

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
The Honorable Roger M. Young, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2018-001128

THE STATE,

Respondent,

v.

DASHAUN LIVAUGHN SIMMONS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Did Appellant preserve the issue of whether the trial judge correctly allowed Sidearis Singleton to testify that Denzel Heyward previously abused Quesantrina Rivers, when Appellant did not object to Singleton's testimony or join Heyward's objection to the testimony? If the issue was preserved for appeal, was Appellant prejudiced by evidence that his co-defendant was a domestic abuser when the evidence was irrelevant to Appellant's guilt or innocence, thereby making any error harmless to Appellant?

II.

Whether the trial judge abused his discretion by declaring Verna Lockhart-Carter to be a hostile witness and allowing the State to use leading questions to impeach her with her prior inconsistent statement, when her inconsistent statement resulted in surprise to the State and harm to the State's case? Even if the trial judge erred in declaring Lockhart-Carter a hostile witness, was any error harmless to Appellant when Lockhart-Carter did not identify Appellant in her testimony?

STATEMENT OF THE CASE

In January 2014, the Charleston County Grand Jury indicted Appellant for one count of murder (2014-GS-10-758), one count of attempted murder (2014-GS-10-759), one count of armed robbery (2014-GS-10-760), and one count of possession of a firearm during the commission of a violent crime (2014-GS-10-761). On November 10-15, 2014, Appellant proceeded along with his co-defendant, Denzel Heyward, to a jury trial in the Charleston County Court of General Sessions with the Honorable Roger M. Young, presiding. Appellant was represented by Peter M. McCoy, Esquire, and Sara A. Turner, Esquire. The State was represented by Assistant Solicitors Jennifer Shealy, Nina Savas, and Daniel Cooper of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of attempted murder, armed robbery and possession of a firearm during the commission of a violent crime. The jury was hung on the murder charge for Appellant and his co-defendant and a mistrial was declared for those charges. Following the verdict, the trial judge sentenced Appellant to thirty years' imprisonment for attempted murder, thirty years' imprisonment for armed robbery and five years' imprisonment for possession of a firearm during the commission of a violent crime. Each sentence ran consecutively to the others resulting in an aggregate sentence of sixty-five years' imprisonment. Appellant filed a motion for reconsideration of his sentence on November 26, 2014. Appellant's motion was denied on June 12, 2018. Appellant then timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

On May 16, 2012, Quesantrina Rivers and Denzel Heyward traveled with their daughter, Trinity, and Appellant to drop Trinity off at a relative's house. (R. 242). After dropping Trinity off, Rivers drove Heyward and Appellant to the home of a man named Skrill¹. (R. 244). Heyward entered Skrill's home and then exited carrying a black duffle bag with the top of a gun sticking out. (R. 246). Heyward placed the bag in Rivers' trunk. (R. 246-47). The trio left Skrill's home and returned to Heyward's grandmother's house. Rivers anticipated going to dinner and a movie later that night. (R. 249). When Rivers told Heyward she would rather get her hair done, Heyward assaulted her and pulled at her ponytail². (R. 250). Later in the evening, Rivers drove Heyward and Appellant to the home of Lorenzo Mechiz on Johns Island. (R. 254-55). Mechiz's mother, Verna Lockhart-Carter, identified Heyward as being present at her home just prior to hearing three loud booms outside her house. (R. 169-70).

Earlier in the evening of May 16th, Jujuan Hemingway agreed to drive his brother, Kadeem Chambers, from Longs, South Carolina to Charleston County. (R. 491-95). Hemingway followed directions from his brother's GPS, but he was not sure where they were going or who they were going to meet. (Tr. V. III, 133, 136). Hemingway and Chambers eventually arrived on Johns Island and parked outside of Mechiz's residence. (R. 255-58, 499-500). Chambers exited the vehicle from the passenger side and began to speak with Heyward. Heyward pushed Chambers against the vehicle and Appellant emerged from the woods with a gun drawn and demanded that Hemingway and Chambers both get on the ground. (R. 260-62, 503-04). Heyward and Appellant repeatedly asked Hemingway and Chambers "where the money at?" (R. 506). As the two victims were lying on the ground, Appellant held the gun to the back of Chambers' head

¹ Quesantrina Rivers did not know Skrill's real name. (R. 244-45).

