STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

vs.

SAMUEL LEE BROADWAY,

Appellant.

Appellate Case No: 370679

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in sustaining the prosecution's objection to Broadway's out of court statement because Broadway sought to admit the testimony for the truth of the matter asserted and Broadway failed to argue the statement was not for the truth of the matter asserted or any hearsay exception applied. The issue is not preserved for review.

II.

Appellant's request for the officer to call "Chase Payne" was not a clear and unequivocal request invoking the right to counsel, and law enforcement was not required to cease questioning.

STATEMENT OF THE CASE

Broadway was indicted on October 11, 2016, for leaving the scene of an accident which results in death. S.C. Code § 56-5-1210. The jury found Broadway guilty following trial on November 28-30, 2016. The Honorable R. Markley Dennis sentenced Broadway to twelve years' imprisonment. Broadway filed a motion for new trial and motion to reconsider the sentence. Following a hearing on September 28, 2017, Judge Dennis denied the motion for new trial but amended Broadway's sentence to eighteen years' imprisonment suspended to eight years' imprisonment and memorialized the same by an order filed October 17, 2017.

STATEMENT OF FACTS

Broadway swerved to avoid rear-ending a car, went off the road, hit a moped reentering the highway, did not stop, drove past a gas station to a bar, then left the bar for his father-in-law's house where he fell asleep by the time law enforcement arrived. He never stopped for the accident, and he never contacted law enforcement in the approximately four hours between the accident and when law enforcement finally spoke to him.

Lieutenant Joshua Battista was off-duty, but on-call, and he responded to the scene of the traffic accident. The victim, soon to be deceased, was already airlifted to the hospital when he arrived. Lieutenant Battista testified the wreckage from the accident was spread out over two and a half football fields. He described the site as a cone of debris. He determined the Victim's moped was pushed over to the side of the road, became airborne, and came to rest across the other side of the highway. The moped was broken into two pieces. R. pp. 258-59. Lieutenant Battista found pieces of the vehicle, including a headlight and pieces of the bumper. R. p. 263.

Lieutenant Battista and several other officers responded to a tip sometime after 5 a.m. He immediately saw a damaged white Cadillac matching the description of the vehicle they were searching for. The pieces he found at the accident scene matched the pieces missing from the damaged Cadillac. R. pp. 273-74. For instance, the part of the bumper he recovered from the accident scene matched the missing chunk of bumper on the Cadillac. R. p. 276. Blemishing the Cadillac's white finish was blue transfer paint from the moped and brown transfer marks from the leather jacket Victim wore. R. p. 278.

Appellant Broadway came out of the house after his father-in-law fetched him at the officers' request. Broadway's father-in-law said he was asleep. R. p. 305. While Appellant Broadway was

interviewed by the lead investigator, Officer Ted Lewis, Lieutenant Battista stood only three or four feet away and he could smell alcohol on Broadway. Lieutenant Battista testified Broadway's eyes were bloodshot and glassy. R. p. 280. Broadway said he was at a bar and left. When he realized he did not have his phone, he drove back to get it. Broadway struck what he thought was a bicycle. The officers told Broadway he was not under arrest but they were towing the Cadillac. R. pp. 280-81. Broadway never denied being involved in the collision. R. p. 290.

Victim suffered severe brain injury and his life was sustained only by machinery before he died. R. p. 286. Dr. Stuart Leon treated Victim when he started duty that morning. Victim sustained a nonsurvivable traumatic brain injury. No medical treatment would have been sufficient for Victim to survive. R. p. 331.

