

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case Tracking No. 2018-001909

The State,

Respondent,

v.

Dana L. Morton,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in requiring Morton to represent himself when he did not affirmatively waive his right to counsel and was not properly warned about the dangers of self-representation?
- II. Did the trial judge err in failing to appoint a public defender to represent Morton?
- III. Did the reference by the investigator to a reliable confidential informant impermissibly vouch for the informant's credibility?
- IV. Did the trial court properly limit Appellant's cross-examination of the informant related to unadjudicated drug charges?

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. Did the trial judge err in requiring Morton to represent himself when he did not affirmatively waive his right to counsel and was not properly warned about the dangers of self-representation?

Appellant contends the trial court erred in requiring him to proceed *pro se* at trial without providing a proper warning of the dangers of self-representation pursuant to Faretta v. California, 422 U.S. 806 (1975). While the transcript does not reflect a proper Faretta warning, the case should be remanded to the circuit court for a determination of whether Appellant knew of the dangers of self-representation such that the trial court properly required him to proceed *pro se*.

A defendant may waive his right to counsel, but he must do so knowingly and intelligently. Faretta, 422 U.S. at 835. For a knowing and intelligent waiver to occur, the defendant must be “(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.” Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing Faretta, 422 U.S. at 835, 95 So. Ct. at 2541, 45 L. Ed. 2d at 581-82). “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

Appellant moved to relieve counsel. (T.13-14; R.13-14). The trial court indicated there did not appear to be cause for the removal of Appellant’s counsel. (T.24-26; R. 24-26). Appellant indicated he believed counsel was railroading him and asked for appointment of a public defender. (T.24; R.24). Appellant did not provide an affidavit of indigency or other proof that he would qualify for a public defender. As a result, the trial court offered Appellant two options: 1) proceed with his current counsel; or 2) fire counsel and go forward *pro se*. (T.30; R.30). Appellant responded by stating: “I would like to proceed, sir, but I don’t - - I wish not to have [Appellant’s

trial counsel] on my side.” Appellant continued: “He could - - if he could give me my case load, and I could sit down right here in front of y’all, . . ., and we can proceed.” (T.31; R.31). The trial court took that response as an affirmative waiver of counsel and a desire to go forward *pro se*. The trial court verified the response, asking: “Are you asking [Appellant’s trial counsel] to get off your case?” Appellant responded directly: “Yes.” (T.31; R.31). There is no question Appellant affirmative selected to go forward *pro se* when presented with the clear option of either continuing with counsel or representing himself.¹

The State acknowledges the transcript fails to provide a colloquy between the judge and Appellant regarding the dangers of self-representation. (T.1-50; R.1-50). As a result, the question would become whether Appellant knew of the dangers through other means, had prior experience such that he would have the requisite knowledge to make a valid waiver, or otherwise made a valid knowing and voluntary waiver of his right to counsel.²

In State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420 (1977), the question presented was “[w]hether or not such waiver [of counsel] was intelligently made in this case” and the Court indicated the issue was “a subject of debate.” The Court found the appropriate remedy was not a new trial, but instead “the appellant is entitled to a factual determination by the lower court on the ‘intelligent waiver’ issue.” As a result, the Court remanded the case “to the lower court for a determination of whether the waiver was intelligently made” and allowed both the prosecution and the appellant to introduce relevant evidence. Id.

¹ It is also important to note that the trial court specifically found that the request to fire counsel was being made for the purpose of delaying trial. (T.30; R.30).

² During briefing, the State moved to remand the case to the trial court for a determination of whether Appellant’s waiver of counsel was knowing and voluntary even without a proper Faretta warning being included in the transcript. This motion was denied.

The South Carolina Supreme Court explained again in 1991: “We now hold that, except in **extraordinary cases** where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing.” State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) (emphasis added). The Court explained the remand allowed “the trial judge to determine whether appellant knowingly and intelligently waived his right to counsel under the standard established in Prince and Wroten.” Id. The standard requires the court to “look to the record to determine whether other facts show petitioner had sufficient background or was apprised of his rights by some other source.” Wroten, 301 S.C. at 294–95, 391 S.E.2d at 576.

