STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COREY MARK PORTER,

APPELLANT

APPELLATE CASE NO. 2023-000059

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 6

ARGUMENT

The trial court erred by allowing the State to impeach Appellant's expert witness by asking "How much do you make a year off your testimony and your work" as it was irrelevant to his work or credibility in the case at trial. 7

CONCLUSION 11

PETITION TO BE RELIEVED AS COUNSEL 12

TABLE OF AUTHORITIES

Cases

Assoc. Mgmt. v. E.D. Sauls Constr.Co., 279 S.C. 219, 305 S.E.2d 236 (1983) 7

Johnson v. Ward, 288 S.C. 603, 344 S.E.2d 166 (Ct. App. 1986) 8, 9, 10

State v. Cope, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009) 6

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) 6

State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983) 6

State v. Passio, 433 S.C. 666, 861 S.E.2d 785 (Ct. App. 2021) 6, 7

State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986) 7

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) 7

State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004) 6

Todd v. Joyner, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008) 8

Wrobleski v. de Lara, 353 Md. 509, 727 A.2d 930 (1999) 8, 9, 10

Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001) 7

Rules

Rule 401, SCRE 7

Rule 402, SCRE 7, 10

Rule 403, SCRE 8

Rule 411, SCRE 8

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by allowing the State to impeach Appellant's expert witness by asking "How much do you make a year off your testimony and your work" as it was irrelevant to his work or credibility in the case at trial?

STATEMENT OF THE CASE

Appellant Corey Mark Porter was indicted by the Spartanburg County Grand Jury on April 21, 2021, for murder and possession of a firearm during commission of a violent crime. R. 10, ln. 11—R. 11, ln. 8; R. 351-352. His case proceeded to trial before the Honorable J. Derham Cole and a jury from January 9th through 11th, 2023. R. 1. Appellant was represented by Michael D. Morin, while Barry Joe Barnette represented the State. R. 1. The jury found Appellant guilty of both charges, and the trial court imposed a sentence of to life without parole.[1] R. 335, ll. 7-18; R. 348, ln. 16—R. 349, ln. 3.

[1] No sentence was imposed for the offense of possession of a firearm during commission of a violent crime because Appellant was sentenced to life without parole for murder. R. 348, ln. 24—R. 349, ln. 3.

STATEMENT OF THE FACTS

Appellant Corey Mark Porter owned and operated a remodeling business. R. 205, ll. 12-20. In 2020, he contracted with Mr. Jasmine Lamar Nesbitt (Nesbitt) to remodel two bathrooms and a kitchen in Inman, South Carolina. R. 50, ln. 21–R. 51, ln. 20; R. 62, ln. 19–R. 63, ln. 20; R. 205, ll. 20-21. After first stopping at an Ace Hardware store in the late afternoon of November 20, 2020, Appellant arrived at Nesbitt's home. He was driven by one of his employees, Derambez Morgan (Morgan), while two other new employees—Tyler Pace (Pace) and Candice Lell (Lell)—arrived in another car driven by Lell.[2] Also present were Nesbitt and his father, Robert Nesbitt (Father). Materials were brought inside off the trailer pulled by Nesbitt's SUV. R. 52, ll. 7-13; R. 70, ln. 23–R. 71, ln. 17; R. 79, ll. 1-6; R. 208, ln. 9—R. 209, ln. 24. While Pace and Lell were replacing a door lock in a different room, Nesbitt and Appellant spoke in the living room, and Morgan was in the kitchen area. R. 52, ll. 10-11; R. 53, ln. 3—R. 54, ln. 17; R. 79, ll. 8-18; R. 209, ll. 17-20. Nesbit and Father then left out the front door. While Father was about to walk off the front porch of the home, multiple gunshots were heard coming from inside. R. 54, ll. 18-23; R. 71, ln. 23–R. 73, ln. 4; R. 74, ll. 14-21.

Appellant went to the front door, and Nesbitt asked, "Y'all good in there?" to which Appellant responded, "No, I just shot [Morgan]." R. 55, ll. 9-12; R. 213, ll. 3-4. Nesbitt called 911, and Appellant went to Lell's car where she and Pace had already run. He entered the vehicle, but the car was stopped by police who arrived within minutes of the shooting. R. 55, ln. 19–R. 56, ln. 18; R. 95, ll. 1-5; R. 138, ll. 9-17; R. 212, ln. 21–R. 213, ln. 9. EMS and took Morgan to the hospital; however, he ultimately succumbed to two of three gunshot wounds—one

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[2] Due to a labor shortage issue, Appellant hired Pace and Lell the day of the incident, while Morgan was hired about two weeks beforehand. R. 77, ll. ; R. 206, ln. –R. 208, ln. ; R. 225, ll. ; R. 227, ln. –R. 228, ln. .

in the neck below the left ear, and another to the left mid-back underarm area of his torso. R. 110, ln. 1—R. 112, ln. 22; R. 186, ln. 1—R. 187, ln. 14; R. 196, ll. 3-21.

