice does not warrant reversal).

ARGUMENT

The trial court erred in disallowing virtual testimony during a time period affected by COVID-19, where the out-of-state witness would have offered vital testimony in accordance with Rule 608, SCRE, and where there was no rational basis for denying the WebEx appearance.

Relevant facts

At 7:30 in the morning on September 10, 2018, Randy Marchbanks discovered a trespasser in his home. A man named Casey Nalley, the boyfriend of Marchbanks' daughter Melissa Karr, had invaded Marchbanks' home, despite having been given clear directions to leave and not come back. R. 66, l. 25 – R. 67, l. 7; R. 168, l. 19 – R. 169, l. 13. Despite having been ejected, Nalley returned to the home less than a week later.[2]

Karr invited Nalley inside while she was getting ready for work. R. 67, l. 22 – R. 68, l. 6. According to Nalley, Marchbanks fired a warning shot after discovering his intrusion. Id. As Marchbanks followed Nalley outside to make sure he was leaving, Nalley attacked him. R. 68, ll. 13 – 22. Marchbanks suffered injuries to his head and ribs. R. 105, ll. 3 – 17. His daughter testified at trial that he may have had a broken nose, a black eye, and rib pain. R. 157, ll. 10 – 12.

Law enforcement was called to the home. Marchbanks signed a waiver of rights indicating he did not wish to pursue charges against Nalley. R. 82, ll. 2 – 12. Only after speaking with Karr was Marchbanks placed into custody. R. 83, ll. 19 – 24.

Immediately following jury selection, defense counsel moved for a continuance, in order to secure the testimony of Appellant's grandson, who was also Karr's son. R. 8, l. 11 – R. 10, l.

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[2] After Marchbanks was arrested, Nalley moved back in to the home and was living in Marchbanks' house at the time of trial. R. 74, ll. 8 – 25.

5. Counsel described the grandson as a vital witness and explained that he was in Michigan for work. Id. A week before the incident giving rise to the present charges, Karr called police and claimed her brother and Appellant had hit her. Id. The grandson talked to the police officer "and told him how she had made up stories like this before in the past." Id.

During his investigation, counsel spoke with the grandson:

> I spoke with him and he has indicated that she was outside the bathroom, didn't have any blood on her face. Walks into the bathroom by herself, comes out, has blood all over her. Talks to the officer when the officer gets there, claiming that she was hit by her brother. And the officer didn't make any arrests. Indicated in his report that there's a strong possibility that she made it up herself. Again, no report even though she was bloody. Now, we've got a week later, where now my client is being accused of pointing a gun at somebody. And, I think, this goes directly to, you know, a common scheme that she has in making these allegations.

R. 9, ll. 1 – 15.

Notably, that was not the full extent of what the grandson's testimony would have been. He also observed, firsthand, an argument between Karr and her ex-husband. R. 9, l. 16 – R. 10, l. 5. Similar to the above fabrication, Karr *burned herself with a curling iron, called the police, and claimed her ex-husband had choked her*. Id. The grandson saw this happen. Defense counsel correctly described the grandson as a "paramount witness" that goes directly to the credibility of the state's main witness. R. 10, ll. 1 – 5.

In response, the trial judge questioned whether the severity of the instant charges entitled Appellant to a full and complete defense. According to the solicitor, Appellant was previously charged with attempted murder. R. 10, ll. 6 – 10. The trial judge indicated he was unlikely to grant the continuance and seemingly suggested the state's witnesses always tell the truth:

> You know, I think, if [he was still charged with attempted murder], then, I think it would be quite stronger. But, I mean - - and, again, I'm not - - just to me that doesn't sound as crucial in a matter where you have independent witnesses saying, Oh we saw him shoot a gun. I mean, I don't know how that would really go to refute that. I mean, these are totally independent witnesses.

R. 10, ll. 11 – 18.

Defense counsel noted how Appellant was also charged with pointing and presenting. R. 10, ll. 19 – 20. Continuing to point out how this case ultimately comes down to credibility, counsel posited that the grandson's testimony would be crucial. R. 10, l. 22 – R. 11, l. 17. Although the indictments had been issued only six months prior to trial, the trial judge remarked that Appellant's case had been previously continued, once when Appellant's wife was sick. R. 11, ll. 18 – 24.

