STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case No. 2012-212010

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

CHRISTOPHER RYAN HOLLIDAY,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The issue raised on appeal is not preserved for appellate review because the issue was not raised below. In any event, the trial judge did not commit reversible error and any error was not prejudicial to Appellant.

STATEMENT OF THE CASE

Appellant was indicted in York County for indecent exposure and possession of marijuana, second offense. On May 9, 2012, Appellant proceeded to trial before the Honorable Lee S. Alford and a jury. The jury found Appellant guilty of both charges, and Judge Alford sentenced Appellant to one year for indecent exposure and one year, concurrent, for the marijuana charge. He also ordered that Appellant register on the sex offender registry. A timely notice of appeal was served and filed.

ARGUMENT

The issue raised on appeal is not preserved for appellate review because the issue was not raised below. In any event, the trial judge did not commit reversible error and any error was not prejudicial to Appellant.

Evidence Presented at Trial

Shortly before 5:00 pm on August 29, 2011, Catherine Holley, who had just started her freshman year at Winthrop University, was walking back to her dorm from her computer science class. (R. p. 121-23). It was a nice, sunny day, and there were a number of people out walking around. (R. p. 123-24). As Ms. Holley proceeded down the sidewalk, she saw Appellant's bluish-green Dodge Intrepid parked in an unusual spot beside a construction area. (R. p. 124-29; p. 90, lines 19-20). Ms. Holley noticed that both front windows were rolled down and that Appellant was sitting in the driver's seat in a reclined position. (R. p. 125). As she passed directly by the car, she observed Appellant masturbating as he sat in the car. (R. p. 124, lines 18-20). Specifically, "he had his penis out of his pants and his hand was on his penis and it was moving." (R. p. 124, lines 23-24).

Ms. Holley started to go back to her dorm, but turned back to see if Appellant had noticed her. (R. p. 126, lines 4-7). At that point she saw Appellant smiling directly at her through his front windshield. (R. p. 126, lines 4-13). Ms. Holley became afraid and ran back to her dorm and called her mother and then the police. (R. p. 131, line 16 – p. 132, line 17). Ms. Holley provided a description of Appellant and also described Appellant's car. (R. p. 132-33). Sergeant Wiles of the Winthrop Police Department responded within two minutes of being dispatched. (R. p. 90, lines 9-17; p. 111, lines 19-21). He observed Appellant reclined in his seat in a bluish-green Dodge Intrepid parked in the exact

location described by Ms. Holley.[1] (R. p. 90). Meanwhile, Officer Rockholt picked Ms. Holley up and brought her back to the scene to see if she could identify Appellant. (R. p. 133-34). Ms. Holley immediately recognized Appellant as the man she saw masturbating a few minutes before. (R. p. 134-37). After Ms. Holley made a positive identification, Sergeant Wiles placed Appellant under arrest for indecent exposure and advised him of his rights. (R. p. 91). A "tow inventory" revealed a baggy of marijuana, along with a smoke pipe, in the center console of the vehicle. (R. p. 99-108). Appellant acknowledged that the marijuana was his, and later at the jail, Appellant mentioned that he had a "problem" with marijuana. (R. p. 109-110).

Appellant was ultimately indicted for indecent exposure and possession of marijuana, second offense. (See Indictments). Appellant's primary defense at trial was that although he was guilty of the marijuana offense, he was not guilty of the indecent exposure charge because Ms. Holley, a scared young girl away from home for the first time, was mistaken about what she saw. (See R. p. 156-61).

Issue Preservation

Appellant argues on appeal that the trial judge erred by allowing the jury to hear evidence regarding the "psychological impact" the case had upon Ms. Holley because such information was irrelevant and prejudicial. This issue is clearly unpreserved for appellate review because it was not raised in any way, shape, or form below. Appellant's brief takes issue with particular testimony of Ms. Holley and certain comments made by the solicitor in opening statement and closing argument. (See Brief of Appellant, p. 5-8). However, Appellant did not object to any of the challenged

[1] Subsequent investigation revealed that Appellant was not a student or employee of Winthrop University and had no apparent reason to be parked on the campus. (See R. p. 91-92).

references at trial.[2] (See R. p. 79; p. 83; p. 131-32; p. 137-38; p. 147-48; p. 150; p. 153). See, e.g., State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (a contemporaneous objection is required to preserve an issue for appellate review); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (a losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred; imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). Therefore, the issue raised is not preserved for review, and the appeal should be dismissed on error preservation grounds.

