STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2019-001303

The State, Respondent,

vs.

Tyreek Dashawn Hayes, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in admitting testimony of a police officer that the victim identified Appellant by his Facebook name because it is not hearsay. Further, the trial court did not err in finding it was an excited utterance. Finally, any possible error is harmless in light of the other evidence in the record.

STATEMENT OF THE CASE

The Dillon County Grand Jury indicted Appellant on charges of criminal sexual conduct in the first degree, two counts of attempted murder, kidnapping, and possession of a weapon during commission of a violent crime. He proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury acquitted him of criminal sexual conduct, but found him guilty of all other charges. Judge Henderson sentenced him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon. The sentences ran consecutively for a total of eighty years in prison.[1] On August 2, 2019, Appellant served his Notice of Appeal and subsequently served his Initial Brief of Appellant on July 27, 2020.

[1] Appellant's Statement of the Case includes unnecessary commentary regarding the jury charges given by the trial court which are entirely unrelated to the subject and issue on appeal. The State disagrees with the inclusion, especially in the procedural Statement of the Case, but the State's motion to strike was denied. It is also important to note, that notwithstanding counsel's commentary and characterizations, Appellant's trial court did not object to the jury instructions given, and specifically indicated his desire for the Allen charge referenced in Appellant's Statement of the Case. (T.595; 600; 603-604; R.478; 483; 486-487).

STATEMENT OF FACTS

Candace Simpson met someone named Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T.106-107; R.21-22). Reedy Boss was later identified as Appellant. On the evening of September 30 and into the morning of October 1, 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T.106; 108-109; R.21; 23-24). After going to Strikers, Simpson and a friend went to T Lees, another club. (T.111-112; R.26-27). While at T Lees, Simpson saw Appellant. (T.113; R.28).

Appellant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113; R.28). When they all got out of the car, Appellant asked about coming into Simpson's apartment. (T.115; R.30). Simpson went to wash off the smoke and change clothes. When she came back out, she originally sat in a recliner while Appellant sat on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Appellant to leave, but he would not. (T.116; R.31).

Instead, Appellant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Appellant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T.117; R.32). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Appellant then raped Simpson. (T.118-119; R.33-34). Simpson passed out after Appellant began penetrating her with his penis. (T.119; R.34).

When she woke up, it was daylight and Appellant was just standing there watching her. (T.119-120; R.34-35). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He asked her to do oral sex, and she agreed believing she would be choked if she did not

perform oral sex. (T.120; R.35). Ultimately, Appellant choked Simpson again. She begged him to stop, telling him she had children. Appellant said Simpson would tell and she kept begging for her life. She woke up again after the choking, and could barely walk. (T.120; R.35).

Someone came over and Simpson saw that it was her sister. Simpson told Covington that Appellant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Appellant was punching Covington, at the time not knowing he had a knife. (T.123-124; R.38-39). Simpson jumped on Appellant and Covington was able to get free. Simpson tried to run, but Appellant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He drug her into the kitchen and stabbed her. (T.123-125; R.38-40). Ultimately, Appellant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T.126; R.41). Simpson had to bust through the screen to get out and away from Appellant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T.127; R.42).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T.128; R.43). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Appellant in the lineup. (T.129; 303; State's Exhibits 84 & 86; R.44; 45; 498; 500). At trial, Simpson again identified Appellant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T.137-138; R.52-53).

Covington testified that when she brought Simpson's son back she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T.197-198;

R.112-113). She managed to escape when Simpson jumped on Appellant's back. Covington went next door and asked them to call 911. (T.199-200; R.114-115). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Appellant. (T.203; R.118).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"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).

ARGUMENT

I. The trial court did not err in admitting testimony of a police officer that the victim identified Appellant by his Facebook name because it is not hearsay. Further, the trial court did not err in finding it was an excited utterance. Finally, any possible error is harmless in light of the other evidence in the record.

Appellant contends the trial court erred in admitting the testimony of Investigator Tyler who stated that Simpson identified her assailant by his Facebook moniker—Reedy All Boss. Appellant maintains this was inadmissible hearsay and the trial court erred in admitting it under the excited utterance exception. The testimony was not hearsay and so no exception was necessary. Further, if an exception was required, there was sufficient evidence to support the trial court's determination it was an excited utterance. Finally, even if it could possibly be admitted in error, any error was entirely harmless as the testimony was cumulative to additional testimony in the record and court not have conceivably affected the outcome of the trial.

At trial, the State asked Investigator Tyler, one of the first officers on the scene after the 911 call, if Simpson identified her assailant. Appellant objected as hearsay, and the State responded it was an excited utterance. The trial court ruled it was an excited utterance and was the victim making the identification. (T.243-244; R.154-155).[2] Thereafter, Investigator Tyler indicated Simpson told him her assailant was someone she knew as "Reedy All Boss," someone she knew from Facebook. (T.244; R.155).