Richley Campbell was Victim's fiancé. She testified neither she nor Victim were drinking that night. R. p. 168. Victim finished repairing a moped he worked on for two days. The customer was irate and wanted his moped back, so Victim decided to return the moped even though it was late. Campbell worried about drunks on the road on a Friday night. R. pp. 168-70. Victim drove the moped while Campbell followed behind in her Toyota Highlander. R. pp. 170-71. Victim did not wear a helmet. Victim stopped at the stop sign, with his feet on the ground, at the intersection of Domingo Road and Highway 176. He looked both ways and turned left on the highway. Campbell saw a car coming so she pulled out in front of the vehicle to get between it and the moped. The car swerved to the right, fishtailed some, got back on the road, and hit Victim. R. pp. 172-73. Campbell explained she pulled in front of the oncoming car because it was speeding and she was certain it would hit Victim. R. p. 183.

Campbell testified the car, a white Cadillac, just kept going. R. p. 174. She testified it did

not look like the Cadillac slowed down at all. She was not sure, but she did not think she even saw brake lights. R. p. 178, p. 186. She watched the vehicle drive down the road, and she thought it turned at a gas station near the intersection with Highway 17. R. p. 175. She ran to Victim and called 911. R. p. 177.

Jason White worked at the SUNOCO gas station. The store is lit up and open 24 hours. He was on a smoke break when he saw an off-white Cadillac Sedan turn off of 17 onto 17A with a bumper dragging and a headlight out. He testified the bumper was "literally" dragging on the ground – he could hear it. R. pp. 189-92. The store opened about three months prior to that night and it had a phone Broadway could have used. R. pp. 193-94.

Matthew Snider, a firefighter, was off duty, driving his personal vehicle as he saw a car swerve and correct its steering. He noticed its headlight was out. He came upon a traffic accident shortly thereafter and assisted. A woman spoke frantically on the telephone, stating her fiancé was just hit. He saw a man lying on the ground and moped parts scattered on the roadway. R. pp. 150-52.

Justin Bryant was shooting pool at BFE Bar and Grill, he was not drinking. He arrived at around 10:30-11:00 p.m. and walked out at closing time at 2 a.m. R. pp. 197-98. He saw a four-door sedan, a Cadillac. He heard something was dragging and he saw the front-end of the Cadillac was damaged. R. p. 199. He recognized the driver from earlier that night at the bar. R. p. 200. The man, Broadway, was ranting about looking for his phone. Broadway said he needed to call his wife, he was going to lose his kids. Even though the bar was closed, he knocked on the bar door to get in, but received no admittance. R. pp. 200-01. He tried to use other people's cell phones; Bryant would not let him use his. However, a woman allowed Broadway to use her phone, but Broadway could not

figure how to operate it. R. pp. 201-02. Broadway found his phone on the floorboard, appeared to call someone, and then drove away. R. pp. 206-07. Bryant identified Broadway as the frantic man looking for his phone at the bar. R. p. 209.

Sergeant Conrad Strayton responded to the accident and remained there until traffic units arrived. He then assisted in the search for the vehicle that hit the moped. The vehicle involved in the hit-and-run did not return to the scene. Sergeant Strayton went to Broadway's father-in-law's residence with the other officers. He testified approximately four and a half hours passed from the time he responded to the accident until they made contact with Broadway. R. pp. 220-22. Likewise, Officer Logan Wolfsen was at the accident scene for about two or three hours and never saw the Cadillac return to the accident. R. p. 236, p. 239.

Harvey Burton was Broadway's father-in-law. He woke up to hear Broadway speaking with Burton's wife at 4:30 a.m. Broadway seemed in shock. Broadway said he was in an accident, swerved, hit a moped, panicked, and came to Burton's house. Burton asked Broadway if he called the police and he said no. Broadway said he did not know what to do, and Burton said he should call the police. Broadway went to sleep and Burton decided to call the police. Broadway never called the police. R. pp. 334-38; p. 342.

