STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2020-000482

RECEIVED

Apr 20 2020

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Ricky Henley was indicted during the July 2012 term of the Grand Jury for Abbeville County for burglary in the first degree and larceny. He proceeded to a jury trial before the Honorable R. Lawton McIntosh from April 8-9, 2015, in Abbeville, South Carolina. The jury found Henley not guilty of larceny, but remained hung on the burglary charge. Judge McIntosh declared a mistrial on the burglary charge.

Henley was subsequently re-tried for burglary in the first degree from April 4-6, 2016 in Abbeville, before the Honorable Eugene C. Griffith, Jr. and a jury. Henley was found guilty of burglary in the first degree. He was sentenced by Judge Griffith to imprisonment for a term of twenty-four years.

STATEMENT OF FACTS

Rick Culbreth resided in the same community as Jamie and Amanda Moss in Abbeville. R. pp. 486-87. On February 15, 2012, Culbreth passed by the Moss's house and noticed a black male running from the front door to a side door and observed a gray car backed under the carport with the door open. R. pp. 488-89. Recognizing the situation as abnormal, Culbreth turned his vehicle around and went back to the Moss's house. R. pp. 488-89. Culbreth observed the black male standing in the doorway of the house and noted it appeared he had made entry into the home. R. p. 489. Culbreth testified he could tell the man wasn't supposed to be there. R. p. 490.

After spotting Culbreth, the intruder got into his vehicle and pulled out of the driveway. R. p. 490. The intruder stopped his vehicle in front of Culbreth's white pickup truck, which was pulling a trailer with a lawn mower, and asked him if he needed any help with lawn care, to which Culbreth replied that he did not. R. p. 490. When asked what the intruder looked like, Culbreth stated, "I just remember he had a bandana tied tightly around his head. It went down the back of his neck. Light-skinned from what I could tell. But I do not remember any, you know, marks, facial scars, or anything." R p. 491. The intruder then drove away and merged onto Highway 28 North. R. p. 491. As the intruder drove past, Culbreth looked into his rearview mirror and was able to get a partial license plate number. R. p. 491. After the intruder turned onto Highway 28 North, Culbreth turned into the driveway and called 911. R. p. 491. Culbreth described the car as a Pontiac that was gray in color and seemed to be a late 1980's or 1990's model. R p. 498. The license plate number Culbreth provided to law enforcement was "HSN 454."

Patrick Thompson, a detective in the property crimes division of the Abbeville County Sheriff's Office, was working on February 15, 2012. R. pp. 518-19. Deputy Thompson received a radio call about the apparent burglary at the Moss home and proceeded to the area. R. pp. 519-

20. Upon his arrival, Deputy Thompson processed the crime scene. R. p. 520. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. R. p. 521. Officers also recovered a cigarette butt from the intruder's point of entry. R. p. 521. The cigarette was collected and placed into evidence at the scene. R. p. 524.

Amanda and Jamie Moss both testified at trial. R. pp. 508-17. Mrs. Moss testified that when looking through the home's windows, you can see televisions, speakers, couches, antiques, and pictures. R. p. 509. At trial, Mrs. Moss was shown various photographs which she testified depicted the home's side carport door. R. pp. 511-12. The carport door was partially broken off and appeared to have been tampered with. R. p. 512. The doorframe was also damaged. R. p. 512. Mrs. Moss testified the cigarette found near the steps to the home did not belong to her or her husband, as neither one of them smoked. R. p. 513, 510. Mrs. Moss stated the cigarette was not there when she left the house that morning. R. p. 511. Mrs. Moss noted she normally locked the door to the house when she left. R. p. 514. Mr. Moss also noted the door was locked when he left and there was not a cigarette butt on the steps. R. p. 516. A laptop computer was missing from the home. R. p.136).

