STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2012-210107

THE STATE,

Respondent,

vs.

BENJAMIN JACKSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

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The issue Appellant asserts on appeal is not preserved because Appellant failed to place an objection based on a specific ground on the record. Regardless of preservation, the investigator's testimony regarding the shell casings he found in Appellant's home was relevant under Rules 401 and 402, SCRE because the shell casings were consistent with the victim's description of the type of gun used during the armed robbery. Further, the probative value of admitting the testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Finally, even if the trial judge erred in admitting the testimony, any error was harmless in light of the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

On October 20, 2010, a Berkeley County Grand Jury indicted Appellant on the following charges: 1) possession of a firearm during the commission of a violent crime; 2) burglary in the second degree; 3) grand larceny; 4) kidnapping; 5) armed robbery; and 6) failure to stop for a blue light.

On March 8, 2012, Appellant proceeded to trial. Patricia A. Kennedy represented Appellant, and Assistant Solicitors Brian Alfaro and Ariel Pittman represented the State. The jury found Appellant guilty as charged. The Honorable J.C. Buddy Nicholson sentenced Appellant to the following: 1) five years for the possession of a firearm during the commission of a violent crime conviction; 2) fifteen years for the burglary in the second degree conviction; 3) ten years suspended to five years of probation for the grand larceny conviction; 4) thirty years for the kidnapping conviction; 5) thirty years for the armed robbery conviction; and 6) three years for the failure to stop for a blue light conviction. Judge Nicholson ran all of the sentences concurrently except for the probation.

On March 12, 2012, Appellant filed a timely notice of appeal. On May 13, 2013, Appellant served the Initial Brief of Appellant. However, on June 27, 2013, Appellant served the Amended Initial Brief of Appellant. This brief follows.

STATEMENT OF FACTS

On May 19, 2010, Appellant entered a church and held Hazel Dunning ("Victim") at gun point. (R. p. 28; R. p. 33.) Appellant told Victim that he "wanted [her] f'ing keys or [he will] blow [her] head off." (R. p. 33.) Appellant took Victim's keys and stole her vehicle. (R. pp. 33-34; R. p. 36.) According to Victim, her vehicle was a White Eddie Bauer Expedition with tan on the bottom. (R. p. 31.) Victim described the assailant as a black male, who was approximately 5'11 to 6'2 and 150 to 180 pounds. (R. p. 23.)

On May 28, 2010, Investigator Rick Ollic saw a vehicle fitting the description of Victim's stolen vehicle. (R. p. 43.) Investigator Ollic was able to see the driver's face. (R. p. 45.) Initially, the vehicle stopped when Investigator Ollic activated his blue lights in order to pull over the vehicle. (R. p. 46). But when Investigator Ollic approached the vehicle, the vehicle took off. (R. pp. 47-48.) At that point, the backup officers began chasing the vehicle. (R. p. 48.) Eventually, the vehicle crashed and the driver fled the vehicle. (R. pp. 49-50.) The officers found a wallet with multiple credit cards that listed Appellant's name as the owner and Appellant's student identification. (R. pp. 50-51.) According to Investigator Ollic, the person on the student identification card resembled the person he saw driving the vehicle that night. (R. pp. 51-52.) The officers determined that the vehicle was in fact Victim's stolen vehicle. (R. p. 52.)

On June 2, 2010, the officers executed a search warrant of Appellant's house. (Supp. R. p. 76.) The officers found Victim's luggage rack and a palmetto tree sticker from her vehicle in Appellant's yard. (R. p. 53.) Further, the officers found a prescription medicine bottle belonging to Victim in Appellant's home and a check with Victim's name on it in Appellant's home. (R. p. 53.) In addition, the officers found Victim's

vehicle registration, roadside hazard kit, cell phone, and other miscellaneous documents belonging to Victim in Appellant's home. (R. p. 53; Supp. R. pp. 79-80; Supp.R. pp. 97-98)

At trial, Investigator Michael Cortte testified Victim reported that the assailant used some sort of long gun or rifle during the commission of the armed robbery. (Supp. R. p. 92.) When the officers executed the search warrant of Appellant's home, they found numerous .410 shotgun shells. (R. p. 57.) However, the officers never found a firearm. (R. p. 57.) According to Officer Cortte, the shotgun shells the officers found in Appellant's home were consistent with Victim's description of the type of weapon used during the commission of the armed robbery. (R. p. 57.)

Later on the day of the execution of the search warrant, Investigator Cortte asked Appellant specifically about the armed robbery that occurred on May 18, 2010. (R. p. 59.) According to Investigator Cortte, Appellant "said he did it. He said that he was sorry for what he put the victim through. He said that she was never a target. He wanted the vehicle. He said he wanted to apologize to her. He said that someone had left the gun for him to use. He said that someone helped him dispose of some of the victim's property, including her purse and the license plate from her vehicle. He told [the officers] that those items were disposed of at a car wash in Orangeburg County." (R. p. 63.) Appellant refused to tell the officers the name of the person who provided him the gun. (R. p. 63.) On June 3, 2010, Appellant confessed once again to the armed robbery. He wrote a note apologizing to Victim and asking for her forgiveness. (R. pp. 67-68; State's Exh. 2.) According to Dean Kokinda, an expert in the field of forensics and fingerprint analysis, Appellant's fingerprints matched certain items found in Victim's stolen vehicle. (Supp R. pp. 148-149.)

