STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-001958

THE STATE, ...RESPONDENT,

v.

TERRANCE LEMAN CALLOWAY, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant failed to preserve the issue of whether the trial court erred in allowing alleged hearsay testimony because he neither objected to nor did he ask that the statement be stricken. Further, no reversible prejudice emanated from its admission.

STATEMENT OF THE CASE

Appellant was indicted for kidnapping and first degree criminal sexual conduct (CSC). He proceeded to trial before the Honorable Alison Renee Lee and was convicted by a jury of kidnapping. The jury acquitted him of CSC. Judge Lee sentenced him to five years' imprisonment.

STATEMENT OF FACTS

Terrance Leman Calloway (Appellant) was charged with kidnapping and CSC and proceeded to a jury trial. In her testimony, Sherry Williams (Victim) explained that on the night of the incident, she went to a club briefly but decided she wanted to go to Burger King. (Tr.48.) Appellant offered to take her, and they left the club in his car. (Tr.49.) However, instead of driving her to Burger King, Appellant forced her to perform oral sex on him. (Tr.49.) Victim stated Appellant threatened to kill her and her family if she did not comply. (Tr.49.) Appellant eventually stopped the car and made Victim get out. (Tr.51.) Victim described how Appellant then "pulled [her] pants down and bent [her] over [and] put his penis up in [her] and started having sex." (Tr.51.) Victim testified this continued until Appellant was startled by an oncoming vehicle, at which point they reentered the vehicle and Appellant forced her to resume oral sex. (Tr.51.) Eventually, Victim was able to jump out of the car and fled to the Burger King parking lot where she found her aunt, Tessie Singleton. (Tr.53.) Singleton testified she was in the Burger King drive-thru line when she saw Victim running toward her, crying and hysterical. (Tr.81.) Victim told her aunt what Appellant had done to her but refused to get in her car. (Tr.82.) Instead, Victim ran to another aunt's house, where she called 911. (Tr.53.)

Sandy Purdy then testified for the State. Purdy worked for Anderson County 911 in an administrative position with Computer Aided Dispatch (CAD). (Tr.94.) She handles the records and historical reports, and had reviewed a CAD report on Victim's call. (Tr.94.) Purdy testified that Victim called to report a sexual assault. (Tr.94–95.) Purdy continued to explain which police department was contacted based on the call and Appellant objected based on hearsay.[1] (Tr.98.) The trial court overruled the objection, stating "as long as there is not a discussion as to

[1] Much of the testimony at trial focused on the county where the incident actually occurred because the Appellant repeatedly challenged venue as improper.

what was said and who - - who said it." (Tr.98.) The State then asked again what the call was about, and Appellant objected based on hearsay. (Tr.98.) When the State clarified it was simply revisiting Purdy's prior testimony, Appellant reframed the objection as "based on asked and answered." (Tr.99.) The court allowed Purdy to respond and she testified: "It's documented that the caller stated that she had been raped by a Terry Calloway . . . ." (Tr.99.) Appellant did not object.

The State rested, and Appellant rested without presenting any evidence. After closing arguments and the jury charge, the jury ultimately found Appellant guilty of kidnapping but not guilty of CSC. (Tr.246–47.) Judge Lee sentenced him to five years' imprisonment. (Tr.262.)

ARGUMENT

Appellant failed to preserve the issue of whether the trial court erred in allowing alleged hearsay testimony because he did not object to nor ask that the statement be stricken. Further, no reversible prejudice emanated from its admission.

At the outset, this issue is unpreserved because Appellant neither objected to the statement he now challenges nor did he move to have it stricken. Although Appellant objected on the basis of hearsay twice during the first part of Purdy's direct examination, the trial court's ruling clarified Purdy could answer "as long as there's not a discussion as to what was said and who – who said it." When the solicitor asked her "what was the call about again," Appellant first objected on hearsay grounds and then changed the basis to asked and answered. The trial court allowed Purdy to answer and she stated, "It's documented that the caller stated that she had been raped by a Terry Calloway in a – and he left in a white car, unknown direction of travel." Appellant did not object or ask that the statement be stricken from the record despite the fact that the testimony included what was said and who said it—in direct contravention of the court's prior ruling on hearsay. Absent a contemporaneous objection to the statement as clearly violative of the court's prior ruling on hearsay or a motion to have it stricken, there is no ruling for this court to review. *State v. Frank*, 262 S.C. 526, 534, 205 S.E.2d 827, 830 (1974) ("The general rule is that the failure to object to, or failure to move to strike, testimony renders such competent and accordingly entitled to be considered to the extent it is relevant."); *see State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court.").

Even assuming arguendo the issue was preserved and had merit, no prejudice emanated from the statement's admission. In determining whether an error is harmless, the question before the appellate court is not "whether the State proved its case beyond a reasonable doubt, but

whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). Accordingly, this analysis is not governed by a definite rule of law, but instead the materiality and prejudicial character of the error must be determined from its relationship to the specific case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). An error is harmless where it reasonably could not have affected the result of the trial. *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475.

Importantly, the testimony at issue is addressed solely to the issue of criminal sexual conduct—a charge for which Appellant was acquitted. Purdy's statement does not corroborate Victim's testimony that she was unlawfully confined by Appellant but only reiterates her statements about being raped. To the extent Appellant claims the testimony bolstered Victim's credibility, the jury's decision to acquit Appellant of criminal sexual conduct belies that assertion. Further, the testimony Appellant now challenges was cumulative—as Appellant tacitly acknowledged when he ultimately objected to this statement as "asked and answered." Purdy testified without objection that a 911 call was received concerning Victim in relation to a sexual assault. (Tr.94–95.) Appellant nevertheless seeks to draw a distinction in that Purdy mentioned Appellant's name in her subsequent statement. However, Purdy's statement was not the only one that identified Appellant as the perpetrator. Victim identified Appellant as her assailant and Singleton, who spoke with Victim immediately following the event and prior to her calling 911, stated Victim informed her Appellant had kidnapped and assaulted her. (Tr.82.) Thus, the statement is both cumulative to other testimony and unrelated to the conviction Appellant challenges before this Court. Accordingly he suffered no prejudice from its admission.

CONCLUSION

Appellant failed to object to the specific testimony he now challenges and his argument is therefore unpreserved. Regardless, there was no reversible prejudice from the statement because it is unrelated to the conviction he now asks this court to review—kidnapping. The State therefore asks that this Court affirm his conviction.

Respectfully submitted,

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July 17, 2017

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PROOF OF SERVICE

I, Angela Bennett, 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:

Ms. Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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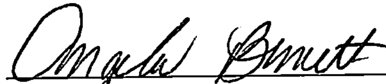
I further certify that all parties required by Rule to be served have been served.

This 17th day of July, 2017.



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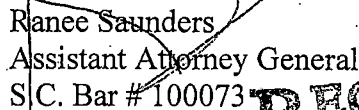
RE: <u>State v. Terrance Leman Calloway</u>
Appellate Case No. 2016-001958

Dear Ms. Hudgins:

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

Sincerely,



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Enclosures

cc: Honorable Jenny A. Kitchings
Victim Advocacy Division

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