² Heyward subsequently assaulted Rivers a second time later in the evening at a gas station. (R. 253). Neither Appellant nor Heyward objected to this testimony.

while Heyward stomped on Hemingway's head multiple times. (R. 262-64, 507). Hemingway's teeth were "pushed back" and his mouth was bleeding as a result of Heyward's assault. (R. 508, lines 5-6). As Hemingway and Chambers maintained they didn't have any money to give, Appellant fired a shot into the pavement near Hemingway's head. (R. 267, 508). Heyward then instructed Hemingway to get off the pavement and open the trunk of his car. (R. 509). Heyward removed a suitcase out of Hemingway's car and placed it into his own car. (R. 509-11). Shortly thereafter, Chambers and Appellant began "tussling" and Appellant fired two shots. (R. 268, 514). Chambers cried out that he had been shot and he and Hemingway began to run from the scene in opposite directions. (R. 268, 514-15). Appellant, Rivers, and Heyward returned to their vehicle and began to chase Hemingway with the vehicle. During the chase, Appellant shot at Hemingway from the back seat of the car. (R. 269). Rivers nearly hit Hemingway with the vehicle but managed to avoid him by swerving. (R. 269).

Hemingway managed to escape the oncoming vehicle by jumping over a fence. After jumping the fence, Hemingway ran to a portable bathroom in a new housing development and called 911. (R. 516). Meanwhile, Chambers attempted to drive his vehicle to get help but crashed into a white pickup truck nearby. (R. 95). Law enforcement arrived at the scene of the crash and found Chambers in the driver's seat gasping for air. (R. 99). As law enforcement waited for an ambulance to arrive, Deputy Matthew Colburn of the Charleston County Sheriff's Office asked Chambers who shot him. Chambers told Colburn that "Fat³" shot him. (R. 100). Chambers died early the next morning from a gunshot wound to his chest. (R. 635).

After the shooting, Rivers spent the next two nights at Skrill's house with Heyward. (R. 274-76). Rivers eventually confessed her role in the shooting to her mother, Sidearis Singleton

³ Denzel Heyward went by the nickname "Fat." Heyward was referred to as "Fat" throughout the trial. (R. 487).

and turned herself in to law enforcement. (R. 214-16, 278). Rivers was arrested and charged with accessory after the fact of murder, armed robbery, and attempted murder. (R. 282). Rivers entered into a proffer agreement with the State and testified against Heyward and Appellant at trial. (R. 288).

STANDARD OF REVIEW

I.

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

II.

“A case will rarely be reversed on the ground that the trial judge permitted leading questions and then only if there has been a clear abuse of discretion resulting in prejudice to the objecting party.” State v. Hale, 284 S.C. 348, 351, 326 S.E.2d 418, 420 (Ct. App. 1985).

ARGUMENT

I.

The issue of whether the trial judge erred by allowing Sidearis Singleton to testify that Denzel Heyward previously abused Quesantrina Rivers was not preserved for appeal by Appellant, because Appellant did not object to Singleton's testimony, nor did he join Heyward's objection to the testimony. Even if the issue is preserved for appeal, Appellant was not prejudiced by evidence that his co-defendant was a domestic abuser and therefore any error in the admission of the testimony is harmless to Appellant.