After speaking with Culbreth, Deputy Thompson searched for a suspect vehicle. R. p. 521. Deputy Thompson searched a SLED vehicle database based on the tag description provided by Culbreth. R. p. 522. The search returned a 1997 Pontiac owned by Henley and Jolene Gray with the license plate number "HSN 544." R. p. 522. Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Henley's address in Anderson County on February 22, 2012. R. p. 524. Upon arriving at the apartment, Deputy Thompson noticed a Pontiac Bonneville with the license plate "HSN 544" parked outside. R. p. 528. Deputy Thompson noted this license plate number was close to the description provided by Culbreth and

that, "I believe he stated it was HSN 454 or HSM 454, but we knew it was, there was a possibility it could be off, because he was reading it from his rearview mirror." R. p. 528. Henley was at the residence and spoke with law enforcement. R. p. 529. Henley admitted he had been in Abbeville recently and further acknowledged he had been on Highway 28. R. pp. 530-31. Henley also recalled speaking to someone in a truck. R. p. 531. Henley also admitted he smoked Newport cigarettes, the type of cigarette found at the Mosses' home. R. pp. 532-33. Deputy Thompson also noticed Henley was wearing boots, the soles of which resembled the impression left on the Moss's carpet. R. p. 532. Henley was later placed under arrest. R. p. 533. The laptop computer was never recovered. R. p.231.

Maryanne Boehm works for SLED in the DNA casework department. R. p. 570. Boehm received the Newport cigarette butt for testing on March 29, 2012. R. p. 573. The DNA profile developed from the cigarette butt matched the DNA profile of Henley. The probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt is 1 in 1.5 billion. R. p. 580.

ARGUMENT

I.

The trial judge properly denied Henley's motion to quash the indictment on double jeopardy grounds because his prior acquittal for larceny did not decide the ultimate question of whether he entered the dwelling with criminal intent.

Henley contends the trial judge erred by denying his motion to quash the burglary indictment in his retrial on double jeopardy grounds, citing Yeager v. United States, 557 U.S. 110 (2009). Henley argues his acquittal on the larceny charge during his first trial should have barred the State from re-trying him for burglary because this would be "relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny." Br. of App. p. 17. Henley's argument fails because his prior acquittal of larceny did not decide whether Henley committed burglary. The issue of whether Henley entered the Moss's home without consent and with the intent to commit a crime is different from whether he stole the laptop, and was not decided in his first trial. Henley's re-trial for burglary in the first degree was not barred by issue preclusion. Certiorari should be denied.

Relevant Facts

As noted in Respondent's Statement of the Case, at Henley's first trial, he was acquitted of larceny and the jury hung on the burglary charge. R. p. 348. At the beginning of Henley's second trial, Henley filed a motion to quash the indictment based on Double Jeopardy. R. p. 352-61 (Defendant's Motion to Quash). During a pre-trial hearing, Defense Counsel argued:

> So it's our position, Your Honor, that under the Supreme Court case of Yeager that because of this overlap in facts that jeopardy attaches because he was acquitted of full larceny that there is, in order to prove their case at all for a burglary, they need to reference some sort of crime and the only one they can reference is larceny. He's been acquitted of that larceny. So it's our position that under Yeager and Ashe that the issue preclusion analysis offered there and done

under the double jeopardy clause of the Fifth Amendment would prevent the State from prosecuting him again on this case.

R. p. 392. In response, the solicitor argued:

> While [Defense Counsel] does note that the warrant identifies that petty larceny, we would note that the indictment does not identify that a petty larceny was committed inside. It merely restates the elements of burglary in that Mr. Henley entered with the intent to commit a crime therein. We didn't say there was larceny in the indictment. And to quote Yeager, because a jury speaks only through its verdict, it's failure to reach a verdict cannot by negative implications yield a piece of information that helps put together the trial puzzle. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return. Your Honor, we will certainly concede that the not guilty on the larceny puts us in a much tougher spot with regard to proving the burglary. But again we would note the elements of burglary of Code 16-11-311 (a). A person who is guilty of burglary in the first degree if a person enters a dwelling without consent and with intent to commit a crime in the dwelling. It doesn't say enters without consent and commits a larceny. . . . Mr. Brown and I have pretty much resigned ourselves to the fact that any mention of that lap top will be gone from this trial. But to say that Yeager precludes us from going forward on this case because of double jeopardy is to just read Yeager too broad.

