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SC Court of Appeals

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

AMENDED INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

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 defense counsel preserved his objection under the Confrontation Clause where he objected to

[1] 541 U.S. 36, 124 S.Ct. 1354 (2004).

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

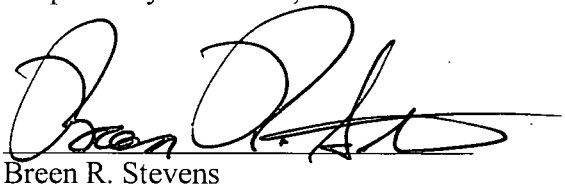
return, and where the government conceded before the Circuit Court a matter it tried to re-assert before the Court of Appeals) (citing State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007)).

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, as well as Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), which applied Crawford to statements of complaining witnesses taken by law enforcement in criminal domestic violence scenarios. 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.

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,



Breen R. Stevens
Public Defender

ATTORNEY FOR APPELLANT

This 13th day of August, 2013.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Amended 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
Columbia, SC 29211

I further certify that all parties required to be served by Rule have been served this 13th day of August, 2013.

Breen R. Stevens
Public Defender

ATTORNEY FOR APPELLANT

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

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 9/14/15