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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2013-UP-020 (S.C. Ct. App. filed 1/16/2013)

10-GS-46-3461

THE STATE,

RESPONDENT,

V.

JASON RAY FRANKS

PETITIONER

Appellate Case No. 2013-000618

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 21, 2013.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by finding no abuse of discretion by the trial court's refusal to allow impeachment evidence on cross-examination that complaining witness Mullins was involved in an incident in West Virginia a few weeks after this incident which led to Mullins outrunning police officers, where Mullins claimed on direct examination that petitioner intentionally hit him with his car and severely injured him, since this was relevant impeachment evidence refuting Mullins' claims on direct examination?

2.

Whether the Court of Appeals incorrectly held it was not error for the trial court to allow Patricia Johnson to testify that her granddaughter, fourteen-year-old Taylor J[redacted] told her petitioner said he was "going to get" Mullins before the incident occurred since Taylor was not told of the alleged time and place she alleged made this statement to Johnson as mandated by Rule 613(b), SCRE?

STATEMENT OF THE CASE

Petitioner was indicted by the York County Grand Jury for the offense of attempted murder in an automobile crash involving Mullins. R. 337. His case was called to trial on December 13, 2010 before the Honorable John C. Hayes, III, and a jury. B. J. Barrowclough and Erik Delaney represented petitioner. E. B. Springs, IV was the Assistant Solicitor. R. 1.

On December 15, 2010, the jury found petitioner guilty of attempted murder. R. 327, ll. 23-25. Based on petitioner's prior conviction for homicide by child abuse petitioner was sentenced to life without the possibility of parole based upon the two strikes law.[1] R. 330, l. 13 – 336, l. 3.

The Court of Appeals affirmed petitioner's convictions in State v. Franks, 2013-UP-020 (filed January 16, 2012). App. 1-2. Petitioner sought rehearing. App. 3-10. Rehearing was denied. App. 11.

This petition for a writ of certiorari to the Court of Appeals follows.

[1] The solicitor acknowledged at one point he offered petitioner a *one year prison sentence* to resolve the dispute given the horrible criminal record that Mullins had. R. 330, l. 6 – 333, l. 13.

ARGUMENT

1.

The Court of Appeals erred by finding no abuse of discretion by the trial court's refusal to allow impeachment evidence on cross-examination that complaining witness Mullins was involved in an incident in West Virginia a few weeks after this incident which led to Mullins outrunning police officers, where Mullins claimed on direct examination that petitioner intentionally hit him with his car and severely injured him, since this was relevant impeachment evidence refuting Mullins' claims on direct examination.

Relevant Facts

Petitioner was Anthony Valenti's neighbor, and he did "odd jobs" for him. R. 37, l. 23 – 38, l. 4. Edward Mullins, the alleged victim, according to the solicitor was "no angel. He has a horrible criminal record." Mullins saw petitioner Jason Franks washing the truck of his friend, Anthony Valenti, a couple of weeks or so before the incident in this case. Mullins remembered petitioner "had a tattoo under his eye and I made a comment about didn't that mean he was queer and he said no. And then so I made a comment about he had some earrings. Made a comment about that, and I asked him didn't that mean he was queer and he said no." Add. R. 1, ll. 12-19; R. 159, l. 9 – 160, l. 24.

Mullins also "told him if he [petitioner] ever [had] been locked up with me he would have got all the chocolate candy bars he wanted." Mullins said this meant petitioner would be his "bitch" if he was ever in jail with him. R. 160, l. 25 – 161, l. 4. Mullins claimed: "He really didn't say anything. He said that he would stab me, and I told him he wouldn't do nothing, and he went home." R. 161, ll. 3-10.

The evidence of what occurred on June 7, 2010 was, not surprisingly, very much in dispute. Anthony Valenti testified that Mullins had gone to prison for driving his truck with a revoked driver's license. Apparently Mullins had an accident, and fled. R. 37, l. 28 – 38, l. 23. Thereafter, Mullins drove a moped.

Valenti said he was going to follow Mullins as Mullins rode on his moped, to be sure Mullins did not run out of gas on his way to the bank. Valenti made no secret of the fact that he did not like petitioner. He claimed petitioner jumped off "his front porch and run (sic) to his wife's SUV and he got in it and started it when Mullins drove by his [petitioner's] house on the moped." R. 43, l. 20 – 45, l. 24. Valenti maintained petitioner followed Mullins at a very slow rate of speed and he claimed: "I had a bad feeling about it." R. 49, ll. 14-25.

