RECEIVED
Oct 09 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

vs.

SAMUEL LEE BROADWAY,

Petitioner.

Appellate Case No. 2020-001336

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, S. C. 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

Did the trial court err in sustaining the State's hearsay objection?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court did not err in sustaining the prosecution's objection to Broadway's out of court statement because Broadway sought to admit the testimony for the truth of the matter asserted. Broadway was not prejudiced by the alleged error. Because Broadway failed to argue the statement was not for the truth of the matter asserted or any hearsay exception applied, the issue is not preserved for review.

STATEMENT OF THE CASE

Broadway was indicted on October 11, 2016, for leaving the scene of an accident which results in death. S.C. Code § 56-5-1210. The jury found Broadway guilty following trial on November 28-30, 2016. The Honorable R. Markley Dennis sentenced Broadway to twelve years' imprisonment. Broadway filed a motion for new trial and motion to reconsider the sentence. Following a hearing on September 28, 2017, Judge Dennis denied the motion for new trial but amended Broadway's sentence to eighteen years' imprisonment suspended to eight years' imprisonment and memorialized the same by an order filed October 17, 2017.

Broadway appealed the conviction and sentence. Following briefing, the Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Samuel Lee Broadway, 2020-UP-118 (S.C. Ct. App. filed April 29, 2020). The Court of Appeals subsequently denied Broadway's petition for rehearing.

STATEMENT OF FACTS

Broadway swerved to avoid rear-ending a car, went off the road, hit a moped reentering the highway, did not stop, drove past a gas station to a bar, then left the bar for his father-in-law's house where he fell asleep by the time law enforcement arrived. He never stopped for the accident, and he never contacted law enforcement in the approximately four hours between the accident and when law enforcement finally spoke to him. Importantly, he never returned to the scene nor evidenced any intent to return to the scene of the accident.

Lieutenant Joshua Battista was off-duty, but on-call, and he responded to the scene of the traffic accident. The victim (Victim) was airlifted to the hospital before Battista arrived. Lieutenant Battista testified the wreckage from the accident was spread out over two and a half football fields. He described the site as a cone of debris. He determined Victim's moped was pushed over to the side of the road, became airborne, and came to rest across the other side of the highway. The moped was broken into two pieces. R. pp. 258-59. Lieutenant Battista found pieces of the vehicle, including a headlight and pieces of the bumper. R. p. 263.

Lieutenant Battista and several other officers responded to a tip sometime after 5 a.m. He immediately saw a damaged white Cadillac matching the description of the vehicle they were searching for. The pieces he found at the accident scene matched the pieces missing from the damaged Cadillac. R. pp. 273-74. For instance, the part of the bumper he recovered from the accident scene matched the missing chunk of bumper on the Cadillac. R. p. 276. Blemishing the Cadillac's white finish was blue transfer paint from the moped and brown transfer marks from the leather jacket Victim wore. R. p. 278.

Petitioner Broadway came out of the house after his father-in-law fetched him at the officers' request. Broadway's father-in-law said he was asleep. R. p. 305. Broadway was interviewed by the lead investigator, Officer Ted Lewis. Lieutenant Battista stood only three or four feet away and he could smell alcohol on Broadway. Lieutenant Battista testified Broadway's eyes were bloodshot and glassy. R. p. 280. Broadway said he was at a bar and left. When he realized he did not have his phone, he drove back to get it. Broadway struck what he thought was a bicycle. R. pp. 280-81. Broadway never denied being involved in the collision. R. p. 290.

Victim suffered severe brain injury and his life was sustained only by machinery before he died. R. p. 286. Dr. Stuart Leon treated Victim when he started duty that morning. Victim sustained a nonsurvivable traumatic brain injury. No medical treatment would have been sufficient for Victim to survive. R. p. 331.

Richley Campbell was Victim's fiancé. She testified neither she nor Victim were drinking that night. R. p. 168. Victim finished repairing a moped he worked on for two days. The customer was irate and wanted his moped back, so Victim decided to return the moped even though it was late. Campbell worried about drunks on the road on a Friday night. R. pp. 168-70. Victim drove the moped while Campbell followed behind in her Toyota Highlander. R. pp. 170-71. Victim did not wear a helmet. Victim stopped at the stop sign, with his feet on the ground, at the intersection of Domingo Road and Highway 176. He looked both ways and turned left on the highway. Campbell saw a car coming so she pulled out in front of the vehicle to get between it and the moped. The car swerved to the right, fishtailed some, got back on the road, and hit Victim. R. pp. 172-73. Campbell explained she pulled in front of the oncoming car because it was speeding and she was certain it

would hit Victim. R. p. 183.

