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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000982

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SC Court of Appeals

THE STATE,

Respondent,

v.

ARTHUR LEE WILLIAMS, III

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

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

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29483
(864)-942-8800

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STATEMENT OF ISSUE ON APPEAL

Was the issue of whether the trial judge erred in denying Appellant's motion to remove or strike the videotape of Appellant's drug purchase from evidence preserved for appeal when Appellant waived any objection to the videotape's admissibility by explicitly conceding that he had no objection to the videotape, and where Appellant did not object to Sammy Anderson's competency until after he had testified? And even if Appellant had preserved these issues for appeal, whether the trial judge erred in denying Appellant's motion where Appellant failed to prove Anderson was incompetent and the State appropriately authenticated the videotape of the drug purchase?

STATEMENT OF THE CASE

In October 2015, the Laurens County Grand Jury indicted Appellant for one count of distribution of cocaine base third offense. On May 24-25, 2018 a jury trial was held in the Laurens County Court of General Sessions with the Honorable Donald B. Hocker, presiding. Appellant was represented by Ivan J. Toney, Esq. The State was represented by Assistant Solicitors Margaret Boykin and Dale Scott of the Eighth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant. The trial judge sentenced Appellant to a term of twenty-five years' imprisonment for distribution of cocaine base third offense. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On July 10, 2015, Officer Shane Prather of the Clinton City Police Department utilized the services of Sammy Anderson as a confidential informant to execute a controlled purchase of cocaine base at 84 Ponderosa Lane in Laurens County (R. 20-21). Appellant was the target of the controlled purchase operation. (R. 24). Anderson was equipped with a video recording device and given \$100 to make a purchase of cocaine base. (R. 26, 33). Anderson was dropped off in the vicinity of the residence at 11:18 AM and picked up by law enforcement after completing the buy at 11:25 AM. (R. 26-27). Anderson gave law enforcement the suspected cocaine base. (R. 33). The substance was later tested and analyzed by SLED and found to be one gram of cocaine base. (R. 155). Anderson was paid \$50 by law enforcement for his help with this transaction. (R. 40).

At trial, Anderson testified he was the victim of an attack in July 2017 where he was beaten with a hammer. (R. 71-73). Anderson could not remember how long his injuries left him in the hospital, but his injuries were severe enough for Defense counsel to opine that he looked “like John Merrick, the ‘elephant man’ with his distorted skull and his facial disfigurements.” (R. 116, lines 8-10). Despite his injuries, Anderson was able to remember specific details of his transaction with Appellant. Anderson remembered that he asked law enforcement to let him out of their car a certain distance away from Appellant’s house because Appellant knew Anderson didn’t have a car. (R. 60-61). Anderson also told Appellant that he was buying the drugs for someone else. (R. 61, State’s Exhibit #13). Anderson identified Appellant in court and said he knew Appellant for twenty years. (R. 57-58). At the conclusion of Anderson’s direct testimony, the State offered the video of the drug transaction into evidence. Appellant did not object. (R.

65). The video depicts a hand to hand drug transaction between Appellant and Anderson. (State's Exhibit #13). At the conclusion of trial, Appellant was convicted of distribution of cocaine base.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (referencing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). “An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.” State v. Bickham, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009).

ARGUMENT

I.

The issue of whether the trial judge erred in denying Appellant's motion to remove or strike the videotape of Appellant's drug purchase from evidence was not preserved for appeal because Appellant waived any objection to the videotape's admissibility by explicitly conceding that he had no objection to the videotape. Furthermore, Appellant did not object to Sammy Anderson's competency until after he had testified. Even if Appellant had preserved these issues for appeal, the trial judge did not err in denying Appellant's motion because Appellant failed to prove Anderson was incompetent and the State appropriately authenticated the videotape of the drug purchase.

Appellant contends the trial judge erred in denying his motion to remove or strike the videotape of Appellant's drug buy with Sammy Anderson, the confidential informant, from evidence after Anderson contradicted himself during cross examination. Specifically, Appellant argues Anderson was not competent to testify and should have been excluded as a witness by the trial judge. Furthermore, Appellant argues the videotape was not properly authenticated and should have been excluded from evidence. Appellant's arguments are without merit. Appellant waived any objection to the admissibility of the videotape by explicitly conceding that he had no objection to its admission. Furthermore, Appellant did not challenge Anderson's competency until after Anderson had already testified. Thus, Appellant failed to preserve any issue regarding Anderson's competency on appeal. However, even assuming Appellant did not waive his objection to the admission of the videotape, the trial judge nonetheless properly admitted it into evidence because it was properly authenticated by the State. Additionally, assuming Appellant preserved the issue of Anderson's competency for appeal, Anderson was presumed competent to testify and Appellant otherwise failed to prove that Anderson was incompetent. Appellant's conviction and sentence should be affirmed.

