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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Perry M. Buckner, III, Circuit Court Judge
Appellate Case No. 2019-001014

The State,

Respondent,

vs.

Terek Rasheed Goodwin,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Appellant does not have a right to be present at general jury qualification. He failed to timely preserve the issue for review on appeal. Finally, any error in him not being present is entirely harmless in light of the fact someone for the defense was present, he obtained all relevant information, and he failed to identify any issues related to the qualification other than solely the fact he was not present.

STATEMENT OF THE CASE

The Dorchester Grand Jury true-billed indictments for burglary in the first degree, armed robbery, and kidnapping. On June 10-12, 2019, Appellant proceeded to trial before the Honorable Perry M. Buckner, III, and a jury. Appellant was convicted of burglary in the first degree, kidnapping, and the lesser included offense of common law robbery. He was sentenced to thirty years for burglary, thirty years for kidnapping, and fifteen years for robbery, all to run concurrent. He time served and filed a Notice of Intent to Appeal.

STATEMENT OF FACTS

In December 2013, Kevin Sauls received approximately \$20,000 from an insurance settlement related to an automobile accident. (T.155; 167; R. 155; 167). He showed the money to some co-workers on a Friday after receiving it. (T.156; 167; R. 156; 167). The following Monday, Kevin got up with his kids and his wife, Monica Sauls, fed the kids, and headed to work. (T.167-168; R.167-168).

After getting the kids off to school, Monica laid back down before beginning her day. When she awoke, there were three guys in her living room. The three had guns, snatched her up, and threw her to the floor. After tying her up and covering her with a blanket, they demanded the money. (T.157; R.157). She told them where the money was located and begged them not to kill her. After they left, she managed to get untied and ran to find help. (T.157-158; R. 157-158).

ARGUMENT

- I. **Appellant does not have a right to be present at general jury qualification. He failed to timely preserve the issue for review on appeal. Finally, any error in him not being present is entirely harmless in light of the fact someone for the defense was present, he obtained all relevant information, and he failed to identify any issues related to the qualification other than solely the fact he was not present.**

Appellant contends the trial court erred in overruling his objection to jury qualification taking place outside the defendant's presence. First, he does not have a right to be at general jury qualification as it is an administrative function of the court. Second, the issue was not timely raised, so it was waived. Finally, any error was entirely harmless in light of the fact the defense obtained all relevant information from the jury qualification, had someone from their office present at qualification, and has not pointed to a single issue regarding jury qualification or the jury that was ultimately selected which would have been remedied by his presence.

Preservation/Waiver

Initially, it should be noted Appellant did not timely raise his objection to being absent from the general jury qualifications. "Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011); see also, In re Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."); State v. Owens, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial); Beaufort County v. Butler, 316 S.C. 465, 451 S.E.2d 386 (1994) (observing that constitutional issues must be timely raised to be preserved for appeal).

In the instant case, the trial court noted at the beginning of the hearing: “We are not in our regular courtroom because Judge Murphy is going to qualify the jury, and my regular court reporter . . . is already set up down there; so Eve’s going to be our court reporter for pretrial motions.” (T.8; R.8). Appellant never made an objection to the fact jury qualification occurred without his presence.

The parties then engaged in discussion regarding pre-trial motions. After the discussion, the jury panel entered and the trial judge engaged in discussions with the jury. (T.67; R.67). The judge then indicates that he wants the jury panel to meet the attorneys, stating:

Now, I want you to meet, since you have not seen them, **because I had them working while you were being qualified**, because I don’t believe in wasting time, ladies and gentlemen. So they weren’t in here. **Normally, they would be in this courtroom during your qualifications, but we were next door working, ladies and gentlemen, while you were being qualified.** So I want you to meet the lawyers that are going to be representing both the State of South Carolina, and the defendant, Terek Rasheed Goodwin.

(T.71; R.71) (emphasis added). Appellant’s counsel introduces himself and co-counsel as well the Appellant. Once again, he did not raise any objection to the failure to be present at the initial jury qualification even though it is clear from the judge’s comments to the jury that the qualification took place without them present.

The trial judge then began conducting voir dire of the jury panel. At no time during voir dire did Appellant object to the fact qualifications previously occurred without him being present. (T.73-88; R.73-88). The parties discussed the number of strikes and then struck and sat the jury. Again, throughout this process Appellant never objected to his not being present for jury qualifications. (T.89-97; R.89-97). The court has a break, allows the jury time to select a foreperson, and conducts further business prior to sending the jury out. Again, no objection raised during this time.

Only after the jury is sent out for their lunch break does counsel for Appellant finally raise the issue regarding his failure to be present during qualifications. At the time the objection was finally made, it was well after Appellant knew or should have known that qualifications occurred without his presence. The judge made multiple references to qualifications occurring in another courtroom while the parties were working on pre-trial motions. Additionally, the jury panel arrived in the courtroom, the attorneys introduced themselves, the judge conducted voir dire, and the parties selected a jury all without Appellant raising an objection. Clearly, the objection made in this case was not timely raised.