Campbell testified the car, a white Cadillac, just kept going. R. p. 174. She testified it did not look like the Cadillac slowed down at all. She was not sure, but she did not think she even saw brake lights. R. p. 178, p. 186. She watched the vehicle drive down the road, and she thought it turned at a gas station near the intersection with Highway 17. R. p. 175. She ran to Victim and called 911. R. p. 177.

Jason White worked at the SUNOCO gas station. The store is lit up and open 24 hours. He was on a smoke break when he saw an off-white Cadillac Sedan turn off of 17 onto 17A with a bumper dragging and a headlight out. He testified the bumper was "literally" dragging on the ground – he could hear it. R. pp. 189-92. The store opened about three months prior to that night and it had a phone Broadway could have used. R. pp. 193-94.

Matthew Snider, a firefighter, was off duty, driving his personal vehicle as he saw a car swerve and correct its steering. He noticed its headlight was out. He came upon a traffic accident shortly thereafter and assisted. A woman spoke frantically on the telephone, stating her fiancé was just hit. He saw a man lying on the ground and moped parts scattered on the roadway. R. pp. 150-52.

Justin Bryant was shooting pool at BFE Bar and Grill, he was not drinking. He arrived at around 10:30-11:00 p.m. and walked out at closing time at 2 a.m. R. pp. 197-98. He saw a four-door sedan, a Cadillac. He heard something was dragging and he saw the front-end of the Cadillac was damaged. R. p. 199. He recognized the driver from earlier that night at the bar. R. p. 200. The man, Broadway, was ranting about looking for his phone. Broadway said he needed to call his wife,

he was going to lose his kids. Even though the bar was closed, he knocked on the bar door to get in, but received no admittance. R. pp. 200-01. He tried to use other people's cell phones; Bryant would not let him use his. However, a woman allowed Broadway to use her phone, but Broadway could not figure how to operate it. R. pp. 201-02. Broadway found his phone on the floorboard, appeared to call someone, and then drove away. R. pp. 206-07. Bryant identified Broadway as the frantic man looking for his phone at the bar. R. p. 209.

Sergeant Conrad Strayton responded to the accident and remained there until traffic units arrived. He then assisted in the search for the vehicle that hit the moped. The vehicle involved in the hit-and-run did not return to the scene. Sergeant Strayton went to Broadway's father-in-law's residence with the other officers. He testified approximately four and a half hours passed from the time he responded to the accident until they made contact with Broadway. R. pp. 220-22. Likewise, Officer Logan Wolfsen was at the accident scene for about two or three hours and never saw the Cadillac return to the accident. R. p. 236, p. 239.

Harvey Burton was Broadway's father-in-law. He woke up to hear Broadway speaking with Burton's wife at 4:30 a.m. Broadway seemed in shock. Broadway said he was in an accident, swerved, hit a moped, panicked, and came to Burton's house. Burton asked Broadway if he called the police and he said no. Broadway said he did not know what to do, and Burton said he should call the police. Broadway went to sleep and Burton decided to call the police. Broadway never called the police. R. pp. 334-38; p. 342.

The State's last witness was the lead investigator, Officer Ted Davis of the Goose Creek Police Department. He arrived at the accident scene at 3 a.m. Campbell gave him a description of

the vehicle they were looking for. R. pp. 347-48. The dispatcher advised Officer Davis that dispatch received a call advising the vehicle and the possible driver involved in the accident were located at a residence in Moncks Corner. R. p. 352. They arrived at the residence sometime before 6 a.m. Deputies from the Berkeley Sheriff's Office met the Goose Creek Police Officers nearby and proceeded together to the residence. They found the Cadillac with front-end damage. R. pp. 354-56. Broadway came out of the house to speak with officers, and Officer Lewis immediately advised Broadway of his Miranda rights, then asked Broadway what happened. Broadway admitted to being in an accident and being aware of hitting something – either the car or something else. He admitted there was a moped. He admitted going to a bar afterwards to fetch his phone and said he was a "nervous mess." He reflected it was all over a phone. State's Exhibit No. 3, (circa 6:10 p.m. to 6:14 p.m).

