STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

APPELLANT

APPELLATE CASE NO. 2018-001572

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5912

Second Petition for Rehearing

On May 25, 2022, this Court affirmed Appellant's convictions, holding that Appellant was not entitled to jury instructions on involuntary manslaughter and accident. This Court also held that appellate counsel abandoned the argument that the trial judge erred in prohibiting Appellant from testifying about the reason he initially fled the scene of the incident and that trial counsel failed to preserve for appellate review the trial judge's decision to allow Appellant to be impeached with a remote criminal conviction. State v. Brewton, Op. No. 5912 (S.C. Ct. App. filed May 25, 2022) (Howard Adv. Sh. No. 18 at 79). On June 9, 2022, pursuant to Rule 221(a), SCACR, Appellant filed a petition for rehearing. On June 16, 2022, this Court requested a

return from the State. The State filed the return on July 7, 2022. On August 10, 2022, this Court granted the petition for rehearing, withdrew the previous opinion, and substituted with a new refiled opinion. State v. Brewton, Op. No. 5912 (S.C. Ct. App. filed August 10, 2022) (Howard Adv. Sh. No. 28 at 30). This Court's rulings with regard to the jury instructions on involuntary manslaughter and accident, issues one and two, and the ruling on Appellant's remote criminal convictions, issue four, remained the same from the previous opinion. Appellant relies on the arguments made in the first petition for rehearing with regard to the issues that remain unchanged.

In the substituted refiled opinion this Court addressed the merits of issue three challenging the trial judge's prohibition of Appellant from testifying about why he initially fled the scene of the incident. In the previous opinion this Court found the issue abandoned. In the refiled opinion this Court found no error in the prohibition, finding that the trial court properly limited the testimony based on a proper application of the evidentiary rules. Appellant respectfully submits that this Court overlooked the fact that Appellant acknowledged that any portions of Appellant's proffered testimony that involved hearsay would not be admissible. Additionally, Appellant respectively submits that no possible confusion could have resulted in unfair prejudice from the remaining non-hearsay portions of the proffered testimony when Appellant was not asserting a mental health defense and this would not have been an option for the jury to consider. The analysis of whether the evidentiary rule, here Rule 403, SCRE, justifies the limitation on Appellant's right to testify in his own defense necessarily requires an analysis of whether the evidentiary rule was misapplied. Respectfully, Appellant submits that this Court misapprehended the evaluation of whether the interests served by the evidentiary rules justify the

limitation on Appellant's constitutional right to testify in his own defense. Appellant respectfully requests rehearing.

Appellant's Proffered Testimony

Prior to the start of trial the State made a motion in limine to prevent Appellant from introducing any testimony that he had any kind of mental illness or that he was "hearing voices." R. 4, l. 4 – 5, l. 9. Defense counsel responded to the state's motion arguing: "Your Honor, under due process, under a res gestae theory I think he has . . . the right to tell the jury what was going on in his mind that day, why he was doing some of those things. Not as an excuse, not as a legal excuse, but as . . . an explanation." R. 5, l. 25 – 6, l. 5.

Defense counsel argued that if the State was going to be permitted to introduce evidence of his flight from the scene and ask the jury to infer a guilty conscience on that basis that Appellant should be permitted to rebut that inference by giving an alternative explanation for his flight. R. 6, ll. 6 – 18. Counsel agreed that he was not planning on presenting a not guilty by reason of insanity or guilty but mentally ill defense. R. 7, l. 9 – 8, l. 9. However, counsel contended that Appellant had a right to testify, including to explain why he fled the scene, and that his hearing voices was part of his narrative as to what happened the day of this incident. R. 12, ll. 2 – 11.

The court indicated that it was not inclined to allow the testimony because it was not relevant and would confuse or mislead the jury. R. 16, ll. 5 – 12. The court did not make a ruling at that time though and stated that if Appellant decided to testify, the court would allow him to proffer his testimony and rule at that time. R. 16, ll. 13 – 17.

After the State rested its case, Appellant sought to proffer his testimony. R. 260, ll. 16 – 17. Appellant testified in detail about the events of the incident date.[1] Appellant testified that he believed Natalie's mother practiced witchcraft and that "she put it on her friend Aaron." R. 261, l. 23 – 262, l. 3. Appellant's understanding was that Aaron also was a practicing warlock, or the male version of a witch. R. 262, ll. 6 – 13.

