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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The issue on appeal is not preserved because the trial judge never ruled on the Crawford issue. Regardless of preservation, the Circuit Court properly affirmed Appellant's conviction and sentence because the victim's statements were nontestimonial. Thus, the Confrontation Clause did not bar the admission of the statements.

STATEMENT OF THE CASE

On September 25, 2009, the Honorable Samuel A. Daily, magistrate judge, found Appellant guilty of criminal domestic violence (first offense). Assistant Public Defender Jillian Ullman represented Appellant at trial.

On October 2, 2009, Appellant filed a notice of appeal with the Orangeburg County Clerk of Circuit Court. On September 16, 2011, the Honorable Edgar W. Dickson heard oral arguments on the matter. Assistant Public Defender Jillian Ullman represented Appellant, and Assistant Solicitor B.J. Jeffries represented the State. On May 4, 2012, Judge Dickson denied Appellant's appeal.

On May 9, 2012, Appellant filed a notice of appeal with this Court. On February 1, 2013, Appellant filed an initial brief. This brief follows.

STATEMENT OF FACTS

On March 31, 2008, Officer Jenkins responded to a domestic violence call at Appellant's residence. (Return.) When Officer Jenkins arrived at the scene, Towanna Haygood, Appellant's wife, was very upset. (Return.) Appellant was highly intoxicated and cussed at Officer Jenkins. (Return.) Appellant told Officer Jenkins that this was his house and that he would do anything he wished. (Return.)

When Officer Jenkins arrived, Towanna told Officer Jenkins that Appellant retrieved a shotgun from the bedroom closet and told her that he was going to kill her. (Return.) Appellant's son tried to take the shotgun away from Appellant. Thereafter, Appellant reached in his pocket where he kept a small handgun. (Return.) When Towanna grabbed Appellant's pocket, bullets fell from Appellant's pocket onto the floor. Appellant went outside the residence but came back inside and punched a hole in the bedroom closet.

ARGUMENT

I.

The issue on appeal is not preserved because the trial judge never ruled on the Crawford issue. Regardless of preservation, the Circuit Court properly affirmed Appellant's conviction and sentence because the victim's statements were nontestimonial. Thus, the Confrontation Clause did not bar the admission of the statements.

Appellant's argument on appeal fails for two reasons. First, Appellant failed to preserve the issue on appeal because Appellant never obtained a ruling regarding his Crawford[1] argument; the trial judge's ruling only addressed hearsay. Second, the victim's statements were nontestimonial statements; therefore, the Confrontation Clause did not bar the admission of the statements.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse a trial court's ruling absent a prejudicial abuse of discretion. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002)

A. Preservation

First, Appellant's argument on appeal fails because Appellant never obtained a ruling from the trial judge regarding his Crawford objection.

Under South Carolina law, an issue must be raised and **ruled upon** in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742

[1] Crawford v. Washington, 541 U.S. 36 (2004).

(2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In this case, Appellant failed to preserve the Crawford issue because Appellant never obtained a ruling from the trial judge regarding his Crawford objection. According to the magistrate's return, Appellant objected to the officer's testimony regarding the victim's statements to the officer.[2] (Return.) The State's argument at trial was based on hearsay related rules, not the Confrontation Clause. The trial judge stated that he agreed with the State. (Return.) Also, the trial judge stated "that in some criminal domestic violence [cases] the investigating officer . . . should be allowed to testify as to the finding of facts during his investigation." (Return). Nowhere in the magistrate's return is there any mention of Crawford or the Confrontation Clause. The trial judge's ruling seemed to focus solely on hearsay not the Confrontation Clause. In fact, Appellant conceded that the trial judge never ruled on Appellant's Crawford objection. (Tr. p. 5 lines 11-16; App. Br. p. 4.)

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[2] Notably, the magistrate's summary of Appellant's argument at trial does not mention Crawford or the Confrontation Clause. (Return.) While it is true that the objecting party does not have to use the exact name of the legal doctrine employed, it must be clear to the appellate court that the argument presented on appeal was presented to the trial court. State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 727 (Ct. App. 2012). In the case at hand, it is unclear from the magistrate's return if Appellant objected to the officer's testimony on Confrontation Clause grounds. However, Appellant's counsel argued on appeal at the circuit court that she did challenge the officer's testimony on Confrontation Clause grounds (Tr. pp. 3-4.)

Simply put, Appellant failed to obtain a ruling on the Crawford issue; thus, the issue on appeal is not preserved for appellate review.

