

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

Opinion No. 2017-UP-425 (S.C. Ct. App. filed November 15, 2017)

Appellate Case No. 2013-000207

THE STATE,RESPONDENT

v.

ESAIVEUS FRANTREZ BOOKER,APPELLANT.

RETURN TO PETITION FOR REHEARING

On November 15, 2017, this Court issued an unpublished opinion that affirmed Appellant Booker's convictions for seven counts of attempted murder and one count of second degree assault and battery by mob. *State v. Booker*, Op. No. 2017-UP-425 (S.C. Ct. App. filed November 15, 2017). On November 29, 2017, Booker submitted a Petition for Rehearing and by letter dated December 6, 2017, this Court requested that Respondent (the State) submit a return within ten days of the date of the letter. This return in opposition to the petition for rehearing now follows. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. Indeed, in regard to each of Booker's four issues, the Court employed a straightforward application of existing precedent to the facts and circumstances of Booker's case in finding no reversible error. Rehearing should be denied.

Issue One

In his appeal to this Court, Booker argued the trial court erred in allowing testimony by State's witnesses using the term "gang" in reference to the investigation of his case because: (1) the solicitor failed to lay the proper foundation that he was a gang member; (2) the reference was inflammatory and unduly prejudicial under Rule 403, SCRE; and (3) the reference constituted improper character evidence under Rule 404, SCRE. He complained that contrary to the solicitor's claim during the pretrial motion *in limine*, none of the victims gave testimony identifying the codefendants as being involved in a gang, much less any particular gang, and that as a result the solicitor should not have been allowed to call Investigators Brown and Whitlock to testify they consulted in the investigation due to suspected gang involvement. Booker further complained that Brown was allowed to testify regarding gang signs shown in photographs of some of the codefendants. He argued all of this testimony should have been excluded by the trial judge for a lack of foundation and under Rules 403 and 404, SCRE. (Brief of Appellant, p.20-p.21).

This Court found no error, relying on the principle discussed in *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) that the admission of improper evidence is harmless when it is merely cumulative to other evidence admitted during trial. The Court accurately noted that evidence referencing gangs was admitted numerous times without objection from Booker,

and therefore testimony from Investigator Brown referencing the term “gang,” even if error, was merely cumulative and therefore harmless. The State continues to maintain the positions argued in its Final Brief that the trial court properly admitted the testimony from Brown. In regard to laying a proper foundation, the State merely elicited testimony from Investigator Brown regarding suspected gang activity which helped move the investigation forward from one suspect to the next. The only foundation required was Brown’s own testimony that he was able to make these investigative connections due to his extensive knowledge about gangs in Greenville County. In regard to Rule 403, Booker did not challenge relevance in his argument, instead claiming the testimony should have been excluded as inflammatory and unduly prejudicial. However, the probative value of the testimony clearly outweighed any danger of unfair prejudice; therefore, it was properly admitted. In regard to Rule 404, the State did not offer any testimonial evidence that Booker was in a gang; therefore, no character evidence was offered and there was no basis for exclusion under the Rule. (Final Brief of Respondent, p.25-p.32). Additionally, the State submits this Court properly affirmed on the alternative basis that the testimony from Brown was cumulative and therefore harmless.

At trial, after calling all of the victims of the shooting as well as numerous officers involved in the immediate response and the subsequent investigation leading to the arrest of Williams and his codefendants, the State called Investigator Brandon Brown to the stand. Booker raised an objection as to how that witness would be identified to the jury. He explained that Brown is in the gang investigation unit and objected to Brown being identified this way. Booker complained that to do so would imply Brown was called in because police were investigating a gang, and that the State had not laid any foundation from any witness that the defendants were actually in a gang. The trial judge noted the objection for the record and the

fact that all codefendants had joined in the objection; however, the objection was overruled. (R.p.472, line 7-p.473, line 23).

Investigator Brown then took the stand. He testified he was a “gang investigator” and that his responsibilities include maintaining all gang intelligence throughout Greenville County and knowing the players and entities involved as they pertain to gangs and violent crime. Brown explained he is often called to assist if an incident might involve a gang. He responded to the attack at the LC and began gathering information to see if any of his gang knowledge would help the investigation. Brown learned about the prior incident at another location involving what people were calling the “Folk Boys” who all showed up together wearing black. Several witnesses mentioned the name “Mikey” but the name did not stand out as someone he associated with a gang. Meanwhile, another investigator learned an individual named Brandon Edwards had been shot at the previous location. Brown testified that Edwards’ name definitely had significance because he knew Edwards to be associated with several notable individuals in Greenville, particularly Young. He described Edwards and Young as possibly “family.” (R.p.475-p.479). Young objected to the testimony “involving this whole gang thing” and testimony about himself and Edwards. He argued it was prejudicial without a foundation. The objection was overruled and Brown continued explaining the investigation. (R.p.479, lines 14-23).

