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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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S.C. Supreme Court

Mason Johnson, Petitioner

v.

State of South Carolina, Respondent

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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QUESTION PRESENTED

Did the trial judge properly sustain trial counsel's objection when the State's witness testified as to the contents of a letter that was sent to her by Appellant while he was incarcerated awaiting trial?

STATEMENT OF THE CASE

The Appellant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's order of commitment. The Appellant was indicted at the February 2010 term of the York County Grand Jury for grand larceny (2010-GS-46-0950) and burglary, second degree (2010-GS-46-0949). Appellant was represented by Kenneth Snow, Esquire. The State took the case to trial. On May 26, 2010, the Appellant was convicted of both charges. The Honorable Lee S. Alford sentenced the Appellant to concurrent terms of fifteen (15) years imprisonment for burglary and five (5) years imprisonment for grand larceny.

A timely notice of Appeal was filed on the Appellant's behalf. However, the South Carolina Court of Appeals dismissed the appeal for failure to timely provide the Court with proof of service of the Notice of Appeal. The Remittitur was issued on September 24, 2010.

The Appellant filed an Application for Post-Conviction relief on February 14, 2011. The State filed its return on or about August 18, 2011. An evidentiary hearing was convened on August 15, 2012 at the York County Courthouse. The Appellant was represented by Bradford A. Rawlinson, Esquire. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General. The Honorable John C. Hayes, III, granted Appellant this belated appeal in an order dated August 20, 2012 and filed August 22, 2012.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct.App.2003). The appellate court is limited to determining whether the trial court abused its discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Bowie, 360 S.C. 210, 216, 600 S.E.2d 112, 115 (Ct.App.2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793–94 (Ct.App.2003).

ARGUMENT

The trial judge properly sustained trial counsel's objection when the State's witness testified as to the contents of a letter that was sent to her by Appellant while he was incarcerated awaiting trial.

Appellant argues that, "the trial judge erred in allowing prejudicial hearsay testimony into evidence at trial because this allowed the solicitor to introduce Appellant's private confession to another through the back door when Appellant neither testified at trial nor gave a statement to police and where the admission of this hearsay testimony was not a harmless error as it contained information (alibi evidence) that was not cumulative to other evidence presented at trial." (Appellant Brief p.1). This argument is without merit.

At trial, the following exchange occurred while Appellant's girlfriend, Monalisa Macintosh was testifying for the State:

> **Solicitor (Mr. Hutchinson)**: Did Mr. Johnson (Appellant) attempt to contact you in any other fashion since then?
>
> **Macintosh**: I got a couple of letters from him and I had one letter the rest of them I had told Stephen if they come just get rid of them.
>
> **Solicitor**: Now, do you remember the substance of the letter that you received from Mr. Johnson?
>
> **Macintosh**: Yeah. Basically it was telling me that he wanted me to come up.
>
> **Defense Counsel (Mr. Snow)**: Objection.
>
> **The Court**: Hold it just a minute, Counsel. If you're going to object, stand and object. State the nature of your objection. I can't tell who said what if you just set there.
>
> **Defense Counsel**: Sorry, Judge, I apologize, Your Honor. Your Honor, it's hearsay.
>
> **Solicitor**: Hold on a minute, Your Honor. Mr. Johnson wrote a letter to her.
>
> **The Court**: You may proceed. Over ruled.

Solicitor: I apologize. And let me go back just a little bit as far as the letter is concerned. How did you know it was from Mr. Johnson?

Macintosh: Because it came from the Moss Justice Center and it had his name on it.

Solicitor: And again, could you tell us, do you remember what it said?

Macintosh: Yes. He basically was asking me to come up to the police station make a statement saying he was with me that day and Stephen was drunk and he would get probation because he doesn't have a record.

The Court: All right.

Defense Counsel: Your Honor, Judge, I'm gonna definitely object to this, Judge. Hearsay.

The Court: I sustain the objection there. That's as far as you'll go there.

Solicitor: Thank you, Your Honor. No further questions at this time.

(App. p. 163-64).

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Rule 801 (c), SCRE; State v. Lindsey, 394 S.C. 354, 361, 714 S.E.2d 554, 557 (Ct. App. 2011). The admission of improper hearsay evidence into evidence constitutes reversible error where such an admission results in prejudice. State v. Garner, 389 S.C. 61; 697 S.E.2d 615 (Ct. App. 2010).

In the instant case, Appellant argues the testimony was offered to prove the truth of the matter asserted (i.e. that the Appellant was guilty of the crime). However, that assumption is incorrect. Macintosh's statement was merely that the Appellant wanted her to say she was with him the day of the burglary, and that his co-defendant was drunk. It requires a significant mental leap of faith to derive an admission of guilt from that statement. Thus, the statement did not

constitute inadmissible hearsay because it was not offered to prove the truth of the matter asserted, that Appellant was guilty of these crimes.

Regardless and most importantly, the trial judge sustained trial counsel's objection to the hearsay evidence. "Appellate courts have recognized that an issue will not be preserved for review where the trial court *sustains* a party's objection to improper testimony and the party does not subsequently move to strike the testimony or for a mistrial." State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct.App. 2010) (emphasis added). "The rationale for this rule is clear; without a motion to strike or motion for a mistrial, when the objecting party is sustained, he has received what he asked for and cannot be heard to complain about a favorable ruling on appeal." Id. Clearly, in this case, trial counsel objected and was sustained. The testimony concerning the letter was not allowed into evidence. Additionally, there was no motion to strike or motion for a mistrial as Appellant received what he asked for: a sustained objection. He cannot now complain about a favorable ruling on appeal. Thus, this issue is not preserved for appeal.

Nevertheless, even if the initial testimony is considered improperly admitted and/or preserved for appeal, Appellant has not demonstrated reversible error because Appellant's argument cannot overcome a harmless error analysis. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding improper admission of hearsay evidence is reversible error only when the admission causes prejudice); State v. Carmack, 388 S.C. 190, 202, 694 S.E.2d 224, 230 (Ct.App.2010) ("An error without prejudice does not warrant reversal."). Generally, a conviction will not be set aside by the appellate court when error by the trial court is insubstantial and does not affect the result of the trial. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). When guilt has been conclusively proven by competent evidence, an

insubstantial error not affecting the result of the trial is harmless. Id. State v. Lindsey, 394 S.C. 354, 361, 714 S.E.2d 554, 557 (Ct. App. 2011).

The harmless error analysis clearly applies in this case. There was an ample amount of evidence linking the Appellant to the crime. The victim's neighbor, Earnest Gordon, witnessed the theft and made an in-court identification of the Appellant as one of the burglars. (App. p.97). Appellant's co-defendant, Stephen Robinson, testified that the Appellant kicked in the door of the victim's house, and then the two of them stole the lawnmower and various appliances. (App. p.180-81). Officer William Andrews testified that when he and the other officers arrested the Appellant, within minutes of the burglary, his pant-legs were wet like he had been outside recently. (App. p.225). Furthermore, the victim's property was recovered from the home where the Appellant lived and was arrested. (App. p.257). As such, the evidence against the Appellant was overwhelming, and even if the admission of the testimony was improper, there is no showing of prejudice.

CONCLUSION

For all the foregoing reasons stated above, Respondent respectfully requests the judgment of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 28, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2012-213721

Mason Johnson.....Petitioner,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I, J. Rutledge Johnson, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner and Brief of Respondent Pursuant to White V. State by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served, this 28th day of October, 2013.

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