Discussion

Even if the issue had been preserved, the trial judge did not commit reversible error. Testimony at issue is contained in the following excerpt:

Solicitor: Let's go back to when you turned to look at the defendant to see if he had seen you. You mentioned that he had smiled at you?

Witness: Uh-huh.

Solicitor: How did that make you feel at that moment?

Witness: Afraid. I mean, I was really hoping he didn't see me, and that's kind of what initiated me to run and call my mom and the police, because at that point I didn't know if he was plotting something, or what was going on, because, like I said, he was just looking around

[2] The only objection by defense counsel was an objection to the solicitor's question inquiring why the prosecuting witness was no longer a student at Winthrop University, and the only ground for the objection was "relevance." (R. p. 137, lines 24-25). Significantly, in response to the defense objection, the solicitor immediately withdrew the question and the judge almost contemporaneously sustained the objection. (R. p. 138, lines 1-2). No testimony came in a result of this question. See State v. Watts, 320 S.C. 377, 384, 465 S.E.2d 359, 364 (Ct. App. 1995) (there was no prejudice to the defendant where "no evidence whatsoever materialized as a result of the two objectionable questions").

and people were just walking out freely and he was doing that in his car, so I – I didn't know what was going to happen.

Solicitor: When you turned to look at him, was he still looking around, or was he looking straight at you?

Witness: When I first saw him, he wasn't looking directly at me. He was looking around. And then when I turned back to look the second time, he was looking directly at me.

Solicitor: And what did you do at this point when he smiled at you?

Witness: I ran to my dorm and I called my mom and she told me to call Officer Scott, who was Lee Wicker's – like we had designated security cops for each dorm, and he at the beginning gave us all his cell phone number and said "if any of you girls or guys have any problems day or night, you know you can call me. Call this number directly," and stuff, because he's right around the area, and so I called Officer Scott and then he reported it to the police.

(R. p. 131, line 16 – p. 132, line 17).

Appellant also challenges testimony that occurs several pages later:

Solicitor: Okay. Now, earlier you mentioned that the first person that you called was your mom?

Witness: Yes.

Solicitor: Why did you call her?

Witness: Because it was my first week at college away from home and you guys, well, most people just remember how Cherry Road is, and I was already scared to death living by myself for the first time, and then that happened to me. And I'm just like oh, what else could happen wrong, and it was – I don't know, it was an emotional time.

Solicitor: Okay.

Solicitor: Beg the court's indulgence.

(Off the record.)

(Back on the record.)

Solicitor: Now, Catherine, earlier you said that you were no longer at Winthrop University, but you were still at a university –

Witness: Yes, ma'am.

Solicitor: --is that right? Why are you no longer at Winthrop?

Defense Counsel: Objection, relevance.

Solicitor: Withdrawn.

The Court: Sustained.

Solicitor: Thank you. Please answer any questions that [defense counsel] may have for you.

(R. p. 137, line 4 – p. 138, line 5).

Appellant argues that the inference to be drawn from the above testimony was that "this event was so traumatic and life-altering for the prosecuting witness that she could not remain at Winthrop University to pursue her education." (Brief of Appellant, p. 6). However, again, *no testimony* came in as a result of the objected-to question about why the witness left Winthrop University. (R. p. 137-38). Accordingly, there was no information before the jury regarding why Ms. Holley left the school and, thus, no possible prejudice to Appellant. See State v. Watts, 320 S.C. 377, 384, 465 S.E.2d 359, 364 (Ct. App. 1995) (there was no prejudice to the defendant where "no evidence whatsoever materialized as a result of the two objectionable questions").