The State's last witness was the lead investigator, Officer Ted Davis of the Goose Creek Police Department. He arrived at the accident scene at 3 a.m. Campbell gave him a description of the vehicle they were looking for. R. pp. 347-48. The dispatcher advised Officer Davis that dispatch received a call advising the vehicle and the possible driver involved in the accident were located at a residence in Moncks Corner. R. p. 352. They arrived at the residence sometime before 6 a.m. Deputies from the Berkeley Sheriff's Office met the Goose Creek Police Officers nearby and

proceeded together to the residence. They found the Cadillac with front-end damage. R. pp. 354-56. Broadway came out of the house to speak with officers, and Officer Lewis immediately advised Broadway of his Miranda rights, then asked Broadway what happened. Broadway asked the officer if he could call "Chase Payne" and asked if anyone was more severely injured than he realized. The officer replied, "Before we get in to all of that" for Broadway to first say what happened. Broadway admitted to being in an accident and being aware of hitting something – either the car or something else. He admitted there was a moped. He admitted going to a bar afterwards to fetch his phone and said he was a "nervous mess." He reflected it was all over a phone. State's Exhibit No. 3, (circa 6:10: p.m. to 6:14 p.m).

Marlene Burton was the lone witness called by the defense. She attempted to testify that Broadway allegedly asked the Burtons to call police, but the objection was sustained on hearsay grounds. Even though the Burtons had a landline, Broadway did not use their phone to call 911. R. p. 392.

ARGUMENT

I.

The trial court did not err in sustaining the prosecution's objection to Broadway's out of court statement because Broadway sought to admit the testimony for the truth of the matter asserted and Broadway failed to argue that the statement was not for the truth of the matter asserted or that any hearsay exception applied. The issue is not preserved for review.

Broadway claims the trial court erred by sustaining the prosecution's hearsay objection when Broadway elicited testimony from Marlene Burton that he asked the Burtons to call the police.

First, the issue is not preserved for review because Broadway failed to argue the testimony was not hearsay or that a hearsay exception applied. State v. Webb, 389 S.C. 174, 182-83, 697 S.E.2d 662, 666-67 (Ct. App. 2010) (finding issue of exclusion of testimony not preserved for review where counsel did not object to the limitations on the testimony); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that where counsel acquiesces in judge's limitation of his cross-examination and makes no further objection, appellate review of the issue is procedurally barred). Broadway waited until his post-trial motion to argue the testimony should have been admissible, which is too late. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.").

Further, the trial court did not err. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625,

703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)). "[T]o warrant reversal based on admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . . ." State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007).

"Hearsay" is 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 is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert. dismissed* 353 S.C. 538, 579 S.E.2d 318. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The "rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying[,] which is used to prove the truth of the matter asserted." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009).

In State v. Galloway, 305 S.C. 258, 264, 407 S.E.2d 662, 666 (Ct. App. 1991), this Court found no error in not allowing the defendant to testify about an alleged conversation he had with an officer trying persuade Galloway to agree to a release from a civil action. The Court found the statement was hearsay and Galloway failed to show any exception applied.

In State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 662 (2013), the Supreme Court agreed with Brockmeyer that a photograph offered into evidence of two guns with the caption "Wills gun on left my gun on righ[t]" was hearsay because it was offered for the truth of the matter asserted in the caption.

In Wright v. Bi-Lo, 314 S.C. 152, 159, 442 S.E.2d 186, 190-91 (Ct. App. 1994), this Court found no error in the Workmen's Compensation Commissioner's decision to exclude statements by Wright to show Wright's understanding of the employer's shoplifter rules despite the argument the statement was probative of Wright's "state of mind." This Court rejected the argument as an "impermissible bootstrap argument."

To argue that the testimony was not hearsay, Broadway relies on State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980). The entirety of the analysis and conclusion by the Supreme Court in that case is as follows:

> During the course of the evening when appellant forced the prosecuting witness to accompany him on a search for alcoholic beverages, they came upon the home of witness Theresa Dill. While on the porch, the prosecuting witness allegedly said, "Honey, please open the door." Appellant contends this statement is hearsay and the trial judge therefore erred in admitting it. We disagree. The statement was obviously not offered for the truth of the matter asserted and therefore, by definition, is not hearsay.

