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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger L. Couch Circuit Court Judge
Appellate Case No. 2017-001111

The State, Respondent,

vs.

Mack Seal Washington, Appellant.

PETITION FOR REHEARING

On September 16, 2020, in a divided opinion, a majority of this Court reversed the convictions of Appellant by finding the trial judge abused his discretion in admitting portions of Appellant's recorded interview with Detective McCauley because McCauley's statements were hearsay and improperly shifted the burden of proof to Appellant. State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36). A majority of this Court further ruled the error committed by the trial judge was not harmless error. In making this finding, the majority determined the trial judge's error was preserved for appellate review on the grounds of hearsay and improper burden shifting. The State respectfully submits this Court misapprehended or overlooked relevant facts in the record and case law in reaching the conclusions in the majority opinion. Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the petition for rehearing and determine Appellant's claims of error, on hearsay grounds as well as burden shifting were not properly preserved for appellate review. However, even if this Court determines the issues were properly preserved, the Court should hold that

McCauley's statements were not hearsay nor did they shift the burden of proof to Appellant. Finally, even if this Court determines the trial judge erred in admitting McCauley's statements, the Court should hold the error was harmless because it did not contribute to the result of the trial. This Court should affirm Appellant's convictions and sentences.

Error Preservation

As an initial matter, the State submits the majority overlooked Appellant's failure to properly preserve either the issue of burden shifting or the issue of hearsay on appeal. To fully understand Appellant's failure to preserve these issues, it is instructive to review the objections made by Appellant at trial and the arguments made by Appellant on appeal.

At trial, Appellant objected to approximately eleven statements[1] made by McCauley in his interview with Appellant. Trial counsel for Appellant offered the following objection to the selected statements:

> Mr. Malloy: Along that point, I would argue that the statements of Detective McCauley after—these statements coming in after an expert had testified regarding the fingerprints, certainly after the pawn tickets, is simply just bolstering. It's hearsay come from Detective McCauley and also, I would argue that his statements reaffirming the expert's conclusions are improper bolstering. Again, as I said, we are contesting the validity of the fingerprint comparison and, Your Honor, the same thing with the pawn tickets. Coming from Detective McCauley I would argue that it is hearsay. And, again, his statements are bolstering testimony of those pawnshop custodians. Essentially, his statements, Your Honor, are giving his opinion as to the ultimate question of fact in this case, which is whether or not [Appellant] committed this burglary. I would ask that all—of the highlighted portions be redacted for those reasons. Thank you.

(R. 15, lines 5-21). The majority acknowledges that Appellant objected to McCauley's statements "[O]n three grounds: hearsay, improper bolstering of the State's fingerprint expert's

[1] Notably, during the interview Appellant made approximately six other references to his fingerprints being found inside Victim's home that he did not object to or move to redact. (R. 204, 205, 207, State's Exhibit #41).

testimony, and that it contained improper opinion evidence." State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 38).

On appeal, Appellant posed the following question in his statement of issue on appeal in his brief:

> Did the trial judge err in failing to suppress statements by law enforcement during the audio-recorded interrogation of Appellant where the statements concerned improper opinion evidence and shifted the burden of proof to Appellant?

(Final Brief of Appellant 1). Thus, Appellant abandoned his objections to hearsay and improper bolstering and added the additional claim of burden shifting. Not only did Appellant abandon his objection to hearsay in his brief, but he did not raise it at oral argument either. In fact, at oral argument, counsel for Appellant specifically articulated the issues she was presenting to the court. Counsel for Appellant noted she was concerned with "specifically instances where the police both shifted the burden and provided improper lay opinion testimony." (Oral argument at 9:00-9:16). The only time counsel for Appellant ever mentioned the word hearsay at oral argument was when she clarified that the South Carolina Supreme Court was concerned with hearsay in State v. Brewer[2] and how it applied to a harmless error analysis. (Oral Argument at 15:55-16:20).

