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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lee County
Honorable Clifton B. Newman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-000175

The State, Respondent,

vs.

Dennis E. Hoover, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. The trial court properly allowed the victim to testify to information within his personal knowledge. Further, even if the testimony could be improper and not based on personal knowledge, Appellant opened the door to the testimony, and, therefore, the State was allowed to present the testimony even if otherwise inadmissible.

III. All of the comments Appellant complains of were either stricken from the record by the trial court or never had an objection ruled on by the trial court and, therefore, are not preserved for review on appeal.

IV. Appellant did not raise an issue related to cumulative prejudice at trial and so the issue is not preserved for review on appeal. Further, none of the issues presented are error and, therefore, their cumulative nature cannot be prejudicial error which denied Appellant a fair trial.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On January 4, 2014, the victim, Justin Boyce, entered the restroom at a gas station prior to meeting friends to go duck hunting. (T.131-132; R. 46-47). Shortly thereafter, Appellant entered the same restroom, where he waited for the victim, attacked the victim as he exited the stall, and seriously cut the victim seven times. (T.210-212; R. 112-114).

A video summary of the variously positioned cameras detailed the early morning of January 4, 2014. (State's Exhibit 3). The victim entered the gas station convenience store and a white pickup driven by Appellant entered the parking lot. Appellant then entered the store. At approximately 4:28 in the morning, the victim is seen heading to the restrooms of the store. Roughly five minutes later Appellant is seen heading to the same restrooms. About two minutes later the victim is seen leaving the restroom. (State's Exhibits 2 and 3).

Leana Adams, a store employee on duty the morning of January 4, saw a man run out of the bathroom. The man was cut and bleeding. He asked her to call 911, saying he needed help because "he's trying to kill me." (T.172; R. 74). She testified the man was "very distraught" and there was a considerable amount of blood. (T.178; R. 80). Adams called 911 and both police and medical personnel arrived.

Sergeant Torres was the first responder on the scene. When Sergeant Torres arrived he saw the victim standing by the doorway bleeding. Sergeant Torres indicated it "was a lot of blood" on the floor and that the victim was under stress. The first thing the victim asked Sergeant Torres was whether EMS was coming. (T.136; R. 51). Sergeant Torres asked the victim who attacked him and the victim indicated Appellant. Sergeant Torres explained: "all he said to me was he was in the bathroom and all of a sudden Mr.

Dennis Hoover approached him and started assaulting him." (T.137; R. 52). The victim indicated he "didn't think [he] was going to make it." (T.217; R. 119).

The victim was taken to the emergency room where he was seen by Dr. Anthony Bostick. (T.179; R. 81). Dr. Bostick explained the victim's injuries, detailing the seven cuts from the victim's forehead to his thigh. (T.181-183; R. 83-85). He indicated one of the cuts that ran from under the victim's eye, to his neck, and under his chin was deep and that the victim was "very lucky" his carotid artery was not cut. (T.189-190; R. 91-92). He described the cuts as "very deep." (T.183; R. 85). Dr. Bostick also explained one of the victim's cuts appeared to be a defensive wound on his hand. (T.191; R. 93).

Both Investigator Capps and the victim's wife took pictures detailing his injuries. The injuries were to the victim's forehead, two to his cheek and chin, under arm, hand, abdomen, and thigh. (State's Exhibits 29-37; T.211-212; R. 309-397; 113-114). The victim's wife indicated he returned home from the hospital covered in bandages "looking like a mummy." (T.99; R. 14).

ARGUMENT

I. The trial court did not err in admitting the Jail Medical Screen History Report as a business record. Further, the issue of whether the record contained subjective opinions or judgments was never raised to the trial court and therefore is not preserved for review on appeal. Finally, the report contained objective statements not subjective opinions.

Appellant contends the trial court erred in admitting Appellant's Jail Medical Screen History Report as a business record pursuant to Rule 803(6), SCRE. He also contends its admission was error under Rule 803(6) because the report contains subjective opinions. The report was properly admitted as a business record under Rule 803(6). Further, any issue regarding the report containing subjective opinion is not preserved for review on appeal. Finally, the report contained only objective, observable facts and no subjective opinions or judgments of the medical personnel.

