

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Orangeburg County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

The State,

Respondent,

vs.

Henry Haygood,

Appellant.

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court to rehear this matter.

I. Preservation

Respondent respectfully submits this Court overlooked some key facts in finding Appellant's Crawford¹ objection was preserved for review. Under South Carolina law, an issue must be raised and ruled upon in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so

¹ Crawford v. Washington, 541 U.S. 36 (2004).

that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In this case, Appellant failed to preserve the Crawford issue because Appellant never obtained a ruling from the trial judge regarding his Crawford objection. Nowhere in the magistrate's return is there any mention of Crawford or the Confrontation Clause. The trial judge's ruling seemed to focus solely on hearsay, not the Confrontation Clause. While it is true that the objecting party does not have to use the exact name of the legal doctrine employed, it must be clear to the appellate court that the argument presented on appeal was presented to the trial court. State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 727 (Ct. App. 2012). Respondent submits it is not clear in this case what was argued to the trial court.

Respondent respectfully submits that this Court misapprehended the facts when it noted, "There is nothing to indicate the circuit court or either of the parties believed the return was defective or that either party considered the issue not ruled upon by the magistrate or in any way unpreserved for review," in reference to Respondent's supporting use of S.C. Code Ann. § 18-7-80 (2014). In fact, Appellant's trial counsel conceded that the trial judge never ruled on Appellant's Crawford objection. (R. p. 20 lines 11-16; App. Br. p. 4). At that point, Appellant should have asked the circuit court to instruct the Magistrate to amend his return to reflect his ruling on the Crawford objection. Because Appellant did not move to have the return amended, the issue was never properly ruled upon, and it was not preserved for appellate review. Furthermore,

Respondent submits the only party who had any duty to raise the issue was the party challenging the trial judge's ruling, i.e. the Appellant.

Simply put, Respondent respectfully submits that because Appellant failed to obtain a ruling on the Crawford objection, the issue was not preserved for appellate review.

II. Merits

Respondent respectfully submits this Court misapplied the facts of this case to the holdings of Crawford, Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006), and Michigan v. Bryant, 131 S.Ct. 1143 (2011), in ruling the victim's statements were testimonial and thus violated the Confrontation Clause.

In Crawford, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. Critically, only testimonial statements require compliance with the Confrontation Clause. Id. at 68. Thus, a non-testimonial statement would be admissible, subject to traditional limitations upon hearsay evidence, even though the defendant never had the opportunity to cross-examine the declarant. Id. The Court listed four examples of when a statement would be considered testimonial: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and 4) statements made during police interrogations. Id.

Two years later, in Davis v. Washington, 547 U.S. 813, 822 (2006), the United States Supreme Court provided further clarification on the Crawford decision. In Davis, the Court dealt with two different domestic violence cases. Although the Court was clear

that it did not want to create a list of every type of testimonial or non-testimonial statement, the Court held the following:

Statements are **nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency**. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). Thus, not all interrogations by the police are subject to the Confrontation Clause bar. Michigan v. Bryant, 131 S.Ct. 1143, 1153 (2011).

In Davis's case, the Court held that the victim's statements to the 911 operator were not subject to the Confrontation Clause bar because the statements were nontestimonial. Davis, 547 U.S. at 828. The victim made statements to a 911 operator during a domestic disturbance with the defendant. Id. at 817. The victim told the 911 operator: " 'He's here jumpin' on me again . . . He's usin' his fists.' " Id. During the 911 call, the victim identified the defendant as the assailant. Id. at 818. In its reasoning, the Court stated that the primary purpose of the victim's statements to the 911 operator was to "enable police assistance to meet an ongoing emergency." Id. at 828. Simply put, the victim was not acting as a witness; the victim was not testifying. Id.

But the Court reached the opposite result in Hammon's case. See Davis, 547 U.S. at 834. In Hammon's case, the Court held that the victim's statements were testimonial statements barred by the Confrontation Clause. Id. at 831-832. The police responded to a reported domestic disturbance at the defendant's home. Id. at 819. When the police arrived, the victim was alone on the front porch and was " 'somewhat frightened,' but she

told the officers that ‘nothing was the matter[.]’ ” Id. The defendant was in the kitchen, and the defendant told the police that everything was fine. Id. While separated from the defendant, the victim informed the officers that the defendant shoved her on the floor, hit her in the chest, and attacked her daughter. Id. at 820. The defendant attempted to participate in the victim’s conversation with the police. Id. at 819-820.

