THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 08 2018

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-031

Appellant Case No. 2018-000737

The State, RESPONDENT

v.

Arthur William Macon, PETITIONER

AMENDED APPENDIX

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
Attorneys for Petitioner

Other counsel of Record:

Alan M. Wilson
J Benjamin Aplin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-2508

Daniel E Johnson
Solicitor, Fifth Judicial Circuit
PO Box 192
Columbia, SC 29202
(803) 748-4785

Attorneys for Respondent

TABLE OF CONTENTS

[Brief of Appellant, Brief of Respondent, Reply Brief of Appellant and Record on Appeal are attached]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Arthur William Macon, Appellant.

Appellate Case No. 2014-002126

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2018-UP-031
Submitted December 12, 2017 – Filed January 17, 2018

AFFIRMED

Glenn Walters, Sr. and R. Bentz Kirby, both of Glenn Walters & Associates, PA, of Orangeburg, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Susan Ranee Saunders, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: Appellant Arthur William Macon appeals his conviction of armed robbery, for which he was sentenced to twenty-three years' imprisonment. Macon argues the circuit court erred by permitting Ricky Woodberry to testify that Jason Colon—his son—had a lobotomy, was schizophrenic and passive, and had

the mind of a thirteen-year-old because it was improper character evidence designed to bolster Colon's testimony. Macon also argues Woodberry's testimony was hearsay and outside the scope of a lay witness opinion. We affirm.

1. The circuit court correctly permitted Woodberry's testimony as it was not improper character evidence and did not constitute bolstering. *See State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when a[] . . . witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." (quoting *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009))); *State v. Douglas*, 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009) (concluding a witness did not vouch for the victim's veracity because the witness never stated she believed the victim and gave no other indication concerning the victim's veracity).

2. The circuit court should have limited Woodberry from going into the details of how the childhood shooting occurred because it was hearsay as he was not present when it occurred. *See State v. Bottoms*, 260 S.C. 187, 196, 195 S.E.2d 116, 119–20 (1973) (finding a lay witness opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness). However, because it was an insignificant detail in relation to the case overall, Macon was not prejudiced. *See State v. Motley*, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968) (stating the burden is on the defendant to show an error in admission of evidence is prejudicial); *State v. Garner*, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[An] error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors."). Furthermore, it was reasonable to allow Woodberry to testify that Colon was shot in the head—as this testimony was rationally based on his observation of Colon.

3. Macon waived the argument that testimony regarding Colon's medical condition constituted hearsay. *See State v. Dicapua*, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009) (finding a party's concession to the admission of evidence waived any direct challenge to the admissibility of that evidence); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

4. Macon's argument that Woodberry's testimony was outside the scope of a lay witness opinion is unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587

S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."). Even if the argument was preserved, the testimony was not medical testimony, as Woodberry was not testifying to Colon's diagnosis. *See State v. Williams*, 321 S.C. 455, 464, 429 S.E.2d 49, 54 (1996) ("Some statements are not mere opinions, but are impressions drawn from collected, observed facts."); *id.* ("A natural inference based on stated facts is not opinion evidence.").

AFFIRMED.[1]

SHORT, KONDUROS, and GEATHERS, JJ., concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

85922

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,Appellant

MOTION FOR REHEARING

The Court issued its opinion on January 17, 2018, and affirmed the lower court decision in the Opinion 2018-UP-031. The Appellant, by and through his undersigned attorneys, made a Motion of Extension of Time to File the Motion for a Rehearing which was granted and extended the time period until February 16, 2018. The Appellant hereby makes the following Motion for Rehearing in accord with Appellate Rule 221 and respectfully represents unto this Honorable Court as follows:

