STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2014-001880

THE STATE,

Respondent,

v.

PAUL TAT,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

STATEMENT OF ISSUES ON APPEAL

I.

Appellant has had several bites at the apple to appeal the lower court's ruling, but has failed to provide a sufficient record for review, has preserved no issues for appeal, and has failed to state specific errors of law as grounds for this appeal.

II.

The trial judge properly allowed into evidence Victim's medical records and photographs, when Appellant had not requested inspection prior to trial, had not attempted to gain access to photographs, nor objected to their admission at trial. The investigating officer committed no Brady violation when he failed to bring photographs of Appellant to court, when Appellant had not requested pictures prior to trial, and had evidence of comparable value.

STATEMENT OF THE CASE

Paul Tat (Appellant) was convicted of Criminal Domestic Violence in the Magistrate's Court on August 21, 2013, following a bench trial before the Honorable S. Michael Gillespie. (R. p. 73, Trial Audio Part 2.) Judge Gillespie sentenced him to thirty days' imprisonment suspended upon enrollment in and completion of a treatment program.[1] (R. p. 73, Part 2.)

On September 3, 2013, Appellant filed a motion to reconsider. (R. p. 14.) A hearing was convened on September 11, 2013, before Judge Gillespie. (R. p. 29.) Judge Gillespie denied the motion. (R. pp. 29-30.) Appellant appealed to the Circuit Court. (R. p. 13.) The Honorable Edward Welmaker heard the matter on October 7, 2013. (R. p. 40, lines 16-25.) Judge Welmaker found Appellant's motion was timely filed in the Magistrate's Court and remanded the matter for a ruling on the motion. (R. p. 16.) On remand, Judge Gillespie denied the motion. (R. p. 14.) Appellant appealed to the Circuit Court. In an order dated August 1, 2014, and filed August 5, 2014, the Honorable Letitia Verdin found:

> Appellant's conviction in Magistrate's Court is affirmed. The Appellant did not state any grounds in his Notice of Appeal for reversal. However, in his Petition for a Motion to Reverse Judgment, Appellant raises only factual issues & matters not preserved on appeal. Accordingly, there is no error of law to form the basis of a reversal & Appellant's conviction is affirmed.

(R. p. 3.)

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[1] In response to Appellant's statement that he would soon be moving out of state, Judge Gillespie stated that Appellant could complete any type of equivalent program in another location within 6 months' time in satisfaction of the sentence. Judge Gillespie stated that Appellant should inform him of progress by letter. (R. p. 73, Part 2.)

Appellant filed a Notice of Appeal to the South Carolina Court of Appeals. Appellant attempted to file his Initial Brief of Appellant, but the Court returned it to him as untimely. On November 11, Appellant filed an "Amendment to Notice of Appeal." In an order of November 21, 2014, the Court dismissed the appeal for failure of Appellant to order the transcript, file the initial brief, and designate the matter to be included in the Record. (Order in 2013-CP-3901329.) Appellant filed a "Motion to Reinstate Appeal and Recall the Remittitur" on November 26, 2014, and then a "Corrected Motion to Reinstate Appeal and Recall the Remittitur" on November 29, 2014. In an order of January 12, 2015, the Honorable John Cannon Few granted Appellant's Motion to Reinstate the Appeal.

STATEMENT OF FACTS

The case was called to trial August 21, 2013. Appellant was advised of the maximum penalties for CDV and elected to represent himself. The State called Detective Ticknor as its first witness. (R. p. 73, Part 1, 3:30.) Detective Ticknor testified on Feb 20, at approximately 1:20 a.m., he received a call from emergency room nurse named Tanya regarding a possible CDV case. The patient's name was Angelika Tat (Victim). Victim, Appellant's wife, was unable to speak English, but through a translator advised she had been assaulted by her husband. Victim indicated the abusive situation was ongoing and that she was held against her will and malnourished. On the evening in question, Victim alleged Appellant choked her multiple times, causing loss of consciousness. Victim further complained she vomited several times. Victim alleged Appellant reluctantly took her to hospital after several requests. Nurses observed bruising and redness around the Victim's face and head, as well as a hematoma to the head. Further, Victim weighed only eighty pounds. (R. p. 73, Part 1, 3:30- 6:53.) Detective Ticknor then contacted his supervisor and the Victim's Advocate on call, and they responded to the hospital to confirm the report.

