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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEREEN DONYELL LEE,

APPELLANT

APPELLATE CASE NO. 2024-000745

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Appellant writes now to address two specific points regarding the first question presented: issue preservation and subsection 17-23-175(F). On the remainder of that question and all other issues, he will rest on the arguments presented in his initial brief. For the reasons given therein, he is entitled to a new trial or, at least, an individualized hearing where the sentencing court will have discretion to determine if an LWOP sentence is appropriate.

Issue Preservation

In its brief the state makes two issue preservation arguments concerning the recording of Minor: (1) the issue is waived because, after his objection was overruled, appellant used part of the recording in cross-examination of Minor, and (2) appellant stated "no objection" when the recording was introduced and thus failed to make a contemporaneous objection. These arguments should both fail.

Addressing the second argument first, appellant did not fail to preserve the issues for the reasons given in *State v. Jones*, 435 S.C. 138, 866 S.E.2d 558 (2021). In *Jones* the Supreme Court held that although typically a contemporaneous objection is necessary to preserve an evidentiary issue for appeal, "a different approach is warranted where a court rules after a hearing on a constitutional issue." 435 S.C. at 144, 866 S.E.2d at 561. The Court explained that after a pretrial hearing on a constitutional evidentiary issue, "the ruling is final." *Id.* It reasoned that if a defendant has already challenged the admissibility of the evidence and been overruled, so long as during the trial "no new facts arose which would have justified another hearing on the matter," there is no need for a repeated, futile objection when the evidence is introduced. *Id.* "[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form is elevated over

substance." 435 S.C. at 145, 866 S.E.2d at 561; *see also* 3 Corpus Juris, *Appeal and Error* § 734, at 823 (1915) ("As a rule, where objections to the admission of evidence, properly taken, have been overruled and exception saved, it is not necessary to repeat the objection when the same species of evidence is subsequently offered . . . .").

The same rationale should extend to prior objections based on statutory grounds. At the pretrial hearing Appellant argued the video failed to comply with section 17-23-175 and was therefore inadmissible. He was overruled, and that ruling was final. Because "no new facts arose" to justify another hearing or different ruling, there is no need to apply the issue preservation rules with such exacting strictness as to catch appellant in a technicality and create an issue for PCR.

As to the state's waiver assertion, it is similarly flawed. A defendant does not waive an objection to evidence by recognizing the trial court's ruling and then attempting to nonetheless present the best case possible despite a ruling with which he disagrees. For example, in *State v. Pickrell*, 435 S.C. 417, 867 S.E.2d 465 (Ct. App. 2021), this Court held that, if there was error in the admission of a law enforcement officer's testimony, that error "was harmless, as it was cumulative to other un-objected to testimony." 435 S.C. at 446, 867 S.E.2d at 481. Specifically, the Court pointed to what was essentially the same testimony elicited on cross-examination after the objection was overruled. *Id.* The Supreme Court disagreed: "If the trial court overrules a party's objection to the testimony of a witness, that party may question the witness about the objected-to testimony to mitigate the damage flowing from it without rendering the subsequent testimony cumulative." *State v. Pickrell*, 443 S.C. 497, 505, 905 S.E.2d 374, 378 (2024).

That reasoning extends to this final, pretrial ruling. Knowing that the video was coming in anyways, appellant attempted to use it to his advantage as much as that was possible. A party is not required to pretend that the trial court did not overrule his objection in order to preserve an

issue. Appellant had every right to use the video in his defense without waiving his overruled objection to its admission. To hold otherwise is to force parties to choose between preserving an objection to evidence that is coming in anyways by foregoing legitimate argument to the jury or else risk waiving the objection in an attempt to make the most of the situation as it is. Requiring such a calculus is not the purpose of the issue preservation rules.

Finally, the state's reference to *State v. Dicapua*, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007), *aff'd*, 383 S.C. 394, 680 S.E.2d 292 (2009), is entirely misplaced for two reasons. First, the Court there considered an appeal by the state from the grant of a new trial—the evidentiary issue was not before it. 373 S.C. at 455, 646 S.E.2d at 152. Second, and more importantly, the case rests on an entirely different factual background. It was a drug case where officers setup a sting operation with a hidden camera that, due to technical issues, had no audio. 373 S.C. at 454, 646 S.E.2d at 151. Prior to trial "Dicapua sought to suppress the videotape because it did not have any audio." *Id.* No basis for such an objection is given in the opinion, and no statutory or constitutional basis is obvious from context. Thus, stating there was "no objection" at its admission was a waiver of what was, presumably, an ordinary evidentiary issue. Because *Jones* should extend to this statutory issue, that analysis does not control this case.

In addition, the Court in *Dicapua* relied on the analysis in *Martelly v. State*, 187 A.2d 105 (Md. 1963), to hold Dicapua waived the issue. But *Martelly* was a constitutional issue under the Fourth Amendment, 187 A.2d at 107, so *Jones* now controls and refutes it. Moreover, Maryland itself has since disposed of the rule in *Martelly*. *Huggins v. State*, 479 Md. 433, 453, 278 A.3d 747, 760 (2022). Altogether, *Dicapua* is simply of no moment.

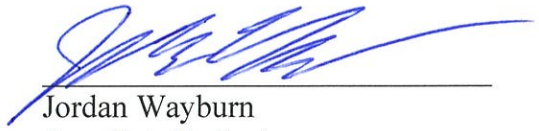
Subsection (F)

The state argues in its brief that the recording of Minor is admissible under section 17-23-175(F), even if it was otherwise inadmissible under subsection (A). Although this Court can affirm "for any reason appearing in the record on appeal," *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000), the trial court undertook no analysis under subsection (F). Therefore, the requirements and factors of subsection (F) do not appear in the record on appeal and thus provide no basis on which to affirm.

A recording is admissible under subsection (F) only if "the necessary visual and audio recording equipment was unavailable." § 17-23-175(F). The trial court also must consider "the circumstances surrounding the making of the statement," "the relationship of the professional and the child," and "if the statement possesses particularized guarantees of trustworthiness." *Id.* Because the trial court did not conduct this analysis, this Court cannot now determine the evidence was properly admitted in this alternative way. The record does not contain sufficient information in order to determine the evidence is admissible under subsection (F). Further, that determination needed to be made by the trial court in the first instance. This Court cannot now—after trial—exercise the discretion necessary in order to "make a determination as to whether the statement is admissible pursuant to the provisions of this section." § 17-23-175 (flush language). Finally, there is no way this Court or the trial court could conclude the necessary equipment was unavailable because it clearly was present and functioning at the time of the interview.

CONCLUSION

For the reasons provided above and in appellant's initial brief, he respectfully requests this Court reverse his conviction and sentence.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final reply brief of appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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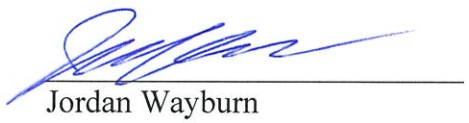
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 4th day of November, 2025.



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