STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Florence County
The Honorable William Seals, Circuit Court Judge
Appellate Case No. 2014-000849

THE STATE,

Respondent,

v.

DERON JARDELL MYERS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly proceeded with the trial in Appellant's absence because Appellant knew when his case would be called for trial, and that he would be tried in his absence if he did not appear for trial.

STATEMENT OF THE CASE

Appellant Deron Jardell Myers was indicted on two counts of attempted murder and one count of possession of a weapon during a crime of violence. The case was called for trial on April 15, 2014, before the Honorable William Seals, Circuit Court Judge. The jury convicted Appellant as charged, and the circuit court sentenced him to twenty years incarceration on each attempted murder conviction and five years incarceration on the possession of a weapon conviction, all to run concurrently. This appeal followed.

STATEMENT OF THE FACTS

On August 29, 2013, the Florence County Grand Jury indicted Appellant on two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, arising from an incident on April 5, 2013, during which two people were shot. The case was called for a jury trial on April 14, 2014, before the Honorable William Seals, Circuit Court Judge.

When the State called the case, Appellant's counsel indicated he was ready to proceed, but his client was not present. Counsel informed the circuit court he gave Appellant notice of the trial date, and Appellant was actually in counsel's office that morning. The circuit court stated for the record Appellant signed a bond form acknowledging he understood his right to be present at trial, and the trial would proceed in his absence if he failed to attend. The court instructed the bailiff to announce Appellant's name three times outside the courtroom to see if he answered, but Appellant did not respond. (Trial Transcript [TT], pp. 1-2; Record on Appeal [R.], pp. 7-8).

The court found "the defendant in this case had notice to be present at trial and was warned that he would be tried in his absence should he fail to attend." The court further found "the defendant is absent from court even though he was given notices that we would go forward without him." (TT, p. 2; R., p. 8). The trial then proceeded in Appellant's absence.

After opening statements and the testimony of one of the State's nine total witnesses (eight in the case-in-chief and one additional witness in reply), court recessed for lunch. The State then requested a bench warrant for Appellant based on his failure to appear at trial, which the court issued without objection. (TT, pp. 25-51; R., pp. 31-57).

When court resumed after the lunch break, Appellant was present in court with counsel, who advised the court "[Appellant] tried to get into the courtroom this morning with his family," but "the bailiff told him he was not allowed in this courtroom and sent him to the 10th, so he sat in the 10th the whole time."[1] The Clerk explained the bailiff probably asked Appellant if he was "a" defendant, and not realizing he was the defendant in the on-going trial, mistakenly told him to go to the tenth floor where all defendants were called. The circuit court then asked if there were motions "of any kind" at that time, and Appellant's counsel responded "no, sir." (TT, pp. 52-53; R., pp. 58-59)

At the close of the State's case, Appellant's counsel made a general directed verdict motion, arguing "the State has not produced sufficient evidence for this matter to go forward." After the State recounted the evidence presented, the circuit court denied Appellant's directed verdict motion. Appellant then renewed the motion at the close of his case, and the court denied it. (TT, pp. 128-130, 167; R., pp. 134-136, 173). Appellant never objected to the trial initially proceeding in his absence, or alleged a violation of his right to be present during trial.

During the jury charge, the circuit court instructed the jury:

> [A]t the beginning of this trial the defendant was on the tenth floor of this courtroom instead of the eleventh floor. Apparently he had received instructions from the court bailiff to go to the eleventh instead of here. This resulted in the defendant being absent during opening statements and the first witness' testimony. However, he has been present in the courtroom since that time. In this regard and under the laws of this state, a defendant may be tried even if the defendant does not attend the trial or even part of the trial; but the fact that the defendant was not present during this short time at the beginning of this trial, may not be considered against the defendant in any manner whatsoever. **Do not consider the fact in any**

[1]The fact no one was allowed to enter the courtroom indicates the trial had already started.

> **way in your deliberations.** It was a simple mix-up between the bailiff and the defendant and should not prejudice the defendant in any way.

TT, pp. 180-181; R., pp. 186-187) (emphasis added). Appellant did not object to any portion of the jury charges, or ask for additional instructions regarding his absence from the courtroom. (TT, p. 195; R.. p. 201).

The jury convicted Appellant on all charges, and the circuit court sentenced him to twenty years incarceration on each attempted murder conviction and five years incarceration on the possession of a weapon conviction, all to run concurrently. (TT, pp. 206, 209; R., pp. 212, 215). This appeal followed.

ARGUMENT

The circuit court properly proceeded with the trial in Appellant's absence because Appellant knew when his case would be called for trial, and that he would be tried in his absence if he did not appear for trial.

Appellant asserts that the circuit court erred by proceeding with the trial in his absence. As a threshold matter, this issue is not preserved for appellate review. Even if preserved, however, Appellant's assertion is meritless.

