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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge
Appellate Case No. 2018-000981

The State,

Respondent,

vs.

Denzel Marquise Heyward

Petitioner.

PETITION FOR REHEARING

On May 15, 2019 this Court reversed the conviction of Petitioner, Denzel Heyward, by finding the trial judge abused his discretion in allowing Sidearis Singleton to testify about prior incidents of domestic violence between Petitioner and Quesantrina Rivers. As an initial matter, this Court found this issue was properly preserved for appeal. Additionally, this Court ruled that Petitioner's trial counsel did not open the door to introduction of evidence of domestic violence when he asked Singleton about prior allegations of sexual abuse made by Rivers. Furthermore, this Court ultimately concluded this could not be harmless error despite the fact that Rivers testified about Petitioner abusing her on the day of the offense.

The State now submits this petition for rehearing to argue the decision of this Court was erroneous in three ways. First, this issue was not preserved for appeal. Trial counsel for Petitioner did make a pretrial motion seeking to have evidence of domestic violence between Petitioner and Rivers excluded. (R. 137-38). However, Counsel did not make a specific objection on the record when evidence of prior domestic violence was offered at trial, but rather trial

counsel offered a generic objection and then asked for an off the record bench conference. (R. 248). Second, even if this issue had been properly preserved for appeal, Petitioner's trial counsel opened the door to evidence of prior domestic violence when he asked Singleton if River's had previously made allegations of sexual abuse. Finally, even if trial counsel did not open the door to the admission of prior incidents of domestic violence, Singleton's testimony was cumulative to Rivers' testimony about the domestic abuse that she suffered at Petitioner's hands on the day of the offense. Accordingly, any error in the admission of Singleton's testimony is harmless. This Court should affirm Petitioner's convictions and sentences.

Error Preservation

This Court held that, while trial counsel failed to state the grounds for his objection on the record, he nonetheless preserved the issue for appeal because "the context of the entire trial demonstrates the issue was raised and ruled upon." With all due respect to this Court, the State argues this holding potentially nullifies our State's error preservation requirements. This Court has long held that an in limine ruling does not preserve an issue for appeal. State v. Hughes, 336 S.C. 585, 591, 521 S.E.2d 500, 503 (1999); State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). A party must make a contemporaneous objection that is ruled upon by the trial judge to preserve the issue for appellate review. State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). The requirement of a contemporaneous objection when evidence is offered serves to aid appellate courts in determining what question the lower court was presented with and whether that question was correctly decided. If a specific objection is not made on the record when evidence is offered, appellate courts must speculate as to the nature of an objection and the arguments that were made by trial counsel. This Court correctly recognized this difficulty at oral argument when one of the justices noted that this Court was left to speculate about what was said

during the relevant bench conference. Indeed, trial counsel for Petitioner may have acknowledged opening the door to questions about domestic violence as one of the justices speculated at oral argument. Furthermore, if this Court is forced to determine what objection was made based on context, the Court must look to the specific objection that was made pretrial. (R. 138). Trial counsel for Petitioner specifically objected to Rivers testifying about prior incidents of domestic violence, not Singleton. However, when Rivers testified about prior incidents of domestic violence between her and Petitioner, trial counsel did not object. Thus, trial counsel did not preserve the specific objection that was made pretrial in regards to Rivers' testimony, nor did he preserve his objection to Singleton's testimony.

The Court must look at the context and subtleties of Petitioner's pretrial objection and speculate about what was said during a bench conference to determine if this issue was properly preserved for appeal. It is precisely because of this need for speculation that our error preservation rules exist. They are designed to aid the task of the appellate court in determining whether the lower court incorrectly decided a question that was presented to the court. It is very difficult for the appellate court to determine if a question was correctly decided by the lower court if the appellate court does not know what question was presented. If trial attorneys in this State are permitted to make specific pretrial motions and then renew those motions in a generic fashion during the trial, it will only make the job of our honorable appellate courts more difficult. An appellate court should not have to scour a trial record to determine what objection was actually made in regards to particular items of evidence or subjects of inquiry. Such a requirement would be an undue burden on the appellate courts of our State and reduce the clarity of future appellate litigation.