The Victim's Advocate (Advocate) testified she received call around 1:30 a.m. about a victim at AnMed Health Hospital with domestic violence injuries. (R. 73, Part, I, 10:50.) Advocate met with the interpreter, and Victim was by herself in a room in the ER. Advocate observed Victim was shy, shaky, and nervous; she had obvious bruises on arms, legs, and chest. Advocate was told by the nurses Victim reported food and water was being withheld from her and she had not eaten in days. (R. 73, Part 1, 12:30.)

Advocate took some photographs of Victim's bruises. At trial, Advocate recognized the photos, and identified them as the photos taken of the injuries sustained when Appellant grabbed Victim. Appellant objected, and the trial court sustained the objection on the basis of hearsay. (R. p. 73, Part 1, 14:10.) The photos were allowed into evidence, but Advocate's statement about who made the bruises was not allowed. Appellant made no other objection on any other grounds to the photos. (R. p. 73, Part 1, 14:15.) The pictures showed bruises on Victim's left arm, legs (kneecaps), chest, left elbow area, and right arm. Advocate also took pictures of chest injuries. (R. p. 73, Part 1, 18:30.) Advocate testified Victim was standoffish, nervous, and withdrawn when Appellant was in the room. Advocate observed the two talking but did not know what was said because the conversation was in Russian. (R. p. 73, Part 1, 23:30.)

Next, the interpreter took the stand. Angelina Sharry (Interpreter), is employed by AnMed Interpretation Services. She was told Victim was crying and would not communicate, but Victim began speaking once Interpreter started speaking to her in Russian. (R. p. 73, Part 1, 25:05.) Interpreter asked Victim why her hands were red, and Victim told her Appellant hurt her and caused her hands to be red. Victim also told her Appellant had beaten her in her head, held her down, and did not allow her to get up. (R. p. 73, Part 1, 25:50.) Interpreter observed a bump on Victim's head, and noticed Victim repeatedly touching her head. Interpreter also took a written statement from Victim. (R. p. 73, Part 1, 33:00). In the statement, Victim reported Appellant brought her to ER. She has bruises to her arms, knees, and chest. She is always afraid of her husband, and she does not want to put her husband to jail.

Interpreter continued to read Victim's statement: Appellant approached Victim seeking sexual intercourse; Victim resisted, putting her hands in front of her retreating to

a spare bedroom, barricading the door with suitcases and hiding in the closet. (R. p. 73, Part 1, 34:00.) Appellant came into bedroom, threw clothes around and pulled her out of the closet by her hair. He then began hitting her, twisting her arms, and pinching her. Victim also stated Appellant has been abusing her since she came to the United States since last May. (R. p. 73, Part 1, 34:50) Victim signed and dated the statement. Interpreter testified she read the statement back to Victim, and she signed it, but asked her not to tell Appellant. The statement was admitted as State's Exhibit 2. (R. p. 73, Part 1, 36:30.) Interpreter testified that after Victim gave the statement, she waited to transport Victim to Safe Harbor, a domestic violence shelter. (R. p. 73, Part 1, 37:30)

Diane Whitfield, Director of Medical Records at AnMed Health, testified she keeps and maintains the records in the regular course of business for the hospital. (R. p. 73, Part 1, 48:00.) She authenticated State's Exhibit 3 to be true and accurate. Appellant objected to having her read a portion of record. The court sustained, admitting the records and agreeing to read the records directly. (R. p. 73, Part 1, 49:50.) Following the testimony of the records keeper, the State rested.

Appellant called Interpreter to the stand. Interpreter testified she again had contact with Victim on February 21, 2013, after she received a call from Safe Harbor. (R. p. 73, Part 1, 53:43) Interpreter was there from 1p.m.-3p.m. to aid in registration they started the day before by explaining rules and regulations of house. Interpreter testified Victim was told she not allowed to talk to husband while there. (R. p. 73, Part 1, 54:56.)