Valenti testified that he drove next to Mullins and motioned to him that petitioner was behind him. According to Valenti, Mullins must have thought he was waving at him and Mullins waved back. Valenti did not see the accident, and he *admitted* he could not tell whether petitioner hitting the decedent was an accident or intentional. R. 50, l. 9 – 51, l. 3; R. 59, l. 24 – 60, l. 1.

On cross-examination Valenti acknowledged that Mullins was a good friend. Valenti admitted he had lied to the police for Mullins on prior occasions. Valenti refused to answer whether he was still under investigation for intimidating a state's witness, petitioner. R. 60, ll. 2-10. Valenti also denied he was getting special treatment from the authorities for his testimony.

Rule 613 (b), SCRE issue (Argument two facts)

Fourteen-year-old Taylor [redacted] lived with her mother.[2] Valenti was their next door neighbor. Petitioner was dating her mother, but the mother was hostile to petitioner and the defense team by the time of the trial. R. 67, l. 17 – 69, l. 2. Taylor remembered on the afternoon of June 7,

2010, at about two o'clock, she was home with her mother and petitioner. Taylor testified on direct examination by the solicitor that she did not remember petitioner saying "I'm going to get him" when Mullins rode by their house on his moped. R. 69, ll. 14-22; R. 70. The following exchange then occurred on direct examination of Taylor by the solicitor:

> Q. Do you remember telling your grandmother Pat Johnson that Jason saw a man on the moped, left, ran out of the house and said that "I'm going to get him" and jumped in your mom's car? Do you remember saying that?
>
> A. I remember when he came back in, he said that he had seen him leaving and **he was going to wait a few minutes so he didn't run into him to leave.**
>
> Q. Taylor, Jason Franks didn't say that, did he?
>
> A. Yes, sir, I think he did.
>
> Q. **Who told you to say that, Taylor?**
>
> **A. Nobody.**

R. 70, ll. 10-20. (emphasis added).

Taylor's mother, Patricia Johnson, also testified for the State. R. 73, l. 2 – 74, l. 23. Johnson said that petitioner was angry with Mullins over his statements about Mullins making him "my bitch" in prison. She claimed petitioner had threatened to hurt Mullins by stabbing him. Johnson testified she told petitioner to "drop it," and that it was not worth getting in trouble over. R. 76, ll. 2-25.

The solicitor then stated he wanted to impeach Taylor through Patricia Johnson under Rule 613(b), SCRE. Defense counsel stated the solicitor had not laid the foundation as to "time and place" with Taylor and the judge agreed. R. 77, l. 1 – 78, l. 12.

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[2] The facts of argument two are included here also so the case flows for the reader.

After the jury was sent out the solicitor claimed Taylor said what he wanted to attribute to her "after the incident, on the telephone." Defense counsel again objected this was not specific as the rule of evidence mandated, and it could have been "a day, a week, a month, or six months after the incident." The judge disagreed and ruled that "it being said over the telephone" was sufficient for purposes of Rule 613(b), SCRE. R. 79, l. 18 – 80, l. 7.

Over objection Johnson then claimed Taylor told her that: "Mr. Franks saw Mr. Mullins leave from his neighbor's house and get on his moped. And she said when Jason saw that happen, he said 'I'm going to get him.'" R. 81, ll. 5-11.

On cross-examination Johnson acknowledged she never gave the police a statement, and she had not talked to the defense about the case. She was hostile to petitioner and the defense team. R. 81, l. 22 – 82, l. 21.

Mullins

During Mullins' testimony he admitted he had cocaine in his system at the time of the incident or accident but he claimed it was "from two days earlier." R. 178, ll. 19-25. Mullins admitted he filed a lawsuit against petitioner and Mullins testified: "I mean I didn't deserve to be run down like a dog in the road, or *twenty-one stitches in my head*, my teeth knocked out, *my shoulder permanently dislocated* don't you think I deserve something." R. 182, ll. 1-18. (emphasis added). Mullins *denied that he walked around after the accident*, and he denied he gave petitioner "the finger": "I was just hit *at 50 miles an hour or 60.* I'm not Superman." R. 182, l. 14 – 183, l .5. Mullins said he was *badly hurt* when petitioner hit his moped and he had to undergo rehab treatment. R. 185, ll. 14-18. (emphasis added).

When defense counsel began questioning Mullins about an incident that happened 290 miles away in Clay, West Virginia, the solicitor objected. R. 184, ll. 6-21. Petitioner proffered the testimony about what happened two weeks after this incident in West Virginia.