B. Merits

Second, Appellant's argument on appeal fails because the victim's statements to the officer were nontestimonial statements made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. Thus, the Confrontation Clause did not bar the admission of the statements.

The Confrontation Clause of the Sixth Amendment states the following: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This procedural safeguard is also applicable to state prosecutions. Crawford, 541 U.S. at 42.

In Crawford, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. Critically, only testimonial statements require compliance with the Confrontation Clause. Id. at 68. Thus, a nontestimonial statement would be admissible, subject to traditional limitations upon hearsay evidence, even though the defendant never had the opportunity to cross-examine the declarant. Id. The Court listed four examples of when a statement would be considered testimonial: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and 4) statements made during police interrogations. Id.

Two years later, in Davis v. Washington, 547 U.S. 813, 822 (2006), the United States Supreme Court provided further clarification on the Crawford decision. In Davis,

the Court dealt with two different domestic violence cases. Although the Court was clear that it did not want to create a list of every type of testimonial or nontestimonial statement, the Court held the following:

> Statements are **nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.** They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). Thus, not all interrogations by the police are subject to the Confrontation Clause bar. Michigan v. Bryant, 131 S.Ct. 1143, 1153 (2011).

In Davis's case, the Court held that the victim's statements to the 911 operator were not subject to the Confrontation Clause bar because the statements were nontestimonial. Davis, 547 U.S. at 828. The victim made statements to a 911 operator during a domestic disturbance with the defendant. Id. at 817. The victim told the 911 operator: " 'He's here jumpin' on me again . . . He's usin' his fists.' " Id. During the 911 call, the victim identified the defendant as the assailant. Id. at 818. In its reasoning, the Court stated that the primary purpose of the victim's statements to the 911 operator was to "enable police assistance to meet an ongoing emergency." Id. at 828. Simply put, the victim was not acting as a witness; the victim was not testifying. Id.

But the Court reached the opposite result in Hammon's case. See Davis, 547 U.S. at 834. In Hammon's case, the Court held that the victim's statements were testimonial statements barred by the Confrontation Clause. Id. at 831-832. The police responded to a reported domestic disturbance at the defendant's home. Id. at 819. When the police arrived, the victim was alone on the front porch and was " 'somewhat frightened,' but she

told the officers that 'nothing was the matter[.]' " Id. The defendant was in the kitchen, and the defendant told the police that everything was fine. Id. While separated from the defendant, the victim informed the officers that the defendant shoved her on the floor, hit her in the chest, and attacked her daughter. Id. at 820. The defendant attempted to participate in the victim's conversation with the police. Id. at 819-820.

In support of its holding in Hammon's case, the Court noted that it was clear from the circumstances that the police's interrogation was part of an investigation into past criminal conduct. Id. at 829. Further, the testifying officer expressly acknowledged that the purpose of his interrogation was to investigate into past criminal conduct. Id. Moreover, there was no ongoing emergency; the officer testified that he did not hear any arguments or see anyone throwing or breaking anything when he arrived at the scene. Id. The Court pointed out that when the officers arrived at the scene, the victim told the officers everything was okay and there was no immediate threat to the victim. Id. In other words, the victim's statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation[.]" Id. at 832.

Approximately five years after the United States Supreme Court decided Davis, the Court revisited the "primary purpose" exception to the Confrontation Clause bar in Michigan v. Bryant. See Bryant, 131 S.Ct. at 1150. Clarifying what it meant in Davis when it said " 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[,]' " the Bryant Court held that courts must "**objectively** evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." Id. at 1156 (internal citation omitted). The Court explained:

> An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the "primary purpose of

> the interrogation." The **circumstances in which an encounter occurs—** ***e.g.,*** **at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards**—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Id. (emphasis added).

Notably, the Bryant Court explained the logic behind why the ongoing emergency circumstance was considered nontestimonial and not subject to the Confrontation Clause bar, and the Court compared that logic to the logic behind the excited utterance exception to the hearsay rule:

> Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.
>
> This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id. Further, the Bryant Court noted that whether an ongoing emergency exists is only one factor – although an important factor – used in the primary purpose analysis. Id. at 1160. Another factor courts should take in account is the formality of the encounter between the victim and the police. Id.

In the case at hand, the victim's statements were nontestimonial because the primary purpose of the interrogation was to enable police assistance to meet an ongoing

emergency. Thus, the Confrontation Clause did not bar the admission of the victim's statements.