1. The Court incorrectly ruled that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

Woodberry's testimony was improper character witness ultimately about both the Defendant and Colon. It was introduced for the purpose of bolstering the testimony of Colon. A review of the

testimony shows that Woodberry was asked about the shooting in New York and contained an improper opinion that the result was Colon was passive, had schizophrenia and had the mind of a 13-year old. [R pp 300 L23- 302 L 20]. The State then further had Woodberry testify that Colon and Macon had begun hanging around about two months before the robbery and that the Appellant would "take Jason off too". [R p 303 L 4-22]. Therefore the implication of the testimony was that Colon had the mind of a 13-year old, was easily lead and suffered from schizophrenia. That painted a picture of Colon as a person unable to make decisions for himself. That was coupled with the assertion that Macon had begun taking Colon off three months before the trial. This is a classic case of bolstering as Woodberry was allowed to give his improper and unfounded opinion in order to take the assessment of Colon as a witness out of the province of the jury. *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (S.C. App., 2013). The testimony was a back door attack on Macon in order to make Colon to be a more sympathetic witness who was under the control of Macon. While Woodberry never testified directly that he believed Colon, the clear and only implication was that Colon was a simple minded, mentally ill person, who was lead astray by Macon. The instant case should be controlled by *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (S.C. App., 2012), as Woodberry's testimony "included comments on the credibility of the victim's account of the [bank robbery], the trial court erred in admitting it." Id at 397 SC at 465, 725 SE2d at 142. The entirety of Woodberry's testimony was a comment on the credibility of Colon. The State admitted the purpose of the testimony was to show how Macon used Colon. [R 294 l 18-22]. The Appellant objected to all of this testimony on the grounds that it was improper character evidence. [R pp 291 L 25 - 296 L 11].

2. <u>The hearsay was not harmless and Macon was prejudiced</u>.

The Opinion of the Court finds that the testimony of Woodberry was hearsay, but limits the application of hearsay argument to the testimony regarding how Colon was shot. It is the argument of the Appellant that all Woodberry's testimony regarding any kind of medical condition, such as schizophrenia is hearsay and the allowance of that testimony was in fact prejudicial. The Appellant made this argument at trial. [R pp 292 L 8 - 299 L 12]. As argued in the Appellant's briefs the testimony regarding a lobotomy and schizophrenia resulting from the gunshot wound was improper hearsay which was admitted to bolster the testimony of Colon and to show that Macon controlled Colon. The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. The evidence was prejudicial as it was the lynchpin to the entire case of the State as it was used to show that Macon "controlled" Colon, a young man who had a lobotomy, was schizophrenic and had a lobotomy. The only reasonable conclusion after this testimony was that the Appellant controlled Colon and therefore was guilty.

3. The argument that Woodberry's testimony was outside the scope of a lay witness was preserved and the testimony as a medical opinion, not an impression drawn from observed facts.

First, the Appellant discussed the Motion in Limine concerning Mr. Woodbery's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The

Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13-year old, but could not testify that he was easily led.

The testimony of Woodberry was that Colon got a lobotomy from the gunshot and was left as a schizophrenic person with the mind of at 13-year old. The testimony was based on what the doctors had told Woodberry. [R. P 302 L 2-20]. When giving his testimony, he based all his opinions on what the doctor had told him. [R p 302 L 4-10, L 11-20]. Thus all of the testimony was based on the information he received from the doctors, not his observations.

CONCLUSION

The evidence given by Woodberry was improper character evidence given to bolster the testimony of Colon. Woodberry, via hearsay, vouched for Colon and his testimony. The trial court allowing improper testimony by Woodberry was not insignificant and was prejudicial as it was the foundation for the entire point of Woodberry's testimony. There was nothing to Woodberry's testimony other than this improper evidence. Finally, the Appellant asserts both that the argument that Woodberry's testimony was improper was both preserved and it was improper expert witness evidence based on hearsay. As such it is substantial. The Appellant is entitled to a new trial in this case as the errors prevented him receiving a fair trial.

This the 16th day of February, 2018, at Orangeburg, South Carolina.

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
(Fax) (803) 531-3628

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State, Respondent,

v.

Arthur William Macon, Appellant

CERTIFICATE OF SERVICE

On the 16th day of February, 2018, the undersigned served a copy of the Motion for a Rehearing on counsel for the Respondent by placing a copy in the United States Mail, postage fully paid, to the following address:

J Benjamin Alpin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
(Fax) (803) 531-3628

Attorneys for Appellant

The South Carolina Court of Appeals

The State, Respondent,

v.

Arthur William Macon, Appellant.

Appellate Case No. 2014-002126

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.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Glenn Walters, Sr., Esquire
R. Bentz Kirby, Esquire
John Benjamin Aplin, Esquire

FILED
March 22, 2018

Susan Ranee Saunders, Esquire
Daniel Edward Johnson, Esquire