Because Appellant never raised the issue of hearsay in his brief or at oral argument, it is not properly preserved for appeal. Similarly, because the issue of burden shifting was not raised to and ruled upon by the trial court, that issue is unpreserved for appeal. "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 may not argue one ground at

[2] State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015).

trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B) SCACR. "An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal." Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2001). "It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief." State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999).

The dissent correctly notes that Appellant's objection at trial to McCauley's statements "did not concern an alleged burden shifting nor mention a Brewer violation." State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 43). Therefore, as the dissent concludes, the issue of burden shifting is not properly before this Court.

As to hearsay, the dissent correctly recognizes Appellant's "*sole* issue on appeal is the inclusion of the statements shifted the burden of proof and constituted improper opinion evidence." State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 43). The dissent further recognizes that Appellant's only reference to hearsay in his brief comes from a quote from Brewer about how statements in that case were hearsay. However, Appellant never argued in her brief or at oral argument that McCauley's statements were hearsay. The majority attempts to address the dissent's error preservation concerns by noting: "The State did not raise issue preservation in its brief. In fact, it spent considerable time there and at oral argument claiming the recording is not hearsay. While

we may invoke preservation rules on our own, we should not be quick to disturb the parties' silence." State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 41). This statement is not accurate. While, the State did not raise the issue of error preservation as to burden shifting in its brief, the State explicitly argued that burden shifting and hearsay were not preserved for appeal at oral argument. The State was explicitly asked at oral argument if it conceded Appellant's issues were preserved for appeal, and the State argued the issues were not preserved. (Oral argument at 30:15-30:30) Furthermore, the State argued that Appellant had never asserted McCauley's statements were hearsay. (Oral Argument at 25:30-26:00). The only reference made by the State to hearsay in its brief was to argue that Appellant's case was different from Brewer. (Final Brief of Respondent 9-10). In fact, the State explicitly argued that Appellant failed to argue hearsay in the following sentence in its brief: "Furthermore, unlike Brewer where Brewer specifically alleged that the State used a back door to admit hearsay evidence, Appellant does not even allege that the statements at issue here are hearsay." (Final Brief of Respondent 10). For the foregoing reasons, the State requests the panel grant the petition for rehearing and find Appellant did not preserve the issues of burden shifting or hearsay for appellate review.

Hearsay

Even if the majority determines it did not overlook Appellant's failure to preserve the issue of hearsay for appeal, the State submits McCauley's statements were not hearsay because they were not offered for the truth of the matter asserted. In addressing the issue of hearsay, the majority states:

> At trial, the assistant solicitor contended McCauley's statements were not hearsay because they were not offered for their truth but to give [Appellant's] answers 'context'. There is no 'context' exception to the hearsay rule. Brewer rejected this same argument as 'patently without merit', finding it had 'no support in the law.'

> Undeterred, the State recycles the argument before us, still unaccompanied by any authority to support it.

State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 41)(internal citations omitted). Respectfully, the majority misunderstands the State's argument. The State did not argue there was a context exception to the hearsay rule. The State argued McCauley's statements were not hearsay to begin with and thus did not require an exception to the hearsay rule. See Rule 801(c) SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") At trial, the State responded to Appellant's objection with the following argument:

> Mr. Poulos: I don't believe any (sic) Detective McCauley's questions are, in fact, hearsay. We are not offering Detective McCauley's questions for the truth of the matter. We intend to prove the truth of the fingerprint and the proof of the pawn tickets through SLED and pawnshop witnesses. His questioning simply goes to the statements made in furtherance of his investigation, Judge. And I think the responses by the defendant are certainly not hearsay. But for those to make any sense, the jury has to hear the questions made to the defendant, Judge. So I don't believe those assertions are hearsay.

(R. 15, lines 23-35 – R. 16, lines 1-8). Likewise, at oral argument, the State argued that McCauley's statements were not hearsay because they were not offered for the truth of the matter asserted. (Oral argument at 26:30-26:50).