Id. at 628, 266 S.E.2d at 786. The purpose for which the out of court statement was admitted is not obvious from context. It may be to merely show victim was present at Dill's house. In the instant case, Broadway's out of court statement was not sought to be admitted to merely show he was present at the Burton's. Broadway sought to admit it for the truth of the matter asserted, that Broadway allegedly wanted the Burtons to contact law enforcement.

Broadway argues the testimony is not hearsay because it constitutes "conduct with legal significance." This hearsay exception may apply to establish a contractual right or duty. See Deep Kell, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 69-70, 773 S.E.2d 607, 613 (Ct. App. 2015) (loan documents admissible to establish existence of loan contract and terms of the loan

agreement). However, this hearsay exception does not apply so broadly as to apply to all statements that may have legal ramifications or carry mitigating or exculpatory connotations. For instance, in Deep Kell, the hearsay exception did not apply to testimony from the purchaser of the note as to the balance of the loan remaining due. Id. at 70-71, 773 S.E.2d at 614.

Broadway also argues the testimony was not hearsay because it was admitted to show notice. However, the statute does not require the driver involved in an accident to put the driver's in-laws on notice of the accident. Whether the Burtons received notice of the accident is irrelevant. Further, Burton testified he called the police of his own accord, not at Broadway's request. Ms. Burton did not call the police. Reliance on Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972) is misplaced. In that case, an inspector told the defendant that tires on the defendant's vehicle were bald. This would put the defendant on notice that the tires were in need of replacement for safety purposes and relevant in a tort case to establish a duty of due care for the tortfeasor. In the instant case, Broadway's alleged request did not establish a legal duty or duty of due care for the Burtons and it was not exculpatory for Broadway.

Reliance on State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987) is likewise misplaced. In that case, Lewis' co-defendant, Bellamy, testified he purchased a gun because he heard rumors that Lewis was making threats on Bellamy's life. The State alleged Bellamy committed the murder at Lewis' behest. The testimony was not offered for the truth of the matter asserted – that Lewis was threatening Bellamy. Instead the testimony was offered to explain why Bellamy bought the gun. In the instant case, Broadway sought to admit the out of court statement for the truth of the matter asserted – that Broadway allegedly wanted the Burtons to call law enforcement.

Similarly, reliance on State v. Sims, 304 S.C. 409, 419, 405 S.E.2d 377 (1991) fails because

the out of court statement in Sims – that a woman said Sims has a gun and is going to kill her sister – was not offered for the truth of the matter asserted, but to explain why the officer forcibly restrained Sims.

Unlike the out of court statements in Lewis and Sims, Broadway seeks to admit the statement for the truth of the matter asserted – that Broadway wanted the Burtons to contact law enforcement. The State agrees with Broadway the facts of the case – that after hitting Victim, Broadway drove past a gas station, went to a bar, left the bar without contacting law enforcement, went to the Burtons and fell asleep – create abundant evidence that is difficult for him to explain. However, that did not relieve Broadway from the requirement he follow the rules of evidence and allow him to elicit rank hearsay as he suggests in his brief.

Further, Broadway was not prejudiced by exclusion of this testimony, and any error was harmless. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). Even if the jury heard Broadway's claim that he asked his in-laws to call police, it is not exculpatory. S.C. Code §56-5-1210 provides an exception to the duty to remain at the scene of an accident if the driver **temporarily** leaves the scene to contact law enforcement officers. It does not provide an exception to contact in-laws or ask for their advice. First, the Burtons were not proper authorities and it was up to Broadway to make contact. More importantly, no evidence indicated Broadway ever intended to return to the scene of the accident, so **he did not leave the scene temporarily**, and the statute does not provide an exception to the temporary requirement for a defendant who is too sleepy or intoxicated to return to the scene of the accident.

