

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Judge Eugene C. Griffith

Lower Court Case No. 2014GS3203246
Court of Appeals Case No. 2018-001556

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JUN 20 2019
SC Court of Appeals

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Final Reply Brief of Appellant

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Dated: This 19th Day of June, 2019

West Columbia, South Carolina

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II. Respondent’s argument concerning the irrelevancy of the film Where the Lilies Bloom must fail when the State introduced evidence of the manner and method of Decedent’s burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant’s guilt.

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APPELLANT'S ARGUMENTS IN REPLY

- I. Appellant's Issues 1 and 2, whether the trial court erred in analyzing and/or excluding the film Where the Lilies Bloom, were properly preserved at trial when the film was offered twice by Appellant as evidence, its admissibility argued by both sides, and an on-the-record ruling issued by the trial court.
- II. Respondent's argument concerning the irrelevancy of the film Where the Lilies Bloom must fail when the State introduced evidence of the manner and method of Decedent's burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant's guilt.
- III. Failure of the trial court to give the "general permissive inference" charge set forth in *Elmore* was erroneous and prejudicial to Appellant when evidence presented at trial refuted the presence of actual malice during the alleged commission of the crime.

STATEMENT OF THE FACTS

Appellant adopts and incorporates by reference the Statement of the Case and Statement of the Facts set forth in Appellant's initial brief.¹ The factual history raised below is limited to replying to issues raised by Respondent's Statement of the Facts.

Respondent's Statement of the Facts concludes Appellant admitted a financial and malicious motive to kill Decedent; this is not reflective of testimony at trial. During the direct examination of Investigator Bruce Wade, Wade stated when Appellant was interviewed following Decedent's disappearance, Appellant did not know the specific amount of money in Decedent's bank account. (R. p. 107, lines 16-24.) Further, Appellant testified he and Decedent enjoyed a quiet and peaceful marriage. (R. p. 133, lines 8-13.) No evidence was presented at trial as to prior law enforcement involvement surrounding the couple or marriage.

Respondent's Statement of the Facts further characterizes the testimony of Dr. Ross as indicating a frying pan was the likely object which inflicted Decedent's head wounds. This characterization does not fairly reflect the testimony at trial, where Dr. Ross admitted the head wounds could have been caused by a cement block, like the one found in the grave, or from Decedent striking her head on a chair. (R. p. 063, lines 6-9, p. 064, lines 9-12.)

ARGUMENT

- I. **Appellant's Issues 1 and 2, whether the trial court erred in analyzing and/or excluding the film Where the Lilies Bloom, were properly preserved at trial when the film was offered twice by Appellant as evidence, its admissibility argued upon by both sides, and an on-the-record ruling issued by the trial court.**

At trial, the admissibility of Defense Exhibit 7, *Where the Lilies Bloom*, was argued on three separate occasions: immediately prior to Appellant taking the stand; during Appellant's

¹ Appellant further incorporates by reference all Argument set forth in Appellant's Initial Brief.

testimony on direct examination; and at the beginning of Appellant's testimony on re-direct examination.² Each of these arguments followed an objection by the State to the admissibility of the film.

Case law in this State supports Appellant's argument that Issues 1 and 2 are preserved for review. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. King, 424 S.C. 188, 199, 818 S.E.2d, 204, 209 citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). Here, Appellant offered the film as evidence on-the-record two (2) times; both times the Court excluded the film in an on-the-record ruling. This issue was properly preserved pursuant to King and Dunbar.

While Appellant concedes that no explicit request was made for the trial court to view the film in camera, Appellant was not required to provide specific instructions to the trial court on how to examine the evidence in order to preserve this issue. Respondent's contend Appellant should have explicitly asked the trial judge to watch the film; this explicit request is not required, as the proper way to determine the admissibility of the film was evident from its medium- to view it.

Respondent's argument that specific instructions by Appellant were required to preserve Issues 1 and 2 is analogous to requiring a party offering a photograph or written material to

² Although argument on the film's admissibility was heard three (3) separate times, the film was only offered by Appellant twice: during his direct examination and at the conclusion of his cross examination. The other argument occurred when the State objected to the film prior to Appellant's testimony, before the film was offered by Appellant.

explicitly tell the judge, on-the-record, to look at the photograph or read the written material. Explicit instructions such as those proposed by Respondent are not supported by the framework set forth in Dunbar.

Notably, the instant case differs from most issue-preservation cases, as the State, not Appellant, raised the objection to Defense Exhibit 7 pursuant to Rule 403. At trial, the duty of Appellant was to raise the issue of the film's admissibility; Appellant satisfied his duty by offering the film as evidence and securing an on-the-record ruling; therefore, this issue is preserved for review.

II. Respondent's argument concerning the irrelevancy of the film Where the Lilies Bloom must fail when the State introduced evidence of the manner and method of Decedent's burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant's guilt.

At trial the State spent significant time and effort detailing the manner and method of Decedent's burial. These efforts began with the State's opening statement, wherein the Solicitor painted a vivid picture of a body decomposing in a shallow grave, telling jurors they would hear about "a burial as malicious as the killing that put her (Decedent) there," and that Decedent was buried beside a family pet, with the pet's grave covered in mementos and ceremonial items that were absent from Decedent's. (R. p. 002, lines 2-22.)