R. pp. 392-93. The solicitor also referred the trial judge to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), and continued:

> But it is an assault with intent to commit CSC, along with a burglary case. The Defendant in the assault with intent to commit CSC was found not guilty of the assault with intent to commit CSC but found guilty of the burglary first degree. Defendant appealed and the Court reasoned basically the same reason that there is no requirement that the Defendant has to be found guilty of the underlying crime. Once again to sum it up, Your Honor, the elements of burglary do not require us to prove the underlying larceny. They merely require the State to prove that there is an intent to commit a crime in the dwelling.

R. p. 394. The trial judge ruled:

> Here's what I think. I understand your argument. I think it's a directed verdict to fact question as to whether they conclude and get past directed verdict stage. With the intent to commit a crime therein is one of the elements of burglary first and second and third. The State's got that burden of proving with the intent to commit a crime. I don't believe the acquittal of the larceny precludes them from presenting facts which the jury could prove intent to commit a crime therein. They have not had that opportunity yet. So I think your motion should be denied right

> now, but I feel confident you will most likely renew it at the directed verdict stage in a similar-worded argument if the State's failed to prove anything beyond a suggestion of intent to commit a crime therein. So I don't believe jeopardy attaches to the burden (sic) charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

R. pp. 399-400.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

Discussion

"Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed. . . . [with] a value of two thousand dollars or less, is petit larceny." S.C. Code Ann. § 16-13-30(A). By comparison, "a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and. . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. §16-11-311(A)(2).

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject from the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the

same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

The doctrine of issue preclusion is embodied in the Fifth Amendment's Double Jeopardy Clause. Ashe v. Swenson, 397 U.S. 436, 445-46 (1970). The issue-preclusion principle means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. In Ashe, the Court explained "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." Id. at 443. The Court advised:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

Id. at 444.

The Supreme Court later examined an issue preclusion challenge involving an attempted re-trial after the defendant was acquitted on some counts and the jury hung on other counts in Yeager v. United States, 557 U.S. 110 (2009). In Yeager, the defendant was indicted for securities fraud and insider trading. Id. at 113. The jury acquitted the defendant on the securities fraud counts; however the jury remained hung on the insider trading charges. Id. at 115. The prosecution subsequently sought to re-try the defendant on the insider trading counts, which prompted the defendant to move to dismiss all counts on the ground that the acquittals on the fraud counts precluded the prosecution from re-trying him for insider trading. Id. The District Court denied the motion, concluding the question of whether the defendant possessed insider information was not necessarily resolved in the first trial. Id. at 116-17. Despite the fact that

Yeager's case was distinguishable from Ashe in that Yeager involved an acquittal on some counts and a mistrial on others, the Supreme Court applied Ashe's reasoning to Yeager's case, noting, "the reasoning in Ashe is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." Id. at 120. The Supreme Court subsequently found, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123.

In this case, Henley's prior acquittal of larceny did not bar retrial for burglary. The dispositive fact in a burglary case is the entering of a dwelling with criminal intent, not the completion of a particular crime once inside. These are different issues. Henley's acquittal of larceny did not settle whether he entered the home with criminal intent. On the contrary, the fact that the first jury hung on the burglary charge shows they did not make a determination on that issue.

State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), is instructive. In that case, Mitchell sought a new trial on his conviction for burglary in the first degree because the jury found Mitchell not guilty of petit larceny alleged to have occurred during the burglary. The Court noted that Mitchell seemed to be referencing the "inconsistent verdict theory" and explained:

> Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: 'A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling....' S.C. Code Ann. § 16-11-311 (A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified

> that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime.