Appellant also appears to take issue with the testimony regarding how Ms. Holley felt during the incident and why she called her mother. (See Brief of Appellant, p. 5-6). This testimony simply explained the reasons for Ms. Holley's actions in relation to this event and provided background information that was relevant to her credibility. (See R. p. 131-32; p. 137-38). Further, the testimony was relevant to show the malicious nature of the indecent exposure, especially when considered alongside the evidence that the Appellant committed this crime on a college campus where he had no valid reason to be. (R. p. 91-92). See S.C. Code § 16-15-130 (A)(1) ("It is unlawful for a person to wilfully,

maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway.") (emphasis added). Finally, contrary to Appellant's suggestion, the solicitor's remarks in opening and closing regarding how "uncomfortable" this situation was for Ms. Holley did nothing more than state the obvious. (See Brief of Appellant, p. 7-8).

Even assuming error, the limited testimony and references were not of such significance as to have any adverse impact on the verdict, especially considering that the case was conclusively proven by other evidence (see *supra*, p. 3-4), and considering that Appellant actually used the testimony about Ms. Holley's young age and fears as a part of his defense, arguing that because Ms. Holley was young and on her own for the first time, she was overly suspicious and was seeing "the boogeyman" where he was not. (See R. p. 156-62). See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (the harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result); State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (error is harmless beyond a reasonable doubt if it does not contribute to the verdict); see also State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal.") (citation omitted). Significantly, the judge noted after trial was over that there was "very strong evidence of guilt in this case." (R. p. 183, line 25 – p. 184, line 1).

Moreover, the judge thoroughly instructed the jurors that, under their oath, they were required to disregard any sympathy or passion when reaching a verdict:

> You have been selected as fair and impartial jurors, sworn to impartially try and determine the facts of this case. And when you comply with your oath to do so, no one will have the right to criticize your verdict and you will have fully discharged your duty as jurors. You ought to decide this case according to the testimony you have heard from the lips of the sworn witnesses, along with other evidence introduced during the course of the trial. I charge you that as jurors you must decide the issues in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by sympathy, by prejudice, by passion, by public opinion, or any other arbitrary factor. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case and that you will follow the law as I have explained it to you. (R. p. 174, lines 2-19).

In light of this cautionary instruction, Appellant could not have suffered any prejudice from the challenged testimony and comments.[3] See State v. Pierce, 289 S.C. 430, 433, 346 S.E.2d 707, 710 (1986) ("Jurors are presumed to follow the law as instructed.") (citation omitted), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

In sum, any error in allowing the challenged testimony and comments was harmless beyond a reasonable doubt, and Appellant's conviction should not be reversed.

[3] Note that the only question submitted by the jury during deliberations pertained to re-hearing the testimony of Sergeant Wiles. (See R. p. 179-180). The jury did not ask to re-hear the testimony of Ms. Holley.

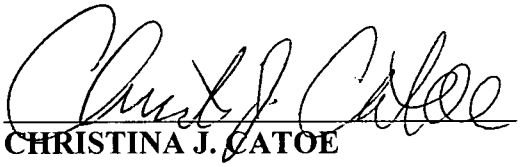
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's indecent exposure conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



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ATTORNEYS FOR RESPONDENT

November 13, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case No. 2012-212010

THE STATE OF SOUTH CAROLINA,

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent submits that the following should be included in the Record on Appeal:

(1) True-billed indictments; and
(2) Trial Transcript p. 79-189.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.

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November 13, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE OF SOUTH CAROLINA,

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Wanda H. Carter**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **13th** day of **November, 2013.**

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SWORN to before me this 13th day of November, 2013.

Notary Public for South Carolina.
My Commission Expires: 10/28/2014

ALAN WILSON
ATTORNEY GENERAL

November 13, 2013

VIA HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Christopher Ryan Holliday
Appellate Case No. 2012-212010

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Affidavit of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

CJC/

cc: Wanda H. Carter, Esquire
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