STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

The State, Petitioner,

v.

Henry Haygood, Respondent.

Opinion No. 5247 (S.C. Ct. App. filed June 30, 2014)

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on July 25, 2014. The Petition for Rehearing was denied by Order filed August 20, 2014.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in reversing Respondent's conviction because Respondent's Crawford[1] objection was not properly preserved for appellate review?

II. Did the Court of Appeals err in reversing Respondent's conviction because the majority misapplied the holdings in Crawford and its progeny to the facts of Respondent's case where there was insufficient evidence in the Record to determine that Officer Jenkins' testimony violated the Confrontation Clause?

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

STATEMENT OF THE CASE

Procedural History

On September 25, 2009, the Honorable Samuel A. Daily, magistrate judge, found Respondent guilty of criminal domestic violence (first offense). Assistant Public Defender Jillian Ullman represented Appellant at trial.

On October 2, 2009, Respondent filed a notice of appeal with the Orangeburg County Clerk of Court. On September 16, 2011, the Honorable Edgar W. Dickson heard oral arguments on the matter. Assistant Public Defender Jillian Ullman represented Respondent, and Assistant Solicitor B.J. Jeffries represented the State. On May 4, 2012, Judge Dickson denied Appellant's appeal.

Respondent filed a Notice of Appeal, and after oral argument, the Court of Appeals reversed his conviction. See State v. Haygood, 409 S.C. 420, 762 S.E.2d 69 (Ct. App. 2014). The State filed a Petition for Rehearing, which was denied by Order filed August 20, 2014. This Petition follows.

Factual Background

On March 31, 2008, Officer Jenkins responded to a domestic violence call at Respondent's residence. (App.p.73). When Officer Jenkins' arrived on the scene, Towanna Haygood, Respondent's wife (Victim), was very upset. (App.p.73). Respondent was highly intoxicated and cursed at Officer Jenkins. (App.p.73). Respondent told Officer Jenkins that "this was his . . . house and that he would do anything he wishe[d]." (App.p.73).

At some point, Victim alerted Officer Jenkins that Respondent retrieved a shotgun from the bedroom closet and told Victim that he was going to kill her. (App.p.73).

Respondent's son attempted to take the shotgun away from Respondent. Thereafter, Respondent reached in his pocket where he kept a small handgun. (App.p.73). Victim grabbed Respondent's pocket, and bullets fell from the pocket onto the floor. Respondent then went outside the residence but came back inside and punched a hole in the bedroom closet. (App.p.73).

Victim did not testify at trial; however, Officer Jenkins testified to what he encountered and the information he received from Victim upon his arrival on the scene.

ARGUMENT

I. The Court of Appeals erred in reversing Respondent's conviction because Respondent's Crawford objection was not properly preserved for appellate review.

The Court of Appeals erred in reversing Respondent's conviction and finding that Respondent's objection to Officer Jenkins' testimony was properly preserved. The Court of Appeals incorrectly held that the issue of whether Respondent's objection was preserved was "doubtful" where the objection was clearly not preserved.[2]

Petitioner submits the Court of Appeals erred in finding Respondent's Crawford 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, 693-94 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). 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.

[2] "Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it "clearly is unpreserved," it is "good practice for us to reach the merits of an issue when error preservation is doubtful." State v. Haygood, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he did at the trial level. Id. In other words, the objecting party cannot change his argument once he reaches the appellate level. Id.

In this case, Respondent failed to preserve the Crawford issue because Respondent never obtained a ruling from the trial judge regarding his Crawford objection. Nowhere in the Return is there any mention of Crawford or the Confrontation Clause. The trial judge's ruling focuses 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). Petitioner submits it is not clear in this case what was argued to the trial court.

Petitioner respectfully submits that the Court of Appeals erred 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 the State's supporting use of S.C. Code Ann. § 18-7-80 (2014).[3] To the contrary, Respondent's trial counsel admitted that the trial judge never ruled on the Crawford objection, thus conceding the Return was defective. (App.p.107). At that point, Respondent should have asked the circuit court to instruct the magistrate to amend the Return to reflect the ruling on the Crawford

[3] "If the return be defective the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order. And the court shall always be deemed open for this purpose." S.C. Code Ann. § 18-7-80.

objection. Because Respondent did not move to have the Return amended, the issue was never properly ruled upon, and it was not preserved for appellate review. Furthermore, the State submits that the only party who had any duty to raise the issue was the party challenging the trial judge's ruling, i.e. the Respondent.

Simply put, Petitioner respectfully submits that because Respondent failed to obtain a ruling on the Crawford objection, the issue was not preserved for appellate review, and this Court should Grant the Petition for Writ of Certiorari and reverse the Opinion of the Court of Appeals.

II. The Court of Appeals erred in reversing Respondent's conviction because the majority misapplied the holdings in Crawford and its progeny to the facts of Respondent's case where there was insufficient evidence in the Record to determine that Officer Jenkins' testimony violated the Confrontation Clause.

The Court of Appeals 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, 562 U.S. ___ (2011), in ruling the victim's statements were testimonial and thus violated the Confrontation Clause. The Record in this case is insufficient to affirm the holding of the Court of Appeals that Officer Jenkins' testimony was barred by the Confrontation Clause. Because there is no indication in the record that Officer Jenkins was not responding to an ongoing emergency, Victim's statements to Officer Jenkins were nontestimonial and therefore admissible.

