STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. Roger L. Couch, Circuit Court Judge
Appellate Case Tracking No. 2021-001115

The State, Respondent,

v.

Dana L. Morton, Petitioner.

Opinion No. 2021-UP-277 (S.C. Ct. App. filed July 21, 2021)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF THE CASE

Procedural History

In August 2017, the Spartanburg County Grand Jury indicted Petitioner on charges of possession with intent to distribute marijuana and trafficking cocaine. He proceeded to trial before the Honorable Roger L. Couch and a jury on October 15-19, 2018. Prior to trial, he asked to relieve his counsel. Petitioner was offered two options: 1) proceed with current counsel; or 2) go forward *pro se*. The trial court found Petitioner sought to relieve counsel and proceed *pro se*, and the court also concluded it was for purposes of delay. The court appointed Seventh Circuit Defender Clay Allen as stand-by counsel for Morton. The jury found Petitioner guilty as charged. Judge Couch sentenced Petitioner to concurrent sentences of ten years imprisonment for possession with intent to distribute marijuana and twenty-five years imprisonment for trafficking cocaine.

Petitioner timely filed a Notice of Appeal. The State moved to hold the appeal in abeyance and remand to the circuit court to determine whether Petitioner's decision to proceed pro se was knowingly and intelligently made. The Court denied the motion. After briefing, the Court of Appeals issued an opinion remanding for the hearing and affirming Petitioner's remaining issues. State v. Morton, Op. No. 2021-UP-277 (S.C. Ct. App. filed July 21, 2021). Petitioner served and filed a Petition for Rehearing which was denied on September 1, 2021.

ARGUMENT

I. The Court of Appeals properly remanded the case for a hearing to determine whether Petitioner made a knowing and intelligent waiver of his right to counsel.

The Court of Appeals correctly found remand was the proper remedy when the Record does not disclose a warning pursuant to Faretta v. California, 422 U.S. 806 (1975), and a determination cannot be made of whether Petitioner intelligently and knowingly decided to proceed *pro se*.

A defendant may waive his right to counsel, but he must do so knowingly and intelligently. Faretta, 422 U.S. at 835. For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing Faretta, 422 U.S. at 835). "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

Petitioner moved to relieve counsel. (App.129-130). The trial court indicated there did not appear to be cause for the removal of Petitioner's counsel. (App.140-142). Petitioner indicated he believed counsel was railroading him and asked for appointment of a public defender. (App.140). Petitioner did not provide an affidavit of indigency or other proof that he would qualify for a public defender. As a result, the trial court offered Petitioner two options: 1) proceed with his current counsel; or 2) fire counsel and go forward *pro se*. (App.146). Petitioner responded by stating: "I would like to proceed, sir, but I don't - - I wish not to have [Petitioner's trial counsel] on my side." Petitioner continued: "He could - - if he could give me my case

load, and I could sit down right here in front of y'all, . . ., and we can proceed." (App.147). The trial court took that response as an affirmative waiver of counsel and a desire to go forward *pro se*. The trial court verified the response, asking: "Are you asking [Petitioner's trial counsel] to get off your case?" Petitioner responded directly: "Yes." (App.147). There is no question Petitioner affirmative selected to go forward *pro se* when presented with the clear option of either continuing with counsel or representing himself.[1]

The State acknowledges the transcript fails to provide a colloquy between the judge and Petitioner regarding the dangers of self-representation. (App.117-166). As a result, the question would become whether Petitioner knew of the dangers through other means, had prior experience such that he would have the requisite knowledge to make a valid waiver, or otherwise made a valid knowing and voluntary waiver of his right to counsel.[2]

In State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420 (1977), the question presented was "[w]hether or not such waiver [of counsel] was intelligently made in this case" and the Court indicated the issue was "a subject of debate." The Court found the appropriate remedy was not a new trial, but instead "the appellant is entitled to a factual determination by the lower court on the 'intelligent waiver' issue." As a result, the Court remanded the case "to the lower court for a determination of whether the waiver was intelligently made" and allowed both the prosecution and the appellant to introduce relevant evidence. Id.

This Court explained again in 1991: "We now hold that, except in **extraordinary cases** where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for

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[1] It is also important to note that the trial court specifically found that the request to fire counsel was being made for the purpose of delaying trial. (App.146).

