STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2014-001402

THE STATE, ...RESPONDENT

v.

BENECO ANTWON GANSON, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the trial court erred in allowing his mother to testify that she called the victim and offered to pay for the damage caused by the burglary is preserved for appellate review where it was not raised to or ruled upon by the trial court and, to the extent it is preserved, whether the trial court properly admitted the testimony where it was relevant to proof of identity and where its probative value outweighed any danger of unfair prejudice.

STATEMENT OF THE CASE

Beneco Antwon Ganson (Appellant) was indicted at the April 2014 term of the grand jury for Lancaster County for first-degree burglary (2014-GS-29-445). He was represented by Assistant Public Defender T. Brandon Steen, Esquire, of the Seventh Circuit Public Defender's Office. Respondent (the State) was represented by Solicitor Randy E. Newman, Jr., of the Seventh Circuit Solicitor's Office. On June 24-25, 2014, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Brian M. Gibbons to twenty (20) years' imprisonment. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On the morning of December 6, 2013, Rodynka Howze was home with her two young children when two men kicked in her front door and entered her house. She came down the hall and confronted the intruders as they were attempting to grab the victim's TV and a ring. The men fled, leaving the TV and the ring behind.

After jury selection, the jury was excused while the trial court addressed pretrial matters. The judge referenced a previous meeting in chambers wherein the State indicated it intended to call "two additional witnesses" which apparently had not been previously disclosed to the defense. The solicitor explained one of those witnesses was Appellant's mother, Linda Thompson. Appellant's counsel stated: "Your Honor, I just received notice that she is going to be testifying, and I have not had a chance to speak with her or anything." The solicitor responded that Thompson lives out of town and that he had no idea she was coming to the trial until he saw her in the courtroom. The trial judge stated: "Okay, what I will do is I will withhold ruling on your objection until you've had an opportunity to talk to her." (Tr.p.14, line 2-p.16, line 8). The trial court then ruled on the admissibility of several pieces of evidence before swearing the jury and proceeding to trial. (Tr.p.16, line 10-p.29, line 16).

At trial, the solicitor made an opening statement briefly describing the State's theory of the case. He said Appellant kicked in Howze's door and was attempting to take a TV from the shelf when Howze caught him in the act, and that Appellant then took off running when Howze said she was going to call the police. Appellant's counsel responded by saying Appellant did not commit or attempt to commit the crime. He argued Howze had severe credibility issues, noting she had falsely accused someone in the case already. (Tr.p.29, line 17-p.32, line 9).

The State then called Howze to the stand. She testified that in December of 2013 she lived at 400 North White Street with her sister and their children. Howze identified Appellant in the courtroom and explained they had been friends for a while. She said Appellant had visited her home before and was actually at the house the night before the incident. The morning of the burglary, while the children were still sleeping, Appellant sent a text message asking Howze if she was home. Howze heard Appellant and another person on her front porch and texted back that she was not home even though she was inside. At that point, Howze heard Appellant tell his friend to "kick the door in." They kicked in the door as Howze was putting her kids in the crib. She came down the hallway, confronted the intruders, and asked what they were doing. Howze said that when she walked in the room she saw them moving the TV and they had their hands on her citizenship class ring. She told the men she was going to call the police and when they ran, she called to report the burglary. Howze described the damage to the door and testified that neither man had permission to be in her house. (Tr.p.32, line 12-p.38, line 1; p.40, line 1-p.41, line 1).

After the incident, Howze told the police about the two intruders and she gave two names: Shawn Quavos and Appellant. She acknowledged she was wrong about Quavos because she only saw the side of the second man's face, but that she knows Appellant. Howze testified she had been with Appellant more than three times before. She said that when she mistakenly picked Quavos out of a photo lineup she thought it had been him, but that when it came to identifying Appellant, she had no doubt he was in her home during the burglary. Howze testified that after the incident she got an apology text message from Appellant. He said he was sorry, he should not have done it, and that there

was no excuse for what he had done. (Tr.p.38, line 2-p.39, line 25; p.41, line 2-p.42, line 3).

Next the State called Howze's sister, Cheyennae Howze. She testified she lived with the victim at the time of the incident and confirmed the damage caused to the front door. (Tr.p.46, line 23-p.48, line 19). Sergeant Dustin Burlingame of the Lancaster City Police Department then described responding to the scene to take photographs and look for fingerprints. He discovered two fingerprints on the TV but neither was a match to Appellant. (Tr.p.49, line 2-p.52, line 20). The State then called latent print examiner Ken Taylor of the Lexington County Sheriff's Office to the stand. He was admitted as an expert in latent fingerprint examination and confirmed the only fingerprint found at the scene with sufficient detail for comparison did not match Appellant. (Tr.p.52, line 24-p.59, line 7).

