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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
The Honorable Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2020-000508

THE STATE,

RESPONDENT,

v.

K'SONE MARQUAIL CAMPBELL

APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the trial judge err in allowing cross-examination of the Appellant about a text message to an unknown individual, an hour and a half before the shooting, indicating that Appellant was armed with a gun when the text message was irrelevant, highly prejudicial, the judge preliminarily ruled that the text message was not admissible and Appellant did not open the door to admission?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

1. Did the trial judge err in allowing during cross-examination the solicitor to question the Appellant on a text message regarding being "strapped" made an hour and a half before the murder?
2. Was allowing this text message into evidence considered a harmless error?

STATEMENT OF THE CASE

On May 13, 2017, the Appellant was arrested and charged with the offenses of murder and unlawful possession of a weapon. He was later indicted by the Charleston County Grand Jury for the offense of murder.¹

On March 2, 2020, the Appellant's case was called for trial before the Honorable Jennifer B. McCoy. Representing the State of South Carolina were Assistant Solicitors David L. Osborne and Richards Hundley of the Ninth Circuit Solicitor's Office. Representing the Appellant was attorneys Reed W. Mulbry and Megan Ehrlich.

Prior to the beginning of trial a *Jackson v. Denno* hearing was conducted regarding statements made by the Appellant to law enforcement. At the conclusion of this hearing the trial court determined that there were no threats of violence nor any promises of leniency made to the Appellant. The trial court found that the Appellant's *Miranda* warnings were given, and he expressed to law enforcement that he understood. So the limited amount of the Appellant's statements the State was seeking to introduce was allowed into evidence. (R. p. 41 lines 16-25).

The Appellant also filed a motion in *limine* regarding a text message sent to an unknown person. This text stated, "Yeah, we strap so don't think it's easy." The Appellant position was there is no evidence revealing that this text had anything to do with the murder, so its prejudice outweighed any probative value it may bring. At the conclusion of this hearing the trial court ruled that it would not make a final ruling until it comes up during trial. The trial court did state that based on everything that was heard it was most likely not going to be admitted into evidence at trial because it was obviously highly prejudicial. (R. p. 81 lines 12-16)

¹ The charge of unlawful possession of a weapon was later dismissed by the solicitor.

After the fifth day of trial the Appellant was convicted by a jury of his peers of the offense of murder. (R. p. 791 lines 13-20) After the jury verdict the Appellant was sentenced to a thirty-seven year term of imprisonment. (R. p. 808 lines 19-25)

After this conviction the Appellant filed a timely notice of appeal. Within this appeal the Appellant argues that the court erred in allowing the solicitor to question him about this text message during cross-examination. The Appellant is of the position that allowing this text into evidence was unduly prejudicial and this prejudice overrides any probative value. The Respondent argues that the solicitor lawfully used these text messages for impeachment during cross examination. Respondent further argues the Appellant's counsel failed to object at the time this text was raised by the solicitor; therefore, he acquiesced this issue. The Respondent will also argue that if the inclusion of this text message was done in error it should be considered harmless since there was sufficient evidence presented by the solicitor proving the Appellant committed this crime beyond a reasonable doubt.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). A trial judge retains discretion to impose reasonable limits on the scope of cross-examination. *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). That ruling should not be disturbed by the Appellant court absent a manifest abuse of discretion. *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). An abuse of discretion occurs when the trial court's ruling is based on error of law or when grounded in factual conclusions without evidentiary support. *State v. Jennings*, 394 S.C. 473, 477-78, 716

S.E.2d 91, 93 (2011). Error is harmless when it could not reasonably have affected the result of trial. *State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018).

STATEMENT OF FACTS

On May 11, 2017, Mr. Deangelo Milligan was possibly selling drugs on King Street in Charleston, South Carolina. (R. p. 713 lines 15-19) Mr. Milligan was then followed into a convenience store by the Appellant where an argument ensued. The Appellant was heard saying “You can’t come down here no more this is my block,” Mr. Milligan answered, “I can come anywhere I want,” (R. p. 395 lines 13-15) After the exchange of words a fight occurred between these two men. (R. p. 453 lines 1-4) During this fight another individual named Demetrius Young entered the fight holding a firearm. Mr. Young hit Mr. Milligan in the stomach three times with the gun. (R. p. 715 lines 18-19) Store employees came in and broke up this fight. The Appellant and Mr. Young left the store, however, employees told Mr. Milligan to wait in the store to allow the others to leave the area. While waiting Mr. Milligan called the victim Derrick Barber to come and pick him up. (R. p. 717 lines 9-12) However, Mr. Milligan was not aware the Appellant was still waiting for him near the store.