On April 19, 2013, Interpreter received another call from Safe Harbor and was told the evening before Victim was found next to gate. They recognized her and admitted her. Victim was afraid, said she walked there. Safe Harbor told Interpreter that police

would accompany Victim to her home if she wished to retrieve belongings. (R. p. 73, Part 1, 56:45) Interpreter went with Victim to her home to retrieve belongings, whereupon Victim collected her belongings and they left. Interpreter testified Appellant cooperated and even reminded Victim of the items she needed to collect to return to Safe Harbor. (R. p. 73, Part 1, 59:50).

After Interpreter was excused from the stand, Appellant attempted to introduce an affidavit from a gentleman from New York, who was not present to testify. The State objected to the affidavit as hearsay, and the court sustained the objection, finding no exception to the hearsay rule under SCRE 803. (R. p. 73, Part 1, 1:05:00). Further, the court did not grant Appellant's request for a continuance. The trial judge paused the proceedings in order to research the admissibility of the affidavit, then affirmed his ruling that the statement is inadmissible as hearsay. Appellant made no further objection regarding the court's ruling. (R. p. 73, Part 1, 1:12:50.)

Appellant then introduced pictures he took of himself to supplement his testimony. (R. p. 73, Part 1, 1:15:00.) Appellant testified Victim closed herself off in her bedroom and refused food. Appellant testified Victim blocked access to room with luggage when he attempted to access room to fix a toilet drain. To access the room, he testified he would have to unlock the door and push things aside. Appellant claimed when he attempted to fix the toilet, Victim had a "crisis of hysteria," grabbing him by the neck. Appellant claimed he attempted to wait until Victim calmed down. As he moved the luggage from the door, Appellant claimed Victim attempted to lift luggage, falling back and striking her head on wall. Appellant testified Victim did not appear injured, but he gave her an ice pack for her head at around 4:30 in the afternoon. (R. p. 73, Part 1, 1:24:00.) Victim wanted something for pain so Appellant gave Victim Tylenol. Victim

began vomiting in the bed. Appellant testified he eventually took Victim to the hospital around 8:30 or 9:00 p.m. (R. p. 73, Part 1, 1:28:00.)

Appellant read details of Victim's medical records that indicated normal values. Appellant also admitted photographs of injuries on his body, and photos of Victim's phone with passcode lock, as well as photos of Victim's computer into evidence. The State agreed to the photos, with the exception of the pictures taken by Appellant's son, who was not at trial to authenticate the pictures. (R. p. 73, Part 1, 1:29:35.) The court accepted these photos as Defendant's Exhibit 1. (R. p. 73, Part 2, 3:52).

Appellant called Detective Gardo to the stand who testified he met with Advocate and, with the help of the Interpreter, communicated with Victim. The detective testified he faxed the information to the magistrate and obtained the warrant. Appellant continued to question Detective Gardo about why he did not bring the photos the Detective took of Appellant to trial. The detective responded he did not deem the photos of the Appellant necessary for the case. The Appellant argued the magistrate's arrest order was based on photos taken of Victim, and attempted to argue that Det. Gardo's photos of Appellant should have been considered, as well. Det. Gardo testified, however, that the arrest warrant was obtained on evidence from a variety of sources. (R. p. 73, Part 2, 28:50.) Appellant attempted to cross examine Det. Gardo about the lack of evidence of injury to Victim in the medical records, but the court halted the line of questioning, finding multiple examples of bruising or redness.

The court found State met its burden in proving the elements of Criminal Domestic Violence. As the finder of fact, the magistrate was firmly convinced" of Appellant's guilt from the two statements made by Appellant, ("she doesn't lie" and "I

grabbed her by the arms.") The court pointed to Victim's statement about putting her hands up and pointed to the strong evidence of injury in the medical records. The judge also considered the actions and demeanor of Victim when interviewed. (R. p. 73, Part 2, 53:30.), and noted Victim did take advantage of safe house for a period of time. (R. p. 73, Part 2, 54:00.) After finding him guilty, the trial court imposed a sentence of thirty days suspended upon his completion of the "Family: You Can't Beat Them" course. After the imposition of sentence, Appellant requested leniency from the court concerning an impending move in an effort to find better employment. The court allowed Appellant to satisfy the requirements of the court by either taking it online or completing the equivalent of the course in another city. (R. p. 73, Part 2, 1:08:00.)

ARGUMENT

I.