Opening The Door

This Court held Petitioner's trial counsel did not open the door to the admission of prior incidents of domestic violence between Petitioner and Rivers because the issues that trial counsel asked about did not "arise out of the same fact or transaction as past incidents of physical abuse [Petitioner] may have committed against Rivers." The Court's conclusion disregards or misunderstands the purpose of trial counsel's questions and the State's original purpose in asking about prior domestic violence between Rivers and Petitioner. This Court implies the State sought to introduce evidence of prior domestic violence for the nefarious purpose of showing the jury that Petitioner was a bad person because he abused Rivers and therefore Petitioner must have committed the offenses for which he was on trial. On the contrary, the State laid out a specific, legitimate theory of why the evidence was being offered during the pretrial hearing. The State offered the evidence to explain to the jury Rivers' mental state as a battered woman and how her mental state influenced her behavior on the date of offense and in the days afterward. When trial counsel for Petitioner asked Singleton a series of questions designed to elicit information about Rivers' mental state, Petitioner thereby opened the door to evidence of prior domestic violence between Petitioner and Rivers.

During the pretrial hearing, Petitioner sought to exclude any testimony by Rivers about prior domestic violence between her and Petitioner. The State responded to Petitioner's motion by noting that Rivers was submissive to Petitioner because of Petitioner's prior acts of domestic abuse towards her. Therefore, the State sought to introduce evidence of that abuse to explain Rivers' behavior. The assistant solicitor articulated her purpose as follows:

Assistant Solicitor Shealy:...And the jury needs to understand why she would have taken [Petitioner and co-defendant] over there. It takes two days to turn herself in and go tell the police because [Petitioner] is hiding out with her. So I

feel like the jury needs to understand why it is that she is submissive to [Petitioner].

(R. 144, lines 6-12). The assistant solicitor further reasoned:

Assistant Solicitor Shealy: If [the jury] do not understand that when [Rivers] does not conform to what [Petitioner] wants, he smacks her, then [the jury]'s going to be—they could be very well misguided in evaluating her testimony.

(R. 146, lines 12-16). Thus, the State's purpose in offering the evidence of domestic abuse was clear: for the jury to understand Rivers' submissive behavior towards Petitioner and how that mental state of submission influenced her actions on the day of the offense.

When Petitioner cross examined Singleton, trial counsel asked Singleton about whether Rivers ever made allegations of sexual abuse towards Singleton's husband. Petitioner also asked about Rivers attempting suicide and whether Rivers worked at a strip club. When the State objected to Petitioner's line of questioning, counsel for Petitioner responded to the objection by saying "The relevance, Judge, is the mental state of her daughter." (R. 240, lines 21-22). Petitioner's questions were designed to detract from Rivers' credibility in the minds of the jury. Petitioner's stated justification for the questions demonstrates that Petitioner believed allegations of sexual abuse had some bearing on Rivers' behavior and her overall mental state. Therefore, it stands to reason that asking questions regarding allegations of sexual abuse to show a witnesses' mental state is very similar to asking questions about domestic abuse for the same purpose. Accordingly, Petitioner opened the door for the State to ask about domestic abuse when he asked Singleton about Rivers' allegations of sexual abuse.

This Court has long recognized that a party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been

incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003).

Here, the trial judge initially ruled the State could not ask Rivers about domestic abuse that occurred prior to the date of offense. The State complied with that ruling until Petitioner opened the door by asking about Rivers' prior allegations of sexual abuse. Petitioner's questions about allegations of sexual abuse made by Rivers were enough by themselves to open the door to evidence of other allegations of domestic abuse¹. However, when those questions are coupled with Petitioner's stated rationale of inquiring about Rivers' mental state, it is even clearer that Petitioner opened the door to this line of questioning.

