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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

THE STATE,.....RESPONDENT,

v.

BYRON LABRON RIVERS,.....APPELLANT.

FINAL BRIEF OF RESPONDENT
Appellate Case No. 2019-001253

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APPELLANT'S STATEMENT ON APPEAL

1. **Did the trial judge err in finding that defense counsel opened the door to allowing a detective to testify about the results of a gunshot residue test from the co-defendant in violation of Appellant's right to confront witnesses?**

RESPONDENT'S COUNTER ARGUMENT ON APPEAL

1. **Was the fact that defense counsel opened the door to the testimony of the witness regarding the results of the gun shot residue test of the co-defendant properly allowed by the trial court and cannot be considered a violation of the confrontation clause? Was the fact that the Appellant failed to object to the gun shot residue testimony waived any argument relating to the gun shot residue results?**

2. **Even if the trial court erred in allowing the results of the gunshot residue test into evidence, should that decision be considered harmless error?**

STATEMENT OF THE CASE

The Respondent agrees with the Appellant's version of the proceedings.

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 a matter addressed to the sound discretion of the circuit court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. *State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847 (2006). Error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell,* 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Under the "hand of one is the hand of all" theory, 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. Condrey,* 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002).

STATEMENT OF FACTS

The Respondent concurs with the facts that occurred in this case that was included within the Appellant's brief.

ARGUMENTS

1. **The Appellant's counsel opened the door to the testimony regarding the results of these tests, so the inclusion of the GSR results were lawful. The Appellant also never objected to the testimony regarding the gun shot residue test, so they waived any argument regarding these tests.**

The solicitor called to the stand, the lead investigator Detective Robert Bailey. He testified as to the statements given by the victims in this case, he was also asked about any gunshot residue (GSR) test done on any of the individuals involved in this case. During his testimony, Detective Bailey explained why GSR's are done, and that there is a six hour window

to complete these tests. If this is not done within this window these test are useless. (6/11/19 R. p. 344 line 17 – p. 345 line 6) He also testified that he was unaware if a test was done on the Appellant. (6/11/19 R. p. 345 line 13-16) During his testimony there was never an objection regarding his lack of expertise on these test, or an objection to him not being introduced as an expert in this filed. The Appellant allowed this testimony to continue and also asked him questions on this matter during cross examination.

The Appellant also opened the door to any testimony regarding any results when they decided to ask Detective Bailey about any GSR test done on co-defendant Stacy Green. (6/11/19 R. p. 360 line 24 – p. 361 line 1). On cross examination the Appellant also inquired into the ability to recover GSR from clothing. (6/11/19 R. p. 361 lines 9-11). They also inquired if this test was done on the Appellant's or co-defendant's clothing. (6/11/19 R. p. 361 lines 12-15)

During re-direct examination the solicitor decided to inquire about the results of the GSR test on Mr. Green, the Appellant objected due to the fact Detective Bailey was never introduced as an expert on gunshot residue tests. (6/11/19 R. 369 line 22 – p. 370 line 11) The trial court allowed this testimony to continue mainly due to the Appellant's questioning of Detective Bailey regarding GSR test. The trial court specifically ruled that the door was opened by the Appellant; then on redirect the solicitor used the document to merely refresh the investigator's memory as whether or not the results were obtained. (6/12/19 Tr. p. 11 lines 20-24)

Within their brief the Appellant cites two different cases regarding the right to confront witnesses. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)(certificates of the state lab analysis being introduced without testimony of the lab operator violated the confrontation clause.), and *State v. McCray,* 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015)(DNA expert who simply peer reviewed another DNA experts report violated the

confrontation clause.) The trial court differentiated between the present case and *Melendez-Diaz.* The trial court determined that in *Melendez-Diaz,* the results were discussed during direct examination of the case agent. (6/12-13/19 R. p. 395 line 12-14). The trial court specifically stated, "I think what differentiates our situation is that it was brought up on cross and so the door was opened." (6/12-13/19 R. p. 395 lines 15-17)

Where defense counsel purposefully and explicitly opens the door on a particular line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic. *U.S. v. Lopez-Medina,* 596 F.3d 716, 731 (10th Cir. 2010). The Appellant argued that the results of these tests should not be presented before the jury. The Appellant made this argument after inquiring about these tests. The Appellant should not be allowed to introduce that the tests were completed, and then claim the results of said test cannot be mentioned. That would lead the jury into a guessing game as to why the results were not raised by the prosecution.

The trial court's allowance of this evidence to be presented is within the authority of the trial court. When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible. However, permissible does not mean mandatory, the decision to admit or exclude rebuttal testimony remains within the trial court's sound discretion. *Tanberg v. Sholtis,* 401 F.3d 1151, 1166 (10th Cir. 2005). The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 94 (2002). The Appellant has never revealed any abuse of discretion in the introduction of this evidence. The sole reason that the trial court allowed this into evidence was due to the fact that the Appellant opened the door to this line of questioning.