Appellant initially argues the trial judge erred in allowing Sidearis Singleton to testify that Denzel Heyward previously physically abused Quesantrina Rivers. Appellant contends Singleton's testimony constituted improper evidence of Heyward's bad character and thereby prejudiced Appellant because of his joint trial with Heyward. In support of his contention, Appellant relies exclusively on our Supreme Court's reversal of Heyward's conviction in State v. Heyward, 426 S.C. 630, 828 S.E.2d 592 (2019). Appellant's argument is meritless. As an initial matter, Appellant did not preserve this issue for appellate review. Trial counsel for Heyward moved pretrial to exclude any testimony regarding Heyward's prior history of domestic violence with Rivers. (R. 6-7). Appellant did not join his co-defendant's objection pretrial or make his own objection. (R. 6-19). Furthermore, Appellant did not object when evidence of Heyward's prior history of domestic violence with Rivers was offered during the trial⁴. (R. 210-35). Therefore, Appellant did not preserve this issue for appeal. However, even if the issue is

⁴ Trial counsel for Heyward objected when the State asked Singleton about prior incidents of domestic violence on redirect examination. The State attempted to ask about Heyward's prior abuse of Rivers based on Heyward opening the door to this line of inquiry with his cross examination of Singleton. The trial judge did not make a ruling on the record, but we can infer that Heyward's objection was overruled because the solicitor was allowed to ask about Singleton about Heyward's prior acts of domestic violence against Rivers. Our Supreme Court subsequently ruled that Heyward did not open the door to this line of inquiry. Heyward, 426 S.C. at 637, 828 S.E.2d at 595. However, Appellant did not offer his own objection or attempt to join his co-defendant's objection to the solicitor's questions about Heyward's prior acts of domestic violence. (R. 231).

preserved, Appellant suffered no prejudice from testimony about his co-defendant's history of domestic violence. Heyward's prior acts of domestic violence with Rivers are irrelevant to Appellant; therefore, any error in their admission is entirely harmless to Appellant.

Error Preservation

“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). 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. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). “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). An “appellant may not utilize the objection of another defendant to gain review” of an issue on appeal. State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678,678 (1977). An appellant may not preserve an issue for appeal using his co-defendant's objection. State v. Brannon, 347 S.C. 85, 89, 552 S.E.2d 773, 774-75 (Ct. App. 2001). If an appellant fails to make an objection or join his co-defendant's objection, he fails to preserve that issue for appeal. State v. Nichols, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997).

Here, Appellant did not move to exclude any testimony regarding Heyward and River's history of domestic violence pretrial or object to the testimony when it was offered at trial. (R. 6-19, 210-35). Appellant cannot use his co-defendant's objection to preserve an issue for appeal.

Because Appellant did not offer his own objection to Singleton's testimony or attempt to join in Heyward's objection to the same testimony, Appellant did not preserve this issue for appeal.

No Prejudice and Harmless Error

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Even if Appellant preserved this issue for appeal, he did not suffer any prejudice from Singleton's testimony. Appellant relies exclusively on the reversal of his co-defendant's conviction to argue that his conviction should be reversed as well. Appellant urges this Court to feed Appellant "out of the same spoon" as Heyward and grant him a new trial as well. (Initial Brief of Appellant 12). However, the argument that testimony regarding Heyward abusing Rivers somehow prejudiced Appellant is attenuated at best.

In Heyward, our Supreme Court determined the evidence of prior incidents of domestic violence between Heyward and Rivers was problematic because it "was introduced solely to demonstrate Heyward's poor character, and given the close case presented, we are unable to find the error was not prejudicial." Heyward, 426 S.C. at 638, 828 S.E.2d at 596. While Heyward was prejudiced by the jury hearing about his prior acts of domestic violence towards Rivers, this prejudice does not extend to Appellant. Singleton never testified that Appellant abused Rivers

nor did Rivers testify that Appellant previously abused her. Appellant is essentially arguing that he suffered from some kind of guilt by association because the jury heard that his co-defendant was a domestic abuser. Appellant's argument should be unavailing to this Court. Appellant does not cite to any authority to support his argument because no such authority exists in this state. As previously noted, trial counsel for Appellant did not object to the admission of Singleton's testimony. Trial counsel likely didn't object because Heyward's prior acts of domestic violence were irrelevant to Appellant's guilt or innocence. The trial judge did not abuse his discretion in admitting evidence of Heyward's prior incidents of domestic violence when such evidence was irrelevant to Appellant.