Id. at 422-23. Like Mitchell, Henley conflates entering with the intent to commit a crime with the actual commission of a crime. Although the jury in Henley's first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove he committed a separate crime within the home in order to prove the burglary charge. See State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (in a case where defendant was found guilty of first-degree burglary and not guilty of first-degree assault with intent to commit criminal sexual conduct, the Court of Appeals held the "fact that the jury failed to convict Peterson of the sexual assault charge does not affect the validity of the burglary charge. Indeed, that fact is immaterial."). As noted by the solicitor at trial, if the State was required to prove a larceny occurred within the home, the State may find itself in dire straits under the Yeager framework. But as in Mitchell, the jury could have concluded Henley criminally entered the home, yet been unconvinced he stole the laptop, which was never recovered. R p. 231. Because Henley's acquittal for larceny did not settle whether he entered the home with the intent to commit a crime, the State was not precluded from retrying Henley for burglary. Certiorari should be denied.

II.

The trial judge properly denied the defense's request to admit evidence of Henley's prior acquittal for larceny because the evidence was irrelevant and risked misleading the jury.

Henley asserts the trial court erred in denying his motion to admit evidence of his prior acquittal on the larceny charge relating to the laptop that was stolen from the Mosses' house. Specifically, Henley avers the prior verdict was relevant to attack the State's theory that he had the intent to commit a crime within the residence, and that the trial judge never made the requisite finding that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. This argument fails because the larceny acquittal was irrelevant in Henley's subsequent prosecution for burglary and any probative value the evidence had was substantially outweighed by unfair prejudice. Certiorari should be denied.

Relevant Facts

At trial, Defense Counsel sought to introduce the self-authenticating copy of the larceny indictment from Henley's first trial. R. p. 612. Defense Counsel argued:

> I think it's exculpatory information and it is important for the jury to consider. One of the things that the state has to prove is the intent to commit a crime therein. We are permitted to put up a defense, Your Honor. [Henley] is certainly entitled to his constitutional right to defend himself and part of our defense is in talking to the jury about that crime of intent to commit a crime that he was acquitted of. It's exculpatory and I think it's important for the jury to know. I don't think it brings up any sort of reference as to any prior trial on this particular charge. . . .

R. p. 613. The solicitor argued the evidence was irrelevant. R. p. 612, 614. The trial judge found, "I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. . . But it seems to me this would confuse the jury

more than help the jury in their findings of fact as to his guilt or innocence on this charge." R. p. 614.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); 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).

Discussion

Only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE.

However, even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of

time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

Evidence of Henley's acquittal on the larceny charge was irrelevant because it did not make the existence of any fact of consequence more or less probable. The prior verdict was not evidence at all; it was a previous jury's determination of guilt of a separate, uncharged crime. There was no evidentiary link whatsoever presented at trial that would make the larceny acquittal a relevant issue. While the State was required to prove Henley entered the Moss's home with intent to commit a crime, the fact that Henley was found not guilty of larceny did not make that fact more or less likely. As discussed above, the State was not required to prove a crime actually occurred within the home, much less that the crime was larceny.

Henley further claims the trial court erred by not conducting a Rule 403 analysis. Because the evidence was irrelevant, it had no probative value and no 403 balancing test was required. But even if the evidence had some probative value necessitating a 403 balancing test, the trial judge made an express finding that the evidence would "confuse the jury." This is clearly an acknowledgment that he consideredRule 403 was before excluding the evidence. The trial judge correctly concluded the prior acquittal carried a high risk of unfair prejudice because

it would have confused the issues and misled the jury. The admission of the indictment for larceny would invite the jury to speculate about what occurred at the first proceeding and would suggest a decision on an improper basis. By presenting evidence that Henley was acquitted of a larceny charge stemming from the same incident, Henley would be impliedly imploring the jury to find him not guilty of burglary simply because the earlier jury had found him not guilty of larceny. This would suggest a decision on an improper basis, as the jury would concern themselves with the results of the other proceeding instead of the facts presented to them throughout trial. The evidence of Henley's prior conviction was thus irrelevant and carried the risk of unfair prejudice. See West v. State, 228 Ga.App. 713, 492 S.E.2d 576 (Ga. Ct. App. 1997) (finding evidence of defendant's prior acquittals had no probative value in trial for perjury based on statements he made during prior trial for child molestation, because evidence of the acquittals was neither relevant nor material to any issue in the case). Certiorari should be denied.