After Appellant alleged he had cuts and bruises from the incident with the victim, the State sought to impeach this testimony by admitting the medical report created upon Appellant's booking into jail. The Jail Medical Screen History Report included the following two questions to which Appellant objects in his brief:

> 1. Is inmate unconscious or showing visible signs of illness, injury, bleeding, pain, or other symptoms suggesting the need for immediate emergency medical referral?
>
> 2. Are there any visible signs of fever, jaundice, skin lesions, rash, or infection: cuts, bruises, or minor injuries; needle marks, body vermin?

Both questions were marked "N" for no. (State's Exhibit 50; R. 399-401).

Pursuant to Rule 801 of the South Carolina Rules of Evidence, hearsay is definied 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 801, SCRE. Hearsay testimony is not admissible except as provided by the Rules of Evidence or statute. Rule 802, SCRE. One such exception is the business record exception of Rule 803(6), SCRE. The Rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (6) Records of Regularly Conducted Activity. 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. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE.

The trial court properly admitted the report as a business record. It clearly meets the requirements of being a "report . . . made at or near the time, by . . .a person with knowledge." The report was made when he was booked into the jail later the same day of the incident. Further, the report is something maintained in the regular course of business at the jail as testified to by the report's custodian. (T. 528-529; R. 327-328).

The argument the report contains subjective opinion and does not comply with Rule 803(6) is not preserved for review on appeal. Appellant never raised this issue to the trial court, instead only raising a general objection based on the best evidence being from the medical personnel that conducted the examination or on hearsay. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (finding to preserve an issue for review there must be a contemporaneous objection that is ruled on by the lower court); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Additionally, the report contained only visible, objectively verifiable facts, and not subjective opinion. The two main questions asked about by the solicitor both include the statement "visible signs" clearly indicating an objective, observable basis for the answer and not the subjective opinion of the person making the report. The report does not include any conclusions or opinions developed as a result of the examination conducted, merely the objective results of the visible examination. Whether or not someone has "visible signs" of cuts, bruises, or bleeding is not subjective but is exactly the type of recordation the business record exception is intended to cover. As a result, the trial court clearly did not err in admitting the Jail Medical Screen History Report under the Rule 803(6) business record exception to the hearsay rule.

II. The trial court properly allowed the victim to testify to information within his personal knowledge. Further, even if the testimony could be improper and not based on personal knowledge, Appellant opened the door to the testimony, and, therefore, the State was allowed to present the testimony even if otherwise inadmissible.

Appellant maintains the trial court erred in allowing the victim to testify to information outside his personal knowledge that he obtained only through hearsay. This argument is belied by the colloquy establishing the victim was testifying from his own personal knowledge. Nonetheless, even if the testimony was hearsay, Appellant opened the door to its admission by addressing the prior incidents between Appellant and the victim's brother during cross-examination of the victim. As a result, the State was entitled to admit the testimony, even if otherwise improper, to explain or clarify what Appellant's counsel first raised in cross-examination.

On cross-examination, Appellant's counsel went into great detail with the victim regarding an incident in which the victim and his brother encountered Appellant. (T.236-240; R.138-142). The victim and his brother stopped their truck after Appellant started waiving a stick at them. When the victim's brother exited the truck, Appellant and the victim's brother got into an altercation. The victim broke it up. (T.238-239; R. 140-141). However, the two reengaged in the fight, and the victim was hit by the victim's brother. (T.239; R. 141). The victim and the victim's brother attempted to help Appellant back up and offered him a ride, but Appellant refused. Appellant then had words with the victim's father who had arrived at the scene. The parties subsequently went their separate ways. (T.239-240; R. 141-142).

On redirect, the State sought to provide explanation for the argument and altercation between Appellant and the victim's brother. The victim was asked if he knew

why Appellant and his brother were at odds. He began to respond based on information his brother told him, but was stopped and an objection to hearsay was sustained. (T.247; R. 146). He explained he did know what the dispute was about. He further stated he knew his brother had turkey houses. (T.248; R. 147). The victim was then asked if his brother was cooperating with Appellant's brother, and responded affirmatively. When the victim was asked: "You know if that upset Dennis Hoover?" Appellant's counsel objected, but the judge allowed the testimony if the victim knew. (T.248-249; R. 147-148). The victim responded: "Yes, sir, it upset him." (T.249; R. 148). Appellant contends this question and answer were inappropriate because they were not within the victim's personal knowledge.