ARGUMENT

I.

The issue Appellant asserts on appeal is not preserved because Appellant failed to place an objection based on a specific ground on the record. Regardless of preservation, the investigator's testimony regarding the shell casings he found in Appellant's home was relevant under Rules 401 and 402, SCRE because the shell casings were consistent with the victim's description of the type of gun used during the armed robbery. Further, the probative value of admitting the testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Finally, even if the trial judge erred in admitting the testimony, any error was harmless in light of the overwhelming evidence of Appellant's guilt.

Appellant's argument on appeal fails for four primary reasons: First, Appellant's argument is not preserved because Appellant failed to place a specific objection on the record to the admission of the testimony regarding the shell casings found in Appellant's home. Second, even if the issue was preserved, the testimony was relevant because the shell casings found in Appellant's home were consistent with Victim's description of the type of gun used during the armed robbery. Third, the probative value of admitting the testimony was not substantially outweighed by the danger of unfair prejudice. Finally, even if the trial judge erred in admitting the testimony, any error was harmless due to the overwhelming evidence of Appellant's guilt, which included the following: 1) Appellant left his wallet containing his credit cards in Victim's vehicle; 2) Appellant left his student identification in Victim's vehicle; 3) Investigator Ollic testified that the driver of the vehicle was the same person in the student identification card, which was Appellant; 4) the police found Victim's luggage rack in Appellant's yard; 5) the police found Victim's palmetto tree sticker on Appellant's property; 6) the police found Victim's prescription medication in Appellant's bathroom; 7) the police found a check belonging to Victim at Appellant's home; 8) the police found Victim's vehicle registration at Appellant's home; 9) the police found Victim's roadside hazard kit on Appellant's property; 10) the police

found various documents belonging to Victim on Appellant's property; 11) Appellant's fingerprint was on a jalapeno can in Victim's vehicle; and 12) Appellant confessed twice to the armed robbery and wanted to apologize to Victim.

Accordingly, this Court should affirm Appellant's convictions and sentences.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The decision to admit or exclude evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). If the trial court's decision lacks evidentiary support or is controlled by an error of law, the trial court has abused its discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Further, it is well settled that in ruling on the admissibility of evidence, the trial court has considerable latitude and its ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

Analysis

A. Preservation

First, Appellant's argument on appeal fails because it is not preserved for review.

In South Carolina, an issue must be raised and ruled upon in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Further, in order to preserve an issue for appeal, the objecting party must make a specific objection to the admission of evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327,

344, 479 S.E.2d 67, 75 (Ct. App. 1996). A general objection that fails to specify the ground on which the party is objecting does not preserve the issue for appellate review. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). In other words, appellate courts do not review issues when the ground for the objection is not stated in the record. See Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990).

On appeal, Appellant claims that the trial judge erred in refusing to suppress the investigator's testimony regarding the shell casings he found in Appellant's home. Before trial, defense counsel argued that admitting the actual shell casings and the photographs of the shell casings would be more prejudicial than probative. (R. p. 11.) In fact, defense counsel's exact words were the following: "Our position would be that it's far more prejudicial than probative. **That's simply our objection**." (R. p. 11) (emphasis added). Although the trial judge made it clear that he would not make a decision until after he heard some testimony, he stated, "As defense counsel says, it may be relevant. I'm not sure that the probative value outweighs the . . . prejudicial effect." (R. p. 12.) Thus, the record clearly reflects that defense counsel was not objecting to the fact that the shell casings and photographs of the shell casings were relevant. Instead, defense counsel's only ground for objection was based on Rule 403, SCRE. Further, at that point, defense counsel did not raise any objection to the investigator testifying that he found shotgun shells in Appellant's home.

During the middle of Investigator Cortte's testimony, the trial judge held an off-the-record bench conference. (Supp. R. p. 99.) Right after the bench conference, Investigator Cortte testified that he found shotgun shells that were consistent with the Victim's description of the gun used during the armed robbery. (R. p. 57.) At that point, defense counsel did not place an objection on the record. (R. p. 57.) At the conclusion of

the investigator's testimony, the trial court stated that defense counsel objected to the admission of the actual shotgun shells and the photographs of the shotgun shells during the bench conference, and the trial judge sustained defense counsel's objection. (R. pp. 70-71.) However, the trial judge allowed the solicitor to ask whether any weapons or ammunition were found in Appellant's home over defense counsel's objection. (R. p. 71.) Despite the trial court's attempt to place the objections on the record, defense counsel never specified the **grounds for her objection** to the testimony regarding the shotgun shells. See Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (noting that a general objection that fails to specify the ground for the objection does not preserve an issue for appellate review). Because defense counsel failed to place the grounds for her objection to the testimony on the record, the issue Appellant asserts on appeal is not preserved. Further, because defense counsel failed to place her grounds for her objection on the record, it is unclear why the trial judge admitted the testimony but excluded the actual shell casings and photographs of the shell casings.