The state "strongly oppose[d]" the continuance. R. 13, ll. 19 – 23. Curiously, the solicitor said "the state doesn't see a strong merit for the defense to have to call him." R. 15, ll. 4 – 5. The judge continued to indicate that he was likely going to deny the motion, so defense counsel shifted his approach:

> Your Honor, I guess that leads me to the next. If you're denying that, I would ask that he would be allowed to testify via WebEx or some kind of web service. I don't feel like that's too much of a burden for us to get set up- -

R. 16, ll. 15 – 19.

Continuing with the previous opposition, the state contended that the court should not grant counsel's request to allow a witness to testify virtually because it would slightly inconvenience the state:

> I would not consent to that, I would it oppose it on the basis that I don't know whether or not the technology is sufficient to accommodate that request. Also, I - - I anticipate that I would have to impeach this witness if his - - since it sounds like his statement has changed. And he's recanted his previous statement, I would need to be able to impeach him with his previous written statement, as well as the video statement that he gave on the officer's body cam video. And the logistics of being able to present those items to him to impeach him, sounds troublesome. So for those reasons I wouldn't agree to that.

R. 17, ll. 4 – 17.

The trial judge, thinking through the predicament, seemed open to the idea of virtual testimony. R. 17, l. 22 – R. 18, l. 9. Instead of investigating the technological capabilities of the courthouse in which he routinely practices, the solicitor however outright refused any modicum of flexibility:

> Your Honor, I also mention the difference between having someone present for a plea by WebEx versus testifying in trial where the state could be severely prejudiced if there's a technology glitch, things goes [sic] wrong, the jury doesn't hear accurate testimony from the defendant for one reason or another and we don't have the opportunity to properly cross-examine him, that could be far too prejudicial to the state's case. And I would not want to take that risk.

R. 18, ll. 10 – 19.

The trial judge stated that he would let the parties know of his decision. R. 18, ll. 20 – 21. The next morning, neither the solicitor nor the trial judge had inquired with the courthouse personnel whether virtual testimony was possible in the courtroom. R. 21, l. 21 – R. 22, l. 22. The trial judge would not allow for virtual testimony since the state did not consent:

> I'm not aware of any use of WebEx for witnesses unless both parties consent to it. I mean, the time that I've done it before in Oconee, both of them consented to it. And I think both sides are consenting to it if we have to use it on the next trial, in fact. But I don't know that I can - - I don't know that I have the authority to enforce that without consent, quite frankly. So I'm sorry.

R. 22, ll. 13 – 22.

During the defense's case-in-chief, counsel questioned a law enforcement witness regarding the grandson's statements. R. 150, l. 16 – R. 152, l. 1. The state objected, and defense counsel explained the reasons why the testimony would be permissible. R. 152, l. 2 – 25. The trial judge refused to allow counsel to elicit testimony about what the grandson said regarding Karr's previous schemes. R. 153, ll. 1 – 4. Additionally, the trial judge would not allow defense counsel to elicit testimony as to what the grandson observed and/or stated. R. 157, ll. 13 – 25.

Discussion

Whether a single, unelected assistant solicitor consents to a witness appearing virtually is irrelevant to a criminal defendant's ability to defend himself against charges brought by the state. The trial judge erred by refusing to exercise the power given to him by our South Carolina Supreme Court to allow a witness to testify virtually.

Appellant's grandson was correctly described as a paramount witness by defense counsel. The information he would have shared with the jury could not have been conveyed by any other witness. Being a grandson, he likely would have been technologically savvy enough to use WebEx to testify on his grandfather's behalf, yet the state and the trial judge did not even attempt to accommodate the reasonable request. The trial judge therefore erred in refusing the defense's request to present a witness virtually.

Because the grandson potentially was available the following month, defense counsel sought a continuance. The party asking for a continuance based on the absence of a witness must show due diligence was used in trying to procure the testimony of the absent witness as well as set forth what the party believes the absent witness would testify to and the grounds for that belief. State v. Yarborough, 363 S.C. 260, 264, 609 S.E.2d 592, 594 (Ct. App. 2005).

