STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, PCR Judge

App. Case No. 2019-001887

RODNEY C. BRYAN

PETITIONER-RESPONDENT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT-PETITIONER

BRIEF OF RESPONDENT-PETITIONER PURSUANT TO *WHITE v. STATE*

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Was Petitioner-Respondent (Bryan) denied his right to testify as provided by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution where the record fails to show Bryan knowingly, intelligently, and voluntarily waived this fundamental right?

Respondent-Petitioner's Counter-Statement of Issues on Appeal

I. Whether the alleged denial of Bryan's right to testify is preserved for appellate review where neither trial counsel nor Bryan objected to the waiver issue at trial?

II. Whether the record shows that Bryan knowingly and voluntarily waived his right to testify at trial where trial counsel informed the trial court he and Bryan discussed the right to testify, and trial counsel informed the trial court Bryan did not wish to testify at trial?

STATEMENT OF THE CASE

Petitioner-Respondent Rodney C. Bryan (Bryan) was indicted for criminal domestic violence of a high and aggravated nature (CDVHAN), violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807-08; 810-11; 813-14; 716-19. Bryan was represented by Robert "Theo" Williams, Sr. (trial counsel) of Williams, Stitely & Brink, PC. App. 1. Assistant Solicitors Shawn Graham and Emily Howard prosecuted the case. App. 1.

Bryan's case proceeded to a jury trial before Judge R. Knox McMahon on July 14, 2008. App. 1. Bryan's charges stem from domestic disputes with his wife, Rachel Bryan (Rachel), over the weekend of September 14–16, 2007. The State alleged Bryan assaulted Rachel, violated an order of protection, kidnapped her by not allowing her to leave the home or call for help, and raped her two times over the weekend. A.B. (daughter) and D.B. (son), Bryan and Rachel's children, testified at trial. Daughter was ten-years-old at trial. Son was seven-years-old at trial.

The jury convicted Bryan as indicted for CDVHAN, violation of a protection order, kidnapping, and one count of spousal sexual battery. The jury acquitted Bryan of the second count of spousal sexual battery. App. 434; 816-17. Judge McMahon sentenced Bryan to serve concurrent terms of ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violating an order of protection, and twenty-five years for kidnapping. App. 448-49; 809; 812; 815; 820. Bryan appealed.

Appellate Defender Robert Pachak (appellate counsel) represented Bryan on appeal. Appellate counsel perfected Bryan's appeal by submitting an *Anders*[1] brief arguing the following issue:

[1] *Anders v. California*, 386 U.S. 738 (1967).

> Whether the trial court erred in ruling that two minor children of the victim could testify against [Bryan] without him being physically present in the courtroom?

App. 454. Thereafter, Bryan submitted a *pro se* brief to the Court of Appeals, presenting the following issues:

> 1. Did the trial judge abuse his discretion in finding the necessity to conduct an alternative procedure for the testimony of [Bryan's] ten-year-old daughter and seven-year-old son, by invoking S.C. Code Ann. § 16-3-1550(e)?
>
> 2. Did the trial judge err by failing to implement the correct procedure to invoke S.C. Code Ann. § 16-3-1550(e) and violate [Bryan's] Constitutional Rights by removing him from the Court Room prior to and during the testimony of [Bryan's] ten-year-old daughter and seven-year-old son?
>
> 3. Did the trial judge err in allowing the state[']s Expert Witness to be physically present in the Court Room during the victims['] testimony, for the purpose of the Expert Witness to bolster the victims['] testimony?
>
> 4. Did the trial judge err in allowing State's Exhibit No. 8 to be entered as evidence?
>
> 5. Did the trial judge abuse his discretion by failing to recuse himself?

App. 462.

The Court of Appeals dismissed the appeal "[a]fter thorough review of the record, [appellate] counsel's brief, and Bryan's *pro se* brief." App. 481; *State v. Bryan*, Op. No. 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2020). Bryan then filed a *pro se* petition for rehearing. App. 482-83. The State made its return to the petition for rehearing on April 5, 2010. App. 484-95. The Court of Appeals denied the petition for rehearing on April 23, 2010. App. 497-98. Bryan then petitioned the South Carolina Supreme Court for a writ of certiorari to the Court of Appeals. App. 499-511. The South Carolina Supreme Court dismissed the petition. App. 513-14. The case was remitted

back to the circuit court on May 28, 2010. App. 515. Bryan sought review in the United States Supreme Court (USSC). App 516. The USSC denied review on January 10, 2011. App. 569.