The State continued with testimony about the gravesite, including photographs of Decedent in the grave. State Ex. 108, 109, 110, 112, Tr. 211, ll. 24-25, (R. p. 191, lines 5-8, p. 046, lines 12-25.) The State's focus on the burial concluded in the Solicitor's closing argument, wherein she told jurors Decedent was "stuffed in a cold, shallow grave." (R. p. 194, lines 1-2.) In each of these examples the manner of burial was argued as being probative of Appellant's guilt. Admitting the film, in whole or in part, would have permitted jurors to decide whether the burial

was truly “malicious,” or if it was Appellant’s attempt to follow Decedent’s instructions, that she be buried in the manner shown in the film.

Assuming *arguendo* the trial court did not err in excluding the film when offered during Appellant’s direct examination, the State opened the door to its admissibility when the State questioned Appellant about specific scenes and characters on cross examination. When the State delved into specific portions and passages, the film’s probative value certainly rose above the low-threshold for admissibility under Rules 401 and 402. Further, once the State opened the door to admitting the film, it seems disingenuous to allow the State to successfully argue the film’s probative value was significantly outweighed by the danger of unfair prejudice, as required to warrant exclusion under Rule 403.

Appellant concedes that an issue such as this, a film being probative of a manner of burial in a murder prosecution, has not been clearly addressed by this Court. However, in this case, the film was directly probative of the manner and method of Decedent’s burial and should have been considered by jurors while deliberating.

Respondent’s own brief supports Appellant’s argument that the jury should have been permitted to view the film: Respondent goes into painstaking detail of each factual difference in the death of Decedent and the death of the film’s main character. This analysis is then used as an attempt to draw out dissimilarities and argue against the film’s admissibility. *This analysis, however, was only made possible through viewing the film and its contents.* This analysis is one that jurors should have been permitted to conduct, unfortunately, the trial court foreclosed on that opportunity when it excluded the film. This exclusion is clear error.

III. Failure of the trial court to give the “general permissive inference” charge set forth in Elmore was erroneous and prejudicial to Appellant when evidence presented at trial refuted the presence of actual malice during the alleged commission of the crime.

Respondent’s brief alleges that because the trial court issued the first portion of the Elmore charge, the second portion, referred to in Belcher as the “general permissive inference” instruction, is not needed nor required in this State. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). This assertion must fail given the current case law governing this charge.

Here, Appellant is not relying on Belcher to draw factual similarities between the alleged crime or raise an issue of mitigation; rather, Appellant draws on Belcher solely for its two-pronged analysis of the Elmore charge. Belcher reinforced the ideal that both portions of the Elmore charge remain valid in this State. Despite the clear language of Belcher and Elmore, the trial court failed to give both portions of the Elmore charge, instead choosing to abbreviate the charge down to one (1) sentence: “Inferred malice may also arise when the deed is done with a deadly weapon.” (R. p. 225, lines 4-11.) When the trial court omitted all mention of the second prong of Elmore, jurors were given no explanation or instruction as to the weight of an inference, how it arises, or how it is to be used in deliberations. In this case, the trial court significantly deviated from the charge set forth in Elmore - this is clear, reversible error.³

Further, Respondent’s assertion that any error in the charge constitutes harmless error must fail. Appellant concedes numerous versions of what occurred surrounding Decedent’s death were presented at trial. Respondent relies on parts of each account to argue actual malice was

³ This issue (Issue 3 of Appellant’s Initial Brief) was properly preserved at trial given the framework for issue preservation set forth in King and Dunbar. Following the erroneous charge, Appellant objected to the specific charge and secured an on-the-record ruling. (R. p. 232, lines 3-6.)

present: the alleged affair, the finances, alcoholism, and gambling. While these factors may supply an alleged motive for the crime, they do not constitute malice under the law charged at trial. Additionally, Appellant explained his confession to the murder was his attempt to protect his son, who he learned was charged with murder.

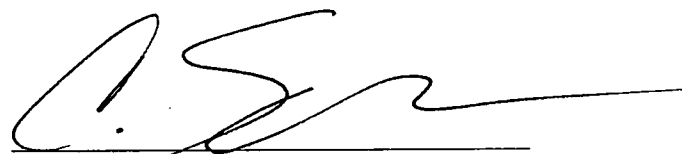
Based on the transcript, the State's presentation of evidence of actual malice is scant. Here, there is no ill-will or hatred between Appellant and Decedent reflected in the record, other than a passing reference to a confrontation in the story Defendant recanted. There is no evidence of a struggle in the home or reports of previous domestic violence between the parties. By erroneously charging the jury on inferred malice, the Court allowed the State to escape their burden of presenting evidence of actual malice- this error was not harmless.

CONCLUSION

For these reasons, as well as those set forth in Appellant's Initial Brief, this case should be reversed and remanded for a new trial consistent with the findings of this Court.

RESPECTFULLY SUBMITTED

This 19th Day of June, 2019
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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Final Brief and Final Reply Brief conforms with Rule 211(b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the following: Appellant's Final Brief, Appellant's Final Reply Brief, in the above referenced case has been served upon: Susannah Cole at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201 on June 19, 2019, by hand delivery.



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