STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Marlboro County
The Honorable Edward B. Cottingham, Jr., Circuit Court Judge
Appeal Case No. 2012-213461
Opinion No. 5390 (Filed March 16, 2016)

THE STATE

RESPONDENT,

V.

TYRONE J. KING,

APPELLANT.

PETITION FOR REHEARING

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

1. Respondent respectfully submits the majority opinion overlooks the overwhelming evidence of Appellant's guilt in finding this case should be remanded to the circuit court. In State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), this Court remanded the case for further analysis when the trial court failed to conduct an on-the-record Rule 403 analysis in assessing the admissibility of prior bad acts testimony. In remanding the case in Spears, this Court noted the potential prejudice to Spears from the introduction of the evidence at issue. Id. at 258, 742 S.E.2d at 884. Further, this Court noted that

based upon the record before it, it was unable to say that the admission of the prior bad act testimony was harmless error. Id. at 258, 742 S.E.2d at 884.

This case is clearly distinguishable from Spears because it is clear from the record in this case that any error in admitting the prior bad act evidence at issue was harmless. The majority opinion in this case did not assess whether the admission of the evidence at issue could be harmless error. As accurately pointed out by the dissent, remand is unnecessary in this case because there was overwhelming evidence of Appellant's guilt outside of the evidence in dispute.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), reh'g granted (Sept. 8, 2015).

There was overwhelming evidence establishing King murdered Mr. Galloway absent the comments at issue. Three eyewitnesses identified King as being in the house with the firearm used in the shooting. Karen Galloway testified that she heard King argue with her husband before she heard the shot

that killed him. (R. p. 92-3). She noted that her husband identified Appellant as he person who was at their door. (R. p. 92). Immediately afterwards, King ran into Karen Galloway's bedroom and pointed the firearm at her. (R. p. 94). She identified Appellant in court as her assailant. (R. pp. 94-5). She also identified Appellant as the person who pointed the gun at Reggie Cousar and as the person who shot the victim. (R. pp. 95-7).

Reggie Cousar, the cousin, also testified that he saw Appellant point the gun at Karen Galloway. (R. pp. 104, 108). He further testified Appellant then pointed the gun at Cousar. (R. p. 104). Cousar identified Appellant in court. (R. p. 104). Devonte, the Galloways' grandson, testified that he saw King point the gun at his grandfather immediately before the shooting occurred. (R. p. 113). He also testified Appellant shot and killed the victim. (R. pp. 113-14).

Further, immediately after law enforcement arrived, King ran away from the scene. Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). The weapon used in the shooting at the victims' house was found behind King's residence. (R. pp. 149-50, 233-35). As to the murder charge, King admitted to being in the residence when the shooting occurred. He initially misled law enforcement about being the one who actually shot the victim. Instead, he accused Aloysius McLaughlin of being the one who shot the victim. The State presented the testimony of Mr. McLaughlin and his girlfriend to disprove King's

initial account that they were together on the night of the shooting. (R. pp. 178-81, 183-88). Further, in his second statement, King later admitted that he was the one who shot Mr. Galloway. (State's Exhibit Four).

Law enforcement recovered a telephone that was identified as belonging to the victims' house and a liquor bottle near the truck where King was apprehended. (R. p. 136). It was also noted that the liquor bottle was of the same type found in the victim's closet in the master bedroom. (R. p. 136). Law enforcement also found a bullet hole in the master bedroom, which led to the den and to the roof of the residence. (R. pp. 136-37). A nine millimeter handgun with an extended clip was found in the wooded area behind King's residence. (R. p. 137). A projectile was also recovered from the living room of the victims' residence. (R. pp. 138-39, 145, 151). Also, two cartridge casings were found, one in the living room and one in the master bedroom. (R. pp. 155, 156). Round lead particles were found in King's right palm. (R. p. 226, 228-29). The two cartridge casings recovered from the scene, along with the projectile recovered from the wall in the living room, were all fired from the gun found in King's back yard. (R. pp. 233-36; Supp. R. 2).

Malice could be inferred from several different facts. First, Mrs. Galloway's testimony regarding hearing the discussion between her husband and King prior to the shooting indicated some ill will on the part of King. (See R. p. 92). Second, Devonte's testimony that he saw King point the gun at Mr. Galloway indicated there was no accident. (R. p. 113). Malice could also have been inferred from the fact that King killed the victim with a firearm. See State v.

Belcher, 385 S.C. 597, 612 n. 9, 685 S.E.2d 802, 810 n. 9 (2009)(noting that State can argue malice can be inferred from use of a deadly weapon even though jury may not be charged with inference of malice from use of deadly weapon).

Also, there was overwhelming evidence King was in possession of a firearm during the commission of the murder. Again, three eyewitnesses saw King with the gun in the victims' house that early morning. Devonte saw it in King's hand just prior to the shooting. (R. p. 113). Mrs. Galloway saw it right after the shooting was over when King attacked her. (R. p. 94). Mr. Cousar saw the gun when King pointed it at him shortly after he attacked Mrs. Galloway. (R. p. 104). King also admitted to having the gun in his possession during the shooting in his second statement to law enforcement. (State's Exhibit Four).

There is nothing in the record to support a finding that the two comments made by King that are at issue in this appeal played any role in his convictions. None of the facts relating to those alleged acts were presented by the State. Thus, there were no details for the jury to consider to see if King's acts in this case were similar to those in the other alleged acts. Further, the State did not reference the comments at any other point in time during the trial. The only other mention was made by Ms. Graham, and the trial court immediately instructed struck the comment by Ms. Graham from the record, and he later instructed the jury to not consider what she had said in regards to her prior encounter with King. (See R. pp. 183-88). In all, there was overwhelming evidence of guilt. Thus, his

convictions for the murder of Mr. Galloway and for possession of a firearm during the commission of a violent crime should be affirmed.

2. Respondent respectfully submits this Court overlooks or misapprehends Respondent's preservation argument in finding Appellant's contention that the trial court did not conduct an analysis under Rule 404(b) or Rule 403 at all is preserved for appellate review. The record clearly demonstrates the trial court was never asked to consider whether the admission of the McColl charges or the alleged murder charge under Rule 404(b), required an on the record, Rule 403 balancing test. Likewise, defense counsel never objected on the record to the trial court's failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question on the record.

Because the record reflects that the argument which is now the basis for the remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

3. Respondent respectfully submits this Court overlooked Appellant's abandonment of his appeal to his third degree assault and battery conviction. In the opinion, this Court notes Appellant appeals from the assault and battery in the third degree conviction. However, as reflected in footnote thirteen of Appellant's Final Brief, the challenge to that particular conviction was abandoned at Appellant's request.

Respectfully submitted,

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March 31, 2016