If we assume for the sake of argument that the trial judge committed error when he admitted Singleton's testimony, any error was harmless to Appellant because it had no effect on the jury's deliberations regarding Appellant's guilt or innocence. The jury was likely convinced of Appellant's guilt by Rivers' eye witness testimony identifying Appellant as having participated in the robbery and attempted murder of Jujuan Hemingway rather than by any evidence that Heyward previously abused Rivers. (R. 260-69). Furthermore, the jury was explicitly instructed by the trial judge to consider Appellant's guilt separate and apart from his co-defendant's guilt:

The Court: I will also remind you that there are two defendants in this case, each of whom is charged with murder, attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for both defendants. The fact that you might find one defendant guilty or not guilty should not control your verdict as to the other defendant. Where more than one person is charged with the crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both or you may convict both. It will depend on your view of the evidence and the testimony. You must take each defendant and consider the evidence as to that defendant and my instruction to

you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant.

(R. 799-800, lines 21-14). Thus, the jury was instructed to consider Appellant's guilt and Heyward's guilt separately. Therefore, any error in the admission of prejudicial evidence against Heyward was harmless to Appellant. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly declared Verna Lockhart-Carter to be a hostile witness and allowed the State to use leading questions to impeach her with her prior inconsistent statement, because her inconsistent statement resulted in surprise to the State and harm to the State's case. However, even if the trial judge erred in declaring Lockhart-Carter a hostile witness, any error was harmless because Lockhart-Carter did not identify Appellant.

Appellant next argues the trial judge erred by declaring Verna Lockhart-Carter a hostile witness because the ruling allowed the State to ask her leading questions on direct examination. Appellant claims Lockhart-Carter's testimony prejudiced him because she identified Heyward as being present at her home prior to the shooting, and because she opined that Heyward may have been involved in the shooting. Appellant's argument fails for two reasons. First, the trial judge properly declared Lockhart-Carter to be a hostile witness because her prior inconsistent statements resulted in actual surprise and harm to the State. Secondly, even if the trial judge erred by declaring Lockhart-Carter a hostile witness, Lockhart-Carter's testimony did not prejudice Appellant because she never identified Appellant. In fact, Lockhart-Carter never mentioned Appellant's name during the entirety of her testimony. (R. 143-76). Therefore, it is difficult to substantiate how Lockhart-Carter's testimony prejudiced Appellant. Because Lockhart-Carter could not, and did not, identify Appellant, any error in the admission of her testimony is entirely harmless.

The South Carolina Rules of Evidence provide “the credibility of a witness may be attacked by any party including the party calling the witness.” Rule 607 SCRE. Furthermore, Rule 611(c) defines when it is proper to use leading questions:

(c) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 611(c) SCRE. A witness may not be declared hostile except upon a showing of both actual surprise and harm. State v. Bendoly, 273 S.C. 47, 49, 254 S.E.2d 287, 288 (1979). “A case will rarely be reversed on the ground that the trial judge permitted leading questions and then only if there has been a clear abuse of discretion resulting in prejudice to the objecting party.” Hale, 284 S.C. at 351, 326 S.E.2d at 420.

At trial, the State called Verna Lockhart-Carter as a witness in their case in chief. The solicitor questioned Lockhart-Carter about who she witnessed her son, Lorenzo Mechiz, speaking with when she arrived home on the evening of May 16, 2012⁵. Lockhart-Carter claimed she could identify one of the individuals that her son was speaking with, but only because her son told her who it was. (R. 147). Trial counsel for Heyward objected to the State’s question on hearsay grounds. (R. 147). The trial judge asked the jury to exit the courtroom and an *in camera* hearing was held. (R. 148). During the hearing, Appellant joined his co-defendant’s objection and argued Lockhart-Carter’s testimony was hearsay. (R. 157-58). The solicitor argued Lockhart-Carter’s testimony contradicted a prior out-of-court statement that she gave the solicitor’s office. The solicitor articulated the substance of Lockhart-Carter’s previous statement

