

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SEP 27 2017

S.C. SUPREME COURT

APPEAL FROM LEE COUNTY
General Sessions Court
Clifton B. Newman, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-236
(S.C. Ct. App. filed June 7, 2017)

The State,

Respondent,

v.

Dennis E. Hoover,

Petitioner.

APPENDIX

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ATTORNEYS FOR PETITIONER

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Dennis E. Hoover, Appellant.

Appellate Case No. 2015-000175

Appeal From Lee County
Clifton Newman, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-236
Heard April 18, 2017 – Filed June 7, 2017

AFFIRMED

Jack B. Swerling, of Columbia, and Katherine Carruth
Goode, of Winnsboro, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blich, Jr., both of
Columbia, and Solicitor Ernest Adolphus Finney, III, of
Sumter, for Respondent.

PER CURIAM: Dennis E. Hoover appeals his conviction for assault and battery
in the first degree, arguing (1) the trial court erred in admitting a medical
examination report under the business records exception to the rule against

hearsay; (2) the trial court erred in allowing Justin Boyce to testify concerning Hoover's feelings towards his younger brother, Marshall Boyce; (3) the trial court erred in allowing inflammatory comments and questions by the solicitor during his cross-examination of Hoover; and (4) the cumulative prejudice from the trial court's errors denied him a fair trial. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting a medical examination report under the business records exception to the rule against hearsay: Rule 803(6), SCRE (providing the business records exception to the rule against hearsay: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible."); *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) ("Medical records are admitted routinely as business records."); *State v. Key*, 277 S.C. 214, 216, 284 S.E.2d 781, 783 (1981) (finding the business record in that case represented a "purely factual observation, i.e. the physical path of the bullet"); *id.* ("It is no differen[t], for example, from a report describing the location of damage to a motor vehicle."); *id.* (holding the record was properly admitted into evidence because it did not include any subjective opinion or judgment).

2. As to whether the trial court erred in allowing Justin Boyce to testify concerning Hoover's feelings towards his brother: Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."); Rule 801(c), SCRE (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE (providing hearsay is generally not admissible); *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result."); *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014) ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained.").

3. As to whether the trial court erred in allowing inflammatory comments and questions by the solicitor during his cross-examination of Hoover: *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide."); *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.").

4. As to whether the cumulative prejudice from the trial court's errors denied him a fair trial: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

AFFIRMED.

WILLIAMS and KONDUROS, JJ., and LEE, A.J., concur.

STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from Lee County
Court of General Sessions
Clifton B. Newman, Jr., Circuit Court Judge

Appellate Case No. 2015-000175

RECEIVED
JUN 22 2017
SC Court of Appeals

The State,

Respondent,

v.

Dennis E. Hoover,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, appellant, Dennis E. Hoover, respectfully requests rehearing of his appeal, decided June 7, 2017 (Unpublished Opinion No. 2017-UP-236), based on principles of law and evidence overlooked or misapprehended by the Court of Appeals, as follows:

I. Admission of Medical Report and Related Testimony.

Appellant challenged the admission of hearsay evidence from a report of a medical examination and testimony about the contents of that report, as inadmissible under the business records exception to the rule against hearsay, Rule 803(6), SCRE.

The Court's decision overlooked the portion of Rule 803(6) that provides subjective opinions and judgments contained in such records are not admissible. The Court misapprehended the nature of the information contained in the medical report as not containing subjective opinions and judgments. *Cf. In re Care and Treatment of Harvey*, 355 S.C. 53, 62, 584 S.E.2d 893, 897 (2003) (log of treatment center for juveniles with sexually aggressive behaviors was not admissible under business records exception because it contained subjective opinions and judgments about the progress of the committed patient's treatment and behaviors); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) (appraiser's report of the value of a home was inadmissible under Rule 803(6) because it contained the appraiser's subjective opinion as to that value); *see also South Carolina Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 147 n.11, 705 S.E.2d 425, 430 n.11 (2011) (incident report containing officer's observations was inadmissible under the exclusion for subjective opinions and judgments contained in both Rule 803(6) and Rule 803(8), SCRE). The medical report contained information supplied by the medical professional who examined appellant when he was taken into custody. The observations of the medical professional in answer to questions concerning what symptoms appellant displayed were based on that professional's subjective medical judgment concerning his symptoms. The Court should rehear the issue of the error in admitting this report and the testimony concerning the contents of the report, evaluate the prejudicial effect of this evidence, and reverse.

