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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Unpublished Opinion No. 2020-UP-020

THE STATE,.....RESPONDENT

v.

TIMIYA RASHAD MASSEY,.....APPELLANT

RETURN TO PETITION FOR A WRIT OF CERTIORARI
Appellate Case No. 2017-002348

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred in finding the trial court properly exercised its discretion by refusing to allow the defense to cross-examine state's witness and alleged accomplice Williams about the fact he faced a life sentence if convicted of murder since Petitioner was entitled to probe Williams for his bias in this situation, and the trial court therefore, erred in sustaining the state's unspecified objection to this cross-examination?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals correctly affirm the decision of the trial court limiting the Appellant's cross-examination of the co-defendant by not allowing any questioning regarding the maximum sentence of the offense that he was charged of committing?

If the trial court and the Court of Appeals did err, due to the fact there was other overwhelming evidence that proves the Appellant's guilt can that error be considered harmless?

STATEMENT OF THE CASE

On August 29, 2017, the Appellant was indicted by the Greenville County Grand Jury for the offenses of murder and possession of a weapon during the commission of a violent crime (16-GS-23-008746); attempted murder (16-GS-23-008747); kidnapping (16-GS-23-003414); two counts of attempted armed robbery (16-GS-23-003412, 3413); and, burglary in the first degree (burglary 1st)(16-GS-23-008748). (R. pp. 375-386) On November 6, 2017, the Appellant was brought to trial before the Honorable Robin B. Stillwell for each of these offenses. Representing the state was assistant solicitor Doug Richardson, and representing the Appellant, attorney Caryle Steele. (R. p. 1)

The State alleged that the Appellant along with three other co-defendants unlawfully kidnapped a person in order to make him knock on the door of the victim. Once the victim answered, he was pistol whipped by the Appellant, and asked about the location of drugs. During the course of this robbery, the victim's brother was in the bedroom. He proceeded to grab his gun and enter the living room where a shootout occurred. The victim was hit in the leg and stomach and later died due to these gunshot wounds. (R. p. 303 lines 6-7) Three of the four defendants were later arrested and charged with all of the above referenced offenses.

During the Appellant's trial, two co-defendants Terry Harris (Harris) and Nyerere Williams (Williams) testified against him. During the cross-examination of Williams the Appellant's attorney asked him about the maximum punishment for the offense of murder. The assistant solicitor immediately objected which was sustained by the trial judge. Appellant's counsel went on with the next question conceding any argument he might have had regarding this line of questioning.

On November 8, 2017, the Appellant was convicted of each offense by a jury of his peers. (R. p. 371 line 14 – p. 372 line 10) Upon being convicted, the Appellant appeared before the trial court. He received a sentence of forty years incarceration for the offense of murder; twenty years for each count of armed robbery; thirty years for kidnapping; five years for possession of a weapon during the commission of a violent crime; thirty years for burglary in the first degree; and thirty years for attempted murder. The court ruled that each of these offenses were to be served concurrently. (R. p. 373 lines 1-19)

On November 8, 2017, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within his appeal the Appellant argued that the trial court erred in limiting the cross-examination of the co-defendant by not allowing any inquiry into his knowledge of the punishment for the offense of murder. The Appellant argued that he should have been allowed to reveal to the jury the bias that possibly existed during Williams’s testimony against him. In response to this appeal the State argued that any error that could have existed should be considered harmless.

On January 29, 2020, the Court of Appeals issued an unpublished opinion. Within this opinion the Court of Appeals decided that the trial court did not commit any errors in limiting the cross-examination of the Appellant. The Court of Appeals decided that, “the Appellate court will not disturb a trial court’s ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.” *State v. Massey*, 2020WL469369 (2020). Upon receiving this decision the Appellant filed a petition for writ of certiorari before this court. Within this petition the Appellant argues that the lower court erred in not allowing the cross-examination of the co-defendant to reveal he is facing a life sentence in order to reveal bias.

The Respondent now presents a return to this petition requesting this court to deny this petition for certiorari. The Respondent will argue that the decision of the Court of Appeals does not fall within the parameters found within the South Carolina Appellate Court Rule 242. The Respondent will argue that the Court of Appeals was correct in affirming the decision of the trial judge, and if any error exist it should be considered harmless. For these reasons the Respondent will reveal that this petition should be subject to a denial. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

Pursuant to Rule 242 of the South Carolina rules of the Appellate Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered.

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 SCACR

In reviewing each of these criteria the present case does not apply. The Court of Appeals unanimously affirmed the decision of the trial court, which should not be subject to review.

It is well settled that the scope of cross-examination is within the trial judge's discretion, and the court should not interfere absent a showing of prejudice by the complaining party. *State*

v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983). Even if an error exists it should be considered harmless. An error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial. *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985). Due to these reasons this petition should be subject to denial.

