STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-001047

Harold Anthony (Tony) Trout, ... Appellant,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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STATEMENT OF THE CASE

The State Grand Jury indicted Appellant for official misconduct in office (2009-GS-47-0006, count 1) and attempting to influence a juror by written or oral communication (2009-GS-47-0006, count 2). Kenneth C. Gibson, Esquire represented Appellant.

After the State brought the case to trial, Appellant was found guilty of attempting to influence a juror by written or oral communication. (App.pp.796-97). On March 31, 2011, the Honorable D. Garrison Hill sentenced Appellant to six months imprisonment. (App.p.806). A notice of appeal was filed at the South Carolina Court of Appeals, but it was dismissed based on counsel's failure to properly perfect the appeal.

STATEMENT OF FACTS

Appellant was a member of the Greenville County Council. Appellant made numerous requests to county officials in 2005-06 regarding the county's roads program. (App.pp.476-78; pp.522-25). As time went on, Appellant became increasingly agitated and hostile with numerous county officials. (App.p.276; p.458; pp.481-83; pp.537-39). For example, in January 2006, Appellant became upset when the county administrator would not allocate county cleanup work to his "good friend" David Smith. (App.pp.528-39).

In February 2007, the Honorable John C. Few (who was the Chief Administrative Judge of General Sessions in Greenville County at that time) was notified that an individual wanted to enter the Grand Jury room. (App.pp.204-05). Judge Few was later notified of a second incident of an individual attempting to enter the Grand Jury room.

(App.p.205; pp.265-66). Judge Few met with this individual (Appellant) and the Greenville County Clerk of Court to advise Appellant of the secret nature of Grand Jury deliberations. (App.pp.205-07; pp.266). On April 17, 2007, the deputy clerk of court intercepted a letter the Appellant was attempting to get to the Grand Jury. (App.pp.257-59). Three letters were eventually brought to Judge Few, who kept them sealed. (App.p.210).[1] On October 5 or 6 in 2007, Judge Few realized there was a security breach in the Grand Jury. (App.p.214). On November 5, 2007, Judge Few removed Ricardo Studart as foreman and appointed David Smith. (App.pp.217-18).

It was later discovered Appellant had numerous email exchanges about Grand Jury issues with both Studart and Smith while they were on the Grand Jury. (App.pp.355-96; pp.400-01; p.404; pp.409-29; pp.601-12; pp.613-18). It was also discovered Appellant had telephone contact with Smith and Studart during 2007 – while they were both on the Grand Jury – and that the 190 calls between Appellant and Smith totaled more than twenty-eight hours. (App.p.587; p.592; pp.1057-60).

ARGUMENT

I. The trial judge did not err in denying Appellant's motion for a directed verdict on the charge of attempting to influence a juror by written or oral communication.

Appellant argues the trial judge erred in denying his motion for a directed verdict for the charge of attempting to influence a juror by written or oral communication. This argument is without merit.

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[1] Appellant admitted to bringing three letters to the hallway outside the Grand Jury room and asking a bailiff to give them to the foreman. (App.p.710).

Trial counsel moved for a directed verdict on the charge of attempting to influence a juror by written or oral communication. Trial counsel argued (1) there is no evidence the letters were ever received by the Grand Jury, (2) the communications between Appellant and Smith did not demonstrate an intent to change Smith's mind, and (3) the communications between Appellant and Studart "were authorized by the Court." (App.pp.640-42). The trial judge denied the motion. (App.pp.653-54).

> Any person who attempts personally or through third parties to influence the action or decision of any grand or petit juror of any court in this State or any prospective juror, upon any issue or matter which is or may be pending before such juror or before the jury of which he is or may become a member, by writing or sending him any written communication or making any oral communication relating to such issue or matter, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.
>
> Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury, or other communication authorized by the court.

South Carolina Code Annotated § 16-9-350 (2003).

When ruling on a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). In reviewing a motion for directed verdict, the appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000).