More recently in State v. Dial, Op. No. 27939 (S.C. filed Jan. 29, 2020), the South Carolina Supreme Court reiterated the appropriate remedy is not a new trial, but instead a remand to the trial court to make a determination of whether the waiver was knowing and voluntary:

[W]e remand Dial’s case to the circuit court for the court to conduct an evidentiary hearing pursuant to Dixon to determine whether Dial knowingly and intelligently waived his right to counsel. At this hearing, both the prosecution and the defense are permitted to present evidence on the issue, and if the trial court finds the waiver was not knowing and intelligent, it shall grant the defendant a new trial.

Id.

The State believes this Court should issue an order to remand the case to allow the trial court to consider the issue of whether Appellant made a knowing and voluntary waiver of his right to counsel. This is not one of the “extraordinary cases” in which remand would serve no purpose, especially in light of Appellant’s vast previous criminal history. (T.1084-1096; R.1061-1073). The remand would allow the trial court to consider Appellant’s background, including prior exposure to criminal trials and whether he ever proceeded before a court *pro se*. Remand would

allow the trial court to explore whether Appellant was adequately warned by any other source, including another judge, his prior trial counsel, the solicitor's office, or others. Finally, Appellant would be able to testify and be cross-examined regarding his understanding at the time of his decision of the dangers of proceeding *pro se*.

Accordingly, this Court should find Appellant made an affirmative request to go forward representing himself when he selected to fire counsel after being presented the dual option of going forward with counsel or proceeding *pro se*. The trial court did not explain on the record the dangers of proceeding *pro se*, and as a result, this Court should remand the case to the circuit court to allow a record to be developed to determine whether Appellant understood the dangers and whether his decision to represent himself was knowingly and voluntarily made.

II. Did the trial judge err in failing to appoint a public defender to represent Morton?

Appellant maintains the trial court erred in failing to appoint a public defender to represent him when he requested to fire trial counsel. Appellant waited until the day of trial to request new counsel, had no valid reason to remove his current counsel, never presented an affidavit of indigency or other proof of qualification for a public defender, and selected to represent himself when presented with the dual option of going forward with retained counsel or proceeding pro se. The trial court did not err in failing to appoint a public defender when he was not presented with sufficient information to determine whether Appellant qualified for a public defender and the request was not made until the day trial was set to begin.

Initially, the trial court indicated Appellant's actions were designed, not to ensure proper representation, but instead, to create delay. He waited until the day of trial to move to relieve counsel, even though all of the events which allegedly caused his desire to relieve counsel occurred in advance of the day of trial. He made no attempt to relieve counsel at a time in which it would not cause delay to relieve counsel and appoint new counsel.

Further, his request to appoint a public defender was entirely unrealistic and would certainly have resulted in the exact delay the trial court found Appellant sought to create. He sought to appoint counsel and still proceed to trial on his own theory of defense in the case on the same day. As a matter of fact, he specifically asked for a public defender and "five minutes, ten minutes" to prepare the case. (T.25; R.25). Counsel could not be appointed to represent him and continue the same day on which trial was already scheduled.³ It would be entirely unfair to subject

³ Requiring a public defender or other appointed attorney to take the case, obtain the case file and all discovery, meet with his client for the first time, and proceed to trial without any delay would be guaranteeing a claim of ineffective assistance of counsel.

an attorney to trial the day he is appointed on a new case, and Appellant's counsel would be insisting on the horror of the situation had it occurred. Otherwise, the trial court was entirely correct that the ultimate goal of Appellant's actions was delay, and appointing counsel—instead of requiring Appellant to proceed with current counsel who was ready to go forward or act pro se—would only give Appellant the delay he sought.

In addition, pursuant to section 17-3-30 of the South Carolina code, Appellant must provide an affidavit of indigency which would be required to be screened for accuracy and to ensure Appellant met the requirements for appointed representation. Appellant did not come to court with an affidavit, so one would have to be completed, screened, and approved before trial could proceed. Additionally, pursuant to Rule 608(b)(4), SCACR, there is no presumption of indigency without reference to Appellant's family's net income, which is entirely absent from this Record. As a matter of fact, nothing in this record establishes the entitlement to a public defender or appointed counsel.