Mullins testified:

> Q. You weren't too bad to get into a physical altercation with two women at the same time, right?
>
> A. There wasn't an altercation.
>
> Q. And you weren't hurt too bad to physically drag a woman up a flight of steps by her hair?
>
> A. That didn't happen.
>
> Q. And you weren't hurt too badly to fight off the other woman, Ms. Deborah Nelson, while that was going on?
>
> A. That's not true.
>
> Q. And you weren't hurt too bad – now, when the police came for you, you were able to run away from the police, right?
>
> A. (No response)
>
> THE COURT: *Did you run away from the police?*
>
> *THE WITNESS: Yes, sir.*
>
> BY MR. BARROWCLOUGH:
>
> Q. *From an officer Davis?*
>
> *A. Right.*
>
> Q. And you weren't hurt too bad when they tackled you and you fight him off, right?
>
> A. I was never tackled.
>
> Q. And you weren't hurt too bad to outrun him and escape, right?

A. I did outrun him, yes.

Q. And then you weren't hurt too bad to travel another 290 miles back to South Carolina in your car?

A. I wasn't – I didn't travel. I wasn't driving, no.

Q. But, I mean, you traveled?

A. Right.

R. 186, l. 8 – 187, l. 13. (emphasis added).

Defense counsel then argued that Mullins had testified about had badly he was hurt -- that his teeth were knocked out and he went through rehabilitation -- and the defense was entitled to show the jury that Mullins was quite capable of physical activity two weeks after this incident. The solicitor argued it was irrelevant, and the judge ruled he agreed this evidence was irrelevant. R. 188, ll. 6-22. The judge reasoned: "It might have something to do with his damages claim in a civil trial, but the issue here is whether your client ran over this man. And, if so, did he suffer injuries from it. Not the degree of injuries – *I know he went quite into detail as to what injuries he had*, but I find it's – you are on the record for grounds for appeal, but I find it's not relevant." R. 188, l. 22 – 189, l. 4. (emphasis added).

Later during the trial the defense was also precluded from having the paramedic who arrived at the scene to testify he was told that Mullins was "ambulatory at the scene prior to EMS arrival . . . " but Mullins was told by bystanders to lie down. R. 201, l. 16 – 220, l. 12.

Deputy Michael Scurlock, Jr. testified that petitioner reported to the police station after the accident and he gave the police a statement. Petitioner told the police when Mullins was leaving on his moped: "*I waited three to five minutes* to give him a head start so as to avoid a confrontation." Petitioner said Mullins was playing games with him and looking back and smiling at petitioner as he

rode on his moped. Petitioner told the police that *he did not hit Mullins on purpose*. R. 104, l. 10 – 106, l. 6. (emphasis added).

Scurlock also testified that he was told by petitioner that after he accidentally hit Mullins, he looked in his rear view mirror and Mullins was "standing up walking around flipping me off." Petitioner apologized for the accident and said he would cooperate fully with the police. R. 106, ll. 2-12.

Court of Appeals

In a single paragraph the Court of Appeals apparently found the evidence was not relevant, and that the judge did not abuse his discretion in excluding it. App. 2.

Discussion

Mullins had made out his own claim of how badly he was injured and that petitioner "tried to run him over like a dog in the road," hit him at 50 to 60 miles an hour, knocked his teeth out, and permanently dislocated his shoulder. As seen above, the judge noted that Mullins went into "quite a lot" of detail about his alleged injuries when he was supposedly intentionally run down by petitioner in his car.

The only issue in this case was whether this was an accident or whether petitioner intentionally hit the decedent and tried to kill him as the indictment alleged. The extent of Mullins' injuries was clearly relevant in this case as he urged that petitioner attempted to kill him and almost did. See Rule 401, SCRE. He was badly hurt, he asserted. This cross-examination was relevant on its face. Since relevant to intent; it was inextricably entwined with the claim that petitioner was going 50-60 miles per hour. In any event Mullins certainly opened the door to it through his claims about his injuries.

The definition of relevance is broad. Relevant evidence means 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. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

The judge found that the proffered West Virginia evidence about Mullins successfully outrunning the police and the physical disturbance with the women was admissible in a civil case but not in petitioner's defense in this LWOP case. However, Rule 608(c), SCRE is broad in allowing evidence that shows bias, prejudice, or motive to misrepresent.

In State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) this Court held that "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. at 101, 226 S.E.2d at 249. See, also, State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); Davis v. Alaska, 415 U.S. 308 (1974).

