

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Laurens County
Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2018-000244

Opinion No. 2017-UP-417 (S.C. Court App. Filed November 8, 2017)

THE STATE,

Respondent,

vs.

CHRISTOPHER JERMAINE WELLS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF ISSUES ON CERTIORARI

I.

Whether the Court of Appeals correctly determined that although it was error for the trial judge to allow Investigator Bryan Cheek to testify that Petitioner's codefendant, David Walker, was serving time for the murder of the victim in this case, that error was harmless because Petitioner did not suffer any prejudice from that testimony and the trial judge issued an appropriate limiting instruction which required the jury to consider Petitioner's guilt separate and apart from the guilt of David Walker.

STATEMENT OF THE CASE

In April 2015, the Laurens County Grand Jury indicted Petitioner for one count of murder, one count of armed robbery, one count of criminal conspiracy, and one count of possession of a weapon during the commission of a violent crime. On April 25-27, 2016, a jury trial was held in the Laurens County Court of General Sessions with the Honorable Frank R. Addy, presiding. Petitioner was represented by Rodney Richey, Esq. The Respondent (the State) was represented by Assistant Solicitors Warren Mowry and Ruston Neely of the Eighth Circuit Solicitor's Office. At the conclusion of trial, the jury acquitted Petitioner of murder, but convicted him of armed robbery, conspiracy, and possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Petitioner to a life sentence for armed robbery under the provisions S.C. Code. Ann. § 17-25-45, and five years' imprisonment for conspiracy¹. There was no sentence imposed for possession of a weapon during the commission of a violent crime pursuant to S.C. Code. Ann. § 16-23-490.

On appeal, the Court of Appeals issued an unpublished opinion affirming Petitioner's convictions. State v. Wells, Op. No. 2017-UP-417 (Filed November 8, 2017). Thereafter, Petitioner filed a petition for rehearing with the Court of Appeals on November 22, 2017. The petition for rehearing was denied on January 18, 2018. Petitioner then filed a Petition for a Writ of Certiorari with this Court. This Return on behalf of the State now follows.

¹ Appellant had a prior conviction for voluntary manslaughter.

STATEMENT OF FACTS

On October 31, 2013, Lieutenant Marty Crain of the Laurens County Sheriff's Office responded to a shooting at a residence in Enoree. (R. 160). As Crain approached the residence, he witnessed David Walker slumped over in a swing on the front porch of the residence. (R. 163-64). Crain asked Walker whether he had been shot and Walker responded that his arm was broken. (R. 164). Crain was allowed into the residence by Kelly Ball, and upon entering he discovered Johnny Lee Cheeks (Victim) bleeding profusely from gunshot wounds to his neck and abdomen. (R. 165). Investigator Bryan Cheek arrived shortly thereafter and spoke with Victim, Ball and Walker. (R. 276). Walker informed Investigator Cheek that he had been attacked by two men he did not recognize; however, Victim indicated Walker had come to rob him. (R. 276). Victim told Ball and Crain that Walker shot him. (R. 131, 174). Victim ultimately died of his wounds. (R. 261).

Ball told law enforcement that Victim answered a knock at his door that night and stepped outside to speak with whoever was at the door. (R. 118-19). Ball heard a verbal altercation that included an unknown voice say "I'm here to rob you." (R. 120, line 9). Ball heard one gunshot and then three to five more gunshots approximately fifteen seconds later. (R. 121). Ball called 911 and then stepped outside to assist Victim, who was lying next to his car in the driveway. (R. 122). As Ball began moving Victim inside the house, she witnessed Walker lying on the ground next to Victim's vehicle and a third individual standing in the driveway. (R. 124). The unknown individual ran away and got into the rear passenger side of "an older, box-style car" which then drove off. (R. 126, line 16, 127). When trying to describe the individual she saw to law enforcement, Ball used the example of a man she knew named Ty. Ball said that Ty was not the person there that night, but rather she used Ty for comparison because he was very

similar to the unknown individual. (R. 155-56). Ball identified the unknown individual as Petitioner in a six person photo lineup and in the courtroom at trial. (R. 137-38).

In the course of their investigation, law enforcement spoke with Walker's niece, Torris Moore. (R. 110). Moore testified that she was approached by Petitioner, Walker, and Johnny Lee Saxon on October 31, 2013. (R. 101-02). Walker asked Moore if they could borrow her gun to go "rob an old man that stayed with a white lady." (R. 102, lines 17-18). Walker said the old man "ran a liquor house and sold some drugs." (R. 102, line 20). Ball admitted at trial that Victim sold drugs and liquor out of his home. (R. 114). Walker explained to Moore that the three men already had Petitioner's gun, but they needed another one. (R. 103). Moore told them she did not have a gun. (R. 103).