Given Appellant's last minute request, which was specifically found by the trial court to be a tactic to cause delay, the trial court did not err in denying Appellant's unrealistic request to appoint a public defender, while still proceeding to trial without delay.

III. Did the reference by the investigator to a reliable confidential informant impermissibly vouch for the informant's credibility?

Appellant contends the trial court erred in allowing reference to a “confidential reliable informant” versus a “confidential informant” during Investigator Lachica’s testimony. He maintains it was impermissible bolstering. Investigator Lachica merely explained the terminology used by law enforcement and never labeled the informant, George Vaughn, as “reliable.” Any error in referencing the terms was entirely harmless as the only person who discussed the term “reliable” as it related to Vaughn was Appellant.⁴

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court’s ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). “A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

⁴ It is questionable whether the underlying issue as raised on appeal is preserved for review. The issue raised at trial is that it was improper to call Vaughn reliable because he had other charges pending and not that the use of the term impermissibly bolstered his testimony. (T.112-114; R.89-91). Later, Appellant discussed bragging which could be construed as impermissible bolstering, but that objection was not contemporaneous. (T.165-166; R.142-143). See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

As this Court has stated:

Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain “the assessment of witness credibility . . . within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013).

Investigator Lachica was asked to differentiate between a “confidential informant” and a “confidential reliable informant.” He merely described the terms and what someone had to do to be considered a “confidential reliable informant.” In doing so, he never made reference to Vaughn, the informant in this case, nor did he indicate that he believed Vaughn to be a “confidential reliable informant.” Instead, he merely explained the terminology used by law enforcement. Investigator Lachica never indicated his belief Vaughn was telling the truth or testified in any manner that would remove the determination of credibility from the province of the jury. As a result, nothing in his direct testimony resulted in bolstering or vouching for Vaughn’s testimony.

Additionally, any possible error is entirely harmless. Appellant during his cross-examination of Vaughn asked him: “So, if the police officer referred to you as a C.I., would that be a form of disrespect to you knowing that you’re reliable?” After Vaughn answered: “No”, Appellant followed up with “You just being a C.I. instead of reliable C.I.?” (T.318; R.341). This is the first time reliable was used in front of the jury in direct connection with Vaughn and it was by Appellant.

The next time “reliable” was mentioned was after Appellant recalled Investigator Lachica.

Q: So, so, you say you knew him for how many years, sir?

A: Probably two or three now.

Q. About two or three now. And two or three years, would you consider him to be acquaintance or friend or family member?

A. He's a confidential reliable informant.

(T.878; R.901). This testimony came in without any objection and in direct response to Appellant's questioning. The complained of testimony is entirely cumulative to testimony elicited and discussed by Appellant during his own questioning of multiple witnesses. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless). Additionally, any error is entirely harmless in light of the overwhelming evidence in this case and the fact it could not have contributed to the outcome of the case.⁵ See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (Error is considered harmless where it could not reasonably have affected the outcome of the trial.); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

The trial court properly allowed Investigator Lachica to explain law enforcement terminology, especially when he never indicated his belief that Appellant was "reliable" until the question was asked by Appellant. Further, Appellant has failed to establish any prejudice resulting from the error sufficient to warrant reversal. This Court should affirm the trial court's decision.

⁵ State's Exhibit 1 is a video recording detailing the undercover buy conducted by law enforcement and the confidential informant, Vaughn. (State's Exhibit 1). Further, significant testimony indicated the drugs received were real and not synthetic as alleged by Appellant in his defense. The bag contained 111.76 grams of cocaine. (T.593; R.570). Additionally, a digital scale found with Appellant when he was arrested tested positive for cocaine residue. (T.598; R.575). Additionally, the other substance obtained from Appellant tested positive for marijuana. (T.604; 607; R.581; 584).

IV. Did the trial court properly limit Appellant's cross-examination of the informant related to unadjudicated drug charges?

Appellant contends the trial court erred in preventing Appellant from cross-examining the informant Vaughn regarding unconvicted drug charges. He maintains it shows bias and a motive to misrepresent, likening the questioning to cases when the defendant should have been allowed to explore potential charges for a testifying co-defendant who had a deal to testify. The issue is not preserved for review, and there is no evidence any of the unadjudicated charges were ones related to his acting as an informant in this case in order to show bias or a motive to misrepresent. Further, Appellant thoroughly explored Vaughn's past drug issues, including discussions of prior purchases from Appellant. Finally, during direct examination by the State it was made clear to the jury that drug charges were dropped in exchange for Vaughn acting as an informant.