Appellant testified that he believed that either Aaron or Natalie's mother had put him under a spell that was causing him to hear voices. R. 263, ll. 4 – 7. Appellant stated that on the day of the incident he was hearing voices that were telling him that his family was being murdered and that he needed to look for them in construction sites. R. 265, ll. 2 – 16. Appellant testified that there were several construction sites near Natalie's home that he walked to so that he could look for his family. R. 265, ll. 2 – 16.

When Kevin arrived at the house, Appellant said that he told Kevin he thought Natalie's mom "put a curse on [him]" because he was experiencing "all of these crazy things." R. 265, l. 24 – 266, l. 5. When the three of them got in the car to go to the store Appellant stated that he got in the back seat because voices in his head told him that people were trying to kill him. R. 267, ll. 1 – 5. Appellant said that the voices in his head did not have anything to do with the gun "going off." R. 267, ll. 9 – 11.

When Appellant was asked why he left Natalie's house after the gun went off, he said: "The only reason I left the scene, because the voices was telling me that cement truck that had just went down the road was going to bury my family alive." R. 268, ll. 2 – 4. Appellant said that while he was in the back seat of the car, he saw a cement truck drive down the street and the

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[1] The State only objected to certain portions of Appellant's proffered testimony which will be the focus of this section of the brief.

reason he wanted to get out and drive was because Natalie was not moving fast enough, and he wanted to follow the cement truck. R. 268, ll. 5 – 13.

Immediately after the gun went off, Appellant got in the driver's seat and began to drive to look for the cement truck. R. 269, ll. 6 – 12. When he could not find it, he went back to Natalie's house to check on her. R. 268, ll. 17 – 20. Appellant stated that the first time he went back by the house he saw that EMS was already on the scene giving Natalie medical attention, so he kept driving to look for the cement truck some more. R. 270, ll. 2 – 5. Appellant still could not find the cement truck, so he went back to the scene a second time to check on Natalie and it was at that point he saw police were on the scene. R. 270, ll. 5 – 9. When the police attempted to stop Appellant, he ran because he had drugs on him. R. 268, ll. 19 – 21.

Arguments at trial

After Appellant finished his proffer the State argued that Appellant had been examined by a doctor and that the "psychosis was drug related." R. 272, ll. 4 – 9. The State also argued that Appellant's testimony was replete with hearsay. R. 272, ll. 10 – 15. Further, the State argued that the testimony was not relevant and was "highly prejudicial." R. 272, ll. 16 – 17.

Defense counsel agreed that there was some hearsay that Appellant testified to during his proffer that would not be admissible in front of the jury but still argued:

> He has the absolute right to testify. . . . [A]nd he must testify truthfully. He can't make up reasons that would be more convenient for the defense or easier for the state . . . and so we think that limiting his testimony, especially to these essential factors, would be violating his due process rights and his right to testify in his own trial.
>
> Also, Your Honor, I don't believe the state gets to have it both ways in that they . . . have introduced evidence that they didn't have to about flight, which is an inference they want the state [jury] to draw. They want the jury to draw that he was guilty because he had flight.

> This gives an alternative reason for why he left the scene. It is the reason that he left the scene. And . . . since the state has went [gone] down that road, largely, they have opened the door for this testimony.

R. 274, l. 11 – 275, l. 1.

The court ruled that Appellant would not be permitted to testify about anything relating to witchcraft or hearing voices in his head about a cement truck burying his family. R. 277, ll. 3 – 9. The court reasoned that this testimony would confuse the jury by suggesting to them that Appellant was raising a mental illness defense which he was not in fact raising. R. 276, ll. 2 – 24. The court also ruled that "what he's testifying to is based largely upon hearsay." R. 276, ll. 13 – 14.

Defense counsel argued that Appellant's testimony about witchcraft was not hearsay because he was testifying about his own knowledge of Natalie's mother being a witch and her casting a spell on him. R. 277, l. 10 – 278, l. 5. Counsel also further clarified his position on Appellant's right to testify by arguing that the court was in effect precluding Appellant from testifying by "stopping him from testifying to something that is so intermingled among his testimony that it is . . . a de facto prevention of his right to testify." R. 278, ll. 8 – 14.