STATEMENT OF FACTS

On September 30, 2015, victim Kenneth Leach (Leach) was leaving the apartment of his girlfriend when he was approached by four men, each armed and wearing ski masks. They attempted to rob him but he did not have anything, so they forced him upstairs to the apartment of the two other victims, brothers Haskell and Anthony Nutridge. (Haskell)(Anthony). They made Leach knock on the door. Once Anthony answered the Appellant struck him with the gun knocking him to the floor. (R. p. 111 lines 7-16) Defendants then entered the apartment and Anthony was pistol whipped by the Appellant. (R. p. 253 lines 21-22) As he beat him he continued asking him “where is the shit at?”(R. p. 233 line 2) Later testimony revealed that the Appellant was referring to drugs. (R. p. 255 lines 9-10) During this assault Haskell was in the bedroom. He retrieved his .38 caliber revolver and walked toward the living room. (R. p. 233 lines 20-21) Haskell saw an individual on top of his brother so he fired at him. A gunfight ensued between Haskell and the Appellant until both individuals ran out of bullets. All of the defendants then ran out of the apartment. Haskell ran out of the apartment and at the bottom of the stairs Anthony was shot twice. Haskell held his brother as he died in his arms. (R. p. 239 lines 1-7)

The police were called to the scene and discovered the Appellant hiding in the woods behind the building. He had a gunshot wound to the leg so he was transported to the hospital. He was later charged with burglary 1st, murder, attempted murder, kidnapping, and two counts of attempted armed robbery. Two of the three other co-defendants were later found arrested and

charged with the identical charges as the Appellant. A fourth defendant who only went by the name of Cornelius was never found.

ARGUMENT

- 1. The Court of Appeals correctly determined that the trial court had the ability to limit the cross-examination of the Appellant as long as it did not manifest into an abuse of discretion.**

During the Appellant's trial, a co-defendant by the name of Nyerere Williams (Williams) was called by the solicitor to testify against the Appellant. He testified as to what occurred during the commission of this murder. Though he had the identical charges as the Appellant he had yet to be convicted or receive any type of plea offer. During cross-examination the Appellant inquired if Williams knew that he could be incarcerated for the remainder of his life if he was convicted of murder. (R. p. 290 lines 9-20) The assistant solicitor immediately objected to this question which was thereby sustained by the trial court. Within this appeal the Appellant argues that the trial court violated his right to confrontation in limiting this cross-examination. The Court of Appeals decided that this limitation was correct and affirmed the decision of the trial court. The Respondent agrees with the Court of Appeals decision.

A trial judge retains discretion to impose reasonable limits on the scope of cross-examination. *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). That ruling should not be disturbed by the appellant court absent a manifest abuse of discretion. *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). An abuse of discretion is defined as when a trial court order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusion. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). Once the punishment for murder was mentioned, the solicitor objected, which

was immediately sustained by the trial court. The trial court then made this explanation to the jury as to why he made that decision.

“All right ladies and gentleman, during that last testimony, you heard an objection stated by the State over the Defense’s characterization of a certain penalty for a certain criminal offense. And I sustained that objection. That’s not because I have any secrets that I want to keep from you. It’s because a potential sentence is not relevant to your decision. Your decision in this case is to determine whether the State has met its burden of proof of proving each and every element of the offense beyond a reasonable doubt.

It’s entirely the authority and the responsibility of the Court, that is me, to determine sentencing. So you don’t have to determine that. You don’t have any stake in that. That is the business of the Court. That’s why that was that that’s why that objection was sustained. Just wanted to let you know why.” (R. p. 294 lines 8-25)

The Court was of the opinion that the punishment should not be considered by the jury, and any mentioning of possible punishment would be prejudicial since that decision is left up to the trial court. The only thing the jury must consider is the evidence pertaining to innocence or guilt, not punishment. The trial court did not make this ruling in an abuse of discretion, but in order to not allow information that could be prejudicial before the jury.

The Court of Appeals decided that the trial court did not err in limiting the cross-examination of the Appellant. The trial court retains discretion to impose reasonable limits on the scope of cross-examination. *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. The Appellant failed to reveal any prejudice in the limitation of this cross-examination. Williams was the second co-defendant to testify. He admitted during his testimony that he had the identical charges as the Appellant and had not receive any deals; however, he was yet to be convicted nor sentenced. He admitted to lying to the police before, and how his current testimony is different to what he initially told the police upon being arrested.

Prior to Williams testifying another co-defendant Terry Harris (Harris) testified. His testimony is identical to Williams' as to what occurred during the commission of this crime. He also honestly stated that he was currently serving a ten year federal sentence for possession of a pistol. (R. p. 259 line 25 – p. 260 line 19) He testified that for his cooperation he wished that any sentence he received for these offenses be served concurrently with his federal sentence. (R. p. 261 lines 8-9)

The Appellant failed to reveal any prejudice caused by the trial court's limitation of his cross-examination of Williams. So no error exists regarding the decision made by the court of appeals in affirming the decision of the trial court. This petition should be subject to dismissal.

