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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-001044

THE STATE, Respondent,

v.

SHEMUAL NAHUM BEN YISRAEL, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

102 Ribaut Rd
Beaufort, SC 29902
(843) 779-8477

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted by a Beaufort County Grand Jury for failure to stop for a blue light. Appellant proceeded to a jury trial on June 11, 2022, before the Honorable Robert J. Bonds. Appellant represented himself at trial with Courtney Gibbes, Esq. as standby counsel. The jury found Appellant guilty as charged. Appellant was sentenced to three years' imprisonment suspended upon the service of twenty months, with twelve months of probation. This appeal follows.

STATEMENT OF FACTS

On May 8, 2018, Samuel Watson (Yemassee Police Department) was patrolling the area where Appellant lived. (R. 158). Watson knew that Appellant had an active warrant on him and so when he observed Appellant standing outside his residence by his vehicle, he attempted to call out to him to advise him of the active warrant. (R. 158). Appellant then ran into his house and Watson pursued him. (R. 159). Watson then realized that Appellant had escaped through the back door of the house and heard Appellant crank his vehicle. (R. 159). Watson got into his vehicle and began pursuing him in his patrol vehicle. (R. 159-160). Watson initiated his blue lights and sirens. (R. 160).

Watson advised dispatch that Appellant was not stopping, and he was in pursuit. Chief Gregory Alexander (Yemassee Police Department) attempted to stop the pursuit by laying down spike strips, but Appellant evaded them. (R. 164). The pursuit lasted approximately 20-30 minutes before it was called off for becoming too dangerous. (R. 165). Appellant then drove himself to the Beaufort County Detention Center and was placed under arrest. (R. 213).

At trial, Appellant tried to explain that mitigating circumstances for not stopping for blue lights was because he did not trust the Yemassee Police. He testified that they continuously put out false warrants on him, tried to remove him from his land, and had beaten him up on numerous occasions. (R. 340-353). Appellant called Chief Alexander to the stand and questioned him about the warrant that was served on him in May of 2018. (R. 241-242). Alexander testified it was for illegal dumping on town property and how he knew that property was town property. (R. 242-245). Appellant also questioned him about other warrants that were pending or dismissed. (R. 246-249).

Prior to Appellant testifying, he wanted to recall Alexander to question him about whether he or anyone in his department was investigated by the FBI or SLED for allegations of physical abuse made by Appellant. (R. 329-330). Appellant argued that it was relevant to his mitigating circumstances that he was terrified of the Yemassee Police Department and that was why he didn't stop for blue lights. (R. 332). The trial judge allowed Appellant to proffer testimony from Alexander outside the presence of the jury. (R. 333). Appellant asked Alexander if he was involved in any investigation by SLED or the FBI regarding abuse of Appellant. (R. 335). Alexander testified that he was aware of Appellant calling the FBI, but not of an investigation that came from it. (R. 336). The trial judge stated:

> I'm not gonna allow you to get into evidence or get into the fact that they may have been contacted merely by the FBI. They weren't investigated by the FBI. You're stuck with his answer. You know, if you knew this, or you thought this was gonna be an issue you could have gotten somebody from the FBI here, you could have gotten records, or some type of other documents to verify that. And that they were investigated, I'm not gonna allow you to get that into evidence, and have the jury speculate as to what that means because that's just calling for speculation about the matter, so I'm not going to allow that.

(R. 337). In Appellant's own testimony he states that he went to the FBI several times to inform them of the Yemassee Police Department actions. Appellant stated, "They made inquiries, they came to town." (R. 347).

STANDARD OF REVIEW

Issue I

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). "Specifically, we review a circuit court judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo." Id. "In doing so, this Court must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit court judge at the time the defendant made his request." Id.

