STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

vs.

NATHANIEL MURRAY,

Petitioner.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

The Richland County Grand Jury indicted Petitioner Murray for two counts of armed robbery and failure to stop for a blue light. Murray proceeded to trial and was convicted as charged by a jury. The Honorable L. Casey Manning sentenced Murray to life without parole pursuant to S.C. Code § 17-25-45.

Murray appealed. The Court of Appeals affirmed the convictions and sentence. State v. Murray, Op. No. 2012-UP-228 (S.C. Ct. App., filed April 18, 2012). Murray's subsequent petition for rehearing was denied on May 25, 2012. This Court granted Murray's petition for writ of certiorari. The State's Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner Murray was convicted of two counts of armed robbery and failure to stop for a blue light. He robbed an eighty-nine year old man of his wallet, representing he had a weapon, and shortly thereafter, ejected another man from his car, still representing he had a weapon. He then drove away on a high speed chase. He admitted committing the robberies to raise cash for his heroin habit, but denied having a weapon or representing he had a gun.

Lester Woods aided in Murray's quick capture. As Woods pulled into a parking lot at a Big Lots store, Murray approached and lifted the passenger side door handle. Woods exited and asked Murray what he was doing. Woods heard someone yelling that they were just robbed. Murray approached with his hand in his pocket, as if he had a gun,

and Woods pushed him away. ROA. pp. 55-58. Woods ran away behind his vehicle: "because I perceived he had a gun. That's the threat I was perceiving." ROA. p. 58, lines 22-23.

Murray went towards Bi-Lo and Woods got in his vehicle and followed Murray. Woods called 911 and gave a description of Murray. Woods observed Murray open the door to a car parked on the curb in front of Citi Financial. Woods saw Murray engaged in a struggle with someone, and when that person got out of the car, it sped away. Woods later picked Murray out of a photographic line-up. ROA. pp. 59-65.

Walter Langford, eighty-nine years old, waited in his car while his wife went inside Big Lots. Murray entered the car with his jacket "fixed", apparently in a manner that made Langford think he had a gun. Langford did not know if Murray had a gun, but Murray claimed he did. Murray told Langford to give him his money or Murray would kill him. ROA. pp. 80-85. Langford testified that at the time, "I was sure it was a gun", although admitting it could have been a finger or it could have been a gun barrel, he did not know. ROA. p. 90, lines 4-10. Murray entered another car about fifty feet away and tried to crank the car, but it would not crank. So he started walking. Langford got out of his car and hollered, "he robbed me." ROA. pp. 84-85. Asked if he was scared, Langford answered, "He made a believer out of me quick." ROA. p. 93, lines 14-15.

Jimmy Hampton was the person hijacked. He parked in front of Citi Financial so his son could run inside the business. Hampton's son dropped his knit hat, so Hampton bent over to pick it up off the curb. As he was closing the passenger side door, Murray opened the door and jumped in. ROA. pp. 96-103.

Hampton testified as follows:

> He jumped in and he said, take off, bro. And the second time he said it with more authority, take off, bro! He had his hand wasn't visible, it looked like it was in his jacket. It looked like something – had – something was protruding out, clearly there was some type of weapon. And I thought he had some type of weapon.

ROA. p. 103, lines 8-14.

Murray pushed Hampton out of the car and pushed his way to the front seat. Hampton pulled on Murray's jacket, but the buttons he was pulling on came out and Hampton fell backwards. As Hampton got back to his feet, Murray pulled halfway into the driver's side, started the car, and pulled the vehicle away as Hampton held on for about five to seven yards. Sheriff's Deputies were quickly in pursuit as Murray sped away. A Deputy shortly afterwards took Hampton to where his car was stopped and Hampton identified Murray. ROA. pp. 104-107.

Christopher Duke was the Deputy that saw the stolen car speeding away and he gave chase. Duke activated his blue light. During the chase, Duke saw a wallet thrown out of the car. Murray gave up and pulled over after about two or three miles. No weapon was recovered, but Duke had momentarily lost contact with the stolen vehicle around a sharp curve. ROA. pp. 120-128.

Deputy Pennington found the wallet and recovered it for Langford. The description he received over the radio was that the suspect had a handgun. ROA. pp. 164-165.

Murray testified. He admitted he robbed Langford and stole Hampton's car. Murray claimed he did not have a gun or pretend to have a gun, but was relying on his voice to scare his victims. He was trying to get money for his heroin addiction. ROA. pp.

229-236.

ARGUMENT

The trial court did not err in having petitioner remain in shackles while he testified because the shackles were not visible to the jury and petitioner was not prejudiced.