III.

The trial judge properly limited the admission of hearsay testimony from Henley's first trial because Henley did not show the witness was unavailable, and Henley was not prejudiced by the exclusion of a portion of the testimony.

Henley contends the trial judge erred in limiting the admission of Jolene Gray's testimony from Henley's first trial. At trial, Henley asserted Gray's testimony would provide evidence that the police neglected to obtain corroborating evidence like a doo-rag or burglary tools when they first visited Gray's home. Now on appeal, Henley makes a different argument; he asserts the testimony was relevant to show it was possible police picked up a different cigarette off the ground at Gray's house, and tested it instead of the one from the crime scene. His argument fails for several reasons. First, his argument on appeal is different from his argument at trial, and thus unpreserved. Second, Henley did not show Jolene Gray was unavailable pursuant to Rule 804(b)(1), as defense counsel did not even subpoena Gray to secure her appearance at trial. While the Solicitor graciously did not object to the bulk of the prior testimony coming in, he did not consent to the admission of the redirect examination from the first trial. It was within the trial court's discretion to refuse to admit this portion of the testimony because it was hearsay. Finally, Henley was not prejudiced by the exclusion of Gray's redirect testimony because it was not important to the case and he was still able to argue that the State neglected to seek a search warrant and find corroborating evidence at Gray's home. Certiorari should be denied.

Relevant Facts

During Henley's first trial, his girlfriend, Jolene Gray, asserted during cross-examination by the solicitor that law enforcement came to the residence she shared with Henley on a second occasion. R. p. 260. On re-direct, Gray testified:

> The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. [Henley's] car be there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around. Yes.

R. p. 261. Defense Counsel referenced Gray's testimony during her closing argument in support the defense theory that the State's DNA evidence was not credible because of poor investigative protocols, noting:

> You also remember Officer Thompson isn't really sure what other officers were there. And that's another thing that's not good enough. He doesn't know which officers were there. An officer he says was there doesn't remember being there. But Jolene said that one of the times the officers came to talk to [Henley], there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012. And, again, you heard from the SLED agent all the care that they take. And that they had that cigarette butt from March 29th until sometime in August of 2012. They tested it in August. They sent it back to the agency in 2012. But yet she doesn't return her actual analysis until January 2013.

R. p. 302.

During Henley's subsequent re-trial for burglary in the first degree, defense counsel moved to admit former testimony from a previous trial. R. p. 461. Defense Counsel stated, "Ms. Gray was the client, my client's girlfriend. She had some testimony, we have been unable to locate her. I can have our investigator come up and we can have her testify as to all of the efforts that she made to try to locate Ms. Gray." R. pp. 461-462. Defense Counsel continued, "But we would ask under Rule 804 (b)(1), which is the hearsay exception where declarant is unavailable to introduce Ms. Gray's testimony from the previous trial." R. p. 462. The solicitor replied, "Judge, I really don't have an objection to it. If we were in the same boat, I'd be asking the same

thing." R. p. 462. The trial judge granted Defense Counsel's motion, stating, "motion granted." R. p. 463. However, the solicitor reserved his right to double-check whether Gray was actually unavailable: "[a]nd, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. pp. 463-64. The trial judge replied, "Okay. If you can find her, get her." R. p. 464. Defense Counsel indicated her agreement by stating, "I'm fine with that." R. p. 464.

After the State rested its case-in-chief, the solicitor stated:

> Judge, it's my understanding that there are two potential defense witnesses that are not here. . . . Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.

R. pp. 594-95. Defense Counsel responded:

> Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in **to show that no items were collected**, a doo-rag, burglary tools from the home since [Henley] did live there. It's our position that the entire testimony should come in.

R. pp. 595-96. The Court observed, "Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating." R. p. 596. Defense Counsel replied, "She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car." R. p. 596. The solicitor noted:

> And Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to

> [Henley], and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

R. p. 596. The trial judge found:

> All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those lines in your closing argument and you can summarize it, had they gone and found something in that search, certainly it would be here. It's not here.

