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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court Of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2022-000783

THE STATE,

RESPONDANT,

v.

DARRELL D. WILSON,

APPELLANT.

FINAL BRIEF OF RESPONDANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by excluding the testimony of Marjorie Rogers regarding her opinion of Appellant's intent, where the evidence had low probative value and was improper lay opinion evidence and did not relate to a pertinent character trait.

STATEMENT OF THE CASE

A York County grand jury indicted Appellant Darrell Wilson Jr. for inflicting great bodily injury upon a child. He proceeded to a jury trial on May 23, 2022, before the Honorable J. Derham Cole. Wilson was convicted as charged and sentenced to eighteen years imprisonment. This direct appeal follows.

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845 (2006). An “abuse of discretion” occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. Id. “The appellate court may affirm any ruling upon any grounds that appears in the record.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 722 (2000). The “appellate court may review respondent’s additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court’s judgment.” Id.

STATEMENT OF FACTS

On December 21, 2017, Marjorie Rogers was asked by Appellant, her “on again off again” boyfriend, to watch her four-month-old biological child, Minor. (R.p. 46). Rogers raised Minor from his birthday in August 2017 through December 2017. At the time of the incident, Minor was four months old and could only roll about “halfway” over. (R.p. 68). Rogers and her mother testified that Minor was developing normally. (R.pp. 22, 43). Minor had recently started holding his head up and holding his bottle. (R.p. 44). In January 2018, Minor began to live with Elizabeth Matthews, who later became his adoptive mother. (R.p.61).

Rogers agreed to let Minor stay with Appellant and dropped him off around 7:30 or 8:00 PM to stay overnight. (R.p. 46). Rogers had never left Minor alone with Appellant overnight; she recalled leaving him with Appellant once or twice during the daytime. (R.p. 66). Rogers came back to check on Minor around 11:30 PM and found him asleep. (R.p. 47). After checking on Minor, she went back to her mother’s house. (R.p. 47).

Appellant called Rogers in the morning to get Minor because he would not stop crying. (R.p. 47). Rogers arrived and found Minor laying on the couch with Appellant. (R.p. 49). Ms. Rogers stated Minor was screaming unusually when she arrived and held Minor to provide comfort. (R.p. 49). She thought that Minor had fallen asleep in her arms but stated that when she got to the car he was “completely unconscious”, because his arms and head were back, and he had no control. (R.p. 69). Rogers said she considered calling 911 but Appellant stated she was overreacting. Id. Rogers began driving to her mother’s house while her mother called 911. Id. EMS arrived and determined Minor was seizing, they transported him to Piedmont Hospital to be stabilized and placed on life support. (R.p. 51). Subsequently, Minor was taken in a helicopter to Levine’s Hospital in Charlotte. (R.p. 51). Minor was at Levine’s Hospital for about six weeks. (R.p. 52).

The focal point of the trial was causation. Appellant initially claimed nothing had happened, but later stated that Minor fell off the couch. (R.p. 52). The State claimed Minor suffered great bodily injury in the form of abusive head trauma. (R.p. 113). Captain Carson Neely testified that he measured the couch, after obtaining a search warrant, at just over two feet from the ground. (R.p. 94). The State supported its claim with testimony from Dr. Susan Lamb, an expert in pediatric child abuse. (R.p. 105). At trial Dr. Lamb asserted the injuries consisted of “widespread subdural hemorrhages and brain injuries”, making them inconsistent with a short fall from a couch. (R.p. 115). Dr. Lamb stated Minor had external signs of injuries in bruising underneath his chin and at two locations on his chest. (R.p. 114). Dr. Lamb distinguished the injuries Minor obtained from those consistent with a short fall by emphasizing bleeding behind his eye, bruising, and the spread-out nature of his injuries. (R.p. 115). Dr. Lamb stated she believed within a reasonable degree of scientific certainty that Minor suffered from abusive head trauma. (R.p. 116).

Wilson claimed Minor suffered from pre-existing injuries and complications causing the incident. Wilson relied on Dr. Joseph Scheller, an expert in pediatric neurology. (R.p.167-68). Dr. Scheller testified Minor suffered from an unusual virus and an unusual amount of fluid between the brain and the skull. (R.p. 171). Dr. Scheller stated that in his opinion it was more likely the injuries Minor suffered from were caused by the virus and build up rather than a rotational injury. (R.p. 172). Dr. Scheller stressed the lack of external marks on Minor, a lack of fractures in the ribs or limbs, lack of a neck injury, and lack of bruising to the right side of Minor’s head. (R.p. 172-73). On cross examination Dr. Scheller stated that he believed, along with a minority of pediatricians, that shaken baby syndrome was “not a good diagnosis because it has never been scientifically confirmed.” (R.p. 187).