Marlene Burton was the lone witness called by the defense. She attempted to testify that Broadway allegedly asked the Burtons to call police, but the objection was sustained on hearsay grounds. Even though the Burtons had a landline, Broadway did not use their phone to call 911. R. p. 392.

ARGUMENT

The trial court did not err in sustaining the prosecution's objection to Broadway's out of court statement because Broadway sought to admit the testimony for the truth of the matter asserted and Broadway failed to argue that the statement was not for the truth of the matter asserted or that any hearsay exception applied. The issue is not preserved for review.

Broadway claims the trial court erred by sustaining the prosecution's hearsay objection when Broadway elicited testimony from Marlene Burton that he asked the Burtons to call the police.

First, the issue is not preserved for review because Broadway failed to argue the testimony was not hearsay or that a hearsay exception applied. State v. Webb, 389 S.C. 174, 182-83, 697 S.E.2d 662, 666-67 (Ct. App. 2010) (finding issue of exclusion of testimony not preserved for review where counsel did not object to the limitations on the testimony); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that where counsel acquiesces in judge's limitation of his cross-examination and makes no further objection, appellate review of the issue is procedurally barred). Broadway waited until his post-trial motion to argue the testimony should have been admissible, which is too late. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.").

Further, the trial court did not err. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of

evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)). "[T]o warrant reversal based on admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . . ." State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007).

"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. Rule 801(c), SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert. dismissed* 353 S.C. 538, 579 S.E.2d 318. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The "rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying[,] which is used to prove the truth of the matter asserted." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009).

Broadway argues that his alleged request for the Burtons to call 911 was not an assertion under the rules of evidence. Of course, as stated above, Broadway did not present this argument when he attempted to elicit the testimony at trial, and therefore, failed to provide the necessary contemporaneous argument. Nonetheless, his communicative behavior of making a request to the Burtons is an assertion constituting a statement. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. The Court of Appeals noted the Black's Law Dictionary definition of assertion: "A declaration or allegation" or "the act or an instance of engaging in communicative behavior."

Assertion, Black's Law Dictionary (11th ed. 2019). In the instant case, Broadway's statement to the Burtons constitutes communicative behavior and therefore, a statement. It was offered for the truth of the matter asserted.

In State v. Galloway, 305 S.C. 258, 264, 407 S.E.2d 662, 666 (Ct. App. 1991), this Court found no error in not allowing the defendant to testify about an alleged conversation he had with an officer trying persuade Galloway to agree to a release from a civil action. The Court found the statement was hearsay and Galloway failed to show any exception applied.

In State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 662 (2013), the Supreme Court agreed with Brockmeyer that a photograph offered into evidence of two guns with the caption "Wills gun on left my gun on righ[t]" was hearsay because it was offered for the truth of the matter asserted in the caption.

In Wright v. Bi-Lo, 314 S.C. 152, 159, 442 S.E.2d 186, 190-91 (Ct. App. 1994), this Court found no error in the Workmen's Compensation Commissioner's decision to exclude statements by Wright to show Wright's understanding of the employer's shoplifter rules despite the argument the statement was probative of Wright's "state of mind." This Court rejected the argument as an "impermissible bootstrap argument."

To argue that the testimony was not hearsay, Broadway relies on State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980). The entirety of the analysis and conclusion by the Supreme Court in that case is as follows:

> During the course of the evening when appellant forced the prosecuting witness to accompany him on a search for alcoholic beverages, they came upon the home of witness Theresa Dill. While on the porch, the prosecuting witness allegedly said, "Honey, please

> open the door." Appellant contends this statement is hearsay and the trial judge therefore erred in admitting it. We disagree. The statement was obviously not offered for the truth of the matter asserted and therefore, by definition, is not hearsay.

Id. at 628, 266 S.E.2d at 786. The purpose for which the out of court statement was admitted is not obvious from context. It may be to merely show victim was present at Dill's house. In the instant case, Broadway's out of court statement was not sought to be admitted to merely show he was present at the Burton's. Broadway sought to admit it for the truth of the matter asserted, that Broadway allegedly wanted the Burtons to contact law enforcement.