Brown next looked at Young’s Facebook page, particularly a public conversation he had been having with Williams and a photo he posted that was titled “The Family.” The photo came in without objection from Booker, Williams, or Young, and over the objection of Sadler. Brown testified they used the photo to start determining exactly which individuals associated together. After many hours and days of trying to identify and track down people in the photo, Brown was

able to interview Johnson, who he said was very forthcoming with the legal names and nicknames of people in the photo. This led them to Mack, who was involved with Young either romantically or as a friend. Mack shared more useful information about names and vehicles, and she told Brown she saw several guns in the residence where she and Young were staying. Mack also revealed that her roommate, Kerns, was involved with Booker, which was a new name that led Brown to more people from the photo. Mack told Brown the guns had been brought into the residence by Booker in a black duffle bag. Based on all the new information, Brown obtained an arrest warrant for Williams and subsequently got a search warrant for the residence. When executing the search warrant, the police found paperwork belonging to Young as well as two canvas gun holsters. Although Kerns was originally uncooperative, she eventually helped the police locate the guns Mack had seen in the residence. (R.p.480-p.494).

On cross-examination by Booker, Brown admitted he was familiar with the Hardliners. He testified he had seen the photograph of them flashing hand signs and admitted that is something that can be common among gang members. Brown also admitted the police found weapons inside some of the victims' vehicles. (R.p.494-p.499). Under redirect examination from the solicitor, Brown identified three photographs of groups of people who were making hand signs he recognized as being associated with gangs. The photos were admitted over objection and Brown identified Williams, Booker, and Hogan in those photos. (R.p.499-p.504). The trial judge then excused the jury to allow the defendants to argue their specific objections to the photos on the record. Counsel for Young renewed his objection to the prejudicial nature of gang information and the objection was overruled. The trial judge noted the photographs came from Young's cell phone. (R.p.499-p.507).

In his Petition for Rehearing, Booker contends that: “In addition to erring in finding the gang evidence admissible, this Court further erred in finding that the admission of the gang evidence was harmless because the evidence was merely cumulative to other evidence.” He argues “counsel was not required to object to every mention of the term ‘gang’ in order to prevent a finding that the evidence tying the codefendant to a gang was ‘merely cumulative.’” Booker contends further objection in certain circumstances would have been futile because the trial judge made clear his intention to allow the gang evidence, and further contends objection in other circumstances was not necessary because: “The mention of the term ‘gang’ by other members of law enforcement was in reference to their general duty assignments and never tied to this specific investigation.”

None of these arguments were made to the trial court as a basis for Booker not raising further objections to the evidence referencing gangs that was admitted throughout the trial. Indeed, Booker never asked the trial court if he would somehow be excused from making further objections to the term “gang” as the trial proceeded. Officer Michael Moore testified he served as a “cover officer” due to the violence the day of the shooting, noting he was assigned to the “gang task force.” (R.p.437). While Brown was still on the stand, Booker independently raised the issue of gangs during his cross-examination by suggesting the victims of the shooting were themselves part of a gang called the Hardliners. (R.p.452-p.457). Similarly, under cross-examination from codefendant Young, codefendant Larry Johnson repeatedly used the term gang, including a reference to Brown as a “gang investigator.” (R.p.545-p.549). Investigator William Whitlock also testified he assisted in “gang investigations” when describing his role in Booker’s case. (R.p.466, lines 16-18). No objections were raised to this specific “gang” related

testimony. Thus, this Court properly concluded Brown's use of the term "gang" could not have been prejudicial because it was cumulative.

Issue Two

In his appeal to this Court, Booker argued the trial court erred in admitting two photographs of him and his codefendants making "gang signs" because the solicitor failed to lay the proper foundation for their admission, they were not relevant to the facts at issue in the case, and they were unduly prejudicial. This Court found no error, relying on the principle set forth in *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) that when an appellant opens the door to evidence at trial, he may not complain of prejudice from its admission. The State agrees and continues to maintain the positions argued in its Final Brief that: (1) Booker cannot complain of prejudice because he opened the door to admission of the photographs through his own cross-examination of Investigator Brown; and (2) the photographs were appropriately admitted because they were properly authenticated pursuant to Rule 901, they were relevant to facts in issue in the case, and their probative value outweighed any danger of unfair prejudice. (Final Brief of Respondent, p.33-p.38).

In his Petition for Rehearing, Booker argues it is "most important to note that the trial judge had already admitted gang related evidence, over objection, during Brown's direct examination," when Booker then cross-examined Brown about whether the victims were "flashing gang signs" in a photograph from the club where the original altercation took place. Yet none of the "gang related evidence" previously admitted related specifically to gang signs or testimony that anyone in photographs might be displaying gang signs. Booker's cross-examination did, and effectively opened the door to the photographs of the codefendants and

testimony about their gang signs. This Court properly found no error and properly affirmed pursuant to *Robinson*.

