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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 2013), Appellate Case No. 2010-162287

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

RETURN TO BRIAN K. SPEARS' PETITION FOR WRIT OF CERTIORARI

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SPEARS' QUESTION PRESENTED

I. Whether the Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless?

STATEMENT OF THE CASE

On May 27, 2007, gunfire rang out near the intersection of 11th Avenue North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds ("Victim") and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Brian "Bos" Spears was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Spear's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Spears was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Spears was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Spears, represented by Robert M. Pachak, sought review in the South Carolina Court of Appeals contending, "the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]" (App. 6). In response, the State argued: (1) Appellant's argument was "not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;" and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. (App. 23, 26).

On April 17, 2013, the appellate panel neglected the issue Spears had actually raised on appeal[1] and instead issued a published opinion finding the trial court erred in failing "to conduct

[1] See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) ("If a question is not presented for our review, we should not answer it no matter how much we may want to do so.

a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears[.]" (App. 43). The panel then mulled over the remedy for the perceived error explaining that other courts "have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test." (App. 39). Thereafter, the appellate panel declined to conduct, a *de novo* Rule 403 review citing to State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (App. 42), further said the record was incomplete as to whether the trial court's perceived error was harmless (App. 43), and elected to remand the issue to the trial court instructing it to perform and on-the-record Rule 403 balancing test. (App. 43). Both parties unsuccessfully sought rehearing and thereafter, sought certiorari in this Court. (App. 44-66, 67-70, 71).

BACKGROUND

On May 26, 2007, Spears, Nathaniel "June" Douglas, Ishmael "Ish" Douglas,[2] and Thomas "T.C." Shaw (collectively Spears' group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.[3] (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Spears' group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Spears' group was joined by Jeffrey "Bird" Bethea, who, like Spears and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the

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For as former Chief Judge Alex Sanders famously wrote, 'appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' ") (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, ("[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal."); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

[2] Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).

[3] Spears, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

incident, Spears was wearing a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.[4] (R. 288-89, 299). Bethea, who did not know Spears' group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Spears' group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.[5] (R. 365, 273-75, 290-91, 572). After seeing Victim, Spears' group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached the group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Spears who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). During the course of their conversation, Spears expressed to Bethea his belief that Irons and his group, which included

[4] Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Spears' former cellmate in the detention center, Timothy Smith, testified that Spears told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Spears and his friends to come to Myrtle Beach. (R. 426-27).
[5] Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

Victim, were going to kill someone in Spears' group, unless he and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Spears or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Spears had shot and grazed Victim outside of a Wal-Mart in Lumberton.[6] (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[,]" explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Spears had shot him and further informed her that he and Spears did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Spears was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R.

[6] Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE.* Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also (R. 10-11).

144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim's statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

> It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

> I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.[7] (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Spears] is facing." (R. 186). Finally, the State noted that

[7] Spears did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.[8] (R. 187). At no point did defense counsel ever argue that the admission of the prior bad act evidence required a Rule 403, SCRE balancing test. Likewise, defense counsel never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence.

ARGUMENT

I. The Court of Appeals was not Required to Reverse Spears' Conviction as it did not Rule that the Trial Court Erred in Applying Rule 403, but Instead Found the Trial Court Erred in Failing to Conduct a Rule 403 Balancing Test, and as a Result, the Court of Appeals Language Regarding Harmless Error was only Related to Whether a Remand was Necessary for a Rule 403 Analysis

Spears maintains the appellate panel erred in remanding his case to conduct a Rule 403 balancing test contending the appellate panel ruled on his argument that the prior shooting was inadmissible under Rule 403 and therefore, upon stating that it could not determine whether the error was harmless, was required to reverse his conviction.[9] Spears Pet. for Writ of Cert. at 5-6. The State disagrees.

[8] Spears also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

[9] For the sake of argument, the State will address the merits of Spears's argument, but by doing so is not conceding the position taken in its' petition for writ of certiorari that: (1) the Court of Appeals should have declined to rule on the issue of whether the trial court erred in failing to perform a Rule 403 balancing test since Spears did not raise the issue at trial and failed to include such an argument in his statement of issues on appeal; and (2) even assuming the issue was properly preserved and presented, the Court of Appeals erred by failing to determine whether the trial court's failure to rule on the Rule 403 issue was prejudicial.

