

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-000594

RECEIVED

JUN 27 2016

SC Court of Appeals

The State, Respondent,

v.

Devatee Tymar Clinton, Appellant.

APPELLANT’S PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules (SCACR), Appellant Devatee Tymar Clinton hereby files this petition for rehearing. The Court issued its decision, Unpublished Opinion No. 2016-UP-206 (Shearouse Adv. Sh. No. 19) on May 11, 2016. On May 31, 2016, the Court granted Clinton’s motion for an extension of time to file a petition for rehearing until June 27, 2016. Accordingly, this petition is timely under Rule 221(a), SCACR.

Clinton resubmits the arguments from his briefs on the merits of the issues raised in this appeal as if stated verbatim herein, which arguments were not addressed in the Court’s Rule 220, unpublished opinion, and additionally submits the following issues that the Court may have overlooked or misapprehended in reaching its decision:

I. The Court misapprehends and therefore conflates the general rules regarding renewal and sufficiency of an objection following a motion *in limine* hearing with the adequacy of a proffer of testimony.

In finding Clinton's arguments regarding the trial court's erroneous exclusion of certain hearsay statements at trial is unpreserved for appellate review, the Panel misapprehended and misconstrued the issue of the adequacy of a proffer of testimony, instead substituting the standard for the adequacy of a renewed objection to testimony in its place. This misapprehension caused the Panel to misapply the Court's preservation standards to a situation and context where preservation has no application. In doing so, the Panel overlooked Clinton's proffer of the disputed hearsay statements, the State's indisputable objection to those statements, and, most importantly, the trial court's explicit ruling that improperly excluded those statements. **(R. pp. 258-59)**. With a clear and unmistakable ruling on the admissibility of the testimony in question, Clinton's challenge to the trial court's exclusion of the testimony is preserved and the Panel's preservation holding is a solution begging for a problem that does not exist.

The Panel's conclusion regarding preservation suggests that the Court overlooked the manner in which the hearsay statements of the victim's oldest child were presented to the trial court below. This issue was first raised to the trial court through the State's motion *in limine*, prior to opening statements, seeking to exclude the recounting of these statements through the testimony of the officers and first responders to whom these statements¹ were made. **(R. pp. 14-36)**. During this pre-trial discussion, the

¹ To briefly remind the Court, police and investigators arrived on the scene of the mobile home community within minutes of the call to 9-1-1 by Victim's neighbors. **(R. pp. 14-31; 256-59)**. Neighbors were notified of the situation by Victim's oldest son, who was four-years-old at the time, when he went to a neighbor's home to ask for help. **(R. pp. 19; 23)**. Thereafter, in the presence of officers and first responders, and on multiple

statements—and the circumstances in which they were made—were described in detail.² Id. After explaining the content and the context of the statements, the State objected to Clinton’s counsel eliciting this testimony from officers and first responders on the grounds of hearsay. **(R. pp. 14-15)**. Ultimately, the trial court denied the State’s motion and correctly ruled that the child’s statements were admissible. **(R. pp. 35-36)**.

This is perhaps a good place pause and point out a key factor that is present in this case that may have contributed to the Court’s misapprehension of the preservation issue, which is that the situation posed by this appeal is atypical. In vast majority of criminal trials, the State is the proponent of incriminating hearsay statements that implicate the Defendant. In those cases, the Defendant is the party moving *in limine* to exclude the admittance of the hearsay statements. Further, more often than not, the objections to the statements by the Defendant are overruled by the trial court, which preliminarily allows the hearsay statements to be introduced later at trial. In those circumstances, in order to preserve the Defendant’s objection to the admittance of the hearsay statements, our appellate court case law has consistently held that the Defendant must lodge a contemporaneous and adequate objection to the statements when they are proffered

occasions, the oldest child spontaneously exclaims: “Shi’s Daddy shot my Momma.” **(R. pp. 14-15)**. Later, also to officers and first responders, the oldest child states: “Shortycake shot my Momma,” **(R. p. 17)**, and also “Jamia’s Daddy hurt my Momma.” **(R. p. 19)**.