[2] During briefing, the State moved to remand the case to the trial court for a determination of whether Petitioner's waiver of counsel was knowing and voluntary even without a proper Faretta warning being included in the transcript. This motion was denied.

a Dixon hearing." State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) (emphasis added). The Court explained the remand allowed "the trial judge to determine whether appellant knowingly and intelligently waived his right to counsel under the standard established in Prince and Wroten." Id. The standard requires the court to "look to the record to determine whether other facts show petitioner had sufficient background or was apprised of his rights by some other source." Wroten, 301 S.C. at 294–95, 391 S.E.2d at 576.

More recently in State v. Dial, 429 S.C. 128, 838 S.E.2d 501 (2020), this Court reiterated the appropriate remedy is not a new trial, but instead a remand to the trial court to make a determination of whether the waiver was knowing and voluntary:

> [W]e remand Dial's case to the circuit court for the court to conduct an evidentiary hearing pursuant to Dixon to determine whether Dial knowingly and intelligently waived his right to counsel. At this hearing, both the prosecution and the defense are permitted to present evidence on the issue, and if the trial court finds the waiver was not knowing and intelligent, it shall grant the defendant a new trial.

Id.

This is not one of the "extraordinary cases" in which remand would serve no purpose, especially in light of Petitioner's vast previous criminal history. (App.1192-1195). The remand would allow the trial court to consider Petitioner's background, including prior exposure to criminal trials and whether he ever proceeded before a court *pro se*. Remand would allow the trial court to explore whether Petitioner was adequately warned by any other source, including another judge, his prior trial counsel, the solicitor's office, or others. Finally, Petitioner would be able to testify and be cross-examined regarding his understanding at the time of his decision of the dangers of proceeding *pro se*.

Accordingly, this Court should deny the Petition for Writ of Certiorari on this issue because remanding the case to the circuit court to allow a record to be developed to determine whether Petitioner understood the dangers and whether his decision to represent himself was knowingly and voluntarily made was a correct remedy.

II. The Court of Appeals properly did not address the appointment of counsel in light of the remand and there is nothing in the record indicating Petitioner was entitled to appointment of counsel.

The Court of Appeals correctly did not address the issue of appointment of counsel. First, a determination is unnecessary because of the remand to the circuit court. Additionally, the trial court did not abuse its discretion in light of the late timing of the spurious request that was solely intended for delay and the lack of information in the Record indicating Petitioner was entitled to appointment of counsel.

The determination of whether a public defender should have been appointed is tied to whether Petitioner properly waived his right to counsel, a determination which will be made on remand to the circuit court. If waiver was not knowingly and intelligently waived, he will be entitled to a retrial and a determination of his entitlement to counsel can be made at that point. If he knowingly and voluntarily waived his right to counsel with his eyes wide open, then he was properly allowed to proceed *pro se* and no appointment of counsel was necessary

Significantly, the trial court indicated Petitioner's actions were designed, not to ensure proper representation, but instead, to create delay. (App.146). He waited until the day of trial to move to relieve counsel, even though all of the events which allegedly caused his desire to relieve counsel occurred in advance of the day of trial. He made no attempt to relieve counsel at a time in which it would not cause delay to relieve counsel and appoint new counsel.

Further, his request to appoint a public defender was entirely unrealistic and would certainly have resulted in the exact delay the trial court found Petitioner sought to create. He sought to appoint counsel and still proceed to trial on his own theory of defense in the case on the same day. As a matter of fact, he specifically asked for a public defender and "five minutes, ten minutes" to prepare the case. (App.141). Counsel could not be appointed to represent him

and continue the same day on which trial was already scheduled.[3] It would be entirely unfair to subject an attorney to trial the day he is appointed on a new case, and Petitioner's counsel would be insisting on the horror of the situation had it occurred. Otherwise, the trial court was entirely correct that the ultimate goal of Petitioner's actions was delay, and appointing counsel—instead of requiring Petitioner to proceed with current counsel who was ready to go forward or act *pro se*—would only give Petitioner the delay he sought.

In addition, pursuant to section 17-3-30 of the South Carolina code, Petitioner must provide an affidavit of indigency which would be required to be screened for accuracy and to ensure Petitioner met the requirements for appointed representation. Petitioner did not come to court with an affidavit, so one would have to be completed, screened, and approved before trial could proceed. Additionally, pursuant to Rule 608(b)(4), SCACR, there is no presumption of indigency without reference to Petitioner's family's net income, which is entirely absent from this Record. As a matter of fact, nothing in this record establishes the entitlement to a public defender or appointed counsel.