Harmless Error

Finally, this Court found the error of admitting Singleton's testimony could not be harmless because the evidence against Petitioner was not overwhelming. Furthermore, the Court noted the evidence could not be merely cumulative because Singleton's testimony corroborated Rivers' testimony. The State respectfully disagrees with the Court's analysis.

As an initial matter, the evidence of prior domestic violence between Petitioner and Rivers did not unduly prejudice Petitioner because evidence of domestic violence was inevitably going to be heard by the jury. Rivers testified that her relationship with Petitioner included some violence on behalf of Petitioner. (R. 255). Petitioner did not object to this testimony. Rivers went on to make at least four additional references during her testimony to abuse that she suffered at the hands of Petitioner. (R. 261, 267, 270, 319). Petitioner did not object to any portion of

¹ Indeed as trial counsel for Petitioner noted pretrial, Petitioner did not have any prior domestic violence convictions. Petitioner argued Rivers' domestic violence claims were mere allegations. Accordingly, the State limited its questioning of Singleton to her personal observations of injuries she witnessed Rivers sustain and allegations of abuse that Rivers told her about. (R. 248-50). Therefore, the testimony elicited by the State was proportional to the doors that Petitioner opened on cross examination.

Rivers' testimony on this point. However, even if Petitioner had objected to this testimony, any objection would have been overruled by the trial judge. The trial judge was never presented with this question, but he previously indicated he would allow testimony about domestic violence on the day of the offense. (R. 147). We can also be sure of the trial judge's ruling because domestic abuse was part of the *res gestae* of the offense. Rivers could not testify about the events of May 16, 2012 without mentioning Petitioner's abuse because the abuse was part of the timeline of events that evening. Rivers drove Petitioner and his co-defendant to pick up the murder weapon because Petitioner abused her and forced her into the car. Therefore, there was no way for Petitioner to keep out all evidence of his prior abuse of Rivers. The jury was going to hear about it regardless. Therefore, Singleton's observations of prior instances of abuse between Petitioner and Rivers had little, if any, prejudicial effect on Petitioner.

Finally, despite the jury's long period of deliberation and the requirement of an Allen charge, the evidence against Petitioner was nonetheless overwhelming. The evidence presented by the State at trial established that Petitioner was wearing a red shirt via testimony from both Jujain Hemingway and Rivers. (R. 158, 274). An analysis of Petitioner's phone done by Willis Walker placed Petitioner at the scene. (R.539-40). Verna Lockhart-Carter also placed Petitioner nearby the scene. (R. 218). It was also corroborated that Fat is Petitioner's nickname. (R. 222-23, 235, 248, 326). Finally, in a dying declaration, Kadeem Chambers told first responders that Fat is the one who shot him. (R. 187). The evidence was strong enough that trial counsel adopted a strategically questionable and legally dubious defense in closing argument. Trial counsel argued:

Alex Apostolou: I told you that at the beginning of the case I thought that at the end of the case you would believe my theory more: [Kadeem Chambers and Jujain Hemingway] came down here to collect a drug debt. They brought the firearm in their car. They're the ones that started getting into an argument about it. They brought out the firearm, it got wrestled away from them, and that's when the shooting occurred to them.

(R. 605, lines 1-8). Trial counsel did not argue for self-defense. Trial counsel did not ask for a self-defense jury instruction. Trial counsel more or less argued that the Victims deserved to be killed because they were drug dealers. Essentially, trial counsel argued for jury nullification. Presumably, trial counsel would not have done this but for the overwhelming evidence against Petitioner. Therefore, any error resulting from testimony about Petitioner's prior abuse of Rivers was entirely harmless.

CONCLUSION

For all of the foregoing reasons, the State requests this Court grant the petition for rehearing. This Court should affirm Petitioner's convictions and sentences.

Respectfully submitted,

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Donald Michael Mathieson, Esquire
Richland County Public Defender's Office
1701 Main Street
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I further certify that all parties required by Rule to be served have been served.
This 24th day of May, 2019.


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