The trial judge did not err in denying the motion for directed verdict. The State's case presented ample evidence that reasonably tended to prove Appellant's guilt. Testimony from various Greenville County officials indicated Appellant had a history of aggressively attempting to "investigate" issues he found important and that one of his pet issues was the county's roads program. The county attorney, county engineer for land development, assistant county administrator for public works, and the county administrator all testified to Appellant's increasing demands for information. (App.pp.276-79; pp.458-59; pp.476-86; pp.522-36; pp.539-46). Appellant described David Smith as a "good friend" in 2005 and wanted him to sit in on meetings about the roads program with county officials. (App.pp.528-36). Appellant asked the county administrator to give Smith the contract to do cleanup work for the county in January 2006. SLED and the Secret Service imaged four computers from Appellant's home and four computers from David Smith's home. (App.pp.300-03; pp.344-47). Analysis of this imaging revealed numerous emails sent by Appellant to David Smith and Ricardo Studart about the Grand Jury (its rules, policies, and investigations) while they were serving on the Grand Jury in 2007. (App.pp.355-96; pp.400-01; p.404; pp.409-29; pp.601-12; pp.613-18; p.1070; p.1074; pp.1076-77; pp.1083-94; pp.1101-03; p.1109; p.1112; pp.1168-73; pp.1175-76). Appellant was twice turned away after attempting to gain entrance to the Grand Jury room. (App.pp.204-05). After Judge Few explained to Appellant that he would not be allowed in the Grand Jury room, he attempted to pass letters to the Grand Jury foreman through the bailiff. (App.pp.206-07; pp.210-11; pp.258-59; p.710). Appellant's telephone records indicated a large volume of calls to

David Smith during his time on the Grand Jury (as well as a lesser number of calls to Ricardo Studart). (App.p.587; p.592).

Based upon the foregoing, it is clear the State presented both direct and circumstantial evidence that reasonably tended to prove Appellant was guilty of attempting to influence the Grand Jury or having Smith influence the Grand Jury on his behalf. The evidence presented by the State supports its position that Appellant's actions went far beyond a simple request to appear before the Grand Jury. Accordingly, the trial judge properly denied Appellant's motion for directed verdict on the charge of attempting to influence a grand juror by written or oral communication. The evidence must be viewed in the light most favorable to the State, and the State presented ample evidence that reasonably tended to prove Appellant's guilt. See State v. Pinckney, 339 S.C. 349, 529 S.E.2d at 527.

II. The trial judge did not err not charging the jury with criminal intent as it was neither requested by counsel nor warranted.

Appellant argues the trial judge erred in not charging the jury with criminal intent for the charge of attempting to influence a juror by written or oral communication. This argument is not preserved for appellate review. While there was a charge conference in this case, trial counsel never requested the trial judge charge the jury on criminal intent. In fact, the discussion at the charge conference was in regard to the charge of official misconduct in office, not attempting to influence a juror by written or oral communication. (App.pp.727-28). As such, the issue of whether criminal intent should have been charged is not preserved for review by this Court. See Staubes v. City of Folly

Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (noting an argument on a jury charge is not preserved for appeal if it is not made below). Regardless, this issue is without merit.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Brandt, 393 S.C. 526, 549-550, 713 S.E.2d 591, 603 (2011) (quotation omitted). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. " Id. (quotation omitted). "A jury charge which is substantially correct and covers the law does not require reversal." Id. (citation omitted).

Section 16-9-350 clearly sets forth what constitutes criminal behavior and what does not. The trial judge's charge for the offense of attempting to influence a juror by written or oral communication in this case was essentially a recitation of this statute. (App.pp.784-85). The statute – and jury charge – note it is criminal behavior to (1) attempt to influence (directly or through a third party) the action of a grand juror (2) upon which is or may be pending before that juror or his Grand Jury (3) by written or oral communication (4) relating to that matter. S.C. Code Ann. § 16-9-350. The statute – and jury charge – then further note it is not criminal behavior to request to appear before the Grand Jury. Id. Therefore, the jury was told exactly what constituted criminal behavior and intent did not need to be specifically charged. If the jury found the four parts of the criminal portion of the were satisfied, Appellant was guilty of the crime. If the jury found

the non-criminal portion of the statute was satisfied, Appellant was not guilty of the crime. As such, intent is not a necessary element of the offense of attempting to influence a juror by written or oral communication. The charge given to the jury in this case was "substantially correct and cover[ed] the law" and does not support Appellant's request for reversal. State v. Brandt, 393 S.C. at 526, 713 S.E.2d at 603.

Accordingly, this issue should be dismissed because it is not preserved for appellate review. Regardless, there were no errors or omissions in the language the trial judge used to charge the jury on the charge of attempting to influence a juror by written or oral communication.

III. The trial judge did not admit hearsay evidence.

Appellant argues the trial judge erred in admitting an email from a law professor into evidence at trial because it was hearsay evidence. This argument is without merit.