Petitioner Murray complains the trial court should not have allowed him to remain in shackles while he testified, even though the shackles were not visible. Murray relies on Deck v. Missouri, 544 U.S. 622, 631 (2005).[1] Deck found that routine use of **visible** physical restraints violates due process. Deck required that the trial court should take into consideration the circumstances of the particular trial to ensure state interests were justified. Id., at 629.

However, Deck makes clear that it is the use of visible restraints that offends due process: "[G]iven their prejudicial effect, due process does not permit the use of **visible** restraints if the trial court has not taken account of the circumstances of the particular case." Id., at 632 (emphasis added). In Deck, Missouri claimed that the record lacked evidence that the jury was aware of Deck's shackles. Deck rejected that contention, noting that the judge advised defense counsel that the shackles helped take fear out of the juror's minds after defense counsel complained about Deck being shackled in front of the jury. Id., at 634. Deck concludes: "Thus, where a court, without adequate justification, orders the defendant to wear shackles **that will be seen by the jury**, the defendant need not demonstrate actual prejudice to make out a due process violation." Id., (emphasis added); see Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010) (finding restraint of defendant did

[1] Murray did not make any objection to the shackles until after the State rested and just prior to his testimony.

not violate due process because Cole was not subject to "visible shackles").

In the instant case, Murray does not contend that the shackles were visible. Deck does not apply. Murray argues that his rights were violated because the jury would think he was being treated differently since he was already placed under oath and seated at the witness stand when the jury reentered the courtroom. "Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Holbrook v. Flynn, 475 U.S. 560, 567 (1986). "This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Id.

In Cole, the Eight Circuit gave its approbation where the defendant, like Murray, was already seated at the witness stand so his restraints could not be seen when the jury was brought in for his testimony. Cole, supra.

This Court likewise found that where the trial court ensured that the defendant was sitting either at the defense table or on the stand each time the jury entered the courtroom, so that the shackles were not visible, the trial court did not err in requiring the defendant remain in shackles where he had a prior history of escapes and resisting arrest. State v. Tucker, 320 S.C. 206, 209-210, 464 S.E.2d 105, 107 (1995).

In Williams v. United States, 52 A.3d 25 (D.C. Ct. App. 2012), the court found shackles that were not visible to the jury were not harmful constitutional error. The court explained:

> [E]ven if we ignore the substantial number of cases ruling that invisible restraints at trial are not limited by Deck, we cannot find harmful constitutional error. There is not even a hint here that appellant could not confer productively with counsel and participate actively in his defense. For that reason, as well as the undisputed evidence that the jury had no discernible basis for believing that appellant was present at trial under restraint, appellant's shackling argument must fail.

Id., at 34.

In the instant case, the trial court took reasonable steps to ensure that Murray's shackles remained unseen by the jury. While discussing Deck extensively, Murray fails to acknowledge or address that Deck's holding clearly applies to visible shackles only. The trial court did not commit error.

Further, Murray was not prejudiced by the purported error. It is highly speculative at best that Murray being seated when the jury reentered the courtroom prejudiced his trial.[2] Especially in light of the overwhelming evidence of guilt. Further, from the onset of the trial, the trial court advised the jury to keep an open mind. ROA. p. 44; p. 267. It is unreasonable to expect that the jury considered anything other than the testimony and evidence presented. Jurors are presumed to follow the trial court's instructions. State v.

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2 The Court of Appeals found that the contention that it was error to swear Murray out of the presence of the jury was not preserved for review. App. p. 3. Murray has not raised this issue in its Brief of Appellant, and therefore the argument would be abandoned. "In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal." State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008). A reviewing court should not consider an issue that is not presented on appeal. State v. Bray, 342 S.C. 23, 535 S.E.2d 636, 639 n.2 (2000). To the extent that Murray may be making such an argument, it is presented without any legal authority. See State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Assuming error, Appellant has failed to show any real prejudice. "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). While Murray claims the prejudice is evident, it is frankly unlikely that the jury noticed or was concerned with how Murray was sworn when they undertook wading through the abundant evidence of Murray's guilt during their deliberations. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (reviewing courts "will not set aside a conviction due to insubstantial errors not affecting the result"). The main reason Murray stuck out from the other witnesses was because he was the only witness at trial that admitted committing a robbery. Given that he admitted to committing the robbery and his only defense was whether or not he either was armed or pretended to have a weapon (which is rebutted by three witnesses who indicated he represented having a weapon), the evidence of guilt was overwhelming. It is certainly speculative to conclude the non-visible shackles had any impact whatsoever on the jury's verdict. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the conviction and sentence should be affirmed.

Respectfully submitted,

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February 21, 2014

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IN THE SUPREME COURT

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S.C. Supreme Court

Appeal From Richland County

Honorable L. Casey Manning, Circuit Court Judge

THE STATE,

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Dayne C. Phillips, Esquire and Carmen V. Ganjehsani, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 21st day of February, 2014.

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Legal Assistant

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