A. Preservation

It is well established in South Carolina that an issue must be raised to and ruled on by the trial court to be preserved for appellate review. Roberts v. State, 408 S.C. 123, 757 S.E.2d 744, 748 (Ct. App. 2014) (*citing* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 [2011)]; State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [appellate courts] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640, 465 (2011); *see also* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724-25 (2000) (the preservation requirement enables the lower court to rule properly after it has considered all relevant facts, law, and arguments, and prevents a party from keeping an ace card up his sleeve in the hope that an appellate court will accept that ace card and give him another opportunity to prove his case).

Appellant never objected to the trial proceeding in his absence, even after he appeared in court, nor did he move for a mistrial based on his absence during the initial portion of the trial. Since the issue was not raised in the circuit court, it is not preserved for appellate review. *See* Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 458, 498 (Ct.

App. 2004) ("without an initial ruling by the trial court, a reviewing court simply [is] not able to evaluate whether the trial court committed error").

B. Notice of Right to be Present

Even if the issue is preserved, the circuit court committed no error. In criminal cases, the appellate court sits to review errors of law only. State v. Banda, 371 S.C. 245, 639 S.E.2d 36, 39 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*; *see also* State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554, 557 (Ct. App. 2010) (same).

While an accused has the constitutional right to be present at every stage of his trial, the right can be waived, and a defendant can be tried in his absence. Ravenell, 692 S.E.2d at 557. The trial judge must determine a criminal defendant voluntarily waived his right to be present at trial before proceeding in the defendant's absence, and make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend. *Id.* at 557-558; *see also* Rule 16, SCRCrimP ("Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.").

Notice of the term of court in which a defendant will be tried is sufficient notice for the defendant to make an effective waiver of his right to be present at trial. Ravenell, 692 S.E.2d at 558; Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); State v.

Fairey, 374 S.C. 92, 100, 646 S.E.2d 445, 448 (Ct. App. 2007). In this case, it is clear Appellant had notice of the term of court in which his case would be called for trial.

Appellant's counsel advised the circuit court he notified Appellant of the trial date, and met with Appellant the morning of trial. When Appellant failed to respond to the bailiff calling his name, the court found "[Appellant] had notice to be present at trial," and "[Appellant] is absent from court." (TT, pp. 1-2; R., pp. 7-8). Counsel's statements to the court established Appellant had notice, not simply of the term of court during which his case would be heard, but he knew the exact date and time the trial would commence. The record amply supports the circuit court's factual finding Appellant had the required notice of his right to be present at trial. *See* Banda, 639 S.E.2d at 39 ("an appellate court is bound by the trial court's factual findings unless they are clearly erroneous"); *see also* Ravenell, 692 S.E.2d at 558 (the defendant's presence at the first day of trial when his jury was drawn indicates he had notice of his right to appear).

C. Notice of Trial *in Absentia*

The circuit court found Appellant's bail bond form put him on notice the trial would proceed in his absence if he failed to appear when the case was called for trial. Appellant does not challenge that finding on appeal.

A bond form providing notice a defendant can be tried *in absentia* may serve as the requisite warning he may be tried in his absence if he fail to appear. Ravenell, 692 S.E.2d at 558. The bail bond form Appellant signed establishes Appellant knew he would be tried in his absence if he did not appear for trial, and supports the circuit court's factual finding on this issue.

D. Harmless Error

Denial of a defendant's right to be present, as well as other constitutional violations, are subject to a harmless error analysis. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, 816 (2001). "Although the right to be present is a substantial right, no presumption of prejudice arises from a defendant's exclusion." *Id.*

"A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62, 73 (Ct. App. 2004). "Harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." *Id.* at 74.

Appellant does not even assert he was prejudiced by the circuit court's decision to proceed with the trial in his absence, much less indicate how he was prejudiced. The State presented testimony from both attempted murder victims, and Appellant was only absent during the first victim's testimony. Victim 1 testified he was helping break up a fight outside a club, and after the fight was over, Appellant shot him four times, shot Victim 2, and "kept shot'ing [sic] till his bullets ran out." (TT, pp. 40-43; R., pp. 46-49).

Appellant was present during the rest of the State's case (seven additional witnesses in the case-in-chief, and two witnesses in reply). In addition to Victim 1, two other witnesses positively identified Appellant as the shooter. (TT, pp. 54-128; R., pp. 60-134). Appellant was also present when counsel moved for a directed verdict and then presented the defense witnesses, as well as during the State's reply witnesses, the jury charges and closing arguments. (TT, pp.129-195; R., pp. 135-201). Finally, he was

present during the jury's deliberations, when the verdict was handed down, and when sentence was imposed. (TT, pp. 196-209; R., pp. 202-215).

There is simply no evidence Appellant's absence from the initial trial proceedings contributed to the jury's verdict. On the contrary, the circuit court specifically instructed the jury not to consider Appellant's absence in any way, and the jury is presumed to have followed that instruction. *See* State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889, 893 (Ct. App. 2001) (absent evidence to the contrary, a jury is presumed to have followed the jury instructions). Given the overwhelming evidence of Appellant's guilt, any possible error in proceeding with the trial in Appellant's absence was harmless beyond any reasonable doubt.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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August 14, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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

This 14th day of August, 2015.

Sally B. Ellison

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