First, the question begins "You know . . ." as a means of prefacing the question by asking if the victim had personal knowledge of whether it upset Appellant. He did not respond with hearsay based on having been told by his brother or anyone else. Instead, he indicated he had knowledge. As a result, the testimony was entirely proper under 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."). Further, it was not inadmissible hearsay because he did not relay any out of court declaration made by anyone, including his brother, and instead, merely explained his own understanding. See Rule 801(c), SCRE (defining hearsay).

Additionally, even if the testimony was based on hearsay, it was properly admitted because Appellant opened the door by examining the victim regarding the incident between the victim's brother and Appellant. Ordinarily, when a party introduces

evidence about a particular matter, the other party is entitled to explain it or rebut it if the testimony would otherwise confuse the jury. State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (citing State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)). Otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004). "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." Beam, 336 S.C. at 52, 518 S.E.2d at 301; see also, State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005). The testimony elicited from the victim sought to explain and provide the complete picture for the jury regarding the altercation between Appellant and the victim's brother so as to not confuse the jury or leave them without an explanation. Accordingly, the trial court did not err in allowing the testimony because it was clearly within the knowledge of the victim and not hearsay, and, in the alternative, Appellant opened the door to the State's explanation of the circumstances surrounding the altercation, and therefore, even otherwise inadmissible testimony was properly admitted.

III. All of the comments Appellant complains of were either stricken from the record by the trial court or never had an objection ruled on by the trial court and, therefore, are not preserved for review on appeal.

Appellant maintains the trial court erred in allowing the solicitor to make inflammatory comments and questions during his cross-examination of Appellant. He specifically points to three sections of the colloquy between Appellant and the solicitor during cross-examination. Two of the comments were objected to by Appellant and the trial court sustained the objection and struck portions of the colloquy without any further requests or objections by counsel. Appellant admits the objection by Appellant's counsel to the other comments and questions by solicitor was never ruled upon by the trial court and, therefore, is not preserved for review on appeal.

Appellant raises three colloquies between the solicitor and Appellant he contends improperly attacked his character, impermissibly allowed the solicitor to express his personal opinion, and were intended to evoke juror prejudices. First, the issues as raised are not preserved because Appellant never contended to the trial court the specific basis for his arguments now before the Court. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (finding to preserve an issue for review there must be a contemporaneous objection that is ruled on by the lower court); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Further, there is no merit to his contentions as they relate to each individual colloquy because the Court either addressed the questions or Appellant failed to obtain a ruling. As to the first colloquy, Appellant maintained he went to the emergency room the same day as the incident. (T.497; R. 304). When asked if he had the records, he

responded he did not but "My word is good enough." The solicitor responded "Okay. You might think so, sir, but there are people who would dispute that?" (T.497-498; R.304-305). Appellant's counsel objected, and his objection was sustained. He then asked: "I ask that it be stricken." The trial court then explained: "The jury is to disregard that comment by counsel." Accordingly, Appellant received the relief he requested. See State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide."); State v. Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) (Appellant obtained the only relief he sought and, therefore, the Court has no issue to decide); see also, State v. Wilson, 389 S.C. 579, 583, 698 S .E.2d 862, 864 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue.").

The second colloquy occurred shortly thereafter, in which the solicitor and Appellant were discussing Appellant's version of the "fight" that occurred in the restroom. Appellant described him and the victim rolling on the floor: "It was sky, or ceiling, floor. You ever been in a fight? That the way it goes." The solicitor responded: "I doubt I've been in as many as you have." Appellant continued to respond to the solicitor as his counsel attempted to interject an objection. (T.498; R. 305). Counsel attempted again and his client responded: "Don't try to make me out to be a bad man because I'm a lover." (T.499; R. 306). The trial court never ruled on the objection and Appellant never attempted to get a ruling. Instead, he continued to respond to the solicitor without further prompting and the objection was abandoned by counsel.