In light of the fact a determination on remand will make this issue moot regardless of the remand's outcome, and given Petitioner's last-minute request, which was specifically found by the trial court to be a tactic to cause delay, this Court should deny the Petition for Writ of Certiorari as to this issue.

[3] Requiring a public defender or other appointed attorney to take the case, obtain the case file and all discovery, meet with his client for the first time, and proceed to trial without any delay would be guaranteeing a claim of ineffective assistance of counsel.

III. The Court of Appeals properly found any reference to "reliable confidential informant" was entirely harmless.

The Court of Appeals correctly found any reference to George Vaughn being a "reliable confidential informant" was entirely harmless. Investigator Lachica merely explained the terminology used by law enforcement and never labeled the informant, George Vaughn, as "reliable." Any error in referencing the terms was entirely harmless as the only person who discussed the term "reliable" as it related to Vaughn was Petitioner.[4]

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). "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).

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[4] It is questionable whether the underlying issue as raised on appeal is preserved for review. The issue raised at trial is that it was improper to call Vaughn reliable because he had other charges pending and not that the use of the term impermissibly bolstered his testimony. (App.205-207). Later, Petitioner discussed bragging which could be construed as impermissible bolstering, but that objection was not contemporaneous. (App.258-259). See e.g., 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."); 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. 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).

Merits

"The assessment of witness credibility is within the exclusive province of the jury." State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 670 (2021) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). One witness may not testify regarding the credibility or believability of another witness. See, State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); see also, Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017) ("When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering.").

Investigator Lachica was asked to differentiate between a "confidential informant" and a "confidential reliable informant." He merely described the terms and what someone had to do to be considered a "confidential reliable informant." In doing so, he never made reference to Vaughn, the informant in this case, nor did he indicate that he believed Vaughn to be a "confidential reliable informant." Instead, he merely explained the terminology used by law enforcement. Investigator Lachica never indicated his belief Vaughn was telling the truth or testified in any manner that would remove the determination of credibility from the province of the jury. As a result, nothing in his direct testimony resulted in bolstering or vouching for Vaughn's testimony.

Additionally, any possible error is entirely harmless. Petitioner during his cross-examination of Vaughn asked him: "So, if the police officer referred to you as a C.I., would that be a form of disrespect to you knowing that you're reliable?" After Vaughn answered: "No", Petitioner followed up with "You just being a C.I. instead of reliable C.I.?" (App.411). This is the first time reliable was used in front of the jury in direct connection with Vaughn, and it was by Petitioner.

The next time "reliable" was mentioned was after Petitioner recalled Investigator Lachica.

> Q: So, so, you say you knew him for how many years, sir?
> A: Probably two or three now.
> Q. About two or three now. And two or three years, would you consider him to be acquaintance or friend or family member?
> A. He's a confidential reliable informant.

(App.975). This testimony came in without any objection and in direct response to Petitioner's questioning. The complained of testimony is entirely cumulative to testimony elicited and discussed by Petitioner during his own questioning of multiple witnesses. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless). Additionally, any error is entirely harmless in light of the overwhelming evidence in this case and the fact it could not have contributed to the outcome of the case.[5] See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (Error is considered harmless where it could not reasonably have affected the outcome of the trial.); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("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. 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).

[5] State's Exhibit 1 is a video recording detailing the undercover buy conducted by law enforcement and the confidential informant, Vaughn. (State's Exhibit 1). Further, significant testimony indicated the drugs received were real and not synthetic as alleged by Petitioner in his defense. The bag contained 111.76 grams of cocaine. (App.690). Additionally, a digital scale found with Petitioner when he was arrested tested positive for cocaine residue. (App.695). Additionally, the other substance obtained from Petitioner tested positive for marijuana. (App.701; 704).

The trial court properly allowed Investigator Lachica to explain law enforcement terminology, especially when he never indicated his belief that Petitioner was "reliable" until the question was asked by Petitioner. Further, Petitioner has failed to establish any prejudice resulting from the error sufficient to warrant reversal. This Court should deny the Petition for Writ of Certiorari as to this issue.

IV. The Court of Appeals properly concluded Petitioner's issue related to the limitation on his right to confront witnesses and limiting cross-examination was not properly preserved for review on appeal when no proffer was made at trial.