First, the State notes that Spears' argument lies on a faulty assumption. Specifically, that the appellate panel ruled on the argument contained within his brief. Quite simply it did not. Indeed, rather than ruling on the question presented on appeal, whether the trial court erred in applying Rule 403, the appellate panel instead elected to create its own issue—whether the trial court was required to conduct a Rule 403 analysis. The appellate panel then elected to answer its' own question, relied on facts noted in the State's procedural bar argument, that the trial court never ruled on a Rule 403 question, and thus found the trial court erred in failing to conduct a Rule 403 analysis.[10] Having found its' perceived error, the appellate panel then set to work on crafting an appropriate remedy, and within this context, it performed, among other things a harmless error analysis. Thus it seems clear, the harmless error analysis contained within the opinion was utilized for only one purpose, to determine whether a remand was necessary or if the issue could be affirmed on harmless error alone.

A. The Harmless Error Analysis was Clearly Limited to the Discussion of Whether the Court Needed to Remand the Matter to the Trial Court

The appellate panel's opinion itself is perhaps the best evidence of the issue that was actually ruled upon and is therefore most helpful in determining the reason the panel performed a harmless error analysis. Specifically, the harmless error discussion occurred only after the trial court determined, pursuant to State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002), that the trial court was required to conduct a Rule 403 analysis, which it admittedly failed to do in this case.[11] (App. 37-38). Understanding this was the trial court's purported error, the appellate panel reviewed the law from various jurisdictions to fashion the appropriate remedy.

[10] This was of course one of the State's reasons for arguing the issue was not preserved on appeal.

[11] The State notes this argument was also never raised at trial, or included in the statement of issues on appeal, and as such the appellate panel erred in addressing such a question under this Court's preservations rules as well as Atlantic Coast Builders and Contractors, LLC v. Lewis, Langley v. Boyter, Rule 208(b)(1)(B), SCACR and Tobias v. Rice.

(App. 38-42). Summarizing the law from other jurisdictions, the panel went on to explain that other courts have either: "(1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test." (App. 39). After detailing the applicable law, the appellate panel declined to conduct a *de novo* Rule 403 review maintaining this was prohibited pursuant to State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). (App. 42). It was only then that the appellate panel engaged in its harmless error analysis and after determining the record was incomplete as to whether the trial court's perceived error was harmless (App. 43), elected to remand the issue to the trial court with instructions that the trial court perform an on-the-record Rule 403 balancing test. (App. 43). Thus, it cannot be said that the harmless error analysis performed by the appellate panel was based upon a finding that the trial court erred in applying Rule 403.

B. Understanding the Basis for the Appellate Panel's Ruling there is Simply No Basis for the Reversal of Spears' Conviction and Sentence

Understanding the basis for the appellate panel's ruling, it is clear Spears is not entitled to a reversal of his conviction and sentence. Indeed, under Spears' logic, his conviction should be reversed despite the fact that the trial court' s only ruling on the prior shooting was that it was admissible both as an excited utterance and under Rule 404(b), SCRE, both rulings that Spears never appealed. In other words, Spears wants his murder conviction and sentence reversed by this Court based solely on the trial court's failure to perform a *sua sponte* Rule 403 analysis, without regard as to whether the evidence would have been admissible under Rule 403. Quite simply, this cannot be the law as Spears would receive what amounts to a legal windfall since a he would theoretically be receiving a new trial despite the fact that no court would have found the prior shooting was inadmissible evidence.

CONCLUSION

In light of the fact the appellate panel did not rule on Spears' question presented, but instead ruled on a question of its' own making, the harmless error analysis contained within the panel's opinion clearly does not mandate reversal since there was no error in the application of Rule 403. As a result, the State respectfully asks this Court to deny Spears' petition for writ of certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Brendan McDonald, counsel for the Petitioner/Respondent, certify that I have served the within ***Return to Spears' Petition for Writ of Certiorari,*** on opposing counsel by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney:

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I further certify that all parties required by Rule to be served have been served on this 14th day of August, 2013.

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