[2] Appellant argument raised on appeal is not preserved for review. At trial, Appellant objected to hearsay. The State offered the excited utterance exception for admission and the trial court agreed. Appellant never maintained that the State failed to present sufficient evidence to support its claim of an excited utterance, nor did he contend the trial court needed to make more specific findings. As a result, the bulk of Appellant's argument regarding the sufficiency of the ruling and the sufficiency of the State's supporting evidence of an excited utterance was never raised to or ruled upon by the trial court. See 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."); 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).

" '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. However, the Rule continues to define several categories of statements which are not hearsay:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if--
>
> > (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person, ...

Rule 801(d)(1)(C), SCRE.

While South Carolina courts have not had many occasions to address Rule 801(d)(1)(C), the Rule is identical to the federal rule and many federal courts have addressed application of Rule 801(d)(1)(C), FRE. They routinely admit testimony, whether by the witness themselves or a third party such as a police officer, of a prior out-of-court identification. See e.g., United States v. Owens, 484 U.S. 554, 564 (1988) (Rule 801(d)(1)(C) exception applicable to evidence of witness's prior identification of defendant, even though by the time of trial, witness was unable to remember identification); United States v. Paredes-Rodriguez, 160 F.3d 49, 58 (1st Cir. 1998) (rejecting a claim of hearsay and impermissible bolstering because the out-of-court identification was properly admitted under Rule 801(d)(1)(C), FRE); United States v. Brink, 39 F.3d 419, 426 (3d Cir.1994) (admitting testimony by FBI agent and not the declarant regarding the declarants stated identification of the defendant); United States v. O'Malley, 796 F.2d 891, 898–99 (7th Cir.1986) (allowing FBI agent to testify regarding witness's prior identification of defendant after witness recanted at trial).

The testimony objected to in this case was not hearsay. The declarant, Simpson, clearly testified at trial and was subject to cross-examination. Her statement relayed by Investigator Tyler

was one of identification of Appellant—at least by the name she knew—obviously made after perceiving Appellant as her assailant. As a result, the testimony was not hearsay and no exception was necessary.

Even if an exception was necessary, it was properly admitted as an excited utterance. An excited utterance is defined as: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). The statement in this case, when examined in light of the circumstances described by Investigator Tyler and the victims, certainly qualified as an excited utterance.

First, the startling event would be the rape and attack by Appellant. Second, the statement—the identification of "Reedy All Boss" as Simpson's rapist and attacker—clearly related to the startling event. Next, the statement was made while under the stress of the event. Investigator Tyler testified she arrived right after the 911 call. People were gathered and hollering that the victims were in Apartment P3. Investigator Tyler went to P3 and found Simpson and Covington. When she arrived, Simpson was wrapped in a bedsheet and people were covering her wounds with towels. Investigator Tyler described Simpson: "She was bloody. Her face was bloody and swollen. Her eyes were, like, the whites of her eyes were red. She had blood dripping everywhere." (T.243; R.154). The circumstances described certainly indicate the statement was made while the declarant was still under the stress of excitement which would have been caused

by the startling event or condition. Accordingly, the totality of the circumstances support the finding by the trial court that if the statement was hearsay—which it is not—it would still be admissible as an excited utterance.

Finally, even if there could be any conceivable error with the admission of the statement, it would be entirely harmless in light of the extensive cumulative evidence in the record. "The admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989); see also, State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony). The jury knew Simpson identified "Reedy All Boss" as her assailant. She testified that was the name of the person from Facebook. She identified his Facebook page which was presented to the jury and would have allowed the jury the ability to determine for themselves whether "Reedy All Boss" was in fact Appellant. (T.136-137; R.51-52). Simpson also picked Appellant out of a photo lineup while in the hospital and identified him at trial. Covington also identified Appellant as her attacker and indicated she knew him as "Reedy All Boss." (T.206; R.121). In addition, Covington picked Appellant out of a photo lineup. (T.342; State's Exhibit 85; R.253; 499).

Additionally the admission of the statement could not have had any impact on the verdict beyond a reasonable doubt.

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotation marks and citations omitted). "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. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006); see also, 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 single mention of the prior identification by Simpson, especially in light of the fact Appellant never contested the testimony that he was at the apartment and the other identifications made by both Simpson and Covington, could not have impacted the jury's verdict. See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge).

Accordingly, the trial court did not err in admitting the testimony by Investigator Tyler and, even if admitted in error, it was entirely harmless.

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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December 21, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed December 21, 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 21st day of December, 2020.

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