II. Admission of Testimony Without Foundation Based on Personal Knowledge.

Appellant challenged the admission of testimony of the alleged victim, Justin Boyce, concerning appellant's feelings toward his brother, Marshall Boyce, because the

testimony was hearsay and not based on a proper foundation, Justin Boyce's own personal knowledge. See Rules 602, 802, SCRE; *State v. Frazier*, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004); *South Carolina Dep't of Soc. Servs. v. Jennifer M.*, 404 S.C. 269, 287 n.12, 744 S.E.2d 591, 600 n.12 (Ct. App. 2013); *Watson v. Sellers*, 299 S.C. 426, 432, 385 S.E.2d 369, 372 (Ct. App. 1989); *Ellison v. Pope*, 290 S.C. 100, 103, 348 S.E.2d 367, 369 (Ct. App. 1986). The defense objected on both hearsay and foundation grounds, but the trial court allowed the testimony without requiring the proper foundation. The Court of Appeals's decision overlooked the absence of any evidence to establish that the matter about which Justin Boyce was testifying was based on his own personal knowledge, rather than what his brother, Marshall, had told him.

After the witness had twice indicated his knowledge was based on what his brother told him, and after the defense had stated the hearsay and foundation bases for its objections, the following exchange occurred:

Q All right. You know if that upset Dennis Hoover?

MR JONES: Objection, Your Honor.

MR. GENTRY: If he knows.

THE COURT: Overrule the objection.

MR. GENTRY: Do you know ---

THE COURT: You've asked the question. He can answer the question.

BY MR. GENTRY:

Q Okay, go ahead (sic) answer, if you know.

A Yes, sir, it upset him.

Tr. p. 247, line 14 – p. 249, line 5. This colloquy establishes that the basis for the witness's knowledge, other than what he had been told, was never established. The trial court overruled the objection without requiring the prosecutor to lay a foundation, and the witness was allowed to provide the substantive testimony without establishing a proper foundation – the witness's personal knowledge. The Court of Appeals misapprehended that the witness's testimony did not establish he had personal knowledge. His testimony was inadmissible hearsay under Rules 801 and 802, SCRE, and was not within any exception to the rule against hearsay.

The Court further misapprehended the substantial and harmful nature of the error. Only two people knew what transpired in the convenience store bathroom where the altercation took place. Each claimed the other instigated the attack. Investigators failed to gather and preserve evidence that could have corroborated appellant's account. The state's theory was that appellant harbored ill will toward the Boyces and that the confrontation was instigated by appellant as the result of that ill will. Justin Boyce's inadmissible hearsay testimony concerning appellant's feelings was substantially prejudicial, since there was no evidence to corroborate either appellant's account or Boyce's account of how the altercation came about. The Court should rehear this issue, find both error and prejudice, and reverse.

III. Inflammatory Questions and Comments of Prosecutor.

Appellant challenged the inappropriate and improper questions and comments made about his character during his cross-examination by the prosecutor. The Court did not address this claim of error and its resulting prejudice, citing the principle that there is no issue to decide where the appellant received the relief requested and the principle that

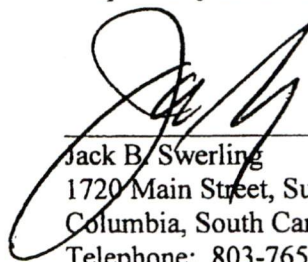
an issue cannot be raised for the first time on appeal. The Court of Appeals overlooked the reasons this claim of error was preserved, as set out in detail in the Final Reply Brief of Appellant, incorporated herein by reference. The basis for the defense's objections was apparent from the context. *See* Rule 103(a)(1), SCRE. To the extent the Court of Appeals's ruling is based on the lower court's striking of an offending question, that action struck only the question, not the answer it elicited. The line of questioning was completely inappropriate and the answer highly prejudicial. The Court should rehear this issue, find it properly preserved, and find prejudicial error requiring reversal.

IV. Cumulative Prejudice.

If the Court rehears the appeal and finds errors, it should also rehear the issue of the cumulative prejudice resulting from the erroneous evidentiary rulings and the prosecutor's improper questions and comments, the cumulative effect of which was to deny appellant his due process right to a fair trial. The state's case was weak, involving the conflicting testimony of the alleged victim and the accused, with no corroborative evidence of either account. In the first two claims of error, the jurors heard extraneous matters that were not properly admitted into evidence. Those matters were prejudicial because of their tendency to support the state's theory of the case. In the third claim of error, the jury heard inflammatory comments by the prosecutor about the accused and answers elicited as the result of improper questions, and the comments, questions, and answers could have inflamed the prejudices of the jurors and influenced their verdict based on improper considerations. Although objections to some of the comments were sustained, the jury heard them nonetheless. The jury heard so many improper and

extraneous matters that the likelihood of unfair prejudice is great. If the court rehears this appeal and finds errors, it should also rehear the issue of cumulative error.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing, by mail, postage prepaid, to counsel for respondent, Assistant Attorney General William M. Blicht, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on June 22, 2017.



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The South Carolina Court of Appeals

The State, Respondent,




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Appellate Case No. 2015-000175

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Jack B. Swerling, Esquire
Katherine Carruth Goode, Esquire
William M. Blich, Jr., Esquire

FILED

August 28, 2017

Ernest Adolphus Finney, III, Esquire
The Honorable Clifton Newman