The Court of Appeals correctly found any issue related to a limitation on cross-examination not preserved for review on appeal. Petitioner contends the trial court erred in preventing him from cross-examining the informant, Vaughn, regarding unconvicted drug charges. He maintains it shows bias and a motive to misrepresent, likening the questioning to cases when the defendant should have been allowed to explore potential charges for a testifying co-defendant who had a deal to testify. In addition to not being preserved for review on appeal, there is no evidence any of the unadjudicated charges were ones related to Vaughn's acting as an informant in this case in order to show bias or a motive to misrepresent. Further, Petitioner thoroughly explored Vaughn's past drug issues, including discussions of prior purchases from Petitioner. Finally, during direct examination by the State it was made clear to the jury that drug charges were dropped in exchange for Vaughn acting as an informant.

Preservation

Initially, the issue as raised to this Court is not preserved for review. Petitioner at trial brought up several charges that did not result in conviction and the State objected saying he could only address prior convictions. The Court addressed the objection and admission of the evidence pursuant to Rule 609, SCRE. Petitioner never asked the trial court to consider Rule 608(c), SCRE, the issue of bias or motive to misrepresent. Petitioner never connected his questioning about the charged crimes to an allegation of motive to misrepresent or bias. As a result, the issue as raised is not preserved for review on appeal. See 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).

Further, Petitioner never proffered any information about the charges he sought to use in cross-examination, so the Record is devoid of information regarding when the charges occurred, what Vaughn was actually charged with, and whether any were actually dropped as a result of the deal with law enforcement to act as an informant in this case. Because there is no proffer, there is nothing for this Court to review to determine prejudice from the failure to be able to admit the testimony. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.") (citing State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 868 (Ct. App. 2005)).

Standard of Review

As discussed previously: "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." Kelley, 319 S.C. at 176, 460 S.E.2d at 370. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." Byers, 392 S.C. at 444, 710 S.E.2d at 58. "The trial judge retains discretion to impose reasonable limits on the scope of cross-examination." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). "If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error." Id. "This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in

testifying, absent a manifest abuse of discretion." State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012).

Merits

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). "A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (citing Davis v. Alaska, 415 U.S. 308 (1974)). "A defendant demonstrates a Confrontation Clause violation when he is prohibited from 'engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness.'" Gracely, 399 S.C. at 372, 731 S.E.2d at 885 (quoting State v. Stokes, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009)).

Additionally, Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.' " State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

In the instant case, neither Petitioner at trial, nor his counsel on appeal, have attempted to connect the proposed cross-examination into charged, but unadjudicated crimes, to the current

case and a claim of bias or prejudice. He indicates the questioning would have explored the charges and potential sentences he avoided by working for law enforcement as a confidential informant. However, he never indicates any of those charges were dropped by being an informant in the case against Petitioner. He never indicates when any of the charges occurred. As a result, he did not provide a sufficient connection to establish bias or motive to misrepresent and instead, at best, was seeking to pursue a fishing expedition or relying entirely on rank speculation.

In addition, the State thoroughly explored Vaughn's convictions and deals made to act as an informant during their direct examination. Testimony revealed he had serious trafficking charges previously, but he pled to a lesser offense and received a probationary sentence. (App.322-323). Additionally, he was asked whether he had any pending charges or whether he was promised anything in exchange for his testimony, and he indicated: "No, ma'am." (App.323). In exchange for working as an informant against Petitioner, he indicated on direct examination, and on re-direct, that charges would be dropped. The solicitor clarified the arrangement meant arrest warrants would not be served. (App.325; 415-416). As a result, any further cross-examination by Petitioner, even if he connected his allegations to the charges that were dropped in exchange for Vaughn becoming an informant against Petitioner, would have been merely cumulative and would not have provided any additional impeachment for bias. Petitioner has failed to prove how he was prejudicially prevented from questioning Vaughn.

Finally, during Petitioner's cross-examination of Vaughn he brought out significant impeachment. He asked if Vaughn had ever been an informant "for free" and Vaughn admitted he had not. Petitioner asked: "So, every time you basically did this with them, it was to basically say for money or to save your own self." Vaughn admitted that was true. (App.348). Petitioner

brought out Vaughn's 1989 crack charges and got Vaughn to admit at the time he was a "crackhead." (App.349). No further impeachment would have been provided, especially in light of the fact he sought to only address unadjudicated actions.

Accordingly, the issue is clearly not preserved for review on appeal and Petitioner has failed to demonstrate any prejudice resulting from the trial court's ruling. As a result, this Court should deny the Petition for Writ of Certiorari as to this issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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