After law enforcement arrived at Victim's house, Officer Andrew Ashley of the Laurens City Police Department received word to be on the lookout for an older box style car. (R. 205). Ashley witnessed a vehicle matching that description and followed it to the Gray Court area of Laurens. (R. 207). After witnessing the vehicle travel down a dead end portion of road, Ashley parked his car at the entrance to that road and waited for backup. (R. 208-09). Once backup arrived, Ashley and Deputy Jeremy McMahan located the vehicle in Petitioner's driveway. (R. 210-11). Ashley and McMahan spoke with Petitioner, and Petitioner acknowledged that he had just driven the car back from Spartanburg. (R. 222). However, Petitioner was evasive in response to the officer's questions and would not specify where he was in Spartanburg. (R. 223). Petitioner was not arrested at that time. Antonio Morris, a resident of the same neighborhood where officers had located Petitioner, reported to law enforcement that he found a wallet in his neighborhood with Victim's ID inside. (R. 267-68). When Morris discovered that Victim had recently been killed, he called law enforcement about the discovery of the wallet. (R. 269).

At trial, the trial judge instructed the State not to tell the jury that Walker had already been convicted of murder for this incident. (R. 74-75). As a result of this ruling, the State claimed in their opening statement “We don’t know who did the shooting that night.” (R. 85, line 13). However, Petitioner claimed in his opening statement: “the testimony is going to be that both gentlemen got shot. That’s the evidence. It’s not that hard who shot who. That’s what the testimony will be, that these two gentlemen shot each other and, unfortunately, one lived and one didn’t.” (R. 90-91, lines 25-4). Petitioner later inquired of Investigator Cheek on cross examination about the nature of drug dealers, asking whether it was true that “these drug folks are dangerous; aren’t they?”, and “when they get mad, they shoot, right?” (R. 295, lines 13-14, 24). The State objected and, outside the presence of the jury, argued that Petitioner’s insinuation that some other people may have been responsible for the shooting opened the door for the admission of evidence about Walker’s conviction. (R. 296). The trial court ultimately ruled that it would allow the State to inquire whether “Mr. Walker is currently in the Department of Corrections serving a sentence for murder in this incident.” (R. 299, lines 13-15). The State then asked Investigator Cheek about Walker’s murder conviction in the exact manner the trial judge ruled was appropriate. (R. 304). The trial judge provided a limiting instruction to the jury mandating that they consider Petitioner’s guilt separate and apart from Walker’s guilt. (R. 350). Petitioner did not object to the sufficiency of the limiting instruction. At the conclusion of trial, Petitioner was acquitted of murder but was convicted of armed robbery, conspiracy, and possession of a weapon during the commission of a violent crime. (R. 375).

ARGUMENT

I.

The Court of Appeals correctly determined that although it was error for the trial judge to allow Investigator Bryan Cheek to testify that Petitioner's codefendant, David Walker, was serving time for the murder of the victim in this case, that error was harmless because Petitioner did not suffer any prejudice from that testimony and the trial judge issued an appropriate limiting instruction which required the jury to consider Petitioner's guilt separate and apart from the guilt of David Walker.

Petitioner contends the Court of Appeals erred by finding the trial judge's decision to allow the State to ask Investigator Cheek about the murder conviction of David Walker was harmless error. In support of that contention, Petitioner maintains the State argued Petitioner should be found guilty, because another jury had already found Walker guilty. Additionally, Petitioner argues the trial judge's limiting instruction, which required the jury to consider Petitioner's guilt separate and apart from Walker's guilt, was inadequate. Petitioner's arguments are without merit. The Court of Appeals was correct in holding any possible error committed by the trial judge in this regard was harmless². Additionally, the Court of Appeals was correct in holding the trial judge issued an appropriate limiting instruction that was not objected to by Petitioner. The Court of Appeals properly affirmed the trial court's judgement. Furthermore, the facts of this case do not feature any of the considerations governing review by the Court under rule 242 SCAR. Most significantly there was no dissent in the decision of the Court of Appeals, and the decision of the Court of Appeals is not in conflict with a prior decision of this Court. Petitioner's request for a Writ of Certiorari should be denied.