Therefore, the State consistently argued McCauley's arguments were not hearsay and accordingly, the State was not required to prove a hearsay exception applied. McCauley's statements regarding Appellant's fingerprint being found inside Victim's home were not offered to prove that Appellant's fingerprint was actually found inside Victim's home. The State had already proven that Appellant's fingerprint was found inside Victim's home via testimony from two SLED witnesses. (R. 100, 121-31). Therefore, McCauley's statements were offered to show

the jury how Appellant reacted when he was confronted with evidence that did not fit his alibi. Indeed, McCauley's statements provided context to Appellant's responses. Otherwise, the jury would have only heard Appellant provide answers to unknown questions and the interview would not have made any sense. McCauley's questions do provide context to Appellant's answers but the State did not argue there was a context exception to the hearsay rule. Rather, the State argued McCauley's statements were not hearsay to begin with.

The State also respectfully submits the majority misunderstands our Supreme Court's holding in State v. Brewer. Brewer does not establish a categorical rule against playing statements by an investigator during an interrogation for a jury. "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial." Brewer 411 at 407, 768 S.E.2d at 659. Rather the Supreme Court sought to ensure that "all out-of-court statements are either 'admissible for a valid non-hearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.'" Brewer 411 S.C. at 407-08, 768 S.E.2d at 659(quoting State v. Miller, 197 N.C. App. 78, 676 S.E.2d 546, 556 (2009)). Yet, the majority appears to create a categorical rule that any statement made by an investigator during an interrogation is inadmissible at trial based on Brewer, despite the fact that Brewer explicitly does not create such a rule.

The statements at issue in Brewer were not admissible for a non-hearsay purpose or as an exception to the hearsay rule. Investigators quoted purported eyewitnesses who claimed that Brewer shot two of the victims in that case. The purported eyewitnesses did not testify at trial. Their testimony was offered for the sole purpose of proving that Brewer shot the victims in question. Indeed, as the Supreme Court noted, Brewer repeatedly denied shooting anyone and

"The meaning of these repeated denials is obvious and requires no explanatory context." Brewer 411 S.C. at 407, 768 S.E.2d at 659. The statements in Appellant's case were not offered to prove Appellant's fingerprint was actually inside Victim's residence. The SLED witnesses had already proven Appellant's fingerprints were inside Victim's home. McCauley's statements were offered to help the jury understand Appellant's answers. For example, Appellant claimed he bought the rifle that was stolen from Victim's house from a drug addict and then pawned it two to three weeks later. (R. 203-04). McCauley then confronted Appellant with the pawn ticket that disproved his claim about the rifle. Without McCauley's statements, the following exchange played for the jury would not make sense:

> McCauley: You're telling me you got the rifle from somebody
> Appellant: Yeah I bought it from somebody
> McCauley: You threw it in the back of your truck and it stayed there for a while?
> Appellant: Yeah it stayed there for maybe 2 or 3 weeks
> McCauley: That's not possible because you pawned it the same day you broke into that house
> Appellant: I pawned it the same day?

(R. 204). The State did not offer the preceding statement to prove that Appellant actually pawned the stolen rifle. The State proved that through the testimony of the pawnshop owner. The statement was played because it directly contradicted Appellant's alibi. McCauley's questions give context to Appellant's answers. Without McCauley's questions, Appellant's answers do not make sense. Similarly, when Appellant claimed he was at work on the day of the burglary, McCauley confronted Appellant with the logical impossibility of his alibi in the following exchange:

> Appellant: I'm going to be honest with you but I know I was working that day, you can't tell me I wasn't working. I work seven days a week.
> McCauley: Then how'd your finger print end up there?
> Appellant: That's what I like to know too, how my fingerprints end up at the house. What time that supposed to be there?

(R. 205). The State did not offer the preceding statement to prove Appellant's fingerprint was actually inside Victim's home. The State had already proven that Appellant's fingerprint was inside Victim's home through SLED witnesses. The State offered this statement to contradict Appellant's alibi. Unlike, Brewer, where no context was needed to understand Brewers repeated denials, the context of McCauley's questions is necessary to understand the strength of Appellant's alibi and for the jury to see Appellant's reactions when he is confronted with evidence that disproves his alibi. McCauley's statements are not a violation of State v. Brewer.