In support of its holding in Hammon’s case, the Court noted that it was clear from the circumstances that the police’s interrogation was part of an investigation into past criminal conduct. Id. at 829. Further, the testifying officer expressly acknowledged that the purpose of his interrogation was to investigate into past criminal conduct. Id. Moreover, there was no ongoing emergency; the officer testified that he did not hear any arguments or see anyone throwing or breaking anything when he arrived at the scene. Id. The Court pointed out that when the officers arrived at the scene, the victim told the officers everything was okay and there was no immediate threat to the victim. Id. In other words, the victim’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation[.]” Id. at 832.

Approximately five years after the United States Supreme Court decided Davis, the Court revisited the “primary purpose” exception to the Confrontation Clause bar in Michigan v. Bryant. See Bryant, 131 S.Ct. at 1150. Clarifying what it meant in Davis when it said “ ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[.]’ ” the Bryant Court held that courts must “**objectively** evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. at 1156 (internal citation omitted). The Court explained:

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides

the most accurate assessment of the “primary purpose of the interrogation.” The **circumstances in which an encounter occurs— e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards**—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Id. (emphasis added).

Notably, the Bryant Court explained the logic behind why the ongoing emergency circumstance was considered non-testimonial and not subject to the Confrontation Clause bar, and the Court compared that logic to the logic behind the excited utterance exception to the hearsay rule²:

Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id.

Further, the Bryant Court noted that whether an ongoing emergency exists is only one factor – although an important factor – used in the primary purpose analysis. Id. at

² Respondent submits this Court misconstrued Respondent’s statements at oral argument where the Court noted in footnote 7, “The State conceded at oral argument that, even if the statements qualified as excited utterances, they would be inadmissible if found to be testimonial in nature.” Respondent submits the answer given to the Court was that such statements “could be” inadmissible.

1160. Another factor courts should take in account is the formality of the encounter between the victim and the police. Id.

Respondent respectfully submits this Court erred in finding the primary purpose of the officer's questions was to prove past events potentially relevant to later criminal prosecution, rather than to meet an ongoing emergency. Thus, Respondent submits the Confrontation Clause did not bar the admission of the victim's statements.

Objectively viewing the circumstances in which the police encounter occurred, the following facts demonstrate why Hammon's case in the Davis opinion is distinguishable from this case:

- The victim was visibly upset when the officer arrived at the scene.³
(Return.)
- Appellant was highly intoxicated and hostile towards the officer. (Return.)
- Appellant told the officer that this was his house and that he would do anything he wished. (Return.)

Unlike the domestic disturbance in Hammon's case, the domestic disturbance in this case was still ongoing. Further, unlike the victim in Hammon's case, the victim in this case was very upset, indicating that there was an ongoing dispute when the police arrived. Appellant's comment to the officer that this was house and that he would do indicated that he wished indicated that Appellant was not done fighting. Also, the fact that the police found a gun in Appellant's possession heightened the scope of the

³ The Court notes that there is no information in the record to indicate that the victim remained upset upon the officer's arrival; however, Respondent submits there is no information in the record to indicate the victim **did not** remain upset.

emergency.⁴ See Bryant, 131 S.Ct. at 1158 (“The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on Davis and Hammon, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun.”).

Although separating Hammon from the victim was sufficient to end the emergency in that case, the same cannot be said with respect to this case because Appellant had at least one, and possibly two guns in his possession. See Bryant, 131 S.Ct. at 1159 (“Hammon was armed only with his fists when he attacked his wife, so removing [his wife] to a separate room was sufficient to end the emergency. If [Hammon] had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency.”). Thus, the fact Appellant had a gun in his possession demonstrates the danger of the situation, not only for the victims involved but also for the responding officers. In contrast to Hammon’s case, where the situation was subdued by the time the officers arrived at the scene, we have no indication from the Record that the domestic dispute in this case was subdued at the time the officers arrived.

Additionally, the fact the trial judge ruled the statements admissible under the excited utterance exception to the hearsay rule⁵ illustrates the freshness of the domestic

⁴ The Court asserts, “Simply put, there is nothing in the narrative to indicate there was any perceived danger from Haygood at the time the victim’s statements were made to Lt. Jenkins”; however, Respondent submits that the absence of any sort of timeline from the record makes such an assertion overly broad. The record does not provide enough facts to determine when the victim made the statements to the officer, or what Appellant’s behavior was, other than noting he was visibly intoxicated. Furthermore, there is no indication as to the location of the shotgun after Appellant’s son took it away from him. Finally, the handgun the victim stated Appellant customarily kept in his pocket was never recovered.