² It was explained that Shi and Jamia are the same person. **(R. pp. 17-19)**. It was also explained that Shi’s Daddy/Jamia’s Daddy goes by the nickname Shortycake, and Shortycake’s actual name is Rashad Johnson. The solicitor stated that “Your Honor, we did verify there is a child who goes by Shi, the nickname Shi ... And that child’s daddy is in fact Rashad Johnson.” **(R. pp. 17-18)**. The trial court inquired: “Okay. And is Rashad Johnson known as Shortycake?” Id. To which the solicitor responded: “Yes, sir he is.” Id. Thus, substituting nicknames, the oldest child told officers and first responders on multiple occasions, within, at most, two hours of having been present inside the mobile home for his mother’s killing, that Rashad Johnson shot my Momma; Rashad Johnson hurt my Momma.

during the trial and in a manner that provides a reviewing appellate court with a sufficient record to determine the basis, or ground, for the objection. Again, typically the trial court does not reverse the decision it reached *in limine* without any explanation on the record.

This case is different. While not an anomaly, it is somewhat unique in the context of criminal law. Here, as the moving party, it was incumbent upon the State to renew its objection to the hearsay statements with adequate sufficiency. On this record, it cannot be fairly said that any further explanation of the content of the oldest child's statements was required to apprise the trial court, and now this Court, about the statements. See, e.g., Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (in finding that an argument as to excluded testimony was adequately proffered and preserved by reference to the discussion about that testimony that occurred during the *in limine* hearing, this Court held that “[i]t is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been ... [h]owever, **this rule regarding proffers has been relaxed where the appellate court is able determine from the record what the testimony was intended to show and that prejudice clearly exists.**”) (emphasis added) (internal citations omitted).³ The State was on notice as to the content of the statements, having presented the statements itself during its objection *in limine*. And the trial court was clearly not laboring under any misapprehension as to the content of the statements, having overseen an in-depth discussion *in limine* and then taking this

³ See also State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (“Moreover, a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony **unless the record on appeal shows fairly what the excluded testimony would have been.**”) (emphasis added).

specific issue under advisement—*overnight*—to consider case law precedent about the statements’ admission.

By holding that Clinton’s trial proffer of the hearsay statements was inadequate, the Panel has overlooked—or, more appropriately, chosen to ignore—the detailed discussion and proffer of the statements at the *in limine* stage. In doing so, it appears the panel has conflated the rule regarding renewal and adequacy of an objection following a motion *in limine* hearing, with the adequacy of a proffer of testimony that was presented during that same *in limine* hearing. That Panel’s misapprehension and subsequent conflation of those two concepts amounts to an error of law. The Panel’s opinion is alone in holding that an appellate court may not take into consideration the discussion of an issue during the *in limine* stage in its determination of the adequacy of a subsequent proffer. The reason there are no reported cases reaching that conclusion is that it is an incorrect statement of the law according to the contrary holdings of Jamison and Santiago, supra.

As will be discussed in more detail below, the cases cited by the Panel to support its preservation holding are also misplaced, because there is no indication that any of those records contain an in-depth introduction and discussion of the excluded testimony. Although the opinion is unpublished, the result reached by the Panel here is troubling, because, in addition to the fact that it reaches an incorrect result and negatively impacts Clinton’s defense, it also signifies a fundamental misapprehension of preservation concepts that could impact other, published case law going forward. The Panel’s misapprehension and disregard of the *in limine* discussion on these hearsay statements warrants rehearing and a discussion of the merits of this issue.

II. The case law cited by the Court is inapposite to the facts and procedural occurrences of this case, demonstrating a misapprehension by the Court of the arguments advanced by Clinton.

The Panel's misapprehension of the applicability of preservation rules to this case is further demonstrated by the three primary cases cited by the Court to support its conclusion that the oldest child's hearsay statements were unpreserved for appellate review. For example, the Court cites State v. Howard, 384 S.C. 212, 219, 682 S.E.2d 42, 46 (Ct. App. 2009) for the proposition that the "finding an exclusion of evidence issue unpreserved where the State objected to testimony, the trial court sustained the objection and asked the jurors to disregard the testimony, and the appellant made no objections or arguments regarding the trial court's instruction to the jury to disregard the testimony." But the facts and holdings Howard bear no correlation to the facts presented in this case.