² The Court of Appeals found that the trial judge erred in admitting testimony about Walker's sentence because Petitioner's questions of Investigator Cheek did not open the door to such testimony. The State maintains the Court of Appeals is incorrect in this respect. Petitioner clearly opened the door to this testimony when he suggested that some unknown third party may have been responsible for shooting Victim because of his status as a drug dealer. (R. 295-96).

Lack of Prejudice and Harmless Error

The Court of Appeals correctly held that any error by the trial judge in allowing testimony regarding Walker's murder conviction was harmless. Petitioner can claim no prejudice as the testimony he complains of was consistent with Petitioner's characterization of the facts in his opening statement and closing argument. The same testimony that Petitioner complains of on appeal likely weighed in his favor in light of the jury's acquittal of Petitioner for his murder charge.

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E. 2d 888 (1971)). To warrant reversal, the admission of evidence must not only be in error, but also result in prejudice to the appellant. State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007). Accordingly, an appellant must demonstrate "there is a reasonable probability the verdict was influenced by the challenged evidence." Id.

Here, Petitioner has failed to demonstrate prejudice resulting from the admission of Cheek's testimony. The challenged testimony merely indicates Walker is incarcerated for the murder of Victim. Petitioner invited this testimony himself when he declared in his opening statement that "the testimony is going to be that both gentlemen got shot. That's the evidence.

It's not that hard who shot who. That's what the testimony will be, that these two gentlemen shot each other." (R. 90-91, lines 25-3). Nevertheless, Petitioner contends that he was prejudiced by Cheek's testimony because Moore placed him with Walker earlier in the day when they were seeking another gun to "rob an old man that stayed with a white lady." (R. 102, lines 17-18).

However, the prejudice that Petitioner complains of is difficult to substantiate. Not only is Walker killing Victim consistent with Petitioner's characterization of the events that transpired, but it was uncontested at trial that Walker was found with a gunshot wound on Victim's front porch and Victim told law enforcement that Walker shot him. The fact that a jury ultimately acquitted Petitioner of murder seems to indicate that they determined only Walker was responsible for Victim's murder. Thus, evidence indicating Walker was imprisoned for Victim's murder likely only bolstered Petitioner's theory of the case and contributed to his acquittal for murder.

Petitioner certainly used the contested testimony of Cheek to his advantage in his closing argument to impugn the credibility of the solicitor and further advance his theory of the case.

Petitioner argued:

This prosecutor, these police officers, they've got a dual job. Their job is to convict people and not to convict to the innocent. They've got a dual job. And to do that, they've got to come out here and be straight with you. They've got to be straight and honest. But when this prosecutor stood up in this opening statement and tell you he don't know who shot Cheeks [Victim], he does know. They told him, David Lee Walker.

(R. 335-36, lines 22-5). Petitioner then proceeded to argue that Walker was responsible for killing Victim and that Ball's identification of Petitioner and Petitioner's vehicle were not credible. In summary, Petitioner did a good job of having his cake and eating it too. Petitioner successfully argued pretrial that the State should be prohibited from telling the jury about Walker's murder conviction and the State complied with that ruling by telling the jury in their

opening statement that they didn't know who shot Victim. (R. 85). Petitioner then used the theory of Walker being responsible for the murder in his opening statement and when the trial judge ruled that Petitioner had opened the door to the jury hearing evidence of Walker's conviction, Petitioner ridiculed the State for not being "straight and honest" with the jury in closing. Therefore, Petitioner not only didn't suffer any prejudice from the admission of evidence of Walker's murder conviction, but Petitioner likely benefited from that evidence.

The cases cited by Petitioner in his Petition for Certiorari are clearly distinguishable from this case. The first case cited by Petitioner is United States v. Blevins, 960 F.2d 1252 (4th Cir. 1992). In Blevins, the defendant was convicted for various drug offenses and alleged fourteen different errors on appeal. The Fourth Circuit found only one of those errors to have merit, but determined "that the error in this case was harmless beyond a reasonable doubt." Blevins, 960 F.2d at 1254. The error the Fourth Circuit did find to have merit was whether the admission of evidence of guilty pleas by six non-testifying co-defendants was improper. During trial, the guilty pleas of six co-defendants were mentioned three different times. Blevins, 960 F.2d at 1261. The guilty pleas in Blevins were mentioned more times than Walker's conviction in this case, and they were more prejudicial to Blevins because Blevins did not use those guilty pleas as part of his defense as Petitioner did here. Yet the Fourth Circuit held: "Admission of the guilty pleas of non-testifying co-defendants provides a classic example of a trial error to which harmless error analysis may be applied." Blevins, 960 F.2d at 1262. Not only did the Fourth Circuit find the error in Blevins to be harmless, but they remarked that when such an error is made a trial judge "should issue a limiting instruction to jurors stating that the evidence of such guilty pleas is not to be taken as substantive evidence of guilt of the remaining defendants." Blevins, 960 F.2d at 1260. Here, the trial judge did issue a limiting instruction. (R. 350).