Even if this Court was to assume defense counsel's objection to the testimony regarding the shell casings was based on the same grounds as her pre-trial objection regarding the actual shell casings and photographs of the shell casings, her only objection was based on Rule 403, SCRE. Thus, Appellant cannot now claim on appeal that the admission of the testimony was irrelevant under Rules 401 and 402, SCRE.

In summary, this Court should affirm Appellant's sentences and convictions because the issue Appellant asserts on appeal was not properly preserved.

B. Rules 401 and 402, SCRE

Second, Appellant's argument on appeal fails because the testimony was relevant under Rules 401 and 402, SCRE.

Generally, all relevant evidence is admissible under Rule 402, SCRE. "'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 probable or less probable than it would be without the evidence." Rule 401, SCRE. But evidence does not have to be "'necessary' to the State's case in order to be admitted." State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004).

Appellant's reliance on State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986), is misplaced. In McConnell, our Supreme Court held that the following items found in the defendant's apartment were irrelevant and inadmissible: 1) two .22 caliber bullets; 2) a .22 caliber pistol; 3) two .25 caliber bullets; and 5) a photograph showing a hole in the window near the front. Id. at 279-280, 350 S.E.2d at 180. ***The victim was shot and killed with a .357 caliber bullet.*** Id. at 279, 350 S.E.2d at 180. The gun used to kill the victim was a .357 Magnum pistol. Id. The defendant did not have the .22 caliber pistol at the time of the shooting. Id. at 280, 350 S.E.2d at 180. Simply put, there was no connection between the bullets and gun found in the defendant's apartment to the .357 caliber bullet that killed the victim. Id.

Unlike the shell casings in McConnell, the shell casings in this case were consistent with the time of gun used during the commission of the armed robbery. The State charged Appellant with possession of a firearm during the commission of a violent crime. The fact Appellant had shell casings in his home that were consistent with the gun

used in the robbery made it more likely Appellant owned or had recently been in possession of a firearm like the one used in the robbery. Thus, the investigator's testimony was circumstantial evidence that Appellant possessed a firearm during the commission of the armed robbery.

C. Rule 403, SCRE

Third, Appellant's argument on appeal fails because the probative value of admitting the testimony was not substantially outweighed by the danger of unfair prejudice.

Under South Carolina's Rules of Evidence, evidence that is relevant "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.

Because Appellant failed to place a specific objection to the admission of the testimony on the record, it is unclear whether the trial judge made a ruling based on Rule 403, SCRE. However, despite not knowing the basis of the objection and the basis of the trial court's ruling, the testimony was admissible under Rule 403, SCRE. The testimony was very probative because the shotgun shells were consistent with the type of gun used during the armed robbery. Appellant claims that the shotgun shells were prejudicial because "it was highly probable that the shells led the jury to believe that [Appellant] owned a gun which could have been used during the crime." (App. Br. p. 9.) However, Appellant admitted someone gave him a gun to use to commit the robbery and admitted he and the gun supplier disposed of some of the evidence of the crime. Because Appellant

admitted to using a borrowed gun during the commission of the violent crime, the prejudicial effect of admitting the testimony regarding the shotgun shells was minimal.

D. Harmless Error

Finally, Appellant's argument on appeal fails because even if the trial judge erred in admitting the testimony, any error was harmless in light of the overwhelming evidence of Appellant's guilt.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is considered harmless beyond a reasonable doubt if it did not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Further, "[w]hen guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, assuming the trial judge erred in admitting the testimony, any error was harmless in light of the overwhelming evidence of Appellant's guilt, which included the following: 1) Appellant left his wallet containing his credit cards in Victim's vehicle; 2) Appellant left his student identification in Victim's vehicle; 3) Investigator Ollic testified

that the driver of the vehicle was the same person in the student identification card, which was Appellant; 4) the police found Victim's luggage rack in Appellant's yard; 5) the police found Victim's palmetto tree sticker on Appellant's property; 6) the police found Victim's prescription medication in Appellant's bathroom; 7) the police found a check belonging to Victim at Appellant's home; 8) the police found Victim's vehicle registration at Appellant's home; 9) the police found Victim's roadside hazard kit on Appellant's property; 10) the police found various documents belonging to Victim on Appellant's property; 11) Appellant's fingerprint was on a jalapeno can in Victim's vehicle; and 12) Appellant confessed twice to the armed robbery and wanted to apologize to Victim.

In summary, this Court should affirm even if it finds the trial court erred in admitting the testimony because the evidence against Appellant was overwhelming.

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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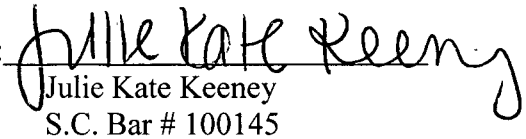
BY: 
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October 16, 2013

STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey Durant, Esquire
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I further certify that all parties required by Rule to be served have been served. This 16th day of October, 2013.

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