Broadway argues the testimony is not hearsay because it constitutes "conduct with legal significance." This hearsay exception may apply to establish a contractual right or duty. See Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 69-70, 773 S.E.2d 607, 613 (Ct. App. 2015) (finding loan documents admissible to establish existence of loan contract and terms of the loan agreement: "Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non[-]hearsay"). However, this hearsay exception does not apply so broadly as to apply to oral statements that may have some potential legal ramification or carries a mitigating or exculpatory connotation. For instance, in Deep Keel, the hearsay exception did not apply to testimony from the purchaser of the note as to the balance of the loan remaining due. Id. at 70-71, 773 S.E.2d at 614.

Broadway further relies on Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008), which discussed the "words of contract" principle found in common law. However, in that case, this Court rejected a claim that the trial court erred in not allowing Fields to introduce an alternative estimate provided by Prime South, which was not a party to the litigation.

This Court found,

> The relevant question in the hearsay analysis is what the Prime South document is offered to assert. The document is not offered as proof that Prime South simply offered to repair the Fields' home. Instead, the Fields offered the document to show that Prime South offered to repair the home for a specific price and that the price offered was reasonable. This assertion is classic hearsay when offered by an out of court declarant, and the trial court properly exclude the statement from evidence.

Id. at 560, 658 S.E.2d at 88. In the instant case, there certainly is not a "words of contract" issue involved, and further, Broadway wished to have the out of court statement to prove exactly the truth of the matter, that Broadway wanted the Burtons to call law enforcement. Therefore, Fields supports the trial court's decision in the instant case.

Broadway also argues the testimony was not hearsay because it was admitted to show notice. However, the statute does not require the driver involved in an accident to put the driver's in-laws on notice of the accident. Whether the Burtons received notice of the accident is irrelevant. Further, Burton testified he called the police of his own accord, not at Broadway's request. Ms. Burton did not call the police. Reliance on Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972) is misplaced. In that case, an inspector told the defendant that tires on the defendant's vehicle were bald. This would put the defendant on notice that the tires were in need of replacement for safety purposes and relevant in a tort case to establish a duty of due care for the tortfeasor. In the instant case, Broadway's alleged request did not establish a legal duty or duty of due care for the Burtons and it was not exculpatory for Broadway.

Reliance on State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987) is likewise misplaced. In that case, Lewis' co-defendant, Bellamy, testified he purchased a gun because he heard rumors that

Lewis was making threats on Bellamy's life. The State alleged Bellamy committed the murder at Lewis' behest. The testimony was not offered for the truth of the matter asserted – that Lewis was threatening Bellamy. Instead, the testimony was offered to explain why Bellamy bought the gun. In the instant case, Broadway sought to admit the out of court statement for the truth of the matter asserted – that Broadway allegedly wanted the Burtons to call law enforcement.

Similarly, reliance on State v. Sims, 304 S.C. 409, 419, 405 S.E.2d 377 (1991) fails because the out of court statement in Sims – that a woman said Sims has a gun and is going to kill her sister – was not offered for the truth of the matter asserted, but to explain why the officer forcibly restrained Sims.

Unlike the out of court statements in Lewis and Sims, Broadway seeks to admit the statement for the truth of the matter asserted – that Broadway wanted the Burtons to contact law enforcement. The State agrees with Broadway the facts of the case – that after hitting Victim, Broadway drove past a gas station, went to a bar, left the bar without contacting law enforcement, went to the Burtons and fell asleep – create abundant evidence that is difficult for him to explain. However, that did not relieve Broadway from the requirement he follow the rules of evidence and allow him to elicit rank hearsay as he suggests in his brief.

Further, Broadway was not prejudiced by exclusion of this testimony, and any error was harmless. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). Broadway claims the testimony would evidence his defense that he complied with the statute. Regardless of whether he asked the Burtons to call 911, he did not comply with the statute. Even if the jury heard Broadway's claim that he asked his

in-laws to call police, it is not exculpatory. S.C. Code §56-5-1210 provides an exception to the duty to remain at the scene of an accident if the driver **temporarily** leaves the scene to contact law enforcement officers. It does not provide an exception to contact in-laws or ask for their advice. First, the Burtons were not proper authorities and it was up to Broadway to make contact. More importantly, no evidence indicated Broadway ever intended to return to the scene of the accident, so **he did not leave the scene temporarily**, and the statute does not provide an exception to the temporary requirement for a defendant who is too sleepy or intoxicated to return to the scene of the accident.

The excluded testimony amounted to gimcrack evidence in the face of the overwhelming evidence Broadway committed the crime. Any error was harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial); State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) (The "materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent would respectfully request permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit

BY: s/David Spencer
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 9, 2020