The issue on appeal is whether the court abused its discretion by excluding the testimony of Marjorie Rogers regarding her opinion of Appellant's intent, by finding the testimony was not relevant and the probative value was substantially outweighed by the danger of unfair prejudice. Shortly before the testimony was sought Ms. Rogers testified about her willingness to leave Minor with Appellant and the fact that she consulted with her mother before calling 911. (R.p. 71). Prior to the statement the jury was excused to determine admissibility. (R.p. 72). The following testimony was proffered:

Butler: Miss Rogers, throughout the case since December was it your belief then and is it your belief now that Darrell would never intentionally hurt [Minor]?

Rogers: I don't think he would intentionally do it, no.

Butler: Thank you.

Rogers: He was perfect with [Minor] while I was around. I don't think he would intentionally hurt him.

Butler: Thank you.

Epting: Do you believe that he did hurt [Minor]?

Rogers: Yes. I don't think it was intentional, but I do think he did. Nobody else was there.

(R.p. 77-78).

The trial court sustained the objection made by the State. The State argued that the proffered testimony was speculative and that since Rogers was not present, she should not be able to testify. (R.p. 78). Appellant argued that Rogers' testimony should be admitted as character evidence. (R.p. 78). The court's reasoning for sustaining the objection was that the testimony was not relevant and that any probative value was outweighed by the danger of unfair prejudice. (R.p. 79)

ARGUMENT

The court correctly excluded the testimony of Marjorie Rogers regarding her opinion of Appellant's intent, because the evidence had low probative value, was improper lay opinion evidence, and did not relate to a pertinent character trait.

The trial court properly excluded the proffered testimony because it was not rationally based on the perception of the witness, helpful to the determination of a fact at issue, or proper character evidence. Even if the court improperly excluded the evidence the error was harmless. This Court should affirm.

A. The proffered testimony does not satisfy Rule 701, SCRE.

Rule 701 provides that a lay witness's testimony in the form of opinions or inferences is limited to those opinions that are (A) rationally based on the perception of the witness, (B) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (C) do not require special knowledge, skill, experience, or training. Rule 701, SCRE.

Roger's opinion testimony that Appellant would not harm Minor did not meet the requirements of Rule 701, SCRE. First, the opinion testimony must be rationally based on the perception of the witness. As noted in Watson v. Ford Motor Co., a difference in expert testimony and lay testimony is that an expert is permitted to state an opinion based on facts without firsthand knowledge. Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). However, "a lay witness may only testify as to matters within [her] personal knowledge." Id. In Hamrick v. State, the South Carolina Supreme Court found that the trial court erred in admitting an officer's opinion testimony. Hamrick v. State, 426 S.C. 638, 642, 828 S.E.2d 596, 598 (2019). The trial court admitted the testimony as lay opinion regarding a car accident under Rule 701, SCRE. Id. The Supreme Court found the trial court erred by admitting the testimony

because the officer arrived on the scene “forty-eight minutes after the incident occurred and clearly did not perceive the location of the impact.”¹ Id. at 649.

Similar to the officer in Hamrick, Rogers was not at the scene at the time of the incident.² She arrived at around 9:30 AM after Minor had already been crying and obtained the injuries at issue. (R.p. 48). Since Ms. Rogers was not at the scene and did not perceive the injury to Minor, she cannot offer testimony regarding Appellant’s intent that is rationally based on her perception. Therefore, the trial court properly excluded the proffered testimony.

Even if the testimony was rationally based on the perception of the witness, it was not helpful to a clear understanding of the witness’ testimony or determination of a fact in issue.

It is well established in several jurisdictions that lay witness testimony regarding intent is not helpful to the trier of fact. The California Court of Appeals has held that “opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.” People v. Torres (1995) 33 Cal.App.4th 37, 46-47. Likewise, the District Court of Appeal of Florida has held “While a witness may describe another person’s appearance and mental state, he should not testify to that person’s undisclosed intent or motive.” Bryant v. State, 17 So. 3d 713, 716 (Fla. Dist. Ct. App. 2009).

The proffered testimony does not reference the pertinent character trait of violence, but rather an opinion on the element of intent. Thus, the proffered testimony is not helpful to the trier

¹ The court also noted that the trial court improperly characterized the testimony as lay opinion testimony when the testimony regarding the accident reconstruction requires expertise.

² Rogers testified she dropped Minor off at around 7:30 or 8:00 PM (R.p. 46 l.25); she came back to check on him at around 11:30 PM (R.p. 47); and she went back to pick him up at 9:30 or 10:00 AM. (R.p. 48).

of fact. It is the jury's responsibility to make a determination on the element of intent. The trial court properly excluded the testimony.

B. The proffered testimony is not proper character evidence.

Rule 404, SCRE states that character evidence of an accused may be admissible if "evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." The character evidence should show specific character traits relevant to the crime charged. State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)).

Appellant did not properly seek the introduction of specific character trait relevant to the crime. The testimony contained no statement concerning the pertinent trait of propensity for violence, but only to Rogers' opinion on the issue of intent. Because the proffered testimony references no pertinent character trait, the trial court properly excluded the testimony.