Objectively viewing the circumstances in which the police encounter occurred, the following facts demonstrate why Hammon's case in the Davis opinion is distinguishable from this case:

- The victim was visibly upset when the officer arrived at the scene. (Return.)
- Appellant was highly intoxicated and hostile towards the officer. (Return.)
- Appellant told the officer that this was his house and that he would do anything he wished. (Return.)

Unlike the domestic disturbance in Hammon's case, the domestic disturbance in this case was still ongoing. Further, unlike the victim in Hammon's case, the victim in this case was very upset, indicating that there was an ongoing dispute when the police arrived. Appellant's comment to the officer that the officer that this was house and that he would do indicated that he wished indicated that Appellant was not done fighting. Also, the fact that the police found a gun in Appellant's possession heightened the scope of the emergency. See Bryant, 131 S.Ct. at 1158 ("The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on Davis and Hammon, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun.").

Although separating Hammon from the victim was sufficient to end the emergency in that case, the same cannot be said with respect to this case because

Appellant had two guns in his possession. See Bryant, 131 S.Ct. at 1159 ("Hammon was armed only with his fists when he attacked his wife, so removing [his wife] to a separate room was sufficient to end the emergency. If [Hammon] had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency.").Thus, the fact Appellant had a gun in his possession demonstrates the dangerousness of the situation, not only for the victims involved but also for the responding officers. In contrast to Hammon's case, where the situation was subdued by the time the officers arrived at the scene, the domestic dispute in this case was far from subdued at the time the officers arrived.

Additionally, the fact the trial judge ruled the statements admissible under the excited utterance exception to the hearsay rule[3] illustrates the freshness of the domestic disturbance. See generally Bryant, 131 S.Ct. at 1156 (noting that the underlining rational for the ongoing emergency rule was similar to the rational for the excited utterance rule).

Finally, with respect to the formality factor in the primary purpose analysis, there is no evidence in the record that the encounter between the victim and the police was formal. See Bryant, 131 S.Ct. at 1160 ("[F]ormality suggests the absence of an emergency[.]"). But the police encounter occurred at the scene of the crime not at a police station; thus, there is some evidence in the record that the encounter was informal. Due to the limited record in this case,[4] it is difficult to ascertain whether or not the police

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[3] **Rule 803 of the South Carolina Rules of evidence provides numerous exceptions to the rule generally prohibiting the admission of hearsay. Once of the exceptions listed in Rule 803 is an excited utterance. An excited utterance is "[a]** statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803 (2), SCRE. Notably, Appellant does not challenge the trial judge's ruling that the victim's statements were excited utterances.

[4] The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to

asked formal questions. See Id. at 1160-1161 ("As the Michigan Supreme Court correctly recognized, Davis requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.") (internal citations omitted).

In summary, Appellant's issue on appeal is not preserved because Appellant failed to obtain a ruling on his Crawford objection. But regardless of preservation, the victim's statements were nontestimonial; therefore, not subject to the Confrontation Clause bar.

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review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

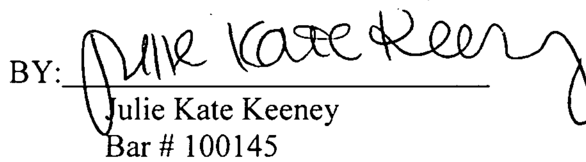
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General



BY:____________________
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July 12, 2013

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

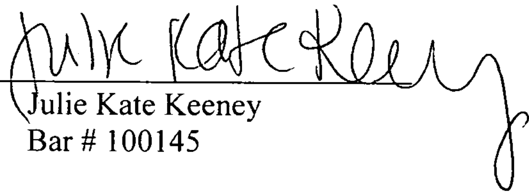
(1) Tr. pp. 3-12

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
Bar # 100145

BY: 
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STATE OF SOUTH CAROLINA

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Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Amended Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jillian D. Ullman, Esquire
First Circuit Public Defender's Office
Post Office Box 1112
Orangeburg, SC 29116

I further certify that all parties required by Rule to be served have been served.

This 12th day of July, 2013.

Ellen DuBois

ELLEN DUBOIS
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RE: State v. Henry Haygood
Appellate Case No. 2012-211961

Dear Ms. Ullman:

I am enclosing two (2) copies of the Amended Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Julie Kate Keeney
Assistant Attorney General
Bar # 100145

JKK/ab
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services