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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-000358

THE STATE,

Respondent,

v.

WESLEY RAY KYZER,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Wesley Ray Kyzer ("Appellant") was indicted by a Spartanburg County Grand Jury in June of 2020 for threatening the life of a public-school teacher and with first-degree harassment. Appellant proceeded to trial before the Honorable J. Mark Hayes, II, and a jury from March 7-9th 2022. Michael Bender, Esq. represented Appellant at trial. The jury convicted Appellant of threatening the life of a public-school teacher and acquitted of the first-degree harassment. Appellant was sentenced to five years in prison suspended upon the service of 90 days home detention, the payment of a $5,000 fine, and five years' probation.

On August 25, 2022, Appellant filed a motion to suspend the appeal while a motion for a new trial on after discovered evidence was held. A hearing on the motion was held on December 9, 2022. By order dated and filed on January 9, 2023, the motion for a new trial was denied. A timely notice of appeal was filed.

This appeal follows.

STATEMENT OF FACTS

On September 24, 2018, Wesley Kyzer ("Appellant") approached Robert Brown, the head baseball coach and assistant strength coach at Spartanburg High School, at a Mexican restaurant in Spartanburg County. (R. 79). Brown was having lunch with his colleagues when Appellant came up to Brown's table looked directly at him and said "fuck you, fuck you, you better hope I don't see you outside of here or I will kill you, fuck you. Like I said if I see you outside of here I will kill you." (R. 97). Brown further testified that he felt threatened and was very shaken by the encounter. (R. 99).

Andrew Caldwell, head strength coach at Spartanburg High School, testified that Appellant approached the table and cursed at Brown, and that while Appellant comments were not directed at him, he felt threatened. (R. 145). Ryan Thomas and Chris Miller, other staff members from Spartanburg High School, also testified that Appellant approached Brown and made threatening statements. (R. 153-154; 159-160). Brown testified that there were two instances where Appellant came to baseball games after his son was dismissed from the team and sat in his line of view which made him feel threatened as well. (R. 101).

Appellant was later served with a trespass order by Ben Johnson, the school resource officer at Spartanburg High School, during which Appellant made multiple comments. (R. 184). Johnson testified that "he stated multiple times that he was gonna catch Coach Brown slipping throughout the encounter." (R. 184). He further testified that Appellant "wanted him to deliver a fuck you." (R. 186).

STANDARD OF REVIEW

Issue 1

"A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion." Hassell v. City of Columbia, 420 S.C. 620, 626, 846 S.E.2d 373, 376 (Ct. App. 2020). In addition, a trial court's denial of a motion based upon a juror's misleading or incomplete answers during voir dire will be affirmed absent a prejudicial abuse of discretion. Id. "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012).

Issues 2 and 3

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In an appeal of a ruling involving a challenge to the sufficiency of the evidence in a criminal case, the appellate court must necessarily apply the same standard that should have been applied by the trial judge and view the evidence and all reasonable inferences in the light most favorable to the State. State v. Gracely, 399 S.C. 363, 371-372, 731 S.E.2d 880, 884 (2012). "In reviewing a refusal to grant a directed verdict, we must view the evidence in the light most favorable to the State and determine whether there is any direct or substantial circumstantial evidence that reasonably tends to prove the defendant's guilt or from which his guilt may be logically deduced." State v. Pinckney, 339 S.C. 346, 348, 529 S.E.2d 526, 527 (2000). On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to a jury. Id.

The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008).

Issue 4

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015).

ARGUMENT

1. The trial court properly denied Appellant's motion for a new trial.

Appellant contends that the trial court erred in failing to grant a new trial when a juror failed to disclose that he had a relationship with one of the witnesses. Specifically, that the juror was a wide receiver for Coach Christopher Miller who was a witness for the State. On August 25, 2022, Appellant filed a motion for new trial based on after discovered evidence. In the motion, Appellant argued that it was found that the first juror called, Juror 129, was a standout wide receiver at Byrnes High School in 2007 and 2008 where, State's witness Christopher Miller was the head coach. (R. 393).

Appellant stated that the trial judge asked the jury "[I]f you have a close personal, social relationship with any of those individuals, or if you've shared any type of employment or work relationship, or professional relationship with any of those individuals, I would ask that you stand at this time." (R. 10). Appellant argues that had they known that Juror 129 knew Miller they would have stricken him or asked that he be excused for cause because of the close personal relationship of player and coach. (R. 394).

A hearing was held on December 9, 2022, in front of the Honorable J. Mark Hayes, II. At the hearing Juror 129 was questioned about his relationship with Miller. The juror stated that Miller was a football coach at Byrnes High School when he played there in 2007 and 2008. (R. 372). He further testified that the last time he had spoken to Miller was "probably around 2011." (R. 372). He stated that at the time of trial he did not have a close personal relationship or social relationship with Miller and that he had never had an employment or working relationship with Miller. (R. 373). The juror stated that he was not trying to conceal the fact that he knew Miller but didn't feel

that a high school football coach who he hadn't talked to in over 10 years was considered a close personal relationship and believed the question didn't apply to him. (R. 373).

A motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery. Rule 29(b), SCRCP. A party seeking a new trial based upon the disqualification of a juror must demonstrate: "(1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." Long v. Norris & Assocs., Ltd., 342 S.C. 561, 570, 538 S.E.2d 5, 10 (Ct. App. 2000).

When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand where the failure to disclose is innocent, no such inference may be drawn." State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001).

"Intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Id. at 588. Unintentional concealment, on the other hand occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. "Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on

a case by case basis." Id. "If the court finds no intentional concealment occurred, the inquiry ends there." Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 155, 760 S.E.2d 111, 116 (Ct. App. 2014).

