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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000437

Appeal from Pickens County

Honorable William P. Keesley, Circuit Court Judge
Honorable Alex Kinlaw, Post-Conviction Relief Judge

Opinion No. 2022-UP-323

PETITION FOR REHEARING

On August 3, 2022, this Court affirmed the trial court's decision to allow the State to argue the specific statutory code section, S.C. Code Ann. § 16-3-657, to the jury when that law was not part of the jury charge, and to prohibit defense counsel from cross examining Minor on the specific punishments that she had received for lying. Cone v. State, Op. No. 2022-UP-323 (S.C. Ct. App. filed August 3, 2022). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Impropriety of the State arguing S.C. Code Ann § 16-3-657 to the Jury is Preserved

This Court found that Petitioner's argument on appeal regarding the impropriety of the State arguing the specific statutory language of S.C. Code Ann. §16-3-657 was unpreserved because Petitioner failed to object contemporaneously and conceded the issue during trial. Respectfully, under the rules of error preservation, Petitioner's argument is preserved for review and should be addressed on the merits.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* (2016) 184. "However, [the error preservation requirement] is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

"There are four basic requirements to preserving issues at trial for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.*

Generally, for an issue to be preserved, a party must make a "contemporaneous objection that is ruled upon by the trial court." *State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). "However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021), reh'g denied (Feb. 3, 2022), cert. denied (June 21, 2022), cert. denied, 142 S. Ct. 2843 (2022) (internal citations and quotations removed).

At the close of the evidence, the State requested that the trial court charge the jury that, pursuant to S.C. Code Ann. § 16-3-657, the testimony of a victim need not be corroborated because the State intended to argue that charge to the jury. App. 309, ll. 1-13. Counsel Sumner objected to the charge as an improper comment on the facts from the bench. App. 310, ll. 7-10. The trial court stated it would decide overnight whether it would charge the jury with S.C. Code Ann. § 16-3-657 but that it would not stop the State from arguing it to the jury because "[i]t's the law and it's proper to argue anything that's in the law." App. 310, ll. 15-18.

The following morning, the trial court ruled that it would not charge the section 16-3-657, noting in a thoughtful discussion that:

> "That instruction has always bothered me and that language there is from charges I've given before… And it bothers me that I'm going to single out one witness and talk about one witness. I tell the jury that they may believe one witness against many or many against one. Which is the same thing… The last couple of times I have not charged this, I believe that's my recollection is I have not charged this, and my intent is not to charge it in this case. But if the state objects and the state request the charge and it's denied. Now, that doesn't stop you from arguing it. It's the law. You can argue it to the jury."

App. 326-328.

The State then asked for permission to specifically reference the code section and statutory language during its closing. App. 328, ll. 8-10. Defense counsel objected to the State arguing the specific statute and statutory language stating "I would object to him opening on that point of law. I do respect the Court's ruling that either of us can argue it, and he can argue that. But I don't think that opening on the law is proper for anything other than the charge against Mr. Cone." App. 328, ll. 13-19. The court ruled that the solicitor could argue § 16-5-657, the "no corroboration" statue, overruling defense counsel's objection. App. 328, ll. 20-24. Defense counsel further stated "I don't want to waive this just purely for appellate purposes. I do object to him referencing that in his opening on the law for the reasons I've stated. And as long as you say the records are protected, I'm not going to object during his actual opening [on the law] statement." App. 329, l. 23-App 330, l. 4.

After a short break, the state decided not to open on the law, and defense counsel presented his final argument. App. 331, ll. 1-2; App. 332, ll. 10-16. The state then presented its closing argument during which it recited S.C. Code Ann. § 16-3-657 verbatim to the jury. App. 348, ll. 2-8; App. 351, l. 1-7. The court took a short recess before it charged the jury on the law. After the charge on the law, defense counsel renewed his objection to the State reciting S.C. Code Ann. §16-3-657 during closing arguments. App. 379, ll. 12-14.

The requirements of error preservation were met in Petitioner's case. Defense counsel's specific objection was to the State referencing the statute and the statutory language of S.C. Code Ann. §16-3-657. The objection was raised to and ruled upon by the trial court prior to closing arguments. Further, defense counsel renewed his objection after closing arguments. The court had ruled the State could argue the statute in closing arguments immediately before closing arguments began. Therefore, defense counsel was not required to object during the closing

argument to preserve the error for review. *See*, *State v. Jones, supra.* As our Supreme Court noted in *State v. Simmons*, 432 S.C. 552, 562, 816 S.E.2d 566, 571-72 (2018) counsel was not required to be a jack-in the box, repeatedly objecting, to successfully preserve the issue for appellate review.

This Court also found that defense counsel waived his objection, presumably when he stated, "I do respect the Court's ruling that either of us can argue it, and he can argue that." App. 328, ll. 13-19. This, however, was not a waiver of the objection but a recognition of the Court's ruling. Further, Counsel renewed his objection shortly after that statement and again objected after closing arguments. App. 329, l. 23-App. 330, l. 4; App. 379, ll. 12-14. A fair reading of the record supports the conclusion that Petitioner's argument regarding the impropriety of the State's use of the S.C. Code Ann. §16-3-657 and statutory language during closing arguments is preserved for appellate review. Accordingly, Petitioner requests rehearing for this issue to be considered on merits.

Limiting Defense Counsel's Cross-Examination of Minor

This Court found that the questions defense counsel had for Minor regarding prior forms of punishment she received for lying were not relevant and, if relevant, they had a substantial likelihood of confusing the jury. Respectfully, the evidence was highly relevant as it went to Minor's credibility and veracity. Further, the trial court did not specify why it ruled the evidence inadmissible pursuant to Rule 403, SCRE.