Bryan commenced the underlying PCR action on February 17, 2011. App. 570-83. An evidentiary hearing into the matter convened on August 15, 2013, before Judge Edgar W. Dickson. App. 610. Bryan was present and appeared *pro se*. App. 610. Assistant Attorney General J. Walt Whitmire represented the State. App. 610. The State moved to reconvene the evidentiary hearing to present trial counsel's testimony regarding his discussions with Bryan about Bryan's right to testify. App. 697; 699. The PCR hearing reconvened on November 13, 2014, before Judge Dickson. App. 699. On February 2, 2018, Judge Dickson found Bryan was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding [Bryan's] right to testify," but denied relief on all other grounds. App. 741-53. The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on February 12, 2018. App. 754-65. Judge Dickson denied the State's motion on October 19, 2019. App. 804-05. On November 6, 2019, Bryan served his notice of appeal. The State served its notice of cross-appeal on November 13, 2019.

STATEMENT OF THE FACTS

On Friday, September 14, 2007, Rodney (Bryan) and Rachel (Rachel) Bryan picked up their children from daycare. Rachel was in the driver's seat, Bryan was in the passenger seat, and their children—Daughter, Son, and their youngest child (Child)—were in the back seat. App. 125; 156. They were sitting in the daycare parking lot, and Rachel was "messing with" Bryan's phone. App. 136-37; 139. Bryan was yelling at Rachel, and Rachel yelled, "Stop." App. 137. Rachel then "popped" Bryan in the mouth. App. 138. Then, Bryan slapped Rachel, Rachel hit the steering wheel and got a black-eye "and it was swelling real bad." App. 138; 157. Bryan told Rachel to "Drive." Rachel drove home. App. 125-26; 157.

When they arrived home, Bryan went to the side of the house with "a wire cutting tool." App. 127. Rachel and the children went inside. App. 129. Bryan then entered the house, and Rachel put a movie on for the children. Daughter went into her parents' bathroom and heard Rachel crying. Daughter, Son, and Child then went into the bathroom and saw Rachel crying on the ground. Bryan was in the doorway "looking angry at [Rachel]." App. 130. Bryan walked away, and Daughter helped Rachel get up off the floor. After Daughter helped Rachel off the bathroom floor, they all went into the living room. Then, "[Bryan] was trying to hurt [Rachel] in the living room, and then . . . [Bryan] looked at [Daughter] and then [Daughter] tried to call the police." App. 130-31. Daughter dialed 911, but "for some reason it didn't work." Daughter then went outside and saw the phone line was cut. Daughter went back inside. App. 131.

Once inside, Daughter got scared, and she, Son, and Child went in the "broken bathroom" because "it's the only bathroom that has a lock." App. 131-32. After a while, Daughter exited the bathroom and tried to go to the neighbor's house to use the phone. App. 132. However, Daughter tried to leave and Rachel asked if Daughter was coming back. Daughter was scared, and this made

her more scared, so she, Son, and Child all three went to try and use the neighbor's phone. Bryan and Rachel stopped the children from going to the neighbors. App. 149. Son was about to enter the woods to get to the neighbor's house when "[Bryan] rushed over there and grabbed Son . . . by the stomach and squeezed . . . the side of his waist." App. 133. The children were crying and calling Bryan names, and Bryan put Son down and said "everything's going to be okay." App. 133. Everyone went back in the house, and the children went to sleep. App. 133-34.

The next morning, Bryan and Rachel were fighting again. Daughter recalled Bryan yelling "Fuck you," to Rachel. App. 134. Rachel was "a little angry and very sad." App. 134. The next Wednesday at school, Daughter told her teacher what happened the past weekend because "I was scared and I didn't want nothing [to] happen again because I was tired of Dad beating up my Mama." App. 135.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The trial court's "findings of fact will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011).

ARGUMENT

I. The alleged denial of Bryan's right to testify is not preserved for appellate review because neither trial counsel nor Bryan objected to the waiver issue at trial

Bryan acknowledges this issue is not preserved for appellate review. *See* Petitioner/Respondent's Pet. 5 n.2 ("Petitioner acknowledges trial counsel did not object, which is ordinarily required to preserve this issue for review."). However, despite this acknowledgement, Bryan, relying on *State v. Rivera*, 402 S.C. 225, 239–40, 741 S.E.2d 694, 771–72 (2013), contends there did not need to be objection for the Court to rule on the matter. *See* Petitioner/Respondent's

Pet. 5 n.2 ("However, the Supreme Court previously reviewed a denial of the right to testify when counsel posed no objection."). This case is clearly distinguishable from *Rivera*. Here, the issue is unpreserved because neither trial counsel nor Bryan objected. Therefore, this issue is not preserved for appellate review, and Bryan's convictions and sentences should be affirmed.

"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, 693-94 (2003). "The rationale behind the requirement of a contemporaneous objection is to 'enable [ ] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition.'" *State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011) (quoting *State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991)). A defendant, who was not entitled to *in favorem vitae* review, may not raise for the first time on appeal the lack of knowing and intelligent waiver of his right to testify at trial. *Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 251 (1994).