The court ruled that Appellant would be allowed to testify but that the voices involved were not relevant to the murder and he would not be allowed to testify about that specifically. R. 278, l. 15 – 279, l. 5. Ultimately, Appellant chose to testify in front of the jury but was not permitted to explain why he got into the back seat of the car, why he decided he wanted to drive the car, and why he fled from the scene immediately after the gun went off. R. 287 – 320. Based on the ruling by the trial judge Appellant was limited to testifying that, after the gun went off, he left. Appellant could only testify that, "I didn't mean to leave her." R. 297, l. 6. When

questioned as to why he later failed to stop for the police he admitted that he had drugs. R.297, ll. 16-25. The ruling prohibited Appellant from explaining to the jury why he initially left the scene after the gun went off. In closing argument the Solicitor told the jury, "This man left her to die. He was running as fast as he could. You saw the chase. This was no accident. This is what it actually is. And murder. Malice can happen that quick." R. 337, ll. 4-7. The Solicitor also told the jury in closing argument that, "This man took her life and left her laying on the ground." R. 355, ll. 5-6. The trial court erred by prohibiting Appellant from testifying as to his belief that the decedent's mother put him under a spell that caused him to hear voices which told him that a cement truck was going to bury his family which caused him to flee the scene after the shooting since this evidence was relevant to rebut the State's argument that Appellant fled the scene because he had a guilty conscience.

Appellate Ruling

After granting the petition for rehearing, withdrawing the previous opinion and refiling a substituted opinion, this Court affirmed the trial judge's decision to prohibit Appellant from testifying about why he initially fled the scene of the incident citing State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), and writing:

> Here, unlike the defendant in Rivera, Brewton was allowed to testify in his own defense. Also, unlike the defendant in Rivera, Brewton does not argue the trial court misapplied our state's rules of evidence; instead, Brewton conflates testifying in his own defense with "testifying in his own words." That argument has no merit. As the Rivera court made clear, Brewton's right to testify did not prohibit the trial court from limiting his testimony based on a proper application of our state's evidentiary rules. Accordingly, because Brewton does not argue the trial court misapplied the rules of evidence, we affirm the trial court's decision to prohibit Brewton from testifying about witchcraft and hearing voices.

State v. Brewton, Op. No. 5912 (S.C. Ct. App. substituted and refiled August 10, 2022) (Howard Adv. Sh. No. 28 at 41-42). In footnote 8 this Court wrote, "Even if Brewton argued the trial court misapplied our state's rules of evidence, unlike the record in Rivera, the record here supports the trial court's ruling that Brewton's proffered testimony about witchcraft and hearing voices would be unfairly prejudicial. A forensic psychologist found Brewton did not suffer from any mental illness, yet Brewton proffered testimony that voices in his head made him flee the scene of [Natalie's] Niemitalo's shooting." Id. at 42.

First, although there was not a complete prohibition in the present case as in Rivera, the limitation in the present case was still improper. Appellant was still prohibited from testifying about why he left the scene. The Rivera distinction is one without a difference with regard to the limitation on Appellant's right to explain why he left the scene. Respectfully, Appellant does in fact challenge the application of the evidentiary rule in the present case. The analysis of whether the evidentiary rules justify the limitation on Appellant's right to testify in his own defense necessarily requires an analysis of whether the evidentiary rule was misapplied. As discussed below, the trial judge failed to conduct a proper Rule 403 balancing test. The State argued Appellant's leaving the scene showed malice. Appellant had the right to counter the State's assertion in his own words. The proffered testimony was relevant and probative as to lack of malice. The trial judge erred in unconstitutionally limiting Appellant's testimony based on a misapplication of the evidentiary rules.

Second, Appellant does not challenge the limitation on any hearsay contained in the proffered testimony. Much of the proffered testimony, however, was not hearsay. The trial judge erred in refusing to admit the non-hearsay portions of the proffered testimony. The State initially objected on hearsay grounds during Appellant's proffered testimony about statements

made by Natalie. R. 263, l. 10 – 16. After Appellant finished his proffered testimony, the State argued in part:

> [Y]ou've got numerous hearsays involved in this [sic] – her mother, the victim, everything. . . . There's hearsay all through it. There is no exceptions to those hearsays [sic], especially the victim in this case and her mother. Neither one of them testified from that standpoint. That's the majority of it – her father, calling the victim's father and talking to him. . . . I ask to keep that evidence out from the voices, *as well as any kind of hearsay in talking to any other witnesses from that standpoint.*

R. 272, l. 13 – 273, l. 3 (emphasis added). Defense counsel *agreed* that some of Petitioner's testimony was hearsay, e.g., Petitioner's testimony regarding statements made by Natalie and her mother, and that *he would not be offering that testimony before the jury.* R. 273, ll. 5 – 25.