Issue Three

In his appeal to this Court, Booker argued the trial court erred by effectively coercing codefendant Bruster to testify against him with a threat to vacate Bruster's guilty plea after finding Bruster's initial testimony violated his plea agreement, which left Bruster facing a sentence of life without parole. He complained that the trial court's actions amounted to enforcement of a portion of the plea negotiations that never existed.

This Court found no error, relying on the principle discussed in *State v. Stanley*, 365 S.C. 24, 30-32, 615 S.E.2d 455, 458-59 (Ct. App. 2005) and *State v. McKay*, 89 S.C. 234, 236, 71 S.E. 858, 859 (1911) that the actions were appropriate under the trial court's duty to supervise and control witnesses. The State continues to maintain the position argued in its Final Brief that the trial judge acted well within his discretion in advising Bruster of the very real consequences of his actions under contract principles, as well as in doing so in the performance of his duty to supervise and control witnesses. (Final Brief of Respondent, p.38-p.40).

In his Petition for Rehearing, Booker claims the *Stanley* case is not analogous to his case. He argues that in his case, there was no perjury by Bruster and repeats the claim from his Final Brief that the trial judge enforced a non-existent term of the plea agreement. However, a witness does not have to offer perjured testimony to be in violation of a plea agreement to testify truthfully at trial. Whether it is actual perjury or a refusal to testify truthfully due to a sudden and convenient loss of memory, the trial court still has a duty to supervise and control witnesses at trial by ensuring they know the consequences of failing to comply with the terms of their agreements. Here, the trial court's actions in this regard were entirely appropriate. As for

Booker's nonsensical and speculative contention that there was no plea negotiation or requirement that Bruster testify for the State, such a circumstance would have left Bruster *entirely free from coercion* by the trial judge rather than under a threat. Bruster could have simply refused to testify, secure in his knowledge that no plea negotiations requiring his testimony were in existence. He and his attorney could then protect his rights if and when the trial court attempted to vacate his plea and proceed to trial. Instead, Bruster, upon advice of counsel, elected to retake the stand and testify truthfully about the attack. This Court properly found no error in the trial court's actions and properly affirmed pursuant to *Stanley*.

Issue Four

In his appeal to this Court, Booker argued the trial court erred in refusing to excuse two jurors and in denying his motion for a mistrial based on juror misconduct in the form of premature jury deliberations. He contended that where a juror allegedly made the comment that "he's going down," it implies that the juror intended to find at least one of the defendants guilty and therefore had been engaged in deliberations. Booker went on to claim: "Their deliberations did affect fundamental fairness, as they not only indicate a premature discussion in the case but a premature decision in the case against the defendants." Focusing on the dictionary definition of "deliberate," Booker complained that the trial court's attempt to follow the procedure set forth in *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), was insufficient to make the requisite findings. Nevertheless, he argued the testimony the trial court did elicit from the questioned jurors indicated they were discussing the case, which met the definition of "deliberate." He argued he was denied a fair trial because it was clear the jurors were discussing the case in spite of the judge's instructions and because "it was apparent from the discussion that was overheard

that at least some of the jurors had made a decision regarding guilt or innocence [] well before the conclusion of the case.” (Brief of Appellant, p.34-p.37).

This Court found no error, relying on our Supreme Court’s opinion in *Aldret*, 333 S.C. at 312-16, 509 S.E.2d at 813-15, and the procedure established therein to address an allegation of juror misconduct that arises during trial. The State continues to maintain the position argued in its Final Brief that the trial court followed the proper procedure as set forth in *Aldret* to explore the allegation of juror misconduct and that as a result, the trial judge committed no error and Booker suffered no prejudice. (Final Brief of Respondent, p.34-p.38).

In his Petition for Rehearing, Booker argues that under the circumstances of the case, the trial court’s efforts to follow the procedure in *Aldret* were insufficient to make the requisite findings. The State disagrees and submits the *Aldret* procedure was followed in its entirety. Upon following this procedure, the trial court concluded Booker was not entitled to a mistrial. He failed to establish the jury engaged in premature deliberations in his case and failed to establish he suffered any prejudice as a result of the brief conversations described by the jurors during voir dire. This Court properly found no error in the procedure or the denial of Booker’s motion for a mistrial, and properly affirmed.

Conclusion


WHEREFORE, based on the foregoing arguments and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Booker's petition for rehearing.

Respectfully submitted,

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December 14, 2017

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PROOF OF SERVICE

I, Anne Mueller, Legal Assistant, hereby certify that I have served the within *Return to Petition for Rehearing*, dated December 14, 2017, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Laura R. Baer, Appellate Defender
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 14th day of December, 2017.


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State v. Esaiveus Frantrez Booker
Appellate Case No. 2013-000207

Dear Ms. Baer:

I am enclosing one (1) copy of the Return to Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
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JBA/ab
Enclosures

~~cc: Honorable Jenny A. Kitchings (original enclosed)~~
Victim Advocacy Division