Next, the solicitor advised the trial court he was indeed planning to call Thompson to the stand to say she called Howze after the incident and offered to pay for the damages. The trial judge stated: "All right. Your objection is already in the record. So you are good to go with that." (Tr.p.60, lines 17-25). Thompson then testified for the State. She lives in Atlanta and learned of the incident when her sister, who lives in Lancaster, called to say she heard Appellant's name on a police scanner in regard to a break-in. She tried to call Appellant to ask about it but was unable to reach him. She then called Howze, who was an acquaintance, to ask what was going on. Thompson offered to pay Howze for the damage to the door. Appellant elected not to cross-examine Thompson. (Tr.p.62, line 7-p.64, line 10).

Finally the State called investigator Phillip Hall of the Lancaster City Police. He received a phone call from Howze the day after the burglary identifying the burglars by name. Hall said Howze named Appellant and described him as a "friend with benefits" and then identified Allen Shaquavous by his street name, Quavos. She proceeded to pick both men from photo lineups prepared by the police. Although they were both charged with the crime, the charges against Shaquavous were later dropped when the police confirmed he was not present at the scene. (Tr.p.64, line 13-p.72, line 15). At the close of Hall's testimony, the State rested and the jury exited the courtroom. Appellant moved for a directed verdict and the trial court denied the motion. Appellant chose not to testify and after the defense rested the parties made closing arguments. (Tr.p.72, line 22-p.77, line 14).

During closing arguments, the solicitor went through the evidence that had been presented. In regard to Thompson, he said: "The Defendant's mother told you she called Ms. Howze to try to cover the cost of any damages. Why would she do that? That is something for you all to decide." (Tr.p.78, line 2-p.80, line 25). Appellant's closing argument focused on the alleged unreliability of Howze's testimony. (Tr.p.81, line 1-p.83, line 3).

The trial judge charged the jury on the respective roles of the judge and jury, including the jury being the sole judge of the credibility of witnesses. He also charged the State's burden of proof, the presumption of innocence, the defendant's right not to testify, direct evidence and circumstantial evidence, expert witnesses, credibility of witnesses, criminal intent, and the elements of first-degree burglary. (R.p.83, line 4-p.95, line 14). After deliberating for a little under an hour, the jury found Appellant guilty of

first-degree burglary. (Tr.p.95, line 22-p.96, line 19). After hearing from the solicitor and Howze, Appellant stated: "I have made a lot of mistakes and I can't do at this time change anything I did, so I've got to accept responsibility and take my medicine." (Tr.p.99, lines 14-18). The trial court sentenced Appellant to twenty (20) years' imprisonment. (Tr.p.100, lines 16-22).

ARGUMENT

I.

Appellant's arguments that the trial court erred in allowing his mother to testify that she called the victim and offered to pay for the damage caused by the burglary is not preserved for appellate review because it was not raised to or ruled upon by the trial court. To the extent it is preserved, the trial court properly admitted the testimony where it was relevant to proof of identity and where its probative value outweighed any danger of unfair prejudice.

Appellant argues the trial court erred in allowing his mother to testify for the State that she called Ms. Howze and offered to pay for damage caused when Howze's front door was kicked in by burglars, because it was prejudicial and made Appellant appear to be the burglar. He contends that under Rule 403, SCRE, the danger of unfair prejudice from admitting the testimony substantially outweighed the probative value. Appellant further argues the solicitor then gave an improper and prejudicial closing argument because, by referencing that testimony, he "added an irrelevant but prejudicial factor to the factors which the jury could consider to decide guilt." (Brief of Appellant, p.9). The State disagrees and submits Appellant's arguments should be denied and dismissed on several grounds.

Issue Preservation

Initially, the State submits Appellant's arguments are not preserved for appellate review because they were not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The South Carolina Rules of Evidence provide that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, **and** . . . [i]n case the ruling is one admitting evidence, **a timely objection or motion to**

> **strike appears of record, stating the specific ground of objection**, if the specific ground was not apparent from the context.

Rule 103, SCRE (emphasis added). This rule is generally in accord with prior South Carolina law which requires a contemporaneous objection with specific grounds to preserve an error for review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

At the beginning of trial, when Appellant first learned that the State intended to call Ms. Thompson as a witness, counsel merely said: "Your Honor, I just received notice that she is going to be testifying, and I have not had a chance to speak with her or anything." The trial judge stated: "Okay, what I will do is I will withhold ruling on your objection until you've had an opportunity to talk to her." (Tr.p.14, line 2-p.16, line 8). Later, when the solicitor advised the trial court he would be calling Ms. Thompson to the stand, the trial judge said to Appellant: "All right. Your objection is already in the record. So you are good to go with that." (Tr.p.60, lines 17-25). Ms. Thompson then testified for the State. (Tr.p.62, line 7-p.64, line 10). During closing arguments, the solicitor said in part: "The Defendant's mother told you she called Ms. Howze to try to cover the cost of any damages. Why would she do that? That is something for you all to decide." Appellant did not object or otherwise challenge these remarks. (Tr.p.78, line 2-p.80, line 25).