Here, Clinton was the proponent of the oldest child's statements to first responders, and while the trial court sustained the State's renewed objection to admittance of the statements during the trial, the statements were never presented to the jury and therefore no instruction to the jury was required, much less made. The implication of the Court's citation to Howard is that Clinton was somehow required to "object" to the Court's ruling which sustained the State's objection to the proffered testimony. But such analysis is fundamentally flawed. Simply put, the concept of "objecting" to testimony has zero relevancy to the position advanced by Clinton as no corrective instruction was provided. Certainly Clinton, as the proponent of evidence, does not have an obligation to "object" to the Court's ruling on the State's initial objection. The Court's ruling constitutes a holding that preserves Clinton's argument on

appeal. Consequently, the Court's citation to Howard, as well as the explanatory parenthetical, demonstrates a clear misapprehension of the arguments by the Panel.

Similarly, the Court's citation to State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) is inapt. In Stokes, the Defendant sought to present impeachment evidence of a testifying expert.⁴ The trial court excluded the evidence at the *in limine* stage, and this Court found the appellant's argument on appeal unpreserved because he had not raised the issue again at any time during the trial. Id. The Court's citation to Stokes for this proposition overlooks three crucial occurrences in this case subsequent to the *in limine* stage. Unlike Stokes, Mr. Clinton's counsel proffered the oldest child's hearsay statements through the cross examination of Officer Ken Taylor by Clinton's counsel. (**R. pp. 258-59**). This point alone renders citation to Stokes inapposite. But even more surprising is the Court's complete disregard of the State's renewed objection to the admittance of the hearsay statements, and the trial court's ruling that the statement could not come in. (**R. pp. 258-59**) ("Solicitor: Objection. ... Trial Court: I will sustain the objection. You may ask your next question."). The Panel's holding that, notwithstanding the subsequent proffer, objection by the State, and ruling by the Court, the hearsay statements are unpreserved for appellate review, does nothing short of stand the concept of error preservation on its head. For these reasons, the Panel's citation to Stokes, as well as the explanatory parenthetical, demonstrates a further misapprehension of the arguments by the Panel.

⁴ The opinion is not clear on this point, but it can be presumed that the State moved to exclude this impeachment evidence; otherwise, it would not have been raised at the *in limine* stage of the trial.

Indeed, the Panel's application of error preservation principles to this situation begs the following questions: if the State was unaware of the content of the statements that Clinton's counsel was attempting to elicit from Officer Taylor, **what was the basis for the State's objection**? No explanation was provided by the solicitor, because it is patently obvious from the transcript which statements were being elicited. And the logical follow-up question would, of course, be: if the trial court was unaware of the content of the statements that Clinton's counsel was attempting to elicit, **on what basis did the trial court sustain the State's objection** (which likewise had no accompanying explanation)? The only logical response to both of these questions necessarily implies the adequacy of the proffer of the testimony which the Panel misapprehends and incorrectly criticizes in finding it unpreserved for appellate review.

Likewise, the Court's citation to State v. Simmons, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004), also misses the mark and is easily distinguishable. In Simmons, the Supreme Court found the appellant's due process argument regarding certain excluded impact testimony was unpreserved. Id. The Supreme Court first noted that the due process issue was never raised at trial, but then also held that, because there was no proffer of the impact testimony made during the trial, there was no evidence on the record from which the Supreme Court could determine the content of the excluded testimony. Id.

But, as discussed above, the circumstances in Simmons are vastly different than the situation presented in this case. Upon the motion *in limine* of the State, the parties discussed—at length—both the content of the oldest child's statements and the context in which they were given. The record is clear and unambiguous on this point. Yet, the

import of the Panel's holding on preservation grounds is that Clinton was required to re-lay the entire foundation of the hearsay statements during the trial. Short of a request by the trial court that such an exposition take place again outside of the presence of the jury, no mechanism was available to trial counsel to do so. However no such request was made by the trial court and, as described above, the only reasonable inference to be drawn from the colloquy at trial, see infra, is that the trial court was fully apprised of the impending testimony.

Instead, our Supreme Court has observed that “it may be good practice for [appellate courts] to reach the merits of an issue when error preservation is doubtful.” Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). “[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.” Id. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part). Moreover, the rules of appellate procedure should not be interpreted to create a trap for the unwary. Clark v. Aiken Cty. Gov't, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004)).