In *State v. Rivera*, a capital case, the trial court, trial counsel, the defendant, and the defendant's guardian *ad litem* (GAL) engaged in an on the record colloquy regarding the defendant's choice to testify at trial. 402 S.C. at 230–35, 741 S.E.2d at 696–99. The defendant and his GAL both informed the trial court he wished to testify in his defense. *Id.* at 231–32, 741 S.E.2d at 697. However, trial counsel informed the trial court he advised the defendant on serval occasions that it was not in the defendant's best interest to testify at trial, he refused to call the defendant as a witness, but the trial court could call the defendant as the court's witness. *Id.* at 232, 741 S.E.2d at 697–98. Thereafter, the trial court called the defendant as an *in camera* witness. *Id.* at 234–35, 741 S.E.2d at 699. The trial court decided it would not call the defendant as a court's witness based

on the defendant's proffer. *Id.* at 235, 741 S.E.2d at 699. Importantly, the defendant, through his GAL, timely objected to the ruling. *Id.* at 236, 741 S.E.2d at 700. The Court found the issue was preserved because the defendant, through his GAL, timely objected to the trial court's refusal to allow him to testify before the jury. *Id.* at 240, 741 S.E.2d at 702.

Here, at trial, after the State rested its case, and trial counsel moved for a directed verdict on each charge, the trial court asked:

> [Trial] Court: All right. [Counsel], do - - do I need to interview Mr. Bryan with regard to his right to testify or not testify?
>
> (Sotto voce discussion between [Counsel] and the defendant.)
>
> [Trial counsel]: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.
>
> [Trial] Court: All right. With that being said then, and your advising the Court I do not need to interview him, I - - I will not do so. Again, I am sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, [trial counsel].
>
> [Trial counsel]: Your Honor, I think we're okay on this.

App. 373-74.

The waiver issue was not preserved for appeal because there was no objection to the trial court failing to advise Bryan of his right to testify at trial. This case is distinguishable from *Rivera* because the Court in *Rivera* found the issue was preserved because the defendant, not trial counsel, timely objected. For this issue to be preserved, Bryan actually needed to inform the trial court he wished to testify. Instead, Bryan remained silent, arguably because he agreed with trial counsel's statement they had discussed his right to testify and Bryan had decided not to testify in the case. Therefore, this issue is not preserved for appellate review, and Bryan's conviction and sentence should be affirmed.

II. The record shows Bryan knowingly and voluntarily waived his right to testify at trial because trial counsel informed the trial court he and Bryan discussed the right to testify, and trial counsel informed the trial court Bryan did not wish to testify at trial

The record shows Bryan knowingly and voluntarily waived his right to testify at trial. Bryan acknowledges trial counsel discussed his right to testify at trial, and Bryan never asserted he wished to testify at trial until PCR. Importantly, trial counsel informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify. App. 700–01. Therefore, Bryan knowingly and voluntarily waived his right to testify at trial.

"An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." *Brown*, 317 S.C. at 272, 453 S.E.2d at 252. There is no requirement for an on-the-record waiver in non-capital cases. *Id.* "A defendant's knowing and voluntary waiver of . . . constitutional rights . . . may be accomplished by colloquy between the Court and the defendant, *between the Court and defendant's counsel*, or both.'" *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (emphasis added).

Here, the trial court's colloquy with trial counsel satisfies the knowing and voluntary waiver requirement. The trial court asked trial counsel if it needed to advise Bryan of his right to testify. App. 373-74. Then, the record shows there was a brief discussion between trial counsel and Bryan. App. 374. After their discussion, trial counsel informed the trial court it did not need to interview Bryan because trial counsel had spoken to Bryan about testifying, and Bryan was not going to testify. App. 374. The trial court then stated, "I am sure you've explained [the right to testify] to [Bryan] fully and completely, and if you need any more time to discuss that with [Bryan], you certainly may have that." App. 374. Trial counsel responded, "[W]e're okay on this." App.

374. Importantly, trial counsel informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify. App. 700–01. Bryan's PCR testimony that he wanted to testify at trial is unsupported by anything in the record. However, trial counsel's testimony he informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify is amply supported by the record before the Court—the colloquy at trial. Therefore, Bryan knowingly and voluntarily waived his right to testify at trial, and his conviction and sentence should be affirmed.

CONCLUSION

Based on the forgoing, whether Bryan knowingly and voluntarily waived his right to testify at trial is not preserved for appellate review. Further, even if the issue was preserved, the only credible evidence in the record shows that Bryan knowingly and voluntarily waived his right to testify at trial. Therefore, this appeal should be dismissed, and Bryan's convictions and sentences should be affirmed.

Respectfully submitted,

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