The victim arrived to pick up Mr. Milligan with his children in the back seat of his vehicle. He saw the Appellant sitting in his vehicle with Mr. Young. Mr. Milligan walked behind the car and as he did the Appellant points his gun out of the car window and fires four times shooting the victim. After shooting the victim before his children Appellant fled the scene. A friend of the victim Mr. Mikel Funnie got word that there was a shooting in that area. His aunt lives there so he went to the area to check in on her, when he arrived he saw the victim’s car and Mr. Milligan kneeling near the victim lying on the ground in a pool of blood. (R. p. 265 lines 2-5) Mr. Funnie decided to take the victims children from the crime scene to the victim’s mother’s house. (R. p.

265 lines 6-10) As law enforcement arrived they attempted to speak with Mr. Milligan, however he was uncooperative.

Dr. Nicholas Batalis forensic pathologist at the Medical University of South Carolina performed an autopsy on the victim. He determined the victim was shot four times. (R. p. 572 lines 9-11) Once on his left flank under his armpit which went through his left lung, through the heart and through the diaphragm exiting the right side of his body. (R. p. 572 lines 17-23) Another shot went through his abdomen perforated the bowel and stomach multiple times and then exited the right hip. (R. p. 575 lines 5-7) Another one entered the right side of his chest, passed through the right lung and exited the mid-back. (R. p. 576 lines 9-13) The least fatal shot went through his wrist. (R. p. 579 line 25 – p. 580 line 1) Dr. Batalis determined that that cause of death was gunshot wounds to the trunk that caused defects in the lungs and heart leading to substantial bleeding and dysfunction of those organs. He determined the manner of death was homicide, which is the death at the hands of another individual. (R. p. 581 lines 9-14)

The authorities gathered all of the surveillance video in the area and upon viewing this evidence determined that the Appellant was involved. On May 13 law enforcement decided to go to the Appellant's home to determine if he was willing to come to headquarters and speak with them. (R. p. 21 lines 7-11) He was informed that he was not in custody, he still decided to go with them to make a statement. After making numerous inconsistent statements, the Appellant was arrested and charged with the offense of murder. (R. p. 31 lines 13-15)

During trial the Appellant testified that he and all of the other persons involved including the victim were very close friends. (R. p. 618 lines 4-6) He testified that Mr. Milligan asked him to join a street gang where he refused. (R. p. 621 lines 7-9) He then followed Mr. Milligan into the store just to "stop the madness and remain friends." That is when the fight started between those

two, Mr. Young then got involved and pulled out the handgun. (R. p. 623 line 10 – p. 624 line 9) The Appellant stated that he was not aware that Mr. Young had that gun on his person. (R. p. 624 lines 17-19) He also testified that he was to give Mr. Young a ride home but he had to get rid of the gun before entering his car. (R. p. 629 lines 12-13) He thought that Mr. Young left the gun in his grandmother’s house before he got into his car. (R. p. 630 lines 9-11)

He testified that later the victim pulled up beside him and Mr. Young. The victim was upset but the Appellant hoped that they could work something out. (R. p. 634 line 25 – p. 635 line 3) The Appellant accused Mr. Young as the individual who pulled out the gun, reached over him, and shot the victim four or five times. (R. p. 637 lines 5-7) After this occurred, he left the scene with Mr. Young later dropping him off at an unknown location.

ARGUMENTS

- 1. The trial court did not err in allowing the solicitor to question Appellant regarding a text message delivered an hour and a half prior to the murder.**

The Appellant argues that the trial court erred in allowing the solicitor to question him during cross examination regarding a text delivered to an unknown person an hour and a half before the murder. The Appellant argues that the inclusion of this text is prejudicial and the prejudice outweighs any probative value it may have.

After the Appellant’s arrest law enforcement obtained a search warrant for the contents of his cell phone. During the search of his phone a text was found that stated “we strapped so don’t think it’s easy.” (R. p. 643 lines 1-2) During his testimony the Appellant stated that he was not aware Mr. Young was armed. (R. p. 642 lines 5-9) He did admit that “being strapped” means you have a gun. (R. p. 642 lines 19-21) He also admitted to sending the text, however he stated that it had nothing to do with this incident. (R. p. 642 line 19 – p. 643 line 6) The Appellant argues that the trial court should not have allowed this into evidence because of its prejudice. However, the

solicitor mentions this text for impeachment so it should be relevant. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about “past transactions tending to affect his credibility.” *State v. Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990) It is well settled that when a defendant takes the stand he becomes subject to impeachment like any other witness. “The defendant maybe asked about prior bad acts not the subject of a conviction which goes to his credibility.” *State v. Outlaw*, 307 S.C. 177, 179, 414 S.E.2d 147, 148 (1992). The text mentions “we being strapped” meaning that both or either one of them has access to a firearm. This text sent an hour and a half before the murder reveals the Appellant had knowledge of this possession. It was not an error for the solicitor to use the text for impeachment.

During trial the Appellant argued that the text messages were not relevant due to the fact it was never linked to the actual murder, and was sent to an unknown person. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401 SCRE The inclusion of this evidence was to show that the Appellant did have access to a gun when he stated within his testimony he did not. The reference to “strapped” means carrying a firearm, so he admitted to having access to a firearm. The Appellant had the opportunity and ability to commit this murder.