Issue II

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "To warrant the reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

ARGUMENT

I. Appellant knowingly, intelligently, and voluntarily waived his right to counsel.

Appellant contends he did not knowingly, intelligently, and voluntarily waive his right to counsel. Specifically, he argues that the court did not engage in a colloquy with him pursuant to Faretta v. California, 422 U.S. 806 (1975), and that the record does not show that he had a sufficient background to appreciate the dangers and disadvantages of self-representation. This argument lacks merit because the trial judge did inform him of the dangers of representing himself.

On June 10, 2022, about a month before the case went to trial, there was a motion to continue hearing held. From the transcript it infers that Appellant had been in front of the trial judge before for other reasons and had indicated that he wanted to represent himself. At the motion hearing the judge asks Appellant "Let me make sure—of course, you still want to represent yourself, right?" (R. 11). When Appellant responded in the affirmative for a second time when the trial judge then asked "I wish you would let me give you a lawyer. They will assign you a lawyer to represent you. You understand that. You have repeatedly told me that you don't want a lawyer; is that correct?" (R. 11). Later in the hearing the motion the following conversation occurred:

> **Trial Judge**: Now, what is going to happen is this: Mr. Yisrael, I really think this case is going to get tried. I want you to know that. I think this case will be tried. I don't think this is going to be a case that is just going to be dismissed. I don't think it is. It could be. Based on your history, who knows what you are telling me. Look at all these Judge. I see that.
>
> Mr. Yisrael, I think this one, though, is going to go. My concern is for you, sir, that your (sic) facing – in the event of a conviction, you are facing up to three years incarceration. This is a serious offense. So, what I am telling you, sir, is I would ask that you seek, think about reconsidering whether or not to have a lawyer represent you.
>
> What is going to happen is this, Mr. Yisrael. I want to let you know this, sir. Do you hear me?
>
> **Appellant:** I'm Listening. I'm very intent.

> **Trial Judge:** If this case gets reached for trial, sir, and it's 2018 you will not be able to walk in that day and ask for a lawyer. If you need a lawyer, you need to get a lawyer now.
>
> If you reconsider that and you want a lawyer, you need to let the clerk know. She will let me know. I will sign an order appointing a lawyer to represent you, sir.
>
> But I want to let you know, you have a right to represent yourself. We have been through this before. I do want to let you know, sir, I honestly believe that this case will be a case that will be tried. Unlike the other cases that were dismissed, if this case is tried, sir, and you are found guilty—and I'm not saying you are guilty. But if a jury did sir, I just want to make sure you understand, sir, that this charge potentially carries up to three years in jail. Again, I am not saying you are going to be convicted. I am not saying that I would oppose a prison sentence. I haven't heard the facts of the case. I don't know anything about the case.
>
> I just want to make sure you understand the serious nature of this matter. I think you do, but I have to say that, sir, in doing my job.
> Do you understand that?
>
> **Appellant**: I understand that.

(R. 14-15).

When the case was called to trial in July the trial judge again asked Appellant about representing himself and asked if he recalled signing a piece of paper that he wanted to represent himself. (R. 48). The trial judge then told him to sign the piece of paper again stating that he wanted to represent himself. (R. 48-49). The trial judge further asked Appellant if he would like a stand in lawyer and explained that the stand in lawyer could sit in the court room or at the table with Appellant and if he had any questions he could ask the stand in lawyer, to which Appellant agreed. (R. 51-52). Courtney Gibbes, from the Public Defender's Office, agreed to be Appellant's stand in Lawyer. (R. 52-53).

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A "defendant may waive his Sixth Amendment right to counsel. A waiver is an

intentional and voluntary relinquishment of a known right." State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). "To establish a valid waiver of counsel Faretta requires the accused be (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. In the absence of a specific inquiry by the trial judge addressing the disadvantages of a pro se defense as required by the second Faretta prong, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990). "A defendant may waive counsel by an affirmative, verbal request, or a defendant's actions may constitute a waiver by conduct." Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019). In Osbey, the PCR court found that Osbey waived his right to counsel because Osbey did not seek counsel after being told three separate times he needed to contact the public defender's office; however, the Supreme Court reversed stating that he did not waive his right to counsel because he was not warned of the dangers of self-representation. Id. In this case, Appellant was also told multiple times to go get a lawyer and that he should have a lawyer; however, this case differs from Osbey because Appellant was also told about the dangers of self-representation. Further, Appellant didn't just waive his right by his "conduct", Appellant stated multiple times that he wanted to represent himself. Therefore Appellant knowingly, voluntarily and intelligently waived his right to counsel.