Rule 7(b), SCRCrimP, speaks to the subject of continuances in the context of unavailable witnesses. This Rule provides:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

As outlined above, the grandson's testimony was vital. Defense counsel had explored the possibility of sending a subpoena, and the solicitor had even informally served a subpoena via electronic mail. R. 14, ll. 10 – 20. The solicitor even referred to the grandson as a state's witness. R. 14, ll. 10 – 11. However, because the solicitor opposed the reasonable request, the trial judge incorrectly believed he lacked the authority to allow for a witness to testify virtually, less than two years after the start of a global pandemic.

All five justices of our South Carolina Supreme Court signed an Order on September 21, 2021—less than three months before Appellant's trial—entitled "Re: Use of Remote Communication Technology by the Trial Courts."[3] Pursuant to Rule 612, SCACR, the Court may provide for the use of remote communication technology by the courts of this State to conduct proceedings. The purpose of the Order was "to provide guidance on the use of remote communication technology by the trial courts." Under section (c)(1), the Order provides that the decision to allow RCT rests in the discretion of the judge. That is likely the standard which controls this appeal: abuse of discretion.

Located under section (d)(11) of the Order is a provision entitled "Use of RCT [Remote Communication Technology] 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).

(footnote omitted).

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[3] https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2628 (last accessed August 25, 2022).

In Craig, the United States Supreme Court addressed the use of one-way video testimony in the context of a child sexual assault case. 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). The Court recognized the right to face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 850, 110 S.Ct. 3157. Those considerations are not in play here, where the defendant was attempting to use remote technology in order to allow a state's witness to testify for the defense.

Our jurisprudence has not yet caught up with technological capabilities and alternatives brought about by the COVID-19 pandemic. Most of the case law regarding witness appearances revolves around a defendant's right to confront witnesses under the Sixth Amendment of the United States Constitution. Other states are grappling with similar issues, however:

> The possibility of a virtual hearing was, of course, not contemplated by the framers of our Constitution in 1780. In fact, much of our recent case law addressing the defendant's right to confrontation at an evidentiary hearing predates the advent of technologically advanced video conferencing platforms, including Zoom, which was established in 2011.

Vazquez Diaz v. Commonwealth, 487 Mass. 336, 349, 167 N.E.3d 822, 837 (2021).

The judge should have allowed the grandson to testify from afar. The state's objections were insufficient to prevent the testimony; they were not based around realistic concerns. The grandson could have been sworn, his testimony displayed to the jury, and he could have been questioned under both direct and cross examination. Prior to the start of trial, the solicitor had already informally served him with a subpoena via electronic mail. Defense counsel indicated the grandson was at a hotel. There existed means to provide the witness with the documents the state intended to use to cross-examine him. Coupled with the fact that this witness was

necessary to attack the credibility of one of the state's two witnesses, he should have been allowed to testify virtually.

This case, similar to criminal sexual conduct cases involving minors, came down to a credibility contest. The jury struggled with their decision. They asked for a written explanation of reasonable doubt. R. 242, ll. 7 – 12. The jury asked to see the statements taken at the scene by the police. R. 242, ll. 20 – 21. They wanted to hear testimony again during deliberations. R. 246, l. 6 – R. 247, l. 17. They later reached a unanimous verdict on the first charge but indicated they were unable to reach a verdict on the second charge. R. 248, ll. 2 – 14.

After being unable to reach a unanimous verdict, even after deliberating further, the jury sent another note stating: "we have tried and cannot reach a verdict on charge number two." R. 249, ll. 3 – 7. The trial judge then gave an Allen charge, without objection. Following another hour of deliberation, the jury returned its guilty verdicts.

Additionally, defense counsel impeached Karr with prior convictions. She previously worked for a home healthcare facility and pled guilty to exploitation of vulnerable adults. R. 52, l. 1 - R. 53, l. 5. She had also pled guilty to an enhanced shoplifting offense. R. 54, ll. 3 – 5. Karr's criminal record also included a methamphetamine possession charge. R. 55, ll. 4 – 6.

Ultimately, the state did not want Karr's son to testify because it would hurt their case. Their opposition was not entirely based on logistics or limited technology; the solicitor admitted he neglected to determine whether the courtroom contained the necessary equipment. Allowing a key defense witness to testify virtually was inconvenient and may have gotten in the way of a conviction. Due to the solicitor's opposition, the trial judge incorrectly believed he lacked the authority and the discretion to act. Accordingly, the trial judge erred. Appellant is entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of March, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

March 22, 2023

Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589