Waiver/Issue Preservation

Appellant argues the trial judge erred in denying his motions to remove or strike the videotape of Appellant's drug buy from evidence. At trial, Appellant argued that if the video was not removed from evidence, a mistrial should be granted in the alternative¹. (R. 108). Appellant waived any objection he may have had to the admissibility of the videotape by explicitly acknowledging he did not object to the videotape's admission when it was offered into evidence. (R. 65). Furthermore, Appellant did not challenge Anderson's competency until after he already testified. (R. 108). Because Appellant did not object to Anderson's testimony and did not challenge Anderson's competency until after he testified, any issues regarding Anderson's competency are not preserved for appellate review.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). Failure to contemporaneously object to the question now advanced as prejudicial 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). When a party specifically states they have no objection to the admission of evidence, it acts as a waiver of any issue that party subsequently has with the admissibility of the evidence. State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007).

¹ Appellant does not argue on appeal that the trial judge erred by not granting a mistrial.

To determine if Appellant successfully preserved this issue for appeal, it is instructive to review the portion of the record where the video was entered into evidence:

Assistant Solicitor: Your Honor, the state at this point – he's ID'ed it – identified it, vouched for its accuracy. The state would publish State's No. 13---

The Court: Okay.

Assistant Solicitor: --- or offer it for admission into evidence and then publish it.

The Court: Okay. Mr. Toney?

Defense Counsel: No objection.

The Court: All right. Without objection, No. 13 into evidence for the state.

(R. 65, lines 5-14). Appellant did not object to the admissibility of the videotape. In fact, Appellant specifically acknowledged he had no objection to the videotape's admission. Appellant therefore waived any objection to the videotape's admissibility. Additionally, Appellant did not object to Anderson's competency until the day after Anderson testified. Because Appellant did not offer a timely objection or a challenge to Anderson's competency, any issue regarding Anderson's competency is not preserved for appeal.

Competency

Even if Appellant properly preserved the issue of Anderson's competency for appeal, Anderson was properly allowed to testify because Anderson's testimony was presumed to be competent and Appellant did not otherwise prove that Anderson was incompetent.

A determination of competency is rooted in South Carolina Rule of Evidence 601. The rule states:

- (a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or these rules.
- (b) Disqualification of a Witness. A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or

through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

Rule 601 SCRE. “[A] trial judge should make a judicial determination of competency through his personal observations of a witness while that witness is being questioned.” State v. Camele, 293 S.C. 302, 304, 360 S.E.2d 307, 308 (1987). “[S]tatements from advocates for either party in a judicial proceeding evaluating a witness' competency cannot substitute for a trial judge's personal observations of a person's capacity to be a competent witness.” Id. “Courts presume a witness to be competent because bias or other defects in a witness's testimony—revealed primarily through cross examination—affect a witness's credibility and may be weighed by the factfinder.” State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005). “In order to be competent to testify, a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath.” State v. Needs, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998) (citing Commonwealth of Pennsylvania v. Goldblum, 498 Pa. 455, 447 A.2d 234, 239 (Pa.1982)). “The party opposing the witness has the burden of proving a witness is incompetent.” Id.

Here, Anderson was presumed to be competent to testify. Appellant did not question Anderson's competency prior to his testimony, but rather questioned it the day after Anderson testified. Even if Appellant made a timely objection to Anderson's competency, he did not prove that Anderson was incapable of expressing himself or incapable of understanding the duty to tell the truth. Appellant argues that Anderson was incompetent to testify because he contradicted himself on cross examination. If a witness contradicting himself on cross examination rendered him incompetent to testify, then perhaps no witness would ever be deemed competent. Any contradictions in Anderson's testimony could certainly be considered by the jury when deciding

the weight to be given to the testimony. Indeed, Appellant rightly encouraged the jury in closing argument to consider Anderson's contradictions when deciding if Anderson was a credible witness. (R. 181-91). However, a contradiction in testimony alone does not prove that a witness is incompetent. Because Appellant failed to prove Anderson was incapable of expressing himself or understanding the duty to tell the truth, the trial judge did not abuse his discretion in ruling that Anderson was a competent witness.

Authentication

Assuming for the sake of argument that Appellant preserved the issue of authentication of the drug buy videotape for appeal, the trial judge did not abuse his discretion in admitting the videotape. The State produced sufficient evidence for the jury to conclude the videotape was what the State claimed it to be.

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901, SCRE. Evidence must be authenticated before it can be admitted State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). “The burden to authenticate . . . is not high’, and requires only that the proponent ‘offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’” Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting United States v. Hassan, 742 F.3d 104, 132 (4th Cir. 2014)).

Here, two witnesses authenticated the videotape for the State. Officer Prather identified his initials on the tape. (R. 37). Prather testified that he reviewed the tape and said it showed a drug transaction between Anderson and Appellant. (R. 37). Next, Anderson testified that he reviewed the tape and it was a fair and accurate depiction of his drug transaction with Appellant.

(R. 63-64). The testimony of Anderson and Prather combined to form a satisfactory foundation for the jury to conclude the videotape was, in fact, a depiction of a drug transaction between Appellant and Anderson. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed:

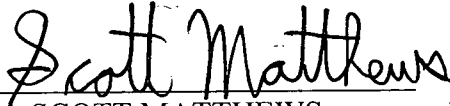
Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864)-942-8800

BY: 
SCOTT MATTHEWS
Bar # 101464

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

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

DAVID M. STUMBO.
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864)-942-8800

BY: Scott Matthews
Scott Matthews
Bar # 101464

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

ATTORNEYS FOR RESPONDENT

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