Respectfully, the Panel has either overlooked the subsequent proffer by Mr. Clinton's counsel—and the trial court's unequivocal ruling thereon—or misapprehended the tenets of error preservation. Under either circumstance, rehearing is warranted and the merits of Mr. Clinton's arguments should be addressed.

III. The Court overlooks or misapprehends the fact that the preservation standard the Court imposes on Clinton's trial counsel in this case would violate Rule 18 of the South Carolina Rules of Criminal Procedure.

In addition to misapplying the preservation standard in this context, the Panel's opinion is also directly contradicted by the oft-forgotten Rule 18 of the South Carolina Rules of Criminal Procedure (SCRCrimP), which provides in pertinent part that:

- (a) Argument After Ruling. Counsel **shall not attempt to further argue** any matter after he has been heard **and the ruling of the court has been pronounced**.
- (b) Argument on Objection. **No argument shall be made on objections to admissibility of evidence** or conduct of trial **unless specifically requested by the court**.

(Emphasis added).

Each of the above-recited provisions of Rule 18, SCRCrimP expressly forbid making the very arguments that the Panel criticizes trial counsel for not making, in finding the hearsay argument unpreserved. For point of reference, the colloquy between Officer Taylor and Clinton's counsel in which the oldest child's statements were presented is included once more below:

- Q: Did you ever have any conversation with any of these children?
- A: Yes.
- Q: Which one?
- A: Oldest child.
- Q: Okay. Where did you have this conversation?
- A: In the EMS truck.
- Q: Do you recall about when you had this conversation? How long you had been on the scene?
- A: I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
- Q: Do you recall the demeanor of this child?

A: He seemed – he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep there [sic] mind off maybe their thoughts or whatever.

Q: Okay. Did you take a statement from any of these children?

A: No, I did not take a statement.

Q: Was anything told to you?

[SOLICITOR]: Objection.

MR. FRICK: I didn't ask what.

THE COURT: I will sustain the objection. You may ask your next question.

MR. FRICK: Thank you, Your Honor.

(R. pp. 258-59).

Of course, this colloquy must be placed in the context of the motion *in limine* argument prior to trial. **(R. pp. 14-36).** During that hearing, it is undeniable on this record that both the content of the child's statements, as well as the context in which they were made, was fully explored, discussed and debated. Therefore, it is indisputable that the trial court and the parties were fully apprised on the statements that Clinton's counsel attempted to elicit in the above colloquy.

Moreover, once the trial court sustained the State's objection, Clinton's counsel was not permitted to argue the point any further under the express prohibitions of Rule 18(a) and (b), SCRCrimP. Notwithstanding, the clear ruling of the trial court and Rule 18's restriction on further inquiry, this Court's opinion and preservation holding would impose an impossible requirement to achieve by conscientious trial counsel.⁵ Contrary to

⁵ See also State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (recognizing the well-settled rule that "[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again") (international quotations omitted); State v.

the trial court's unequivocal direction to "ask your next question," the Panel's opinion would require counsel to both further argue its position (after the trial court had already ruled), as well as argue its position on an objection to the admissibility of evidence without a specific request of the trial court and over a specific direction to the contrary. Respectfully, that is an untenable position in which to put practitioners. Because the Court overlooked the application of Rule 18, SCRCrimP in its analysis of the adequacy of Clinton's proffer of the hearsay statements, the Panel should grant rehearing on this basis and address the merits of the arguments advanced by Clinton as to the trial court's exclusion of the hearsay statements.

IV. Because the Court overlooked or misapprehended the circumstances surrounding the proffer of the hearsay statements below, the Court erred in failing to address the merits of the arguments advanced by Clinton on appeal.

- a. The Court misapprehended the fact that the oldest child's statements qualified as both excited utterances and present sense impressions and should have been admitted at trial.

Because the Court disposed of the primary issue in this appeal on preservation grounds, the Court overlooked the merits of evidentiary issues raised by Clinton in this appeal. As stated above, rather than restate Clinton's arguments regarding the trial court's exclusion of the oldest child's statements to first responders in detail herein, Clinton incorporates by reference, as if stated verbatim herein, the arguments advanced in each of the briefs previously filed in this case. In summary, however, the Court's misapprehension of the application of the rules of preservation to Clinton's proffer of

Liberte, 336 S.C. 648, 652 n.1, 521 S.E.2d 744, 746 n.1 (Ct. App. 1999) (holding that once a trial judge has overruled an objection, there is no need to renew objections to preserve the issue for appeal).

these statements caused the Panel to overlook meritorious arguments that require reversal and a new trial for Clinton.

