

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County
Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. **2017-000091**

THE STATE,

Respondent,

vs.

KAYLA GAYLE WRIGHT,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion by declining the jury's request to replay half of the trial testimony, and the issue is not preserved for review since appellant's trial counsel asked the trial court to not replay the testimony.

STATEMENT OF THE CASE

Appellant Kayla Wright was indicted for first degree burglary and grand larceny. A jury found Wright guilty of both offenses following trial on January 9-11, 2017. The presiding judge, the Honorable Brian M. Gibbons, sentenced Wright to twenty-two years' imprisonment for burglary and a concurrent five years' imprisonment for grand larceny. On January 10, 2018, the Honorable Robert E. Hood reduced Wright's sentence to twelve years' imprisonment pursuant to S.C. Code §17-25-65 for providing substantial assistance to the State. Judge Hood found, "The Court finds that the information provided to law enforcement did rise to the level of substantial assistance in the prosecution of other Defendants in this criminal case." Order dated January 10, 2018.

STATEMENT OF FACTS

Kayla Wright burglarized her grandmother's house while her grandmother was at Wright's mother's wedding. Her grandmother (Grandmother) was raising Wright's child. Wright's Grandmother and Wright's child lived in a double wide trailer in Green Sea. R. pp. 86-88. Grandmother testified Wright and her boyfriend, Matt Stevens, stayed overnight in Grandmother's residence about two months prior to the burglary. R. p. 89. The night Wright and Stevens stayed with Grandmother, Wright implored Grandmother to show Stevens a valuable firearm and some of Grandmother's jewelry. R. p. 95.

The State's theory of the case was Wright and her co-defendants chose the night of her mother's wedding to burglarize Grandmother's home because they knew she would be at the wedding. Wright was not at the wedding. When Grandmother arrived home, the house was torn up. The burglars stole Grandmother's rifle, a Colt .22, a flat screen television, \$2,300 cash, and expensive jewelry. R. pp. 92-95. Grandmother noted the burglars did not touch the child's Playstation and Playstation games. She noticed tire tracks indicating a vehicle drove in a circle in the yard, and she knew the reverse gear in the truck Stevens drove did not work. R. p. 97.

The next day Wright came in through the back door, where the damage was already repaired, and asked what happened. R. pp. 97-98; pp. 104-05. Grandmother played a trick on Wright, which she explained to the jury:

Well, I found an old video camera laying on the floor. So then she come in and she sit down. I held the video camera up and I says, "[Y]'all left the most important thing last night that you should have got." She said, "[G]randma, is Matt on that[?]" I told her, "I didn't know."

R. p. 98, lines 5-10 (quotation marks added). Grandma was bluffing, she did not even know if the

camera worked. There was no video. R. p. 98, lines 11-14.

Grandma told Wright to bring back the stolen items and a new flatscreen television (since the stolen television was likely banged up from being hauled in the bed of the pickup truck). Wright texted the rest of the time she was at the trailer before she said she needed to leave to talk to Stevens. R. pp. 98-99.

Officer Tyler Papp, from the Horry County Police Department, was dispatched to Grandmother's house. The grass was wet and he observed tire tracks "turning around in the driveway." R. p. 108, lines 20-22. Officer Papp noticed pry marks on the back door. Only the living room, with items scattered, and the damaged master bedroom, were disturbed. The other bedrooms were left untouched by the burglars. R. pp. 109-10. Grandmother informed Officer Papp that Wright called her earlier in the day and asked if she was going to the wedding. R. pp. 111-12.

Bradley Suggs testified for the prosecution. He was involved in the burglary with Wright, Stevens, and "Bug." Suggs scoped out the house in the morning and Stevens picked him up in a van and they went back to Stevens' house in Green Sea. They switched vehicles to Bug's truck, which did not go in reverse. Suggs thought it was Bug's truck, but he acknowledged he saw Stevens in the truck before. They picked up Bug and Wright and went to Grandmother's house. The plan was to take two safes out of the closet. They pulled in the yard and Wright and Bug went in the house. Suggs moved from the passenger side to the driver's seat and drove down the street to wait on their call. When he was called, he returned to pick them up. Suggs saw two safes and a rifle. Later, when the safes were opened, a pistol, knife, cash, and jewelry were found inside. R. pp. 117-20. Suggs admitted he was serving a prison sentence in North Carolina for breaking and entering. R. pp. 121-22.

Horry County Police Detective Terry Elliott became involved in the case when Suggs was arrested and asked to speak with Detective Elliott about some information that would help Detective Elliott. R. p. 136. After speaking with Suggs, Detective Elliott pulled up information about the burglary at Grandmother's, which Detective Elliott did not know anything about until his conversation with Suggs. Detective Elliott decided to take the lead on the case. R. p. 137.

Detective Elliott went to Columbus County, North Carolina, which borders Horry County, to attempt to speak with Wright. She said she did not want to talk because she feared Stevens would find out. R. p. 140. Subsequently, when Wright was picked up by North Carolina authorities to be returned to South Carolina, Detective Elliott was informed Wright wished to speak to him. R. p. 141. Detective Elliott interviewed Wright at the detention center in Horry County. Detective Matt Singleton also participated in the interview. R. p. 141-42. The officers read Wright her rights. R. pp. 147-50. Wright never asked for an attorney. R. p. 150. Wright was not intoxicated and appeared to understand what was going on. Detective Elliott did not make any threats or promises. R. pp. 142-45. During cross-examination, Detective Elliott testified based on his interaction, Wright seemed to have more than a ninth grade education, countering the defense's assertion. R. p. 158. He did not doubt Wright understood her rights. R. p. 158, lines 22-23.

The interview only lasted seven minutes. R. p. 145. The State published the interview for the jury as State's Exhibit No. 1. Wright admitted her involvement in the robbery and explained she, Suggs, and Bug went to the house, stole the safes and other items while Matt Stevens waited for them down the road. Bug used a crowbar to break in the house. Wright claimed during the interview she felt compelled to participate because everyone talked about burglarizing the trailer, everyone was high, and she was afraid of Stevens. Ex. No. 1. Detective Elliott observed Stevens

walking around the courtroom all through trial. R. pp. 163-64.

In her brief, Wright complains about the voluntary nature of the statement, restating trial counsel's pretrial arguments. Detective Elliott denied trial counsel's allegation that Detective Elliott told Wright she would sit in jail for a few more days because she did not cooperate. R. p. 20, lines 20-25. Detective Elliott indicated he was unaware that Wright legitimately required pain medication as alleged by defense counsel and did not have her medication in jail. R. p. 21, lines 1-9. She did not appear to be in pain. R. p. 22, lines 15-18. Detective Elliott also rejected defense counsel's contention that Detective Elliott played Suggs' statement for Wright before taking her statement. R. p. 25, line 10 – p. 26, line 3. Detective Elliott noted he did not have control over how long Wright remained in North Carolina before being extradited. R. p. 21. He also rejected defense counsel's allegation that he threatened to hold Wright for sixty days in jail if she did not sign a confession. R. p. 26, lines 22-25. Wright testified pre-trial, claiming she was coerced. The trial court ruled the statement was admissible. R. pp. 57-58.

At trial, Kayla Wright testified and claimed Detective Elliott threatened she would sit in jail for sixty days. She wanted out of jail because she was sick. She took oxycodone for the last twelve years and she did not receive any pain medication while in jail in North Carolina. R. pp. 170-71; p. 177. She claimed she was at a bowling alley at the time of the burglary, she was there for eight hours. R. p. 174-75; p. 185. She said there were pictures of her at the bowling alley that day, but claimed her attorney told her to not bother bringing the pictures. R. pp. 185-86. She claimed she was with several people at the bowling alley, but admitted only one of those alleged alibi witnesses would testify at trial. R. p. 192. She claimed the reason she called Grandmother's house was to speak with her child. She claimed she thought about going to her Mother's wedding, but found out

from the conversation with her Grandmother that her sister was going to be there. Wright testified she did not go because she and her sister were not getting along and she did not want to cause a scene at her mother's wedding. R. p. 175.

She claimed her and Stevens did not stay overnight, but she admitted Grandmother showed her and Stevens the jewelry and Colt .22. She claimed she did not ask Grandmother to show Stevens the items. R. pp. 180-81. She admitted she visited Grandmother's house the next day, but only to see her son. She claimed when Grandmother accused her of the burglary, she told Grandmother she did not do it. R. p. 190.

Sherry Caines was the alibi witness. She claimed her and others were with Wright for eight hours at the bowling alley. R. pp. 196-98. When asked why she did not come to the police earlier, she claimed she only found out about the trial a couple of weeks ago, although she knew about Wright being accused of the burglary beforehand. R. p. 200. She said she took pictures, but admitted she did not bring them, claiming no one told her to bring the pictures. R. p. 200.

During sentencing, the trial court advised Wright, "I thought your testimony was not credible whatsoever." R. p. 266, lines 2-6.

STANDARD OF REVIEW

Appellant Wright raises on appeal the efficacy of the trial court's decision to decline the jury's request to replay the testimony of three witnesses, even though Wright acquiesced in the ruling. The trial court is afforded "broad discretion . . . in dealing with requests of the jury to review evidence during their deliberations." State v. Summers, 276 S.C. 11, 16, 274 S.E.2d 427, 430 (1981) *overruled on other grounds by State v. McFadden*, 342 S.C. 629, 539 S.E. 387 (2000). Further, "[s]ince the rulings of the trial judge were discretionary, prejudice must be shown to constitute reversible error." Summers. "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

ARGUMENT

The trial court did not abuse its discretion by declining the jury's request to replay half of the trial testimony, and the issue is not preserved for review since appellant's trial counsel asked the trial court to not replay the testimony.

During jury deliberations, the jury sent the trial court a note requesting to replay trial testimony from accomplice Suggs, Grandmother, and Wright. The trial court noted, "[I]t sounds like the jury wants to rehear the entire trial."¹ R. p. 258, lines 16-22. The trial court intimated to the attorneys he was disinclined to replay testimony from all three witnesses. R. p. 258, lines 16-25. The prosecutor favored replaying the testimony. R. p. 259, lines 1-5. Wright's counsel answered as follows:

¹ The jury testimony in the transcript is roughly 120 pages. By Respondent's calculations, the combined total pages of testimony by the three witnesses constitutes sixty-two transcript pages. Only seven witnesses testified at trial.

Your Honor, they want to listen to testimony from three different witnesses. They've already heard for the second time the statement, the recorded statement. Perhaps we can ask the jury if there's any particular part of that testimony or any issue in particular that they want to hear, and we could cue it up for them, just to save some time.

R. p. 259, lines 10-16.

The trial court felt questioning the jury about tailoring the request ran the risk of the trial court intervening in the jury's deliberative process and either wanted to replay all or nothing for the jury. R. p. 259, lines 17-20.

Wright's counsel responded, "in that case, Your Honor, they've had ample opportunity to listen to each witness testify. It's their duty to pay attention, and it's their case, **let them deliberate with what they have.**" R. p. 259, lines 21-24.

This case represents a disagreement in trial strategy between Wright's trial counsel and appellate counsel, who apparently after the fact sides with the prosecution's request, rather than trial counsel's explicit request not to replay the testimony. Wright puts the prosecutor's request to replay the testimony in bold and renders counsel's request not to replay the testimony to a footnote. However, Wright does not provide this Court with any authority that a criminal defendant on appeal may utilize the prosecution's objection at trial. See generally State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001) (Appellant may not bootstrap an appeal issue by way of his co-defendant's objection).

Wright's issue is not preserved for review, since the trial court catered to his wish not to replay the testimony. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). "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 party cannot complain of court “error” created by his own conduct. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). “An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review.” Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 469, 472 (Ct. App. 2006). “[A] party cannot argue one theory at trial and a different theory on appeal.” State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003). There is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court. State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010). “One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal.” State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict). Because Wright failed to object to the trial court’s decision not to replay the testimony, but instead advised the trial court not to replay the testimony, the issue is not preserved for review.

Further, the trial court did not abuse its discretion in declining to replay the testimony of the three witnesses. Wright relies on State v. Carlson, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) and State v. Plyer, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1990). In Plyer, the trial court found no error in only replaying for the jury the direct-examination testimony, and not the cross-examination testimony, of a witness. The jury asked to hear the witness’s testimony and when the replay of the direct testimony finished, the foreman told the judge the jury heard all they needed. Plyer, 275 S.C. at 298, 270 S.E.2d at 129. In Carlson, the jury also requested to rehear the testimony of a single witness. Sound quality was so poor that the prosecution reread its questions during the replay. After a recess, the jury wrote a note to the judge that it would tell the judge if they wished to

continue replaying the testimony. The jury made no further request. Carlson, 363 S.C. at 601, 611 S.E.2d at 290-91.

Both Carlson and Plyer affirm the trial court is vested with wide discretion in determining the scope of replayed testimony, and confirm the trial court does not err in acceding to a jury's request to suspend replaying testimony the jury previously requested to be replayed. However, neither case proposes that a trial court errs in declining a jury's request to replay the entirety of multiple witnesses' testimony, especially in a case like the instant case, where the jury requested over half of the trial testimony to be replayed.

The Georgia Supreme Court noted the law in Georgia is "a judgment will not be reversed because the trial court declines to aid the jury in recalling the evidence and refuses to have certain testimony read back." Smith v. State, 625 S.E.2d 766 (Ga. 2006). American Jurisprudence explains the following:

The factors the judge should consider in responding to a jury's expressed desire to rehear testimony include whether the request is reasonably well focused, whether there is any physical or logistical impairment to reading the testimony back, and the amount of time the procedure would probably consume. Although the rereading of testimony to jurors during their deliberations is disfavored in some jurisdictions, portions of witness's testimony generally may be read to the jury after their retirement.

75B Am. Jur. 2d Trial § 1447.

One of the cases cited in the article is United States v. Rodriguez, 457 F.3d 109 (1st Cir. 2006), an appeal from a conviction for possession of a firearm by a felon. In that case, after a vehicle he was a passenger in was stopped for a traffic infraction, Rodriguez fled and was chased by Officer Petrocchi, who observed Rodriguez carrying what appeared to him to be a firearm. The firearm was

later recovered from a backyard Rodriguez and Officer Petrocchi traversed during the chase. The jury asked the district court for “the transcript of Petrocchi’s testimony and all of the testimony of the trial.” Id. at 120 (emphasis removed). The district court ruled that the request was for transcripts, not a read-back, and further decided rereading the entire trial testimony would be burdensome, but rereading just Petrocchi’s testimony raised the risk of highlighting his testimony inappropriately. Id. The district court instructed the jury it was leaving open the possibility of rereading the testimony of a specific witness, but the jury would need to be more specific. The jury requested two items, but cancelled the request and announced it reached a verdict. Id.

The First Circuit Court of Appeals found the district court did not abuse its discretion, noting, “As the court noted in its comments to the jury, the trial was brief, and the juror’s collective memory should have been sufficient for their deliberations.” Id. (citing United States v. Boulerice, 325 F.3d 75, 84-85 (1st Cir. 2003) (finding no abuse of discretion in the court’s refusal to read back testimony of witness where the testimony consumed seventy transcript pages and the read back created a risk of inappropriately highlighting the testimony)).

In the instant case, the trial was fairly brief, and the jury was seeking to replay half of the trial – a significant burden relative to the length of trial. Therefore, because the request was not focused, the trial court did not abuse its discretion in declining the jury’s request to replay half the trial.

Additionally, Wright is unable to assert more than mere speculation that Wright was prejudiced by the trial court’s ruling. Wright is required to show the trial court’s decision was an abuse of discretion resulting in prejudice to Wright. See State v. Summers, 276 S.C. 11, 16, 274 S.E.2d 427, 430 (1981). In the instant case, Wright fails to show prejudice. Note the jury did not ask to replay the alibi witness’s testimony. Obviously, based on its verdict, the jury did not find the alibi

defense credible. Further, contrary to Wright's claims in her brief, Grandmother's suspicion that Wright participated in the burglary was not based on speculation, but instead on Wright's guilty conduct. She was easily led into asking if her boyfriend-accomplice was on the camera when Grandmother bluffed her. Grandmother recounted how Wright asked her to show the boyfriend-accomplice the valuables that were subsequently stolen in the burglary. Tire tracks supported Grandmother's suspicion. Of course, if the jury was left with lingering reasonable doubt about Wright's guilt because it failed to rehear testimony, the jury would not have convicted Wright.

CONCLUSION

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

Respectfully submitted,

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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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