Appellant has had several bites at the apple to appeal the lower court's ruling, but has failed to provide a sufficient record for review, has preserved no issues for appeal, and has failed to state specific errors of law as grounds for this appeal.

As a preliminary matter, Appellant's Initial Brief is confusing and difficult to decipher in terms of its legal arguments, its grammar, and its references to the record on appeal. Appellant's native language is not English, and he has represented himself throughout the matter. Out of consideration for these disadvantages, Respondent has in good faith reviewed the Audio Recording of the magistrate's trial for any appealable issues, notwithstanding the constraints of the Appellant's brief, and found no errors of law or issues preserved for appeal. The lower court appears to have made every effort to ensure Appellant's right to a fair trial.

Despite his pro se status, Appellant should be held to some standard, and the burden is on him 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.) In this case, Respondent does not have the transcript of the magistrate's trial in which Appellant was convicted of CDV. Appellant has provided written transcripts of two hearings: one, before Judge Welmaker on the issue of the timeliness of the appeal of the magistrate's order, and two, before Judge Verdin on the merits of his appeal from the magistrate's court. Appellant has only designated the Audio Recordings of the magistrate's trial in his

matter to be included on appeal. Respondent submits this is inadequate to determine the accurate record, as the Audio Recordings are difficult to understand.

A review of the Audio Recordings, his Petition for Motion to Amend Judgment (R. p. 31), and his Initial Brief of Appellant, demonstrate he has preserved absolutely no issues for appeal, and further, presents no real error of law.

In his Petition for Motion to Amend Judgment, Appellant presented his issues as:

1. Has the detective, JERRY LEE GARDO, committed perjury?
2. Has the detective, JERRY LEE GARDO, conducted the case CDV 2013A3910300068 ...investigation without prejudicing the parties involved in the case?
3. Has the interpreter ANGELINA SHARY committed perjury?
4. Has the Defendant, PAUL IOAN TAT abused and injured ANJELIKA TAT?

(R. p. 31.)

Appellant's grounds for Appeal in this instance are purely factual. The magistrate, as the finder of fact in the bench trial, refused to amend his judgement after reviewing the evidence. The circuit court affirmed, finding Appellant presented no errors of law preserved for appeal.

Appellant changed his argument in his appeal from the circuit court. A party cannot argued one ground below then argue another on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995). Nonetheless, Appellant states:

1. Circuit Court Judge Letitia Verding [sic] erred rejecting the Motion to Reverse Judgement and affirming the judgment and conviction from Magistrate Court.

2. The State represented by Detective J. Gardo and Judge Michael Gillespie infringed on the Appellant rights to a fair trial, Constitution, Amendment IV.

(Initial Brief of Appellant p. 1.)

It is incumbent upon Appellant to cite the issues on Appeal. State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the Appellant's brief must set forth the issue in the statement of issues on appeal.") In the issues above, Appellant again cites no specific issue of law as the basis for the trial court's error. In deference to Appellant's pro se status, however, a review of his brief appears to indicate the general crux of his argument concerning possible errors of law.

II.

The trial judge properly allowed into evidence Victim's medical records and photographs, when Appellant had not requested inspection prior to trial, had not attempted to gain access to photographs, nor objected to their admission at trial. The investigating officer committed no Brady[2] violation when he failed to bring photographs of Appellant to court, when Appellant had not requested pictures prior to trial, and had evidence of comparable value.

As part of its case in chief, the State introduced pictures, medical records, and the statement of Victim at trial. Appellant now claims this evidence was not provided to him prior to trial for him to examine. Appellant seems to be making Rule 5 and Brady[3] allegations. Rule 5 states:

> (C) Documents and Tangible Objects. *Upon request of the defendant* the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

SCRCrimP 5 (emphasis added.).