The trial judge's hearsay ruling appears to refer to statements made by Natalie and her mother which defense counsel agreed were inadmissible and would not be presented to the jury. In that respect, the hearsay arguments and ruling were not disputed at trial. To the extent the trial judge ruled that Petitioner would not be permitted to testify to hearsay, trial counsel agreed that the hearsay testimony from the proffer would not be presented to the jury. The limitations placed on the non-hearsay portions of Appellant's proffer, however, amounted to an outright prohibition on Petitioner's testimony because Petitioner needed to explain to the jury why he initially fled the scene. R. 278, ll. 8 – 14. Respectfully, this Court may have overlooked the true basis for Petitioner's argument at trial which was that the judge was preventing Petitioner from testifying to matters that were critical to his defense in violation of the Constitution. R. 278, ll. 8 – 14.

Third, with regard to this Court's reliance on Rule 403, SCRE, as a basis to limit the proffered testimony, the non-hearsay proffered testimony does not become unfairly prejudicial just because the forensic psychologist found Appellant did not suffer from mental illness. The

trial judge erred in limiting Petitioner's testimony because he believed the jury would misinterpret the evidence as suggesting that Petitioner was raising an insanity defense. App. 275, l. 2 – 277, l. 9. Appellant was not offering a mental health defense. Appellant's defense at trial was that the shooting was unintentional. The proffered testimony explained why Appellant left the scene of the shooting incident and counters the State's argument that he fled the scene of the shooting because he acted with malice. Respectfully, no possible confusion could have resulted in unfair prejudice from the remaining non-hearsay portions of the proffered testimony when Appellant was not asserting a mental health defense. The jury would not have been instructed about mental health defenses. Appellant had the right to explain to the jury why he left the scene of the incident. Under the facts of this case, any interest served by the evidentiary rules do not justify the limitation on Appellant's constitutional right to testify in his own defense.

A criminal defendant has a fundamental right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44 (1987). "[F]undamental to a personal defense . . . is an accused's right to present his own version of the events *in his own words.*" Rock v. Arkansas, 483 U.S. 44, 52 (1987) (emphasis added). In State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013), the South Carolina Supreme Court wrote:

> However, the right to present testimony is not without limitation. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " Rock, 483 U.S. at 55, 107 S.Ct. 2704 (quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038). "But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." Id. at 55–56, 107 S.Ct. 2704. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." Id. at 56, 107 S.Ct. 2704. Evidence rules which " 'infringe upon a weighty interest of the accused' " but fail to serve any legitimate interest are arbitrary. Holmes v. South Carolina, 547 U.S. 319, 324–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)).

The restriction on Appellant's right to testify about why he left the scene is disproportionate to any purpose served by the evidentiary rules. Appellant was denied the right to testify about why he left the scene. The limitation in the present case is not justified by the rules against hearsay because Appellant did not seek to introduce hearsay testimony. The limitation in the present case is not justified by Rule 403 as resulting in unfair prejudice by confusing the jury when a mental health defense would not have been an option for the jury to even consider and the probative value of the testimony was great.

Based on the arguments made above, Appellant respectfully requests rehearing in the case and a finding that the trial judge's limitation on Appellant's constitutional right to testify in his own defense results in reversible error requiring a new trial.

Respectfully Submitted,

Kathrine Haggard Hudgins
Appellate Defender

This 17th day of August, 2022.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

APPELLANT

APPELLATE CASE NO. 2018-001572

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Second Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Lance Antonio Brewton, #272849, at McCormick Correctional Institution, 386 Redemption Way, Pelzer, SC, 29899, this 17th day of August, 2022.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Stock, Chris
To:	SC - BLITCH WILLIAM; SC - COLLINS CAROLINE
Cc:	Hudgins, Kathrine
Subject:	Brewton, Lance - Second Petition for Rehearing - 2018-001572
Date:	Wednesday, August 17, 2022 2:40:00 PM
Attachments:	Brewton, Lance - Second Petition for Rehearing - 2018-001572 - AG Cover Letter.pdf Brewton, Lance - Second Petition for Rehearing - 2018-001572.pdf

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Mr. Blitch,

Please find attached for service the second petition for rehearing for Lance Antonio Brewton's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
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Commission on Indigent Defense
Appellate Division
(803) 734-1330