After the pre-trial motion the trial court ruled that it would not make a final ruling until it comes up at trial. However, the trial court did state that based on everything the court was most likely not going to admit this evidence at trial. (R. p. 81 lines 12-16). Though the trial court might have felt this way after pre-trial motions the trial court never made a formal decision on whether or not this evidence would be allowed. Once the text messages was raised by the solicitor during

the Appellant's cross-examination, it was the duty of the Appellant's counsel to raise an objection in order to get a formal decision from the trial court, however, they failed to do so. The Respondent argues the Appellant acquiesced this issue so it was not preserved for appeal. An issue conceded in the lower court cannot be argued on appeal. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998).

No objection was ever raised when the Appellant was questioned about the text messages. The Appellant actually attempted to raise an argument as to why this text was not involved in this case. Once counsel failed to raise an objection, any argument stemming from this issue was acquiesced. Where counsel acquiesces in the judge's ruling and makes no other objections regarding the issue, the issue is not preserved for appeal. A party cannot acquiesce to issue at trial and then complain on appeal. *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998), *Ex parte McMillan*, 319 S.C. 331, 461 S.E.2d 43 (1995). Since the court never formerly ruled on the admissibility or prejudice of this text message, and the Appellant's counsel failed to renew their objection as to its admissibility, this issue should not be considered by this court.

2. If the inclusion of this text message was done in error it should be considered harmless.

The Appellant argues that it was an error for the trial court to allow this text to be used during cross-examination. The Appellant's position is that this text was unduly prejudicial. The Respondent will continue to argue that the prejudice was overridden by the probative value. There was also no objection when the text was brought into evidence during cross-examination. Therefore, Appellant acquiesced this issue, so it was not preserved for appeal. Even if this court determines that an error has occurred it should be considered harmless.

The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public

respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Delaware v. VanArsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986). There are five factors when considering harmless error: 1) the importance of the witness's testimony in the prosecution's case; 2) whether the testimony was cumulative; 3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; 4) the extent of cross-examination otherwise permitted; 5) the overall strength of prosecution case. *Gracely*, 399 S.C. at 375, 731 S.E.2d at 886, quoting, *VanArsdall*, 475 U.S. at 684, 106 S.Ct. at 1431.

This evidence was presented during the Appellant's testimony. He was asked about these texts for impeachment, because earlier he stated he was not aware the co-defendant was armed until the fight occurred. It was important that the Appellant be allowed to testify in his own behalf, however, the evidence regarding the text messages was not needed for conviction. There exists overwhelming evidence revealing the Appellant committed this crime beyond a reasonable doubt. The text was only minor in relation to all of the other evidence presented to the jury. Due to the numerous amount of surveillance video and corroborating testimony regarding events occurring prior and during this murder, a conviction would still have been acquired without this text message.

The Appellant got into a physical altercation with Mr. Milligan who was at the crime scene when the murder occurred. There was testimony from a store employee that there was an argument over a city block prior to the fight. (R. p. 395 lines 13-15) This argument was most likely about selling drugs on the Appellant's block. (R. p. 713 lines 22-24) During the fight the co-defendant joined the fight pulling out a gun and hitting Mr. Milligan in the stomach. (R. p. 713 lines 24-25) When the fight ended the Appellant and his co-defendant left the store, Mr. Milligan phoned the victim to request a ride home. When the victim arrived he was met by the Appellant. There was

testimony that someone stated “we don’t want any trouble here.” (R. p. 183 lines 8-11). Not long after that a shot came from the white car the Appellant was driving. (R. p. 185 lines 10-11) The solicitor argued that the Appellant was the actual shooter, however, even if he was not he is still guilty pursuant to the doctrine of “a hand of one is the hand of all.” Under the “hand of one is the hand of all” theory of accomplice liability one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017). There was sufficient evidence that the Appellant was either the shooter or aided in the shooting of this victim. He started the fight with an individual that was present at the scene then engages in an argument at the crime scene with the murder victim. (R. p. 184 lines 7-10). The evidence revealed that the Appellant was present in the vehicle where the shots came from. All of this evidence is circumstantial but sufficient enough for a jury to determine his guilt beyond a reasonable doubt. Circumstantial evidence is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred. *State v. Phillips*, 411 S.C. 124, 133, 767 S.E.2d 444, 448 (2014). Without the text message, there exists ample evidence, though circumstantial, for the Appellant to be found guilty beyond a reasonable doubt. So any error that occurred in the introduction of this text should be considered harmless.

CONCLUSION

The trial court made the proper decisions regarding this matter so the Respondent respectfully request this court to affirm the decision of the trial court.

Respectfully submitted,

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K'SONE MARQUAIL CAMPBELL,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 15th day of March, 2021.

s/ Tommy Evans, Jr.

TOMMY EVANS, JR.

Assistant Attorney General

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