The credibility of Mullins in this case was key just as it was for alleged accomplice James Brown in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), where Brown claimed Jones was the killer. In Jones, this Court held the defense had the right to impeach Brown with available evidence showing that what was being presented to the jury as Brown's motivation for testifying may not be accurate. In Jones, Brown's favorable history of dealing with the solicitor's office tended to show -- if the jury sought to believe it -- that Brown may have been motivated by his desire to limit his sentencing exposure *rather than* his concern for telling the truth and for salvation.

Here, the state presented a case where Mullins said he was deliberately hit by petitioner in his SUV while Mullins was defenseless on his moped. Petitioner *attempted to murder* Mullins was

the state's case. The state also introduced evidence that petitioner had threatened to harm Mullins prior to this incident. Petitioner had as much right to show Mullins' bias and motive to misrepresent the truth in this criminal case as he did in a civil action where the judge ruled he would have allowed this impeachment evidence.

The fact that Mullins admitted he ran from the police two weeks later where he claimed to have permanent injuries from petitioner deliberately running him down at 50-60 miles an hour with an SUV while Mullins was on his moped was both relevant and admissible to impeach his credibility. See, Rule 401, SCRE; Rule 608 (c), SCRE. The Court of Appeals respectfully erred in holding otherwise, and certiorari should be granted.

2.

The Court of Appeals incorrectly held it was not error for the trial court to allow Patricia Johnson to testify that her granddaughter, fourteen-year-old Taylor [redacted] told her petitioner said he was "going to get" Mullins before the incident occurred since Taylor was not told of the alleged time and place she alleged made this statement to Johnson as mandated by Rule 613(b), SCRE.

Relevant Facts

As seen, Taylor [redacted] denied that she remembered hearing petitioner saying that he was "going to get him" -- Mullins -- or something similar to that. In fact, her best memory was petitioner said he would wait a few minutes for Mullins *to clear the area before he left.*

Defense counsel correctly objected that the solicitor had not laid a proper foundation as to time and place in his attempt to impeach Taylor through the testimony of her grandmother, Patricia Johnson. The judge initially and correctly agreed, but then erroneously changed his mind.

Rule 613(b), SCRE, mandates that extrinsic evidence of a prior inconsistent statement by a witness is not admissible **unless** the witness is advised of the substance of the statement, **the time and place it was allegedly made**, and the person to whom it was made, and is given the opportunity to explain or deny the statement.

That did not happen in this case. Yet the Court of Appeals cited Rule 613(b), SCRE in its one paragraph affirmance which found the admission of the extrinsic evidence of Patricia Johnson testifying that her daughter, Taylor [redacted] told her petitioner said "I'm going to get him [Mullins]" admissible. App. 2.

There respectfully can be no serious argument that the solicitor complied with the requirements of Rule 613 (b), SCRE in fairness to Taylor [redacted] before demanding the right to impeach her. The judge strangely changed his ruling because the solicitor said Taylor told her

mother this over the telephone. This is simply wide of the mark. Taylor was never told of the time and place she allegedly made this statement or that she said it on the telephone to her mother at a certain time.

Defense counsel properly objected that Taylor was not given the opportunity to give an explanation by being specifically told of the time and place she allegedly told her grandmother, Patricia Johnson, that petitioner had said he was going after Mullins.

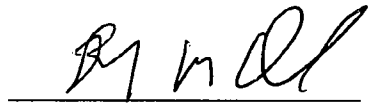
Here, unlike State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), the young Taylor was not given a *specific* time and place that she allegedly told Patricia Johnson that petitioner made this statement about going after Mullins. This is a rule of fairness to jog the memory of the witness and put her on notice that she may be impeached if she denies the *specific inquiry*. This was critical testimony on the issue of intent and the state was not held to its obligations of fairness under Rule 613(b), SCRE as it applied to the time and place of the alleged statement.

Our state rule requires that proper foundation must be laid before admitting a prior inconsistent statement. See, State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). Again, Rule 613, SCRE is a rule of fairness to the witness. The impeachment of fourteen-year-old Taylor in this case -- since she was not given the time and place she allegedly made this critical statement to her grandmother – was improper and highly prejudicial. Motive to maim or kill versus accident was the sole issue in this case. The Court of Appeals respectfully erred in its one paragraph affirmance on this issue. Petitioner felt so strongly about this being an accident and not intentional that he turned down a one year prison sentence in the face of the sentence of life imprisonment without parole he is now serving. This evidentiary impeachment error was highly prejudicial to his defense -- to say the least -- and certiorari should be granted.

CONCLUSION

By reason of the foregoing arguments, the writ of certiorari should be granted.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of May, 2013

STATE OF SOUTH CAROLINA
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THE STATE,

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PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 23rd day of May, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013