2. If any error regarding the limitation of the Appellant's cross-examination existed, it should be considered harmless.

The Respondent initially argued to the Court of Appeals that the decision should be affirmed due to the fact if any error exist that error must be considered harmless.¹ A violation of the confrontation clause is not per se reversible but is subject to a harmless error analysis. *Gracely*, 399 S.C. at 375, 731 S.E.2d at 886 (2012). As stated in *Gracely*, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) there are five factors that the court should consider when determining harmless error:

The factors include, (1) the importance of the witnesses' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating

¹ Since the conclusion of this case the Respondent also observed that the Appellant's argument should have never been considered by the Court of Appeals. The Appellant never raised any argument as to the ruling of the trial court. So Appellant's trial counsel acquiesce any arguments regarding this matter. Where counsel acquiesces in the judge's ruling and makes no other objections regarding the issue the issue is not preserved for appeal. *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998). An issue conceded in a lower court may not be argued on appeal. *TNS Mills, Inc. v. S.C. Dept. of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 475 (1998), An issue is not preserved for appeal when the issue is conceded at trial. *State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000).

or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and, (5) the overall strength of the prosecution's case.

Gracely, 399 S.C. at 375, 731 S.E.2d at 886, quoting, *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1431.

When applying these factors to the present case it reveals that the limitation of the cross-examination should be considered harmless error.

The testimony of Williams was not that important for the conviction of the Appellant. This is because Harris testified right before him. The Appellant had revealed no objection, or any limitation of the cross-examination of Harris, whose testimony was almost identical to that of Williams. If Harris was the only person that testified the information regarding the participation of the Appellant in this crime would have still been revealed to the jury. Williams' testimony was not necessary for the Appellant's conviction; thereby satisfying the first factor in determining if the error should be considered harmless.

Williams' testimony was also cumulative satisfying the second factor. Even though Harris and Williams were sequestered, they both gave identical testimony as to the Appellant actions in the commission of this crime. They both testified that the Appellant was armed, wore a mask, was the first to enter the apartment, pistol whipped the victim, and got into a gunfight with the other victim. They also both testified that the Appellant had a holster which was found with him when he was discovered.

Other evidence was presented corroborating the testimony of the witness on material points. Leach testified that he was approached by the Defendants who attempted to rob him. When he did not have anything on his person they made him go upstairs to get the victim to answer his door. (R. p. 111 lines 7-12) Haskell also testified that he saw the Appellant on top of his brother and that is when he shot at him.(R. p. 235 lines 1-3) He testified that there was a

gunfight. (R. p. 236 lines 1-8) The Appellant was found by the authorities hiding in the woods with a gunshot wound to his leg. (R. p. 35 line 11 – p. 36 line 4) Josh Spurgeon, crime scene investigator, testified that he found a ski mask and gun near the area that the Appellant was found hiding, he was also lying on a gun holster. (R. p. 86 lines 10-15) The holster that both Williams and Harris testified the Appellant had when he approached the complex. (R. p. 250 lines 7-10)(R. p. 273 line 6-8)

Kaitlin Appel who conducted the DNA analysis testified that hairs found in the ski mask matched the Appellant. (R. p. 200 line 20 – p. 202 line 15) And firearm examiner James Armstrong testified that the shell casings found at the scene were from a .9 mm which was the gun that was found at the scene where the Appellant was found hiding. (R. p. 223 line 3 – p. 224 line 22)

The trial court allowed all other questions regarding the crimes that Williams committed. The trial court also did not limit the Appellant's cross-examination regarding the crime's Harris were serving, nor the fact he wished to have a concurrent sentence. It should have been obvious that there was some bias of the co-defendants without the mentioning the amount of time Williams was facing due to his arrest for murder. Any limitation of the cross-examination did not prejudice the case of the Appellant.

The prosecution's case was strong. There was obvious evidence that was presented that would have convinced the jury that the Appellant committed this crime beyond a reasonable doubt. The testimony of Harris placed him at the scene with a gun and a ski mask. There was testimony from two people that there was a shootout that caused the death of the victim. Pursuant to the "hand of one is the hand of all" analysis it did not matter if the Appellant was the person

who made the fatal shot, he was guilty of murder just by being present. This court has previously determined:

“Under the ‘hand of one is the hand of all’ theory one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), quoting, *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)

Other evidence that linked the Appellant to the crime included testimony revealing that the face mask found near where he was discovered tested positive with his DNA; the fact he was found with a gun holster that each of the co-defendants testified he had in his in his possession when he arrived at the apartment complex; the gun found near the place where he was discovered matched ballistics with the shell casings found at the scene; and, he was shot in the leg and hiding for maybe up to an hour. (R. p. 317 lines 11-16) There was plenty of evidence presented that would have proven the guilt of the Appellant beyond a reasonable doubt without the testimony of Mr. Williams.

Due to the overwhelming evidence that existed proving his guilt beyond a reasonable doubt, any error made by the trial court in limiting the cross-examination of Williams must be considered harmless. Error that is “harmless beyond a reasonable doubt” means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319. Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial. *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985).

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. The Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court.

Respectfully submitted,

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July 24, 2020.

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PROOF OF SERVICE
Appellate Case No. 2017-002348

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Writ of Certiorari, and Proof of Service has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, July 24, 2020 to RDudek@sccid.sc.gov, and to his assistant, Hkellner@sccid.sc.gov, and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 24th day of July, 2020.



Donna D'Alessio,
Legal Assistant to Tommy Evans, Jr.
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