Preservation

Initially, the issue as raised to this Court is not preserved for review. Appellant at trial brought up several charges that did not result in conviction and the State objected saying he could only address prior convictions. The Court addressed the objection and admission of the evidence pursuant to Rule 609, SCRE. He never was asked to consider Rule 608(c), SCRE, the issue of bias or motive to misrepresent. Appellant never connected his questioning about the charged crimes to an allegation of motive to misrepresent or bias. As a result, the issue as raised is not preserved for review on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Further, Appellant never proffered any information about the charges he sought to use in cross-examination, so the Record is devoid of information regarding when the charges occurred, what Vaughn was actually charged with, and whether any were actually dropped as a result of the

deal with law enforcement to act as an informant in this case. Because there is no proffer, there is nothing for this Court to review to determine prejudice from the failure to be able to admit the testimony. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (“[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.”) (citing State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 868 (Ct. App. 2005)).

Standard of Review

As discussed previously: “A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” Kelley, 319 S.C. at 176, 460 S.E.2d at 370. “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” Byers, 392 S.C. at 444, 710 S.E.2d at 58. “The trial judge retains discretion to impose reasonable limits on the scope of cross-examination.” State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). “If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error.” Id. “This 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. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012).

Merits

“The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.”

State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). “A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause.” Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (citing Davis v. Alaska, 415 U.S. 308 (1974)). “A defendant demonstrates a Confrontation Clause violation when he is prohibited from ‘engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness.’” Gracely, 399 S.C. at 372, 731 S.E.2d at 885 (quoting State v. Stokes, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009)).

Additionally, Rule 608(c), SCRE, provides that “bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c) “preserves South Carolina precedent holding that generally, ‘anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.’ ” State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

In the instant case, neither Appellant at trial nor his counsel on appeal have attempted to connect the proposed cross-examination into charged by unadjudicated crimes to the current case and a claim of bias or prejudice. He indicates the questioning would have explored the charges and potential sentences he avoided by working for law enforcement as a confidential informant. However, he never indicates any of those charges were dropped by being an informant in the case against Appellant. He never indicates when any of the charges occurred. As a result, he did not provide a sufficient connection to establish bias or motive to misrepresent and instead, at best, was seeking to pursue a fishing expedition or relying entirely on rank speculation.

In addition, the State thoroughly explored Vaughn's convictions and deals made to act as an informant during their direct examination. Testimony revealed he had serious trafficking charges previously, but he was allowed to plead to a lesser offense and receive a probationary sentence. (T.229-230; R.206-207). Additionally, he was asked whether he had any pending charges or whether he was promised anything in exchange for his testimony, and he indicated: "No, ma'am." (T.230; R.207). In exchange for working as an informant against Appellant, he indicated on direct examination and on re-direct that charges would be dropped and the solicitor clarified that arrest warrants would not be served. (T. 232; 322-323; R.209; 299-300). As a result, any further cross-examination by Appellant, even if he connected it to the charges that were dropped in exchange for Vaughn becoming an informant against Appellant, would have been merely cumulative and would not have provided any additional impeachment for bias. As a result, he has failed to prove how he was prejudicially prevented from questioning Vaughn.

Finally, during Appellant's cross-examination of Vaughn he brought out significant impeachment. He asked if Vaughn had ever been an informant "for free" and Vaughn admitted he had not. Appellant asked: "So, every time you basically did this with them, it was to basically say for money or to save your own self." Vaughn admitted that was true. (T.255; R.232). Appellant brought out Vaughn's 1989 crack charges, and got Vaughn to admit at the time he was a "crackhead."

Accordingly, the issue is clearly not preserved for review on appeal and Appellant has failed to demonstrate any prejudice resulting from the trial court's ruling. As a result, this Court should affirm the trial court's decision.

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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Dana L. Morton,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant filed August 20, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 20th day of August, 2020.



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