The reasoning for the Appellant to not allow the results into evidence was due to the fact Detective Bailey was not introduced as an expert in this field. It is the opinion of the Respondent that this argument was waived once the Appellant allowed the discussion of the GSR into evidence without objection. During his direct testimony Detective Bailey was allowed to testify about the GSR kit, why it is done, and the six hour window that exists in getting this test completed. Even on cross examination the Appellant inquired into the removing of GSR from clothing, and whether or not these test were done on the clothing of the Appellant or his co-defendant. Once the Appellant failed to object to the line of questioning regarding the application of the GSR kits, any issue raised regarding him not being an expert in this field were waived. Failure to timely object to introduction of evidence constitutes a waiver of argument. *City of Greenville v. Bryant,* 257 S.C. 448, 454, 186 S.E.2d 236, 238 (1972) So even if in allowing this evidence would have constituted an error by the trial court, the issue was waived as soon as there were no objections regarding the testimony of Detective Bailey regarding the application of the GSR test kit. Therefore, any testimony regarding the results of these tests should not be reversed. Objections to the admission of evidence must be made when evidence is presented at trial to preserve the error for appeal. *Parr v. Gains,* 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992).

2. Even if an error occurred in allowing the GSR results into evidence, this error must be considered harmless.

The "harmless error doctrine is essential to preserve 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 the virtually inevitable presence of immaterial error.'" *State v. Rivera,* 402

S.C. 225, 246, 741 S.E.2d 694, 705 (2013), quoting, *Delaware v. VanArsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

The Appellant argues that his right to confrontation was denied due to the trial court allowing the results of GSR testing into evidence through a witness not recognized as an expert in this field. The trial court decided that since the Appellant opened the door to this line of questioning there exist no violation of the confrontation clause. The Respondent argues that if an error occurred it must be considered harmless due to the fact the GSR analysis has little importance to the state's case. Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial error that are subject to harmless error analysis. *State v. Jenkins,* 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). The solicitor introduced more definitive evidence proving the Appellant's guilt. So if any error occurred it must be considered harmless.

Within the Appellant's brief he argues that the introduction of this evidence cannot be considered harmless because the chief defense rests on the fact that the co-defendant was the shooter and not the Appellant. It is the Appellant's position that the introduction of the evidence that the co-defendant did not test positive for GSR was a great detriment to their case, and it was important to the state's case. There was ample evidence that was presented that would have convicted the Appellant without the GSR evidence. The GSR results were not brought up by the solicitor until the Appellant inquired into the fact that a sample was taken from the co-defendant. The fact that the co-defendant tested negative would never have been brought out by the solicitor during their case-in-chief. Harmless error analysis are fact-intensive inquiries and are not governed by a definite set of rules; rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. *Id.* In applying the harmless error, the court must be able to declare the error had little, if any likelihood of having changed the

result of the trial and the court must be able to declare such belief beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed. 705 (1967).

The United States and South Carolina Supreme Courts have determined the criteria that the court must use to consider if an actual error can be considered harmless. Within the South Carolina Supreme Court case of *State v. Gracely*, the Court specifically stated:

> Whether such an error is harmless in a particular case depends upon a host of factors.... These factors include the importance of the witness's testimony in the prosecution's case, whether the testimony of the witness on material points, the extent of cross examination otherwise permitted, and of course the overall strength of the prosecutor's case.

State v. Gracely, 399 S.C. 363, 375 S.E.2d 880, 886, quoting, *Delaware v. Van Arsdall,* 475 U.S. 673, 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)

It is clear that sufficient evidence was presented by the solicitor that would cause a jury to find the Appellant guilty beyond a reasonable doubt. This determination could have been made without the inclusion of the GSR evidence. The Appellant argues that the GSR test was a major part of the state's case, the Respondent disagrees.

The Appellant's major defense that this incident occurred due to a drug deal that went wrong. It is their position that the Appellant was the person with the 40 caliber pistol and was just present when his co-defendant shot four individuals killing Mr. Kirby Fyall and severely wounding the other three. All of the evidence that was presented greatly revealed that this was an armed robbery, and as a result of this armed robbery one person was killed and three others were wounded. Antonio Fyall testified that he answered the door and was immediately shot. (6/11/19 R. p. 288 line 22 – p. 289 line 6) This fact is not disputed by the Appellant. Each victim that testified stated that they were held at gunpoint by one person as the other searched the house. (6/10/19 R. p. 109 lines 7-8, 6/10/19 R. p. 124 lines 17-19)They were then forced to remove their

pants which were taken by the defendants. (6/10/19 R. p. 109 lines 4-5, 6/10/19 R. p. 124 lines 20-22) This does not amount to a drug deal that went wrong, but an armed robbery.

Within his brief the Appellant also argues that the loaded .40 caliber weapon that was not fired in this robbery was found close to him when the police arrived. Ample evidence revealed that this was the gun of the co-defendant and not the one used by the Appellant. However, the evidence revealed that the gun used by the Appellant was the 9mm, which was determined as the caliber of weapon fired during the commission of this crime.