R. p. 596-97.

During her closing argument, Defense Counsel noted:

> What else would a search warrant maybe have helped Officer Thompson with? Well, you heard Rick Culbreth say the individual was wearing a doo-rag and he wrote that a few days later on the lineup. A search warrant maybe would have produced that doo-rag. What about burglary tools? Why not get a search warrant for the car or the house or something like that to look for burglary tools?

R. p. 627. Defense Counsel later argued Officer Thompson, "could have gotten a search warrant. He could have gotten a comparison of the boots. He could have tried to find burglary tools or a doo-rag." R. p. 629-30.

Standard of Review

A trial judge's determination of whether a statement is admissible under Rule 804(b)(3) will not be disturbed absent an abuse of discretion. Dodd v. Berlinsky, 344 S.C. 172, 176, 543 S.E.2d 237, 239 (Ct. App. 2001).

Discussion

Rule 804(b)(1) of the South Carolina Rules of Evidence provides that the prior testimony of a witness is not excluded by the rule against hearsay if the declarant is unavailable as a witness. Rule 804(b)(1), SCRE. Specifically, the rule allows:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804(b)(1), SCRE. Rule 804(a) provides the various scenarios in which a declarant is deemed to be "unavailable." The only pertinent scenario in Henley's case is Rule 801(a)(5), which provides that a witness is unavailable for hearsay purposes if the witness, "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 801(a)(5), SCRE. The party offering the statement bears the burden of establishing unavailability. Dodd v. Berlinsky, 344 S.C. 172, 177, 543 S.E.2d 237, 240 (Ct. App. 2001).

Henley failed to show Jolene Gray was unavailable. While defense counsel asserted her investigator could not locate Gray, the solicitor's office had no difficulty locating her on short notice in the middle of trial. Gray told the solicitor's office she was never served with a subpoena. The record supports a finding that Gray was not unavailable, making her testimony inadmissible hearsay.

Henley had the burden of showing unavailability. Not only does the record belie his assertion that Gray was unavailable, he failed to make any offer of proof at trial showing what "reasonable means" he used to find Gray. See Wright v. Hiester Const. Co., 389 S.C. 504, 520, 698 S.E.2d 822, 831 (Ct. App. 2010) (explaining prior testimony was inadmissible "because there was no showing that [witnesses] were unavailable as witnesses"). Henley failed to show deviation from the standard hearsay rule was warranted. The solicitor was within his rights to

refuse to consent to this portion of the prior testimony, particular where the redirect examination was outside the scope of cross-examination.

Henley notes, "the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial." Br. of App. p. 26. However, this Court can find the testimony inadmissible on hearsay grounds despite the fact that the solicitor consented to admission of a portion of the prior testimony. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Regardless of whether Gray's prior testimony was properly admissible under Rule 804(b)(1), SCRE, Henley suffered no prejudice from the exclusion of a limited portion of the testimony. An appellate court will not reverse a conviction based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006).

The prior testimony in question was not important to the outcome of the case. This was the entirety of the testimony in question:

> The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. Ricky car be there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around.

(App.p.262).

Henley argued Gray's testimony was necessary to support the defense argument that law enforcement neglected to obtain a search warrant and search Henley's home for corroborating

evidence such as a doo-rag or burglary tools on this particular occasion.[1] But that fact was evident from the evidence presented at trial, and the theory was still presented to the jury. As noted by the trial judge in his ruling, defense counsel had the opportunity to, and did, emphasize multiple times during closing argument that law enforcement declined to search Henley's home for a doo-rag, burglary tools, or other corroborating evidence on that occasion. Although Henley now argues the testimony may have been relevant to show there was a possibility police tested a different cigarette than the one recovered from the crime scene, he did not argue this basis to the trial court. In any case, the testimony was not important and could not have affected the outcome of the case. Henley thus suffered no prejudice from the exclusion of the hearsay testimony. Certiorari should be denied.

[1] Police did later obtain a search warrant and search Gray's home. (App.p.259).

CONCLUSION

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

Respectfully submitted,

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