For the foregoing reasons, the State requests the panel grant the petition for rehearing and find the trial judge did not abuse his discretion by admitting McCauley's statements because they were not hearsay.

Burden Shifting

Even if the majority determines it did not overlook Appellant's failure to preserve the issue of burden shifting for appeal, the State submits McCauley's statements did not shift the burden of proof to Appellant. The majority only addresses the issue of burden shifting by again comparing Appellant's case to Brewer. The majority offers the conclusory statement that McCauley's "repeated requests that [Appellant] explain why he was not guilty amounted to a 'grave constitutional error.'" State v. Washington, Opinion No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36 at 41). However, McCauley's statements did not ask Appellant to explain why he was not guilty, nor did McCauley tell Appellant he had to "prove his innocence." McCauley's statements asked Appellant to explain how his fingerprint could be located in a house he claimed to have never been in. Furthermore, McCauley asked Appellant to explain how he obtained Victim's property to later sell at a pawn shop. Surely, these are legitimate avenues of inquiry for law enforcement to explore when interviewing a criminal

defendant who is giving a voluntary Mirandized interview. Such statements will not always be proper to play in front of a jury, as was the case in Brewer. However, when the statements are used to show a jury how a defendant reacts when confronted with facts that contradict his alibi, as was the case with Appellant, such statements can and should be played before a jury. For the foregoing reasons, the State requests the panel grant the petition for rehearing and find the trial judge did not abuse his discretion by admitting McCauley's statements because they did not shift the burden of proof to Appellant.

Harmless Error

Even if the majority determines the trial judge erred in admitting McCauley's statements on the basis of hearsay or burden shifting, any error was harmless. Any error committed by the trial judge in the admission of McCauley's statements is harmless or cumulative to other evidence presented. At trial the State produced evidence from two expert witnesses from SLED regarding the presence of Appellant's fingerprint inside Victim's house. (R. 100, 121-31). Victim testified he did not know Appellant and there was no reason for Appellant to be in his house. (R. 59-60). Appellant admitted that he did not know Victim and claimed he was never at his house. (R. 204-5). Appellant also did not move to redact approximately six of his own references to his fingerprints being inside Victim's home. (R. 204, 205, 207, State's Exhibit #41). The State presented testimony from employees of two different pawn shops testifying that items matching the description of those stolen were pawned by Appellant on the day of the burglary. (R. 136-37, 142-43, 147). Additionally, Sarah Myers of Alternative Staffing testified Appellant did not begin working for the company until September 28, 2015. (R. 158). This contrasted with Appellant's statement that he was working on the day of the burglary. (R. 203). For the foregoing reasons,

the State requests the panel grant the petition for rehearing and find that even if the trial judge erred in admitting McCauley's statements, any error in the admission was harmless.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find that Appellant did not preserve the issues of burden shifting or hearsay for appeal, and even if the issues were preserved McCauley's statements were not hearsay nor did they shift the burden of proof. Finally, if the trial judge admitted the statements in error, the error was harmless. This Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
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The State, Respondent,

vs.

Mack Seal Washington, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 24th day of September, 2020.

Sally Ellison

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Subject:	The State v. Mack Seal Washington Appellate Case No. 2017-001111
Attachments:	Washington, Mack Seal, Appellate Case No. 2017-001111 Cover Letter Serving Petition for Rehearing (02386476xD2C78).pdf; Washington, Mack Seal, Petition for Rehearing Appellate Case No. 2017-001111 (02386474xD2C78).pdf

Good Morning:

Attached for services this date is the State's Petition for Rehearing and cover letter in the above-referenced appeal. This Petition will be filed today with the Court of Appeals through the AIS system as indicated on the Proof of Service. In addition, a copy will also be served by U.S. Mail.

Please confirm receipt of the Petition for Rehearing.

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