Antonio Fyall testified that after being shot, he escaped through a kitchen window and ran to the house of his friend Antonio Cummings. Mr. Cummings testified that he grabbed a baseball bat and ran to the incident location. At that time he saw the co-defendant with a pillow case in one hand and a gun in the other. (6/10/19 R. p. 93 line 5-6) He also testified that he saw the co-defendant throw the gun down and ran. (6/10/19 R. p. 93 line 14) Anita Marie the I.D. Technician who responded to the scene testified that the gun found behind the trashcan was a fully loaded Walther .40 caliber. (6/11/19 R. p. 230 lines 6-13) Chad Smith the South Carolina Law Enforcement Division (SLED) forensic lab technician also testified that all of the shell casings found at the scene were a .9mm and .380 that could have been shot from a 9mm. (6/12-13/19 R. p. 433 lines 19-21). Detective Bailey testified that he received from Anthony Fyall a bag and within that bag was a gun that was unloaded. (6/11/19 R. p. 347 line 25 – p. 348 line 7). During this testimony Detective Bailey identified the 9mm was the gun that was found in that bag. (6/11/19 R. p. 350 lines 15-17) Sara Goodman forensic scientist at SLED who did the DNA testing testified that she made all comparisons to the samples that were given to her. (6/12-13 R. p. 478 lines 23-24) DNA samples were taken from victims Sanquan, Theodore, and Antonio Fyall, and also from, Eleanor Delesline, and Nashishi Walker. (6/11/19 R. p. 342 line 7 – p. 344

line 1) Detective Bailey testified that he received a search warrant and went to the Charleston County Detention Center to obtain DNA samples from the defendants. (6/11/19 R. p. 352 lines 9 – 20). During trial, Ms. Goodman testified that she found a DNA mixture of three individuals. On the trigger grip the major contributor was the Appellant. She stated that match was approximately 1 in 32 billion. (6/12-13/19 R. p. 479 line 11)

Within his brief the Appellant mentions that the solicitor stated in his closing that, co-defendant DNA "was not on the murder weapon, he did not have GSR particles." The Appellant argues that this statement made the inclusion of the GSR evidence a major part of the state's case, it was not. Without that GSR evidence it would have still remained that the weapon that matched all of the shell casings found at the scene had the DNA on the trigger grip that was a 1 in a 32 billion chance of it not belonging to the Appellant. Witnesses saw him leave the house, being carried by the co-defendant, and also stated he was a part of the armed robbery. A witness also stated that the gun that was found at the scene by a trashcan was thrown down by the co-defendant not the Appellant. All of this evidence reveals that this GSR evidence was not necessary for a conviction so if any error occurred it must be considered harmless.

There was also ample evidence presented that the Appellant was a major contributor in the commission of an armed robbery. So even if he was not the shooter he is guilty of murder. 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. Langley,* 334 S.C. 643, 648, 334 S.E.2d 98, 101(1999). There was testimony that both individuals appeared with weapons. One individual was at the door pointing the guns at them while the other searched the house. There were some conflicting testimony as to who was holding the gun and who was searching but there is no conflict as to what was occurring. These

individuals made everyone take off their pants. The victim's pants and their other belongings were found in the pillowcase which was being carried by the co-defendant after the incident occurred. This reveals an armed robbery, which makes this a situation in which both individuals could be found guilty of murder. Any evidence regarding an error that could have occurred with the inclusion of the GSR results is harmless.

Detective Bailey's testimony was important because he was the lead investigator in this case. He obtained the DNA evidence from the witnesses and defendants, and took statements from the victims. The Appellant was allowed to cross-examine Detective Bailey. They actually asked questions regarding the GSR evidence, opening the door as to the negative results of the co-defendant. On cross examination the Appellant also asked questions concerning the clothes that were found belonging to both defendants that were never tested. But the ultimate test regarding whether or not an error of the court is harmless, is the overall strength of the prosecution's case and whether or not the exclusion of this evidence could have possibly exonerate the Appellant. Without the GSR results there is more than enough ample evidence through testimony and forensics that gave the jury the ability to find the Appellant guilty beyond a reasonable doubt.

In *McCray,* the Supreme Court determined that the statement of the DNA expert was of minimal importance to the state's case, so they determined this to be harmless error. *McCray,* 413 S.C. at 91. The same holds true for the present case. The GSR results are minimal considering the other evidence provided by the state. The murder weapon with the Appellant's DNA on the trigger, all witnesses testifying that two individuals committed the armed robbery and murder. The police found the Appellant at the scene and both individuals were wearing gloves proving that they conspired to commit this criminal act. Even without the GSR evidence

there is sufficient evidence revealing the obvious conclusion that the Appellant committed this crime. The Respondent will not surrender that the trial court committed an error in allowing this evidence before the jury; however, if this court finds that the trial court did err in making this decision, due to the amount of evidence provided, the Respondent request that this court find this error harmless and affirm the decision of the trial court. Error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained. *State v. Watts,* 321 S.C. 158, 467 S.E.2d 272, 277 (Ct. App. 1996)

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
Appellate Case No. 2019-001253

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 7th day of July, 2020.

s/ Tommy Evans, Jr.
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