Relevance

Relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Since it is the function of the jury to

determine the credibility of witnesses and the weight to be given their testimony, as a general rule, 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. Brewington*, 267 S.C. 97, 100–01, 226 S.E.2d 249, 250 (1976) (internal citations and quotations omitted). Further, "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." *Id.*

The only evidence of the criminal sexual conduct alleged in Petitioner's case was the testimony of Minor. There were no witnesses and no physical evidence. The case came down to the credibility and veracity of the witnesses who testified. Whether Minor was telling the truth was the only fact at issue. Any evidence bearing on Minor's credibility and veracity was relevant. The questions defense counsel sought to ask Minor regarded the extreme and unusual punishment she had received for lying. Not only did the testimony "have a legitimate tendency to throw light" onto Minor's truthfulness, but it also informed the jury as to why Minor would maintain her story, even if it was made up. Respectfully, the testimony defense counsel sought to elicit was relevant and should have been admitted.

Rule 403, SCRE Analysis

This Court further found that, even if relevant, the questions defense counsel sought to ask Minor were properly excluded under Rule 403, SCRE, because the questions had a substantial likelihood of confusing the jury. Respectfully, a Rule 403 analysis was not conducted by the trial court, and pursuant to this Court's holding in *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), the matter should be remanded to the trial court to conduct a proper on-the-record balancing test.

In *Spears*, supra, this Court explicitly declined to conduct a de novo Rule 403 balancing test when the trial court failed to perform the requisite on the record analysis. *Spears* at 258, 742 S.E.2d at 883-84. That decision was in line with our Supreme Court's holding in *Colf* that held that when a balancing test is required, **it must be conducted by the trial court**. *See State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (emphasis added). Our Supreme Court wrote,

> The Court of Appeals should not have undertaken the Rule 609(b) balancing test itself, but should have remanded the question to the trial court. In *Cavender*, the Fourth Circuit noted that it is precisely this absence of specific facts and circumstances that causes such cases to defy appellate review. It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision.

Colf, at 628–29, 525 S.E.2d at 249 (internal citation omitted).

As this Court noted in *Spears*, other courts have found that remand is proper where the factors used by the trial court, or the specific facts and circumstances supporting the trial courts ruling, do not appear in the record. Remand in these instances was proper because an appellate court was not able to effectively review the circuit court's decision to admit or exclude evidence when the reasoning of the trial court was not given. *See State v. Taylor*, 196 Ariz. 121, 817 O.2d 488, 492-93 (1991); *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62, 73 (2011).

However, "[t]hough an on-the-record Rule 403 analysis is required, this Court will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). In *King*, the trial court ruled on a Rule 404 and Rule 403, SCRE, matter stating

> Well, to my mind logically, and correct me if I'm wrong if you got some authority, but that goes to the sense he's charged with possession with intent to

> distribute drugs found right there, it's establishing his nexus or contact with that and she's been there, seen that and all that. To my mind, it's fair.

King at 157, 561 S.E.2d at 647. This Court found that, although the trial court had not given a thorough on-the-record analysis pursuant to Rule 403, SCRE, it had given a "compressed" analysis that contained "some indicia of his [the trial court's] consideration of whether admission of the testimony was fair to King (i.e., more probative than prejudicial)." *Id.*

In Petitioner's case, no such compressed ruling occurred, thus remand for the trial court to conduct a full Rule 403, SCRE, balancing test on the record would be proper. In ruling on the State's objection pursuant to Rule 403, SCRE, the trial court stated

> All right. The question about her being pushed in the shower and put under cold water, the Court finds that not relevant. If it is relevant, it's excluded under 403. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is. The part about the television is relevant and it's admissible.

App. 95, ll. 11-17.

There is nothing contained in the court's ruling that indicates which factor in Rule 403, SCRE, was the basis for his ruling. The trial court did not articulate if the testimony was substantially more prejudicial than probative, if the testimony would confuse the issues, or if the testimony would mislead the jury. The trial court merely stated that the testimony was excluded under Rule 403 without offering any specific facts and circumstances to support its ruling and without expressing what factors it analyzed.

Respectfully, the ruling in Petitioner's case was not a compressed Rule 403, SCRE, analysis with some indicia of the trial court's awareness that he undertook some analysis, but a perfunctory ruling on the matter which precludes full appellate review of the matter. *See United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir.2010) (Stating that a "perfunctory analysis is insufficient" and holding that "the district court abused its discretion in failing to propound

reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice"). There was nothing in the record that could support a finding that the trial court excluded the evidence under any specific factor listed in Rule 403, SCRE. Simply naming the rule under which the evidence was challenged was not a compressed analysis that indicated what the trial court was based its ruling upon.

CONCLUSION

Petitioner respectfully request rehearing based upon the specific points overlooked and/or misapprehended by this Court in its opinion as discussed above.

Respectfully Submitted,

___s/Jessica M. Saxon_____
Jessica M. Saxon
Appellate Defender

This 16th day of August, 2022.

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STATE OF SOUTH CAROLINA

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Appeal from Pickens County

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RESPONDENT

APPELLATE CASE NO. 2019-000437

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 Petition for Rehearing in the above-entitled case has been served upon Taylor Z. Smith, Esquire, at the primary email address listed within the Attorney Information System (AIS); and Justin Ryan Cone, #362238, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of August, 2022.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Warren, Kaylynn
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Subject:	2019-000437 Justin Ryan Cone v. The State
Date:	Tuesday, August 16, 2022 3:27:00 PM
Attachments:	2019-000437 Justin Ryan Cone v. The State Petition for Rehearing and COS.pdf

Good Afternoon,

Please find attached for service in the above-referenced case the Petition for Rehearing which will be filed today, August 16, 2022, with the Court of Appeals via OneDrive.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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