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 nontestimonial 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 (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 nontestimonial 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. See Michigan v. Bryant, 131 S.Ct. at 1153.

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 831-32. 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 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 819-20.

In support of its holding in Hammon's case, the Court noted 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 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 nontestimonial and not subject to the Confrontation Clause bar, and the Court compared that logic to the rationale behind the excited utterance exception to the hearsay rule[4]:

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[4] Petitioner submits the Court of Appeals misconstrued Petitioner'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

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

Petitioner submits that in the present case the Court of Appeals 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, Petitioner 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:

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excited utterances, they would be inadmissible if found to be testimonial in nature." Petitioner submits the answer given to the Court was that such statements "could be" inadmissible.

- The victim was visibly upset when the officer arrived at the scene.[5] (App.p.73).
- Respondent was highly intoxicated and hostile towards the officer. (App.p.73).
- Respondent told the officer that this was his house and that he would do anything he wished. (App.p.73).

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, Officer Jenkins' testimony indicated the victim in this case was very upset, showing that there was an ongoing dispute when the police arrived. Respondent's comment to the officer that that this was his house and he would do whatever he pleased indicated that Respondent was not necessarily done fighting. Importantly, the fact that the police found a gun in Respondent's possession heightened the scope of the emergency.[6] 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."). Certainly a domestic

[5] The Court of Appeals opinion notes that there is no information in the record to indicate that the victim remained upset upon the officer's arrival; however, Petitioner submits there is no information in the record to indicate the victim **did not** remain upset.

[6] The Court of Appeals opinion holds, "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, Petitioner submits that the absence of any sort of timeline of events from the record makes such an assertion entirely speculative. The record simply does not provide enough facts to determine when the victim made the statements to the officer, or what Respondent's behavior was, other than noting he was visibly intoxicated. Furthermore, there is no indication as to the location of the shotgun after Respondent's son wrestled it away from him. Finally, the handgun the victim stated Appellant customarily kept in his pocket was never recovered.

violence incident involving the use of a firearm is an ongoing emergency until the police have accounted for both the suspect and the weapon or weapons involved.

Although in the Hammon case, separating the suspect from the victim was sufficient to end the emergency, 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 Return that the domestic dispute in this case was over at the time the officers arrived. Simply put, the record is entirely bereft of any facts to support the assertion of the majority of the Court of Appeals that there was no ongoing emergency.

Additionally, the fact the trial judge ruled the statements admissible under the excited utterance exception to the hearsay rule[7] illustrates the freshness of the domestic disturbance[8]. See generally Bryant, 131 S.Ct. at 1156 (noting that the underlying rationale for the ongoing emergency rule was similar to the rationale for the excited utterance rule).

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[7] 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.

[8] The Court of Appeals opinion 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, Petitioner 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.

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 had any degree of formality. 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,[9] it is impossible to ascertain the substance of Officer Jenkins' questions, much less whether the questions rose to any distinguishable level of formality. See id. at 1160-61 ("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).[10]

Because the danger and formality of the situation cannot be ascertained from the record in this case, Petitioner submits the Court of Appeals misconstrued the facts before it in determining the evidence "sufficiently demonstrates the statements made by the victim were testimonial. . ." State v. Haygood, 409 S.C. 420, 762 S.E.2d 69 (Ct. App. 2014). Petitioner submits the insufficiency of the record fails to provide any basis 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

[9] 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).

[10] The Court of Appeals opinion notes 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 for investigative purposes, rather than as a response to an ongoing emergency. Petitioner submits the assertion is overly broad in consideration of the brevity of the return.

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 findings of fact if any evidence in the record reasonably supports them. City of Greer v. Humble, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013). 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 at 457, 556 S.E.2d at 692. Petitioner submits that in this case, the record provided to the Court of Appeals was simply insufficient to determine that the statements given by the victim were testimonial and in violation of the Confrontation Clause. The trial court and the circuit court ruled the statements were admissible, and there is not sufficient evidence in the record to conclude their rulings were based on any error of law. As such, the majority of the Court of Appeals erred in not affirming the lower court rulings.[11] Because the Court of Appeals abused its discretion, this Court should Grant the Petition for Writ of Certiorari and reverse the Opinion of the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and issue an order reversing the decision of the Court of Appeals and affirming Respondent's conviction and sentence. If the Court grants the petition for a writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

[11] Petitioner 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. Respondent has made no attempt to reconstruct the record in this case.

Respectfully submitted,

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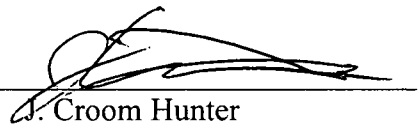
BY: 
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October 3, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

The State, Petitioner,

v.

Henry Haygood, Respondent.

PROOF OF SERVICE

I, J. Croom Hunter, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals and Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Breen R. Stevens, Esquire
First Circuit Public Defender's Office
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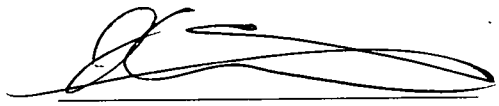
Orangeburg, SC 29116

I further certify that all parties required by Rule to be served have been served. This 6th day of October, 2014.



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