In ruling on the objection, the trial court noted that the attorneys had a discussion of the procedure to be used in chambers and Appellant never raised an objection at that time. (T.106; R.106). The trial court specifically found: "I don't consider this objection timely, I think you've waived it." (T.106; R.106).

The trial court also noted for the record:

I also want to put on the record that I met with the lawyers for over a half hour this morning in my chambers. I went over all the motions and told them that I was going to let Judge Murphy, who's assigned to Common Pleas, qualify the jury, and we would hear motions in the other courtroom, since my court reporter, Becky Hill, had already set up in this courtroom.

I took Judge Murphy's court reporter and used the other courtroom to hear the numerous motions, most of which were by the defendant, there was one by the State, in the trial of this case. No objection was made to that until after the fact, which is after we already began the trial of this case and the selection of the jury; which is why I placed on the record I didn't think the objection was timely, and I told Counsel that at the bench twice, but he wanted to make the objection, to put it on the record. But he certainly could have objected to that beforehand, and I would've certainly considered that.

I will also put on the record the fact that a member of his office sat in here and gave every bit of information that he now

seeks, to object to, that he was denied access to. I also gave him, as a result of his motion, access to the Solicitor's records, so he would have that for the selection of the jury, which is the reason that I didn't think the motion was timely; nor do I think the defendant has been prejudiced by not being present.

(T.107-109; R.107-109). Appellant failed to timely raise the issue even though he had numerous opportunities beginning in chambers before the procedure occurred and including throughout the introduction of the jury panel, voir dire of the jury, and the jury's selection. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A contemporaneous objection is required to preserve issues for direct appellate review.").

Merits

On the merits, Appellant does not have a right to be present for jury qualifications as it is not a critical stage in which his presence could make a difference. Further, in this case he waived his right to be present. As a result, even if preserved for review on appeal, the trial court did not err in overruling his objection.

A defendant has a right to be present to confront witnesses and at any critical stage pursuant to both the United States and South Carolina Constitutions. See U.S. Const. amend V and S.C. Const. art. I § 3. It is unquestioned in this case Appellant was not prevented from exercising his right to confrontation as he has no right to confront during, or even participate, in the administrative jury qualifications. As a result, his right to be present must be based on due process. The United States Supreme Court has held:

The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his

opportunity to defend against the charge.” Although the Court has emphasized that this privilege of presence is not guaranteed “when presence would be useless, or the benefit but a shadow,” due process clearly requires that a defendant be allowed to be present “to the extent that a fair and just hearing would be thwarted by his absence.” Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105–106 (1934)). The South Carolina Supreme Court has acknowledged the right: “A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001).

The central question in this case is whether the general jury qualification constitutes a critical stage in which Appellant’s presence would contribute to the fairness of the procedure or whether it is a stage when his presence would be useless or “but a shadow.” It should be noted that Appellant and his counsel were present for the voir dire of the jury panel and the selection process. He merely was not present for the administrative general jury qualification.

South Carolina has several automatic disqualifications from jury service as well as several exemptions. For example, persons 1) convicted of a crime punishable by more than one year imprisonment; 2) unable to read, write, speak, or understand English; incapable by mental or physical infirmities; or possessing less than a sixth grade education are disqualified from service. S.C. Code Ann. § 14-7-810 (Supp. 2020). Additionally, anyone sixty-five and older can be exempted from jury service. S.C. Code Ann. § 14-7-840 (Supp. 2020). Further, other sections set out additional basis for exemptions or exclusions or allow the judge to transfer individuals to another term. See e.g., S.C. Code Ann. § 14-7-810 through -870 (Supp. 2020). The statutes further provide:

The presiding judge shall at each term of court ascertain the qualifications of the jurors.

The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law. The clerk of court shall maintain a list of all jurors excused or disqualified and the reasons provided therefor by the presiding judge, which list must be signed by the presiding judge. In no case shall the jury commissioners excuse or disqualify any juror for any reason whatsoever; provided that the clerk of court may, without court approval, transfer any juror to a subsequent term upon good and sufficient cause.

S.C. Code Ann. § 14-7-1010 (Supp. 2020).

As can be seen from the procedure above, the defendant and his counsel have no role in the determination of the qualification of the jury. Because Appellant and his counsel are not involved in the questioning of the jurors or the determination of their qualifications, this is a prime example of a portion of the case in which the defendant's attendance would be unnecessary and nothing but a shadow such that his presence is not warranted. This is especially true when the trial judge made certain someone from the defense counsel's office was present during the qualifications, and Appellant and his counsel received all information related to the qualifications prior to the voir dire and selection of the specific jury panel for his trial. Significantly, Appellant has pointed to no individuals improperly disqualified by the judge during his administrative qualification. Accordingly, the trial court did not err in proceeding to jury qualification without Appellant present. See e.g., Starnes v. State, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (finding because the stage of the criminal proceeding at issue was not a critical stage, respondent had no due process right to be present.).