Shortly after being present in the mobile home and witnessing his mother's murder, the Victim's oldest child— a four-year-old child at the time—identified a person by name as being responsible who was not Clinton, and, in fact, was a person who was not investigated, charged, or tried for Victim's death. The child's statements were made spontaneously to multiple first responders, and although the statements changed each time they were made, the person identified by name, nickname, and association (*i.e.*, "Shi" and "Jamia," and "Shi's Daddy/Jamia's Daddy" and "Shortycake") remained the same, unfailingly identifying the same person each time. As this identification meets the requirements of both the excited utterance and/or present sense impression exceptions to the rule against hearsay, as discussed in detail in the briefs, the trial court's ruling that the statements could not be introduced through the officers or first responders who witnessed the declarations was an error of law that warrants reversal. The Panel erred in overlooking and failing to apply the controlling case precedent of State v. M. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002). Accordingly, the Panel should reconsider its misapprehension of the preservation rules, consider the merits of the hearsay arguments advanced, and reverse the trial court, remanding this case for a new trial.

- b. The Court overlooked the fact that the circumstantial evidence presented by the State at trial did not rise to the level of being substantial.

Because the State presented no direct evidence, the circumstantial evidence presented had to rise to the level of being substantial and reasonably tend to prove the guilt of Clinton. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). This Court did not disagree with Clinton's assertion that the State failed to produce any direct

evidence of his involvement in Victim's murder. 2016-UP-206 at 1-2. However, the Court overlooked or misapprehended the sheer dearth of evidence presented by the State. This error is compounded by the fact that the principal circumstantial evidence relied upon by the State was a hearsay comment itself, admitted against Clinton as an admission by a party-opponent. However, the circumstantial evidence presented by the State did nothing more than raise a mere suspicion of Clinton's involvement in Victim's murder, which is insufficient under the established case law of this state. See, e.g., State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) ("Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty.") (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

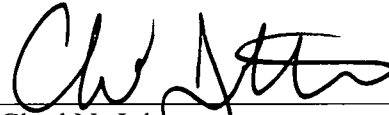
Lastly, the Court has misapprehended recent Supreme Court case law on directed verdicts⁶ to imply that this Court's review of the denial of a directed verdict motion should result in mere cursory review and a rubber stamp affirm. The cases cited by the Court in its opinion are distinguishable from the facts of this case, where no evidence presented by the State placed Clinton in Victim's home with a motive to commit murder, and the State relied exclusively on the self-serving testimony of a co-defendant. See Lollis, 343 S.C. at 584, 541 S.E.2d at 256 ("'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.") (citing (State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963))); see also State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) ("It is not sufficient that they create a probability, though a strong one....").

⁶ E.g., State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) and State v. Pearson, Op. No. 27612 (S.C. Sup. Ct. filed Mar. 23, 2016) (Shearouse Adv. Sh. No. 12 at 13, 23), cited in the Court's 220 Opinion. 2016-UP-206 at 2.

CONCLUSION

For the reasons provided herein, Clinton respectfully requests that the Court grant rearing in this matter, address the merits of the evidentiary arguments raised in this appeal, and reverse and remand this case for a new trial.

Respectfully submitted,



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June 27, 2016

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of Appellant Devatee Clinton's **Petition for Rehearing** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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This 27th day of June 2016

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JUN 27 2016

SC Court of Appeals

*ALSO ADMITTED IN TX

**ALSO ADMITTED IN WASHINGTON, D.C.

June 27, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *The State v. Devatee Clinton*;
Appellate Case No. 2014-000594


Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant Devatee Clinton's **Petition for Rehearing** of the Court's May 11, 2016 Opinion, No. 2016-UP-206, along with a Certificate of Service. Please file-stamp the extra copy and return it via my courier.

Thank you for your time and consideration. If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Chad Johnston

Enclosures

cc: Robert M. Dudek, Esquire (via U.S. Mail)
William E. Salter, III, Esquire (via U.S. Mail)
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