Appellant admits in his brief the trial court did not rule on the issue. (App. Br. P. 13). As a result any issue with this particular testimony is not preserved for review on appeal. "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (citing Jean H. Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice In South Carolina, 57 (2nd ed. 2002)); see also State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994) (holding in order to preserve an issue, the defendant had to not only raise the issue, "but also to obtain a ruling on the issue from the trial judge"). Accordingly, Appellant cannot now complain he never received any relief from the trial court when he never sought a ruling on his objection.

Finally, Appellant contends a colloquy regarding whether Appellant was comfortable being examined by a male lead to improper comments by the solicitor. When the solicitor asked: "You're not a big fan of gay people, are you?" Appellant responded: "Well they stay over there, I stay over here." Without an objection appearing in the record by Appellant, the trial court ruled: "The objection is sustained to the extent that the question solicited in response that was just given. The jury is to disregard the question." (T.518; R. 325). Appellant's counsel then requested: "Will the Court so instruct." The trial court explained: "Whenever the Court sustains an objection the jury is to disregard the comment." Appellant's counsel never requested any further relief from the court. As a result, he received the relief he requested at trial. See Sinclair, 275 S.C. at 610, 274 S.E.2d at 412 ("Inasmuch as the appellant obtained the only relief he sought,

this court has no issue to decide."); Thompson, 304 S.C. at 87, 403 S.E.2d at 140 (Appellant obtained the only relief he sought and, therefore, the Court has no issue to decide). Accordingly, there are no grounds upon which this Court can reverse Appellant's convictions because trial counsel either failed to obtain a ruling or received the exact relief requested.

Finally, there is no indication Appellant's attack of the victim was in any way based upon his dislike of or discomfort with homosexuals, nor is there any indication in the record the victim was homosexual. Quite the contrary, as the victim was married and his wife testified at trial. The attack was based on a long standing feud between Appellant and the victim's family over turkey houses. As a result, the questions by the solicitor and the responses by Appellant could not have influenced the jury's decision. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

IV. Appellant did not raise an issue related to cumulative prejudice at trial and so the issue is not preserved for review on appeal. Further, none of the issues presented are error and, therefore, their cumulative nature cannot be prejudicial error which denied Appellant a fair trial.

Appellant maintains this Court should reverse his conviction based on the cumulative prejudicial error raised in his first three arguments. Initially, he never raised cumulative error to the trial court so the issue is not preserved for review on appeal. Significantly, Issues I and II were clearly not error and, therefore, could not have contributed to any cumulative prejudicial error. Even if Issue III established any error, he received exactly the relief he asked for by having the trial court strike two of the colloquies and instructing the jury to disregard the statements. As a result, there is no cumulative error on which this Court should base a reversal and this Court certainly should not use the cumulative error doctrine as a means of circumventing the preservation or waiver rules.

First, Appellant never raised the cumulative error doctrine to the trial court. He never raised it during trial or even in a post-trial motion after trial, and as a result, the issue is not preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Appellant seems to be asking this court to completely ignore longstanding preservation and waiver rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A

contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

Further, as discussed above, there was no error by the trial court in admitting the prison medical report as a business record as it clearly complied with Rule 803(6), SCRE, or in allowing the victim to testify about his personal knowledge regarding the feud between Appellant and the victim's brother. As a result, the prejudice from any possible error remaining in the case would be insufficient to warrant reversal because Appellant has utterly failed to demonstrate how the errors affected the outcome of the trial and prevented him from receiving a fair trial. See State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) ("Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial.").[1]

[1] After the jury found Appellant guilty, he stated to the court: "I know I have already been found guilty, but I want this courtroom to know that the Boyces (the victim and victim's brother) is just as much wrong as I am, but I'm man enough to say I'm sorry." (T.627; R. 387). He then apologized to the victim. This evidence can be considered when determining whether any error is harmless or whether the cumulative errors precluded his ability to receive a fair trial. See State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976); State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 13, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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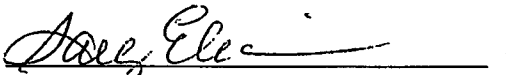
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 13th day of May, 2016.



SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727