⁵ Rule 803 of the South Carolina Rules of evidence provides numerous exceptions to the rule generally prohibiting the admission of hearsay. One of the exceptions listed in Rule 803 is an excited utterance. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Rule 803 (2), SCRE.

disturbance⁶. See generally Bryant, 131 S.Ct. at 1156 (noting that the underlining rational for the ongoing emergency rule was similar to the rational for the excited utterance rule).

Finally, with respect to the formality factor in the primary purpose analysis, there is no evidence in the record that the encounter between the victim and the police was formal. See Bryant, 131 S.Ct. at 1160 (“[F]ormality suggests the absence of an emergency[.]”). However, it is known that the police encounter occurred at the scene of the crime, not at a police station; thus, there is some evidence in the record that the encounter was informal.

Due to the limited record in this case,⁷ it is impossible to ascertain whether or not the police asked formal questions. See Id. at 1160-1161 (“As the Michigan Supreme Court correctly recognized, Davis requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.”) (internal citations omitted).⁸

Because the formality of the situation and questions asked cannot be ascertained from the record in this case, Respondent submits this Court misconstrued the record before it in determining the evidence “sufficiently demonstrates the statements made by the victim were testimonial...” State v. Haygood, 5247, 2014 WL 2930457 (S.C. Ct.

⁶ The Court notes, “there is absolutely no indication in the record that the police arrived and took the victim’s statement very shortly after the domestic incident occurred.” However, Respondent submits the lower court’s ruling that the statements were admissible as excited utterances is, in and of itself, an indication of the close proximity in time between the incident and the statements.

⁷ The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court’s actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

⁸ The Court makes note of the language in the magistrate’s return referring to the officer’s *investigation* and uses that to make the assertion that the statements from the victim were elicited as a result of the officer’s investigation, rather than as a response to an ongoing emergency. Respondent submits the assertion is overly broad in consideration of the paucity of information recorded in the return.

App. June 30, 2014). Respondent submits the insufficiency of the record fails to provide any evidence to overturn the rulings of both the magistrate court and the circuit court that the victim's statements were admissible. "In criminal appeals from magistrate ... court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct.App.2001); S.C.Code Ann. § 18-3-70 (2014). Furthermore, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. State v. Gordon, 2013-000515, 2014 WL 3511153 (S.C. Ct. App. June 11, 2014). Finally, this Court will review the decision of the circuit court for errors of law only. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); Henderson, 347 S.C. at 457, 556 S.E.2d at 692. Respondent submits that in this case, the record provided to the Court is simply insufficient to determine the statements given by the victim were testimonial and violated the Confrontation Clause. The trial court and the circuit court ruled the statements were admissible, and there is no evidence in the record to conclude their rulings were based on any error of law. As such, this Court erred in not affirming the lower court rulings.⁹

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the Crawford issue was not preserved for review, or in the alternative, find the trial court properly held the victim's statements were non-testimonial, and affirm Appellant's conviction and sentence.

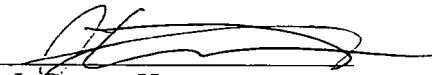
⁹ Respondent respectfully submits the Concurrence's use of State v. Ladson, 373 S.C. 320, 327-28, 644 S.E.2d 271, 275 (Ct. App. 2007) to reverse and remand for a new trial is inappropriate because that case dealt with an insufficiently reconstructed record. Appellant has made no attempt to reconstruct the record in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 24, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable Edgar W. Dickson, Presiding Judge

Appellate Case No: 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

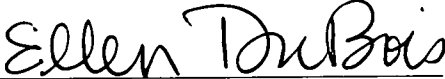
Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the Petition for Rehearing on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Breen R. Stevens, Esquire, First Circuit Public Defender's Office, Post Office Box 1112, Orangeburg, South Carolina, 29116.

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

This 25th day of July, 2014.



Ellen DuBois
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

July 25, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. Henry Haygood
Appellate Case No: 2012-211961

Dear Mr. Kitchings:

Enclosed please find the original and six copies of the Petition for Rehearing, along with proof of service, in the above-referenced case.

Sincerely,

J. Croom Hunter
Assistant Deputy Attorney General
S.C. Bar No: 101253

JCH/erd
Enclosures

cc: Breen R. Stevens, Esquire
Ms. Trisha Allen

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JUL 25 2014
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