Outside the presence of the jury, trial counsel objected to an email from Susan Brenner.[2] (App.p.335). Trial counsel argued that, "[c]onsidering it is a statement of a complete third party, it is absolute hearsay, Your Honor, and should be excluded." (App.p.336). The State countered it was not being "offered for the truth of the matter asserted, but it is offered for effect on the hearer or the recipient in this case which would be [Appellant]." (App.p.336). After reviewing the email, the trial judge overruled trial counsel's objection. (App.p.336). The State later offered the exhibit into evidence. (App.p.359). Trial counsel renewed his objection and, as his previous objection had been

[2] State's Exhibit 32. (App.p.1065).

overruled, the exhibit was entered into evidence. (App.p.359).[3] In discussing the emails sent from Appellant to David Smith, SLED agent Gene Donohue noted:

> A: This is March 22nd of 2007. The subject is Susan Brenner. And it's from [Appellant] to Mr. Smith. This is a copy of a letter or an e-mail he received back from Ms. Brenner, who is a professor at the University of Dayton, where she is responding to – it looks like she's responding to a question about how the Grand Jury works in South Carolina, and what types of steps someone should do to get some satisfaction from the Grand Jury.
>
> Q: Does she talk about how he needs to involve law enforcement, or a prosecutor, or someone of that nature?
>
> A: Yes, sir.

(App.p.603). Trial counsel later renewed his objection to the admission of this email and the trial judge again found it was not hearsay. (App.pp.660-61).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said." 31A C.J.S. Evidence § 365 (1996). "Proof of a statement introduced for the purpose of showing a party relied and acted upon it is not objectionable on the ground of hearsay." Webb v. Elrod, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992).

The trial judge did not err in ruling the email from Susan Brenner was not hearsay

[3] The contents of a bench conversation on this matter were later recited outside the presence of the jury. (App.pp.397-99).

and was thus admissible. It is clear this email was not hearsay evidence. The purpose of the email was not for the truth of the matter asserted. It was not offered to prove Brenner's interpretation of the South Carolina rules and law surrounding the Grand Jury system was accurate. Rather, the purpose of the email was to show Appellant had knowledge of the Grand Jury rules and was seeking a way to appear before the Grand Jury. The purpose of the email was to demonstrate the effect of Brenner's statements upon Appellant and the actions he took subsequent to that email. Brenner's email also did not constitute hearsay because it served as evidence of notice. See Player v. Thompson, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972) (holding statements offered not for the truth of the matter asserted but instead as evidence of notice do not constitute hearsay). Brenner's statements that a "citizen has to go through a prosecutor (sounds like that may be the SC model)" and that "you're really going to need a prosecutor to get results" were not admitted to prove these statements were true. (App.p.1065). Rather, they were admitted to show Appellant was on notice that one generally does not appear before a Grand Jury without a prosecutor. Other testimonial evidence was submitted to show the wording and intent of the prohibition against influencing grand jurors. See id.

Accordingly, as Brenner's email was not hearsay evidence because it was not admitted to prove the truth of the matter asserted, the trial judge did not err in ruling it was admissible at trial.

IV. The trial judge properly excluded a defense witness from testifying at trial and Appellant cannot prove resulting prejudice as that witness's testimony was not proffered.

Appellant argues the trial judge erred in excluding testimony from defense witness

Edward Paxton. This issue is not preserved for appellate review because trial counsel did not proffer Paxton's testimony. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."). Regardless, this argument is without merit.

At trial, trial counsel informed the court that he would be calling Edward Paxton to rebut testimony "regarding the ability to appear before the Grand Jury without the presence or assistance of a solicitor." (App.p.654). Trial counsel argued Paxton wanted to appear before the Grand Jury without a prosecutor and was eventually allowed to do so after being contacted by the Honorable Robin B. Stilwell. (App.pp.654-55). The trial judge found the matter was not relevant. (App.pp.658-59).

"'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. A trial judge's ruling decision regarding a relevancy determination should not be overturned, absent an abuse of discretion. See State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Page, 406 S.C. 272, 287, 750 S.E.2d 623, 631 (Ct. App. 2013).