First, there is no evidence Appellant makes a Rule 5 request prior to trial. Appellant states in his brief, "28:50 Judge denies Defendant request for copies of the pictures and order a copy of the medical record made for the Defendant." (Initial Brief of Appellant, p. 5) Despite Appellant's citation to the contrary, there is no evidence in the Audio Recording to support Appellant's contention that he previously requested access to

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[2,3] Brady v. Maryland, 373 U.S. 83 (1963).

or copies of the medical records. The State introduces the records as part of its case in chief at approximately 28:00 of the Audio Recording. Appellant makes no mention of any prior attempt to see the records. In fact, the Audio Recording reflects the trial court went to considerable effort to provide Appellant with copies of Victim's medical records upon his request, instructing the deputy to make copies during the trial. The court did not make copies of the photographs for the Appellant because the magistrate did not have a color copier, and believed the black and white copier would not provide accurate copies. (R. p. 73, 28:00-30:00)

Again, at 49:50, record keeper Diane Whitfield is on the stand for the purpose of authenticating the medical records of Victim. The State asks the witness what "triage" means in the records, and she responds that she does not know. Appellant objects to this question on the basis that the answer is outside the record keeper's expertise. The judge sustains the objection, stating that he will read the records into evidence. Appellant offers no objection to the records being admitted as evidence. (R. p. 73, Part 1, 49:50.) "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Appellant's objection to any portion of the records testimony was only related to

the expertise of the witness, not to the records admitted as evidence. The issue was neither raised nor ruled upon, and thus, was not preserved.

As to the substantive law, "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). S.E.2d 375, 381 (2012). Where the prosecution violates Rule 5, SCRCP, the trial court retains discretion to determine what remedy, if any, is appropriate. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) (finding under Rule 5, the court may order the offending party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or enter any other appropriate order the court deems just under the circumstances). In the instant case, Appellant fails to establish an actual Rule 5 violation occurred. Appellant was certainly aware of the medical records taken by the personnel at AnMed Health. It is unclear why Appellant failed to make a Rule 5 request before the date of trial, but the State is under no obligation to turn over every piece of evidence unsolicited by the Appellant in its case in chief prior to trial. Further, Appellant makes no objection to the introduction of the records into evidence on any grounds, much less with the specificity of a Rule 5 violation.

The Appellant also seems to suggest the photographs taken by Detective Gardo of Appellant that were not produced at trial could have been exculpatory and were therefore wrongfully suppressed by the State. (Initial Brief of Appellant, p. 6.) Of course, nothing in the record suggests the possibility of a Brady violation. Brady v. Maryland, 373 U.S. 83 (1963) is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: (1) the evidence was favorable to the accused, (2) it was in possession of or known to the prosecution, (3) it was suppressed by the prosecution, and

(4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The mere possibility that an item of undisclosed information may be helpful to the defense in its own investigation is insufficient to establish constitutional materiality under Brady. United States v. Agurs, 427 U.S. 97, 109-10 (1976). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). For Brady purposes, the court's function is to determine whether the appellant's right to a fair trial has been impaired when viewing the non-disclosed evidence in the context of the entire record. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987).

Appellant was aware of the photographs, as they were made at his request and obviously in his presence. (R. p. 73, Part 2, 24:00.) There is no indication on the record Appellant attempted to gain access to the photographs prior to trial. Nor is there evidence of suppression of the pictures by Detective Gardo. In fact, Appellant was allowed to introduce pictures he took of himself showing the same injuries as the ones in the photos taken by Detective Gardo. Appellant claims that because the State did not introduce the pictures in its case against him, it therefore violated Brady. "The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (citations omitted). To establish a violation of due process, a defendant must demonstrate that the State destroyed the evidence in bad faith,[4] or that the evidence had exculpatory value that was apparent before the evidence was destroyed, and the defendant cannot obtain other

[4] The preservation of evidence letter he references is unrelated to this case. The letter references the Access to Justice Post-Conviction DNA Testing Act, S.C. Code §§17-28-10 et seq

evidence of comparable value by other means. Id. at 538-39, 552 S.E.2d at 307 (citations omitted).

Appellant has shown no evidence of bad faith on the part of the police, and he certainly had access to the same evidence of comparable value by other means, which he did, in fact, introduce at trial. Accordingly, no discovery violations occurred and the trial court's ruling should be affirmed.

CONCLUSION

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

Respectfully submitted,

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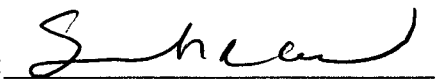
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Paul Ioan Tat
518 Fond Du Lac Drive
Central, SC 29630

I further certify that all parties required by Rule to be served have been served. This 15th day of October, 2015.

Anne Mueller

ANNE MUELLER
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