⁵ Lorenzo Mechiz invoked his Fifth Amendment right against self-incrimination under the United States Constitution and refused to testify at trial. (R. 179-80, 488-89).

as follows: “She only—when she spoke with us, she had said that she recognized [Heyward], because [Mechiz] told her it was [Heyward], but she also recognized [Heyward] because they were friends.” (R. 155, lines 13-16). The solicitor also claimed Lockhart-Carter told the Solicitor’s office that her son told her that Appellant and Rivers were the other individuals outside with Heyward. (R. 155, 159). However, unlike her independent ability to identify Heyward, Lockhart-Carter did not have any independent knowledge of who Appellant and Rivers were. The trial judge sustained Heyward and Appellant’s objection and ruled Lockhart-Carter could only identify someone she recognized on her own and could not repeat what her son told her. (R. 159).

After the *in camera* hearing, Lockhart-Carter again claimed she couldn’t identify Heyward independently of what her son told her. (R. 163-64). This contradicted what Lockhart-Carter previously told the Solicitor’s office, and as a result, the State moved to have Lockhart-Carter declared a hostile witness. (R. 168-69). The State’s motion was made in a bench conference and was not placed on the record. (R. 168). Both Heyward and Appellant lodged objections following the bench conference, but neither party asked the trial judge to make findings on the record regarding why he declared Lockhart-Carter a hostile witness. (R. 168-69). After the trial judge’s ruling, Lockhart-Carter admitted she knew Heyward because of his friendship with her son. (R. 169). When Lockhart-Carter was cross examined by Heyward, she confirmed that she knew Heyward because he lived “right around the corner” from her house. (R. 175, lines 13-20).

Here, the trial judge properly deemed Lockhart-Carter to be a hostile witness. Lockhart-Carter previously told the Solicitor’s office that she could identify Heyward independently of what her son told her. However, at trial she contradicted her previous statement and surprised the

State. Furthermore, Lockhart-Carter's testimony was important to the State's case because it placed Heyward near the scene of the robbery before it happened. In light of Mechiz invoking his Fifth Amendment privilege, Lockhart-Carter became the only witness, other than Rivers, who could place Heyward near the scene of the crime. Therefore, the State's case would have been harmed unless the State was allowed to impeach Lockhart-Carter by using leading questions about her prior inconsistent statement to the Solicitor's office. Accordingly, the trial judge properly declared Lockhart-Carter to be a hostile witness because of the surprise and harmful affect her inconsistent statements had on the State's case.

Even if the trial judge erred in declaring Lockhart-Carter a hostile witness, any error was harmless to Appellant. Lockhart-Carter never identified Appellant or even mentioned his name in her testimony. (R. 143-76). Regarding whether anyone else was with Heyward, Lockhart-Carter could only say there was "another guy standing outside." (R. 162, lines 15-16).

Appellant's argument is nearly identical to his first argument on appeal. Appellant contends that Lockhart-Carter's testimony was prejudicial to Heyward, and therefore that prejudice somehow extends to Appellant. This argument should be unavailing to this Court as well. The jury was likely convinced of Appellant's guilt because of River's eyewitness testimony identifying Appellant as the person who shot at Jujua Hemingway rather than Lockhart-Carter's testimony placing Heyward near the scene of the crime. (R. 260-69). While Lockhart-Carter's testimony may have prejudiced Heyward, it was completely irrelevant to Appellant. Therefore, any error in the admission of the testimony is harmless to Appellant. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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Appellant.

CERTIFICATE OF COUNSEL

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

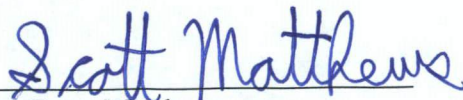
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