In Smith v. State, the Supreme Court affirmed the lower court's holding that the petitioner did not suffer per se violation of the due process right to a fair and impartial jury when a juror remained silent during *voir dire.* Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007). In Smith, there was evidence found that one of the jurors knew the defendant from being incarcerated in the same facility. Id. During *voir dire* the question posed was whether any member of the jury pool "was related by blood or marriage or a close personal friend" of the defendant. Id. at 519. At the hearing the juror testified that he was not a close personal friend and the defendant corroborated that he did not know the juror very well, despite having prior interactions during their period of incarceration. Id. at 516, 519. The court believed the juror did not intentionally conceal the existence of a prior relationship. Id. at 519.

On January 18, 2023, Judge Hayes denied Appellant's motion for a new trial finding that Richardson did not intentionally conceal the information. (R. 399). The trial judge did not abuse his discretion in denying Appellant's motion because there is evidence in the record that the juror did not intentionally conceal his relationship with the witness. Richardson was on the football team where Miller was the coach in 2007 and 2008. Fourteen years had passed since Richardson was a member of the football team and Miller's name was read to the venire. Richardson and Miller did not maintain a social or personal relationship, and they never had a working relationship. Richardson and Miller had not spoken in 11 years. Lastly, Richardson testified that he did not stand because he did not believe it was a close personal relationship, that he thought the question did not apply to him, and that he did not mean to conceal the fact that he knew Miller. (R. 374).

The trial judge found that the juror did not intentionally conceal a relationship with the witness and therefore denied Appellant's motion for a new trial. Just like in Smith the trial judge did not err in denying Appellant's motion because there is evidence in the record that supports his decision. Therefore, this court should affirm.

2. The trial court did not err in failing to grant a directed verdict because the issue was not preserved and even if it was, the State was not required to prove that Brown was a "certified" teacher.

Appellant argues that the trial court erred in failing to direct a verdict for Appellant based upon the fact that the State never proved that Robert Brown was a certified teacher at the school. First, this argument lacks merit because it was not preserved. Even if it was preserved, being a certified teacher was not an element that the State needed to prove.

In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). Here Appellant did not make a motion for directed verdict at any time. He specifically stated "At this time, your Honor, ... I'd make a motion to dismiss the harassment charge. I'm not gonna address, I'm not gonna address the threat charge. I think that's a question for the jury." (R. 225). Appellant did not raise the issue of directed verdict on the charge of threatening the life of a public-school teacher and therefore is not preserved to be ruled upon. However, even if it were preserved, the State did not have to prove that he was "certified."

Appellant was charged with threatening the life of a public-school teacher. Appellant argues that Brown was not a teacher within the meaning of the statute. "It is unlawful for a person

knowingly and willfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any....verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities. S.C. Code §16-3-1040. There is nothing in the statute that requires the State to prove that the teacher is "certified."

Appellant argues that the civil statute should be looked at to determine what constitutes a teacher; however whether Brown was considered a teacher is a question of fact for the jury to determine and if there was any evidence to support that Brown was a teacher than the trial judge did not err in failing to direct a verdict. Robert Brown testified that on top of being the head baseball coach, he was an assistant strength coach for Spartanburg High School. (R. 93). In his duties as an assistant strength coach, he would lesson plan, enter grades, and take attendance for 30 different classes per week. (R. 94). Therefore, the trial judge did not err in failing to direct a verdict and therefore this court should affirm.

3. The trial court did not err in failing to grant a directed verdict because the issue was not preserved.

Appellant argues that the trial court erred in failing to direct a verdict when the alleged threat did not arise out of the duties of Coach Robert Brown as a teacher as required by the statute. Specifically, Appellant argues that because the threat rose out of Brown's responsibilities as a baseball coach and not as a teacher, it didn't meet the statutory requirement.

As mentioned above in order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial

court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). Appellant did not raise the issue of directed verdict regarding the charge of threatening the life of a teacher and therefore is not preserved.

Even if it was preserved there is evidence that the threat arose out of Brown's responsibilities as a teacher. There was testimony Brown taught 30 classes a week, took attendance, put grades in, and lesson planned. (R. 94). The question of whether Brown being a baseball coach was part of his teaching responsibilities is a question for the jury and therefore the judge did not err in not directing a verdict.

4. The trial court did not err in overruling Appellant's hearsay objection.

Appellant argues that the trial court erred in failing to sustain Appellant's hearsay objection. Specifically, Appellant argues that in failing to sustain the objection it permitted Brown to give testimony as to the reputation of Appellant and that it was prejudicial to Appellant's case.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. The rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying which is used to prove the truth of the matter asserted. State v. Vick, 384 S.C. 189, 199, 582 S.E.2d 275, 280 (Ct. App. 2009). Out-of-court statements made by an unavailable witness are admissible if they fall into one of the exceptions. Rules 804(b), SCRE.

Brown was asked during his testimony why Appellant's son was no longer on the team. (R. 136). In his response, Brown stated that there was an incident in a game and afterwards Brown gave the son the opportunity to apologize, but he told Brown that he was not allowed to apologize. (R. 136). Brown testified that since the kid did not apologize, the other option was to be removed

from the team. (R. 137). The statement was not admitted for the truth of the matter asserted. Brown was not testifying about whether the son could apologize was true, nor was Appellant mentioned in this testimony, but it was to explain why Appellant's son had been removed from the team. Therefore, the trial judge did not err in overruling Appellant's hearsay objection.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies 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."

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PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on C. Rauch Wise, 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 12th day of February, 2024.

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