The trial judge correctly denied trial counsel's request to offer Paxton as a defense

witness because his testimony was not relevant. Paxton was purportedly going to testify about his experience before a different Grand Jury. There is no evidence in the record that Paxton utilized actions or techniques similar to Appellant's in order to appear before the Grand Jury. Paxton's testimony would simply not have been relevant to determine whether Appellant influenced or used a third party to influence the Grand Jury. Further, trial counsel stated Paxton was allowed to appear before the Grand Jury after he was contacted by Judge Stilwell and allowed to do so. This is in line with the statute for attempting to influence a juror by written or oral communication, which states "[n]othing in this section shall be construed to prohibit the communication of a request to appear before the grand jury, or other communication authorized by the court." S.C. Code Ann. § 16-9-350. In Appellant's case, however, Judge Few specifically told him that the Grand Jury proceedings were private and he was not allowed to enter. (App.pp.205-07; pp.266).

Regardless, even assuming arguendo Appellant meets his burden of proving Paxton's testimony was relevant, this testimony would still have been properly excluded by the trial judge. "Although relevant, evidence 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; see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). As Paxton's situation involved a different Grand Jury and a different set of factual circumstances, the likelihood of this sort of testimony would simply have confused the

issues or misled the jury. As this testimony would have been more prejudicial than probative, the trial judge properly denied its admission at trial. See id.

Accordingly, this issue should be dismissed because it is not preserved for appellate review. Regardless, the trial judge did not abuse his discretion in ruling Edward Paxton's testimony was not relevant or admissible at trial.

V. South Carolina Code Annotated § 16-9-350 is not unconstitutional.

Appellant argues section 16-9-350 is unconstitutionally vague. This argument is not preserved for appellate review. Trial counsel did not raise this argument during the trial. As such, it is not preserved for review by this Court. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546. Regardless, this issue is without merit.

Statutes are to be construed in favor of constitutionality; the Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made. See State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." Curtis v. State, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." State v. Michau, 355 S.C. 73, 77, 583 S.E.2d 756, 758 (2003).

Section 16-9-350 is not vague or broad – it is specific. It provides exactly what actions by Appellant are prohibited and what actions are not. The statute is written

sufficiently precise to give a person of ordinary intelligence fair notice as to what is permitted and what is prohibited and to prevent arbitrary and discriminatory enforcement. See Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99 (1972) (observing that fair warning and the prevention of arbitrary enforcement are two of the most important values offended by vague laws).

The statute makes it clear that attempting to influence a grand juror subjects an individual to criminal penalties. The statute also makes it clear that it is not improper to request an appearance before the Grand Jury. There is no basis for a person to guess regarding whether his actions would constitute a crime under the statute; the statute specifically sets out what actions are required for the offense of jury tampering. The activities or crimes are sufficiently described. A person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. See Curtis v. State, 345 S.C. at 572, 549 S.E.2d at 598. It is clear Appellant's actions did not fall under the permissible language of the statute (authorizing an individual to appear before the Grand Jury). Appellant exchanged numerous emails and made almost 200 phone calls to two specific members of the Grand Jury – not the entire Grand Jury. (App.pp.355-96; pp.400-01; p.404; pp.409-29; p.587; p.592; pp.601-12; pp.613-18; pp.1057-60; pp.1061-1180). Several of those emails included information about the Grand Jury and suggestions for witnesses to be subpoenaed by the Grand Jury. (App.p.1070; p.1074; pp.1076-77; pp.1083-94; pp.1101-03; p.1109; p.1112; pp.1168-73; pp.1175-76). A person of ordinary intelligence would have had fair notice under section 16-9-350 that these actions were prohibited.

Accordingly, this issue should be dismissed because it is not preserved for appellate review. Regardless, section 16-9-350 is not unconstitutionally vague.

VI. Issues related to Appellant's post-conviction relief action are not properly considered on direct appeal.

In the Statement of Issues on Appeal, Appellant argues this Court should "consider evidence improperly excluded in the PCR." (Brief of Appellant, p.1). Respondent contends this argument is improper in two respects. First, as this is the only sentence in the entire brief about this issue and there is no supporting authority, this issue has been abandoned. See State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a "one-sentence argument is too conclusory to present any issue on appeal"). Second, briefs submitted pursuant to White v. State[4] are intended to address direct appeal issues. Issues related to post-conviction relief are intended to be raised in the accompanying petition for writ of certiorari. See Rule 243(i), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Accordingly, this issue should not be considered by the Court.

[4] 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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March 26, 2014

STATE OF SOUTH CAROLINA
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Harold Anthony (Tony) Trout, ...Appellant,

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent Pursuant to White v. State upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jeffrey Falkner Wilkes, Esquire
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I further certify that all parties required by Rule to be served have been served. This 26th day of March, 2014.

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