In regard to Ms. Thompson's testimony, the only objection Appellant arguably raised was the lack of adequate notice before trial. He never objected on grounds that the testimony itself was improper, irrelevant, or unfairly prejudicial, and never moved to exclude the testimony pursuant to Rule 403, SCRE. In regard to the solicitor's closing argument, Appellant did not object at all. As a result, the trial court was not given an opportunity to make a ruling on Thompson's testimony under Rule 403, or the propriety of the solicitor's closing argument. Because the claims being argued in this appeal were neither raised to nor ruled upon by the trial court, they are not preserved for review. Rule 103, SCRE; Byers, supra; Hoffman, supra.

Argument

To the extent this Court finds the issues were sufficiently preserved, the State nonetheless submits Appellant's arguments are without merit. Thompson's testimony was relevant to prove Appellant's identity, particularly in light of his defense that he was not one of the burglars. In addition, its probative value outweighed any danger of unfair prejudice. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463,

545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("'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."). Here, the identity of the individuals who committed the burglary was of consequence to the jury's determination of guilt or innocence at trial, particularly where Appellant presented a defense that he did not commit or attempt to commit the burglary. (Tr.p.29, line 17-p.32, line 9). Ms. Thompson's offer to pay Ms. Howze for the damage to her door had a tendency to make the determination of the identity of the burglars more probable than it would be without the testimony; therefore Ms. Thompson's testimony was relevant. Rule 401, SCRE.

Rule 403, SCRE: Probative Value

"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; State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that

the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). Further, Rule 403, SCRE, requires there to be unfair prejudice before the evidence will be excluded. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." Id. at 529, 732 S.E.2d at 229. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (finding the trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Here, the prejudice posited by Appellant is that Ms. Thompson's offer to pay for damages to the door "gave the perception that he was guilty or perhaps had confessed to his mother." (Brief of Appellant, p.9). He relies on our Supreme Court's opinion in State v. McLeod, 330 S.C. 420, 401 S.E.2d 175 (1991) in support of his argument. However, the evidence improperly admitted against McLeod consisted of a written statement that contained improper hearsay, not testimony. In McLeod, the trial court admitted

McLeod's statement, which included comments from the questioning officer that his grandfather "feels that, whatever happened on Monday [the day Victim disappeared] was his fault. Because if had left you stay where you was, then everything would be all right." McLeod, 303 S.C. at 424, 401 S.E.2d at 177. The Court noted this statement implies the grandfather thought McLeod had committed the crime and, because the grandfather did not testify, contained improper hearsay. Id. Here, Ms. Thompson testified at trial and was subject to cross-examination. Her testimony that she offered to pay Howze for the damage was not hearsay; therefore, McLeod is inapplicable. Thus, the unfair prejudice claimed by Appellant simply does not exist. Instead, the probative value of the testimony supports the trial court allowing it into evidence. Appellant has shown no abuse of discretion and no exceptional circumstances to warrant reversing the trial court's discretionary ruling to admit Thompson's testimony into evidence.

Because the testimony was properly admitted by the trial court, the solicitor's reference to that testimony during closing arguments was likewise appropriate. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("[A] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."). Furthermore, even if the reference was somehow improper, it would not require reversal because Appellant cannot show he did not receive a fair trial due to the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Indeed, Appellant could not have suffered unfair prejudice from the alleged inference that Thompson believed he was the burglar because the trial court repeatedly instructed the jurors they were the sole judges of the credibility of the witnesses. (Tr.p.27, lines 14-18; p.84, lines 18-21; p.86, lines 6-8). See Foye v. State, 335 S.C. 586,

590, n.1, 518 S.E.2d 265, 267 n.1 (1999) ("A jury is presumed to follow instructions."). Finally, given the unwavering eyewitness identification made by Ms. Howze and Appellant's text message apology to her after the burglary, the overwhelming evidence of Appellant's guilt rendered any errors harmless beyond a reasonable doubt. Appellant's conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
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Appellate Case No. 2014-001402

THE STATE, ...RESPONDENT

v.

BENECO ANTWON GANSON, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated June 26, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

LaNelle C. DuRant, Appellate Defender
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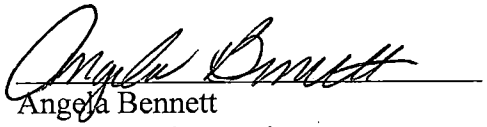
I further certified that all parties required by Rule to be served have been served. This 26th day of June, 2015.



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Re: The State v. Beneco Antwon Ganson
Appellate Case No. 2014-001402

Dear Ms. DuRant:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services