Appellant relies heavily on United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987), for his argument that Appellant had a right to be present at jury qualification and the rationale for why it is a critical stage. However, Gordon is entirely inapposite to this case as the defendant was

prevented from being present during jury voir dire and not during the administrative jury qualifications that occur prior to voir dire of the specific panel for the defendant's case. Appellant is entirely correct that his presence during voir dire and selection of the jury could make a difference and can be considered a critical stage. Appellant, though, was present throughout voir dire and jury selection of his specific jury panel. He only missed the overall administrative jury qualification which is not addressed by Gordon.

Other courts have held the general jury qualification is not a critical stage requiring the defendant's attendance. The Eleventh Circuit Court of Appeals has specifically found: "a general qualification of the jury is not a 'critical stage' in the proceedings." Henderson v. Dugger, 925 F.2d 1309, 1316 (11th Cir. 1991). The Court explained its rationale: "The court was merely deciding which jurors were to be excused for age, hardship, etc. It is difficult to see what the defendant could have added to this proceeding." Id. In Remeta v. State, 522 So. 2d 825, 828 (Fla. 1988), the Supreme Court of Florida considered the ramifications of the defendant's absence during the general qualification of the jury. The Court found there was no constitutional or other violation of the defendant's rights by his absence and did an exemplary job of explaining the rationale for a distinction between general qualification and the specific voir dire and selection of the jury panel for a defendant's trial:

It is important to understand the distinction between the general qualification of the jury by the court and the qualification of a jury to try a specific case. In the former, the court determines whether prospective jurors meet the statutory qualification standards or whether they will not qualify because of physical disabilities, positions they hold, or other personal reasons. The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not

present because this preliminary qualification process occurs days prior to the trial.

Id. The holding was later upheld in Wright v. State, 688 So. 2d 298, 301 (Fla. 1996) (“In short, the general qualification process is not ‘a critical stage of the proceedings requiring the defendant's presence.’”)(quoting Robinson v. State, 520 So.2d 1, 4 (Fla.1988)).

In Com. v. Barnoski, 638 N.E.2d 9 (Mass. 1994), the Supreme Judicial Court of Massachusetts considered the defendant’s absence from the preliminary hardship determination of the jury pool. The Court specifically stated: “We are aware of no case that holds a defendant has a constitutional right to be present at preliminary hardship colloquies of members of the jury pool.” Id. at 13. The Court distinguished the general hardship determination from the specific, individual voir dire and found the defendant is not entitled to be at the former though he is entitled to be at the later. Id. at 13-14.

South Carolina should follow other courts and acknowledge the distinction between the general administrative qualification of individuals to serve on any jury when compared to the determination of a specific jury panel through voir dire and the selection process. In this case, Appellant was clearly present for the voir dire and selection of his specific jury. He was not present for the administrative general qualification of all individuals to sit on any jury. He did not have a due process right to participate and his presence would have made no difference to the administrative general qualification. See Stincer, 482 U.S. at 745 (finding “this privilege of presence is not guaranteed ‘when presence would be useless, or the benefit but a shadow’”)(quoting Snyder, 291 U.S. at 105–106). As a result, Appellant did not have a due process right to be present for the general administrative jury qualification, and the trial court’s proceeding without his presence was not reversible error. See Starnes, 307 S.C. at 250, 414 S.E.2d at 583 (finding no error in defendant’s absence when he had no due process right to be present.).

Harmless Error

Finally, even if preserved and error to exclude Appellant from the jury qualifications, in this case he has failed to demonstrate any prejudice and his exclusion was entirely harmless. The South Carolina Supreme Court has stated: “Denials of a defendant’s right to be present, as well as other constitutional violations, are subject to a harmless error analysis. Although the right to be present is a substantial right, no presumption of prejudice arises from a defendant’s exclusion.” Shuler, 344 S.C. at 626, 545 S.E.2d at 816; see also, Bourne v. Curtin, 666 F.3d 411, 413 (6th Cir. 2012) (stating that the “right to personal presence at all critical stages of the trial” is “generally subject to harmless-error analysis”).

In the instant case, Appellant cannot point to any way in which he was prejudiced. As the trial court noted, someone from defense counsel’s office was present during the jury qualification. Appellant received any and all information obtained during the qualification. Significantly, Appellant has not pointed to anyone that was improperly excused or disqualified by the trial court. Finally, and most important, Appellant was present for the voir dire and selection of his specific jury and raised no objection to any juror based on what was learned during qualifications or the fact that they were not properly excused or disqualified previously during the qualifications that occurred. As a result, Appellant has not shown he was prejudiced by the trial court’s decision to hold the administrative jury qualifications without his presence.

Accordingly, this Court should affirm Appellant’s conviction and sentence because he failed to timely preserve the issue for review on appeal, was not precluded from being present at a critical stage in his trial, and has not demonstrated any prejudice from his failure to attend the administrative jury qualifications.

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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The State,

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Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed March 22, 2021, 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 22nd day of March, 2021.



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