The excluded testimony amounted to gimcrack evidence in the face of the overwhelming

evidence Broadway committed the crime. Any error was harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial); State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) (The "materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

II.

Appellant's request for the officer to call "Chase Payne" was not a clear and unequivocal request invoking the right to counsel, and law enforcement was not required to cease questioning.

Broadway argues he invoked his right to counsel when he asked law enforcement to call "Chase Payne." The trial court noted it did not know anything about a person named Chase Payne. R. p. 113, lines 5-11. Trial counsel assumed Chase Payne was a lawyer, but no evidence was presented Chase Payne was a lawyer. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."). Because Broadway's request to law enforcement was not a clear and unequivocal invocation of his right to counsel, law enforcement was not required to suspend questioning Broadway about his role in the accident. Davis v. United States, 512 U.S. 452 (1994).

The Fifth Amendment of the federal constitution guarantees the right of a suspect to speak with counsel upon request in a custodial setting. U.S. Const. amend V; Edwards v. Arizona, 451 U.S. 477 (1981). If the suspect invokes the suspect's right to counsel, police interrogation must cease unless the suspect initiates further communication with police. Id.

The prohibition on further questioning of a suspect who invokes his right to counsel is not required by the Fifth Amendment's prohibition on coerced confessions, "but is instead justified only by reference to its prophylactic purpose." Davis, 512 U.S. at 458 (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)) (internal quotation marks omitted). Therefore, application of the "'rigid' prophylactic rule" requires a determination of whether the suspect actually invoked his right to counsel. Davis at 458 (quoting Smith v. Illinois, 469 U.S. 91, 95 (1984)) (internal quotation marks omitted).

Police are not required to cease questioning the suspect unless the request for counsel is unambiguous. Davis ("Maybe I should talk to a lawyer" was not a request for counsel). The determination of whether a person "actually invoked his right to counsel" is based upon an objective inquiry. Davis at 458-59. If the suspect makes an ambiguous or equivocal statement concerning the right to counsel, officers are not required to ask clarifying questions: "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Davis at 461-62; see State v. Lynch, 156 A.3d 1012 (N.H. 2017) (discussing Davis and finding Lynch's statement: "I'm being accused of something that I didn't do and then I mean I guess the only thing I can do is probably stop talking and get a lawyer . . ." was not an unequivocal request for counsel).

In Davis, the Supreme Court declared, "In this case we decide how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the Edwards prohibition on further questioning." Davis at 454. During a custodial interview, Davis said "Maybe I should talk to a lawyer." One of the officers testified they told Davis that the officers would stop the interview and would not go any further until Davis clarified if he wanted a lawyer or was merely making a comment about a lawyer. Davis replied he was not asking for a lawyer and did not want a lawyer. Davis was read his rights again and the interrogation continued until Davis made an unequivocal request for an attorney. Davis at 455.

Even though the officers in Davis sought to clear up the ambiguity by Davis' comments, the Supreme Court made clear that officers would not be required to ask clarifying questions if the suspect's statement was not an unequivocal and unambiguous request for counsel: "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of

the circumstances would have understood only that a suspect *might* be invoking the right to counsel" then officers are not required to cease questioning. Davis at 459. "Rather, the suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.'" Id. (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).

In the instant case, no evidence was presented as to who Chase Payne might be and no evidence was presented that officers were aware Broadway was referring to an attorney. Officers were not required to clarify the reason Broadway wanted them to call this person, nor were they required to desist from further interrogation. Because Broadway did not make an unambiguous and unequivocal request for an attorney, the trial court did not err.

Further, Broadway was not prejudiced by the alleged error because Burton testified Broadway admitted he was involved in the accident and admitted he did not call the authorities. Therefore, Broadway's admission to law enforcement is merely cumulative to his admissions to Burton. When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001). Finally, any error was harmless in light of the overwhelming evidence of guilt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial)

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

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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."

Respectfully submitted,

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