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Sep 20 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
William P. Keesley, Trial Judge
Appellate Case No. 2019-000437

JUSTIN RYAN CONE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

AMENDED RETURN TO PETITION FOR REHEARING

Justin Ryan Cone (“Petitioner”) has petitioned for rehearing, asking this Court to rehear his appeal. Petitioner takes issue with this Court’s findings: (1) that the issue of the State’s closing argument using the language in S.C. Code Ann. § 16-3-657 was unpreserved for direct appellate review; and (2) that Petitioner’s questions for the minor victim about punishments to which she had been subjected for lying were not relevant and, even if relevant, had a substantial likelihood of confusing the jury.

The State’s closing argument

During the State’s case-in-reply, the trial court asked if the parties were requesting that he charge the jury using the language of § 16-3-657 (“the statute”) that the victim’s testimony did not need to be corroborated. App. 308-09. The State requested that the charge be given and stated its intention to argue the matter during its closing argument. App. 309. The trial court said that the

use of the statute in closing argument had already been affirmed by an appellate opinion, but denied the State's request for the charge. App. 309-10, 327-28. The State asked for permission to reference the language of the statute while opening on the law during closing argument, and Petitioner conceded that the State could argue using the statute's language, but objected only to the State's doing so while opening on the law; the trial court overruled Petitioner's objection. App. 328-30. Petitioner's objection was rendered moot, however, because the State then waived its opening on the law. App. 331.

In closing, Petitioner argued that there was "not one piece, not one shred of independent corroboration [of the allegations against him] of any type," but conceded that "[t]he law doesn't require it." App. 340. The State argued that the statute provides that "[t]he testimony of the victim need not be corroborated," and noted that the trial court would charge the jury that it could weigh witness credibility however it saw fit. App. 351. Petitioner did not object to the State's argument based upon the statute at any point.

Petitioner argues that Petitioner objected to the State's arguing the specific language. Petition for Rehearing at 4. Respondent submits that Petitioner is not accurately characterizing the nature of his objection, which concerned only the State's argument upon the statute while it was opening on the law, not the propriety of the argument in and of itself. In other words, Petitioner's objection was to the timing of the argument, not to the substance of it, and that objection was rendered moot anyway when the State waived its opening on the law. Furthermore, Petitioner himself was the first party to inform the jury during closing argument that South Carolina law did not require the victim's testimony to be corroborated. Petitioner's statement that he respected the trial court's ruling and that the State could argue in reliance upon the statute was an

acknowledgement of the trial court's decision to allow the argument and a concession that the decision was correct. This Court should not grant rehearing on this issue.

Petitioner's cross-examination of the minor victim

When Petitioner cross-examined of the minor victim, the first question that he tried to ask her was whether she had told anyone that her father would make her take a cold showed while clothed if he caught her lying. App. 88-90. The State objected and, outside the presence of the jury, argued that Petitioner's questions on that topic should be prohibited as irrelevant and violative of Rule 403, SCRE. Petitioner argued that the issue was a proper subject of his cross-examination because the minor victim's credibility was central to the case. App. 90-91. The State countered that Petitioner should not be able to ask about "particular punishments" because there was too great a danger of unfair prejudice. App. 91. The trial court then asked if there was any evidence of interaction between the minor victim and her father regarding the child's sexual abuse allegations against Petitioner. App. 91. The trial court allowed Petitioner to examine the minor victim outside of the jury's presence and said that, afterwards, he would "tell them [the parties] what they can and cannot do" App. 93. After considering the proffered testimony, the trial court ruled as follows:

All right. The question about her being pushed in the shower and put under cold water, the [c]ourt 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.

This Court found, in complete agreement with the trial court, that Petitioner's questions were not relevant and, even if they were relevant, they were inadmissible under Rule 403. On these points, Respondent relies on the arguments presented in its brief. As to Petitioner's argument that this Court erred in finding, in reliance upon *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App.

2002), that the record indicates that the trial court was cognizant of Rule 403 when conducting its analysis of the parties' arguments, Respondent submits that it is apparent from the record that the trial court considered whether the probative value of the minor victim's testimony was substantially outweighed by the danger of unfair prejudice. The trial court found that the evidence was not relevant and then found that, even if it was relevant, it was prohibited under Rule 403. The trial court's juxtaposition between Rules 401 and 403 shows that it considered Rule 403. Obviously, the trial court determined that the evidence fell short of the requirement of Rule 401 and, as a consequence, any probative value that it had, if any, would necessarily be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Rule 403, SCRE. This Court did not err in its findings and should not grant rehearing.

CONCLUSION

In affirming, this Court did not overlook or misapprehend any point, and it should deny the petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of Respondent's amended return to the petition for rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire
jsaxon@sccid.sc.gov

This 20th day of September, 2022.

s/Taylor Zane Smith
TAYLOR ZANE SMITH
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
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(803) 734-3737

From: [Taylor Smith](#)
To: ["Saxon, Jessica"](#)
Cc: [William Corbett](#)
Subject: Motion to amend in Justine Cone's PCR appeal.
Date: Tuesday, September 20, 2022 7:45:00 PM
Attachments: [03106901.pdf](#)
[03106900.pdf](#)
[image001.png](#)

Jess,

Attached to this email are the motion to amend the State's return to the petition for rehearing and the amended return to the petition for rehearing in *Cone v. State*, 2019-000437, which I will file with the Court of Appeals by email tonight. I will attach a copy of this email to the motion when I send the email to the Court.

Thank you,
Taylor

TAYLOR SMITH, Assistant Attorney General
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The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(via e-filing only - ctappfilings@sccourts.org)

**RE: Justin R. Cone v. State of South Carolina
Appellate Case No.: 2019-000437**

Dear Ms. Kitchings:

Enclosed is the State's motion to amend the return to the petition for rehearing and the amended return to the petition for rehearing in the above-referenced matter, which I am submitting for filing in your office by this email.

Sincerely,

s/Taylor Zane Smith
Taylor Z. Smith
Assistant Attorney General

TZS
Enclosures

cc: Jessica M. Saxon, Esquire (by email only)