II. The trial judge did not abuse his discretion by excluding certain testimony.

Appellant contends that the trial judge erred in excluding relevant testimony from Chief Alexander that Appellant had reported to the FBI that he was abused by members of the Yemassee Police Department. Specifically, that the testimony was admissible under Rule 403, SCRE, and where the jury asked during deliberations, "Does the defendant have reports/phone calls to the FBI?" Appellant's argument lacks merit because the testimony was not relevant.

"To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence that can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244 (Ct. App. 2019).

"Although relevant, evidence may be excluded if its probative value is 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. "Probative value is the measure of the importance of that tendency to the outcome of the case." State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "Unfair prejudice does not mean the damage to a defendant's case that results from legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." Id. at 616, 168.

"A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Lyles, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008). "If judicial

self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015).

Here, Appellant wanted to recall a witness to have him testify that Appellant had reported to the FBI that he was abused by members of the Yemassee Police Department. During the proffer of the witness he testified that while he was contacted by the FBI about Appellant's allegations he was not aware of an investigation. The trial judge did not abuse his discretion in excluding this testimony because as he stated, "I'm not gonna allow you to get that into evidence, and have the jury speculate as to what that means because that's just calling for speculation about the matter." (R. 337). The trial judge told appellant he could have called a witness to testify to the allegations of abuse and his calls to the FBI or could have gotten records to verify that information, but that Alexander could not testify to it because he had no knowledge of an investigation and would leave the jury to speculate as to why that would be and therefore would confuse the issues for the jury. (R. 337). Therefore, the trial judge did not abuse his discretion in excluding the testimony.

Even if the trial judge did abuse his discretion in excluding that testimony, it was harmless because the testimony came in through Appellant's own testimony. "To warrant the reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011). Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011).

During Appellant's own testimony, he stated that "I will call the FBI when I got beat up by the cops on several occasions, maybe about six or seven occasions. And I was hospitalized, the

cops would take me-no the ambulance would take me to the hospital and the cops would take me from the hospital because they wanted to beat me up." (R. 345). He also testified that "and don't forget that I said that I was beaten several times in 2000 to 2018. Several times that I went to the FBI, South Carolina Law Enforcement Division. They made inquiries, they came to the Town." (R. 347). Therefore, whether or not the testimony from Alexander that the FBI contacted him informing him of the allegations by appellant and his lack of knowledge of whether there was an investigation, would not have influenced the jury's verdict because they heard the information anyway.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

102 Ribaut Rd
Beaufort, SC 29902

BY: _____
AMBREE M. MULLER
Bar # 104213

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

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THE STATE — Respondent,

v.

SHEMUAL NAHUM BEN YISRAEL, — Appellant

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Joanna K. Delany, counsel of record for Appellant, by sending one copy 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 19th day of August, 2024.

Grace Sommer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Grace Sommer

From: Grace Sommer
Sent: Monday, August 19, 2024 12:36 PM
To: Delany, Joanna
Cc: Ambree Muller; Warren, Kaylynn
Subject: The State v. Shemual Nahum Ben Yisrael (2022-001044)
Attachments: YISRAEL Shemual - FBOR (03668474xD2C78).PDF

Good Afternoon Ms. Delany,

Attached please find a Final Brief of Respondent in The State v. Shemual Nahum Ben Yisrael (2022-001044). This brief will be filed today with the South Carolina Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you,

Grace Sommer, Legal Assistant
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3835 | gracesommer@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov