STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
The Honorable Carmen T. Mullen, Circuit Court Judge

CERTIORARI TO THE COURT OF APPEALS
Appellate Case No. 2019-000629
Opinion No. 2019-UP-034 (S.C. Ct.App. filed January 23, 2019)

THE STATE, ...RESPONDENT,

v.

HERSHEL M. JEFFERSON, JR., ... PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

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

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, South Carolina 29401
(843) 985-1900

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The court of appeals correctly held that Petitioner's challenge to the admission of responding officer's testimony that he determined Petitioner to be the primary aggressor prior to arrest is not preserved for review because it was not raised with specificity to or ruled on by the trial court. Even if preserved, the argument is meritless because the testimony was admissible to explain why Petitioner was arrested.

STATEMENT OF THE CASE

Petitioner was indicted during the October 2014 term of the Charleston County Grand Jury for criminal domestic violence, third offense. (R.110-111). Petitioner failed to appear for trial and was tried *in abstentia* July 13, 2016 before the Honorable Carmen T. Mullen. The jury found Petitioner guilty as charged and Judge Mullen imposed a sealed sentence. On August 25, 2016, Petitioner appeared before the Honorable R. Markley Dennis, Jr., who published the sentence of five years' imprisonment, suspended on the service of three years imprisonment and five years' probation. The court of appeals affirmed Petitioner's conviction in an unpublished opinion without oral argument. *State v. Jefferson*, Op. No. 2019-UP-034 (S.C.Ct.App. filed January 23, 2019). Jefferson's petition for rehearing was denied on March 29, 2019.

STATEMENT OF FACTS

Officer Michael Burton of the City of Charleston Police Department responded to a 911 call reporting a man and a woman fighting. He arrived on scene to find Felicia Edwards at the home of her neighbor, Amanda Powell, bleeding and bruised. (R. p. 53–55). Edwards displayed scratches on the right side of her face and neck, a scratch on the upper right side of her breast, lacerations on her forearm and fingers, and bruises to her face. (R. p. 55). Officer Burton spoke with Edwards and Powell about what happened, but Petitioner had fled. (R. p. 55; 59). Police apprehended him a little over an hour later, and ultimately charged with criminal domestic violence. (R. p. 10; 56).

The case proceeded to a jury trial. On the day of trial, Petitioner failed to appear and was tried in his absence. (R. p. 4). Edwards testified that she and Petitioner were in a romantic relationship and had three children together. (R. p. 20). Edwards testified that on the day of the incident, she and Petitioner began arguing about financial issues because her electricity had been cut off and she was unable to get to work due to a car accident. (R. p. 22). She told Petitioner she thought they should each go stay at their respective parents' homes until their issues were resolved. (R. p. 23). Petitioner became incensed, accused Edwards of trying to leave him, and began "calling [her] names, [and] being very disrespectful." (R. p. 22–23). Petitioner then packed a bag and left, and Edwards went to Powell's house to wait for her mother to come pick her up. (R. p. 24). However, Petitioner came to Powell's house and began pounding on the door, asking Edwards to come unlock their house for him. (R. p. 26). She complied, but left and returned to Powell's house when Petitioner went to the bathroom. (R. p. 27).

Petitioner returned to Powell's house and asked Edwards to use her cell phone. (R. p. 27). Although she declined to give him her phone or open the screen door to allow him in, Edwards agreed to call the people Petitioner wished to contact on his behalf. (R. p. 27). After

none of the calls went through, Petitioner began yelling at Edwards again asking why he could not use her phone, and she told him he needed to go home. (R. p. 28). Petitioner then "snatched the screen door open" and punched Edwards in the face. (R. p. 28). He then entered the home, placed Edwards in a headlock, and hit her in the face again. (R. p. 29). Edwards then began to hit back in an attempt to free herself from the headlock. (R. p. 31). She grabbed a glass candle off the table and warned Petitioner she would hit him if he did not release her. (R. p. 32). When he failed to let her go, she hit Petitioner over the head with the glass candle until it smashed apart, but Petitioner still held on to her. (R. p. 32). She then grabbed a piece of glass and threatened to cut him. When he still refused to release her, she cut his arm with the glass shard. (R. p. 33). Petitioner finally released Edwards from the headlock and fled. (R. p. 34). Edwards testified she sustained numerous injuries as a result of the assault, including scratches, a swollen eye, and a "busted" nose. (R. p. 34).

Powell corroborated Edwards' account. She testified that she and Edwards were in her home on the night of the incident when Petitioner arrived at the door and began to knock loudly. (R. p. 45–46). Powell stated Edwards allowed Petitioner the use of her phone through the closed screen door until Petitioner "pulled open the screen door and started fighting her." (R. p. 47). Powell testified Petitioner "basically hit her in the face, tried to choke her and stuff like that" and Edwards began to fight back. (R. p. 48). Powell emphasized Petitioner initiated the fight by hitting Edwards first. (R. p. 49).

Finally, Officer Michael Burton testified he arrived at the scene and spoke with both Edwards and Powell. (R. p. 55). He noted Edwards suffered "several scratches to the right side of her face and neck." (R. p. 55). He further stated Edwards had a "scratch on the upper right side of her breast, a laceration approximately one inch on her forearm and a laceration on her

right index finger as well as some bruising to her face." (R. p. 55). After speaking with all involved, Burton arrested Petitioner.

STANDARD OF REVIEW

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." *State v. Scott*, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012) (citation omitted).

ARGUMENT

The court of appeals correctly held that Petitioner's challenge to the admission of responding officer's testimony that he determined Petitioner to be the primary aggressor prior to arrest is not preserved for review because it was not raised with specificity to or ruled on by the trial court. Even if preserved, the argument is meritless because the testimony was admissible to explain why Petitioner was arrested.

Petitioner maintains the trial court erred in allowing Officer Burton to testify he determined from his investigation that Petitioner was the "primary aggressor." Specifically, Petitioner contends the statement invades the province of the jury as the ultimate fact-finder. The court of appeals correctly held that this issue is not preserved for appellate review because defense counsel did not make a specific objection on this basis at trial. Instead, defense counsel made a generic objection, and a bench conference was held off the record. Defense counsel did not state the basis for his objection on the record and the trial court made no on-the-record ruling. Contrary to Petitioner's argument, the basis of the objection is not clear from context. The objection could have been based on hearsay or other possible grounds, and this Court would have to speculate as to the specific basis. Therefore, this issue is not preserved for appellate review. Even if preserved, the issue is meritless because the testimony was properly admitted to explain the officer's investigation. Certiorari should be denied.

The relevant testimony appears on page 56 of the record, during the testimony of the responding police officer. The officer had just testified that he spoke to petitioner after speaking with Powell and Edwards in order to "get his side of the story." (R. p. 56). The solicitor then elicited the following testimony:

> Q: What did you do after that?
>
> A: Based upon the evidence and the statements from the victim and the crime scene what we saw as well as the injuries we determined—

Defense Counsel: Objection

The Court: Basis?

Defense Counsel: May we approach?

The Court: Sure.

(Off-the-record conference.)

Q: As a result of your investigation you arrested the [Petitioner], correct?

A: Yes. We found him to be the primary aggressor.

Defense Counsel: Objection.

(R. p. 56). The trial court did not rule this objection, and the testimony continued. Defense counsel did not state the grounds of his objection or attempt to obtain a ruling.

At the close of the State's case, Defense Counsel moved for a mistrial based on his "previous objection and the testimony for the ultimate issue of the case in terms of [Petitioner] being the primary aggressor." (R. p. 61). He also moved for directed verdict arguing the State failed to prove beyond a reasonable doubt that Petitioner had not acted in self-defense. (R. p. 62). The trial court denied the directed verdict motion, holding Edwards' testimony alone was sufficient to create a jury question. (R. p. 63). Defense counsel then requested a ruling on the record for his mistrial motion and the trial court stated, "I denied it. The mistrial motion, yes." (R. p. 63).

The court of appeals correctly held that Petitioner's argument on appeal is not preserved for review. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (internal citations omitted). A general objection that does not

specify the particular ground for the objection is insufficient to preserve a question for review. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Here, there was no contemporaneous objection on a specific ground. Petitioner made only a general objection, the basis of which does not appear contemporaneously in the record. Any argument on the objection took place in an off-the-record bench conference. "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997).

When the testimony resumed, the solicitor asked: "As a result of your investigation you arrested the Defendant, correct?" The officer responded: "Yes. We found him to be the primary aggressor." (R. p. 56). Defense counsel again objected without stating his ground, but the court did not rule on the objection and the testimony continued. Defense counsel did not move to strike the testimony. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility."). Therefore, neither objection was sufficient to preserve an issue for review.

Contrary to Petitioner's argument, the ground for the objection was not apparent from context. Petitioner made no pre-trial motion to exclude or other prior objection to the testimony. Petitioner's objection may have been made on hearsay or other grounds, but this Court has no way of knowing.

Moreover, the record does not reflect an adverse (or any) ruling on this unspecified objection. Defense counsel merely stated he has an objection, a bench conference was held, and the testimony continued. The court never stated whether the objection was overruled, sustained, or withdrawn, and defense counsel never asks for a ruling to be placed on the record. When the

testimony resumes, Petitioner again objects without stating any grounds. Again the trial court made no ruling, and defense counsel did not request one or move to strike the officer's response. "[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). Absent a specific objection and a corresponding ruling, there is nothing for an appellate court to review. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

Although defense counsel made a subsequent mistrial motion based on his "previous objection *and* the testimony for the ultimate issue of the case in terms of Mr. Jefferson being the primary aggressor," he did not provide that rationale in a contemporaneous objection to the testimony, nor did he articulate at any time why the officer's statement would be inadmissible. (R. p. 61, ll. 23–25) (emphasis added). Failure to contemporaneously object to trial testimony cannot be later bootstrapped by a motion for a mistrial. *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981). Moreover, the trial court offered to give a curative instruction but defense counsel refused without giving an explanation. (R. p. 63, ll. 13–15). The issue is not preserved for review and this Court should deny certiorari.

Even if preserved, Petitioner's argument fails on the merits. The officer's testimony was admissible to show why he concluded his investigation by arresting Petitioner. *See Juarez v. State*, 461 S.W.3d 283, 296–97 (Tex. App. 2015) (finding explanation of primary aggressor determination was relevant to give context to arrest). It was not offered as a substitute for a jury finding of guilt, and caused no prejudice to Petitioner.

The testimony is admissible under the rules of evidence. Pursuant to Rule 701, a lay witness's testimony "is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or

training." Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

As Rule 704 of the South Carolina Rules of Evidence makes plain, witnesses are permitted to testify as to their opinion on the ultimate fact without invading the province of the jury. The jury ultimately draws its own conclusions on credibility and then bases its verdict upon its own view of the facts. Officer Burton's testimony regarding his determination that Petitioner was the primary aggressor merely reflects his opinion based on his perception of the events. As defense counsel clarified through cross-examination, determining the primary aggressor is a necessary part of the investigation where both parties sustain injuries. (R. p. 58, ll. 12–17.) Accordingly, Officer Burton testified he spoke with Edwards and Powell and observed Edwards' injuries and after concluding Petitioner was the primary aggressor, he arrested him. The mere fact his testimony reflects his opinion of who was at fault in bringing about the difficulty does not preclude its admission. Nor does it preclude the jury from coming to a different conclusion. His testimony was based on his own perception and did not require special knowledge or skill. *See State v. Douglas*, 380 S.C. 499, 502–03, 671 S.E.2d 606, 608 (2009) (forensic interviewer could have testified as lay witness because she "testified only as to her personal observations and experiences, and her interview with the Victim"). Moreover, this evidence simply verbalizes the inescapable inference drawn from the fact that Petitioner, and not Edwards, was arrested.

Even if the testimony was improperly admitted, any error was harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) "[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result." *State v. Sherard*, 303 S.C. 172,

176, 399 S.E.2d 595, 597 (1991). Both of the witnesses to the crime asserted Petitioner began the altercation without provocation. As the trial court noted, "everything [it had] heard here was the victim testifying that [Petitioner] was the aggressor and she was trying to fend him off." (R. p. 65). The only evidence to which Defense Counsel could direct the court in requesting the self-defense charge was Officer Burton's testimony that he received an "opposing narrative from the Defendant." (R. p. 66). Ultimately, the trial court agreed to give the charge "out of an abundance of caution" despite conveying the sense that the claim of self-defense was specious. Powell and Edwards both indicated, without objection, that Petitioner was the primary aggressor. The officer's testimony was therefore cumulative. Given the absence of evidence of any alternative version of the events, Officer Burton's testimony could not have affected the jury's ultimate finding that the State had disproved self-defense beyond a reasonable doubt. Furthermore, defense counsel inquired into the officer's primary aggressor determination on cross-examination, further making the prior testimony cumulative and removing Petitioner's right to complain about the testimony on appeal. (R. p. 58). Because the testimony was properly admitted and Petitioner suffered no prejudice, certiorari should be denied.

CONCLUSION

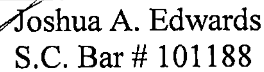
Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
Joshua A. Edwards
S.C. Bar # 101188

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, Anne A. Mueller, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by delivering two copies of the same to Wanda H. Carter, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 15th day of May, 2019.

Anne A. Mueller
Legal Assistant

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