C. The trial court properly found that the evidence is inadmissible under SCRE Rule 403.

Even if the proffered testimony satisfied Rule 701 and Rule 404, the trial court did not commit reversible error in ruling the testimony was inadmissible under Rule 403, SCRE.

Failure to conduct an on-the-record 403 analysis will not result in a reversal of the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when making a ruling. State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002).

In State v. Collins, the trial court's 403 ruling was deemed sufficient. The analysis was upheld, because the record showed the trial court did thoroughly consider the arguments of both parties and it examined each piece of evidence while also conducting an examination of the

photographer before making its decision. State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014).

In State v. Spears, a prior bad act was admitted into evidence after an improper 403 prejudice analysis. State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878 (Ct. App. 2013). The court found the balancing test to be improper because they found nothing implicit or apparent in the record that the trial court considered the probative value of the evidence and if it was substantially outweighed by unfair prejudice. Id. at 254, 792 S.E.2d at 881.

Unlike the trial court in Spears, the court considered the probative value of the proffered testimony and if it was substantially outweighed by unfair prejudice. (R.p. 79). Spears simply requires something implicit or apparent in the record indicating an analysis was conducted. The trial court went beyond that requirement when it addressed the probative value of the testimony sought by Appellant. The court noted that there was low probative value since the witness was not present when the incident occurred. The court noted “Well, okay, she’s not going to give an opinion about what could have happened or might have happened. If she testified what she saw and observed and the State asked her a question like that obviously she can answer, but she can’t give an opinion on that if she was not present.” (R.p. 3). The court did more than simply indicating in the record that a 403 analysis had been conducted. Therefore, the trial court did not commit a reversible error.

Probative value is “the measure of the importance of that tendency to prove or disprove the outcome of a case; it is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues.” State v. Thompson, 420 S.C. 386, 399, 803 S.E.2d 44 (Ct. App. 2017). As the court noted, the probative value of the testimony offered is low. The witness was

not present at the scene of the incident and therefore cannot provide relevant testimony to assist the trier of fact in determining the causation of Minor's injuries.

Low probative value alone does not exclude evidence; the probative value must be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE. Unfair prejudice refers to evidence which tends to suggest a decision on an improper basis. State v. Lee, 399 S.C. 521, 529, 732 S.E.2d 225, (Ct. App. 2012) (quoting State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690 (2009)). The testimony from Rogers would have suggested that the jury make a decision on an improper basis. Even though Rogers was not present when the actions took place she opined as to Appellant's criminal intent. This testimony suggests a decision on an improper basis and therefore is unfairly prejudicial.

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. "We ... are obligated to give great deference to the trial court's judgment." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003) (citing State v. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593(2001)). Because the trial court did not abuse its discretion, the ruling should not be reversed.

D. The exclusion of evidence was harmless.

Even if the proffered testimony was improperly excluded, the error is harmless. In some cases, the evidence of guilt is so overwhelming, and the prejudicial effect of an improper ruling is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper ruling was harmless error. There is no definitive rule of law governing harmless error; it must be determined from its relationship to the entire case. State v. Simmons, 423 S.C. 552, 566, 816

S.E.2d 566, 573 (2018). An error is harmless when it could not have reasonably effected the result of the trial. Id.

The state produced testimony from Ms. Rogers that she dropped Minor off with Appellant and was to pick him up in the morning. (R.p. 46). Ms. Rogers also testified that she picked up Minor in the morning and noticed he had a bruise on his chin and that he became unconscious shortly after. (R.p. 69). Rogers' mother confirmed that Rogers let Minor stay with Appellant and confirmed injuries sustained by Minor. (R.p. 21, 26). The state produced testimony from Capitan Carson Neely that the distance from the couch to the ground was just over two feet. (R.p. 94). Dr. Susan Lamb testified that Minor's injuries were inconsistent with a short fall from a couch. (R.p. 115). Dr. Lamb further stated she believed within a reasonable degree of scientific certainty that Minor suffered from abusive head trauma. (R.p. 116).

Ms. Rogers' proffered testimony provides little probative value, making the exclusion of testimony insignificant by comparison to the evidence produced by the state. Ms. Rogers proffered the testimony "I don't think it was intentional, but I do think he did it." (R.pp. 77-78). First, this testimony was made with no personal knowledge as she was not present when the injury to Minor occurred. Rogers' statement regarding Appellant's intent would provide insignificant help to a trier of fact. Due to the relative insignificance of the proffered testimony and the overwhelming evidence presented by the state, any error made by the trial court is harmless.

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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v.

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APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

Respectfully submitted,

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Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent on Jessica M. Saxon, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 10th day of October 2023.



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Good afternoon, Ms. Saxon.

Attached to this email is a letter to the Court to accompany the State's bound copy of its brief and including an explanation of a clerical error that was made when our brief was filed electronically on Tuesday of this week. A new electronic copy of the brief is also attached.

Sincerely,

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