The second case cited by Petitioner is United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993). In Mitchell, the defendant was indicted in relation to the same series of drug transactions in Blevins. At trial, Mitchell called his brother, Joel, to testify in his defense. Joel had already been convicted of participating in the same conspiracy in an earlier trial. The prosecutor impeached Joel with his prior conviction and then argued against Joel's credibility in closing. Mitchell, 1 F.3d at 236-37. The prosecutor also emphasized in closing that Mitchell's brother "got up and told the same story to another jury in July of 1990. They didn't believe it then either." Mitchell, 1 F.3d at 239. The Fourth Circuit found that the prosecutor's conduct was plain error. Mitchell, 1 F.3d at 246. Here, unlike Mitchell, the State merely presented the same evidence to the jury that Petitioner had already emphasized in his opening statement and was plain and uncontested from the prior testimony of Cheek, Ball and Crain. Additionally the trial judge in Mitchell failed to give the jury a limiting instruction, and the Fourth Circuit expressly mentioned that failure as a factor in their decision. Mitchell, 1 F.3d at 237. Here, the trial judge gave a limiting instruction which cured any potential error. (R. 350).

Petitioner did not suffer any prejudice from the admission of evidence regarding Walker's murder conviction. Petitioner used Walker's conviction to his own advantage and advanced his theory of the case with that information. Because Petitioner was not prejudiced by the contested evidence, any error committed by the trial judge was harmless. The Court of Appeals properly affirmed the trial court's judgement. Petitioner's request for a Writ of Certiorari should be denied.

Limiting Instruction

Petitioner contends that the trial judge did not give a sufficient limiting instruction to cure the prejudice to him of the jury hearing testimony about Walker's murder conviction. However,

as the Court of Appeals correctly recognized, Petitioner did not preserve this issue for appeal because he did not object to the limiting instruction provided by the trial judge. Even if we assume, for the sake of argument, that Petitioner did properly preserve this issue for appeal, the limiting instruction cured any potential error.

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). “Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review.” State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). “A curative instruction is generally deemed to have cured any alleged error.” State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 500 (Ct. App. 2013). “If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.” State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996). “Limiting instructions are deemed to cure error unless ‘it is probable that, notwithstanding the instruction, the accused was prejudiced.’” State v. Young, 420 S.C. 608, 624, 803 S.E.2d 888, 897 (Ct. App. 2017) (Quoting State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986)).

Here, the petitioner did not object to the trial judge’s limiting instruction. The following limiting instruction was given to the jury:

Now ladies and gentlemen, you’ve heard testimony that three individuals were charged in connection with this incident. I emphasize to you that only Mr. Wells is on trial in this case. Therefore, the evidence against Mr. Wells must be considered separately and apart from the cases against any other defendant and the manner in which the case against any other defendant has been resolved. In short, you must consider the evidence in this case in its totality only as it relates to

Mr. Wells without regard to the case of any other co-defendant for the manner in which that case against that other co-defendant was resolved.

(R. 350, lines 8-19). When the trial judge informed both parties of the language he intended to use, Petitioner did not object to the limiting instruction. (R. 314). Not only did Petitioner not object to the limiting instruction, but upon hearing the proposed language, Petitioner said “That’s fine, Your Honor.” (R. 315, line 1). Therefore, Petitioner’s argument regarding the limiting instruction is not preserved for appeal.

Even if Petitioner had appropriately preserved this issue, the limiting instruction adequately instructed the jurors to consider the evidence against Petitioner separate and apart from the evidence against his codefendants. Therefore, absent any showing to the contrary, any potential error was cured by the limiting instruction. The Court of Appeals properly affirmed the trial court’s judgement. Petitioner’s request for a Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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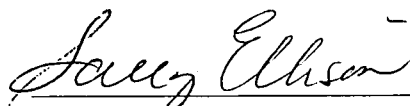
Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

Kathrine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 19th day of March, 2018.



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