Appellant's case proceeded to jury trial, whereupon he testified and explained what happened between him and Morgan immediately prior to the shooting. R. 1; R. 205, ll. 1-2. Specifically, Appellant recalled the events as follows: he walked by Morgan, put down his wood supplies, turned, and saw Morgan standing in front of him; Morgan had his hand in his pocket and said, "I got a gun. Do what I say or I'll blow your … head off." R. 211, ln. 25–R. 212, ln. 7. Shocked, Appellant asked, "what?" to which Morgan responded, "Empty your pockets." R. 212, ll. 8-9. Appellant stated he then lifted his shirt showing his holstered Glock 19 pistol and told Morgan, "you're not the only one with a gun." R. 157, ll. 6-7; R. 212, ll. 10-11. Morgan lunged for Appellants gun, and a struggle ensued briefly between Appellant and Morgan ultimately ending when Appellant shot Morgan until he fell. R. 212, ln. 11–R. 213, ln. 3.

The defense also called Chris Robinson (Robinson) as an expert witness at trial to testify regarding several matters, including gunshot primer residue, firearms and ballistics, and crime scene analysis. R. 232, ll. 16-24; R. 235, ll. 3-11. On cross examination, the State questioned Robinson on a number of matters, including his fee schedule for reviewing materials, traveling, and testifying in the present case. The State further asked Robinson, "How much do you make a year off your testimony and your work?" R. 259, ll. 18-19. Appellant objected on the grounds of relevance, and the trial court overruled the objection. R. 259, ll. 20-21. After Robinson answered "$300,000," the State pressed the matter as follows:

Q- Is that what you report to the I.R.S.?

A- Yes.

Q- So you make $300,000 a year doing this?

A- $300,000 last year; two eighty the year before that. It fluctuates.

R. 259, ln. 22—R. 260, ln. 2.

After deliberations, the jury found Appellant guilty of both counts. The trial court sentenced Appellant "to the South Carolina Department of Corrections for the period of [his] natural life." R. 335, ll. 7-18; R. 348, ln. 16—R. 349, ln. 3.

This appeal follows.

STANDARD OF REVIEW

"The determination of relevancy is largely within the discretion of the trial judge." State v. Jeffcoat, 279 S.C. 167, 170, 303 S.E.2d 855, 857 (1983). As such, its "decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice." State v. Cope, 385 S.C. 274, 286, 684 S.E.2d 177, 183 (Ct. App. 2009) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Passio, 433 S.C. 666, 673–74, 861 S.E.2d 785, 789 (Ct. App. 2021) (citing State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)).

ARGUMENT

The trial court erred by allowing the State to impeach Appellant's expert witness by asking "How much do you make a year off your testimony and your work" as it was irrelevant to his work or credibility in the case at trial.

The State was impermissibly allowed to cross-examine Appellant's expert witness regarding not only his income derived from his fees in the present case, but his overall gross income. Although litigants are typically permitted wide latitude on cross-examination regarding potential credibility or bias of witnesses, questioning about the expert's annual income was beyond the scope of relevance in the present case even as to any potential credibility or bias. Accordingly, the trial court erred in overruling Appellant's objection.

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Assoc. Mgmt. v. E.D. Sauls ConsR.Co., 279 S.C. 219, 305 S.E.2d 236 (1983)); see also Rule 401, SCRE (defining relevant evidence). However, "[e]vidence which is not relevant is not admissible. Rule 402, SCRE; see also State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) ("For evidence to be admissible, it must be relevant.").

Although evidence showing a witness' bias is relevant for impeachment,[3] there are limits as to what falls within the ambit of relevant impeachment evidence to show bias. As it relates to the issue of a "professional witnesses," South Carolina common law is limited and addresses the matter in the context of experts hired by insurance companies defending against liability. See, e.g., Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001) (adopting the "substantial connection analysis" to determine whether an expert witness' connection with an insurance company litigating a matter in court is sufficiently probative as to the expert witness' potential

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[3] Passio, 433 S.C. at 678 861 S.E.2d at 781.

bias under Rule 411, SCRE, such that it would outweigh prejudice to the defense due to the jury learning that the defendant was covered by insurance under Rule 403, SCRE); and Todd v. Joyner, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008) (interpreting and applying Yoho and the "substantial connection analysis").

Nonetheless, South Carolina precedent has previously limited cross-examination of expert witnesses to matters relevant to the case pending before the jury to avoid confusion of issues. For example, in Johnson v. Ward, 288 S.C. 603, 344 S.E.2d 166 (Ct. App. 1986), the Court of Appeals upheld the limits placed upon cross-examination of an emergency room expert. There, the expert had previously provided a deposition in a different case to one of the attorneys in Ward. The appellate court upheld the trial court's refusal to allow cross-examination regarding the expert's relationship with Ward's attorney to show bias, as it "could well have led to a multiplication of issues and confusion of the minds of the jurors in an already lengthy and complicated trial." Id. 288 S.C. at 611-12, 344 S.E.2d 171.

Pertaining to an expert witness' fees, the Court of Appeals of Maryland has addressed the matter squarely in Wrobleski v. de Lara, 353 Md. 509, 727 A.2d 930 (1999) (examining multiple cases from multiple jurisdictions regarding cross-examination of "professional witnesses"). As in South Carolina, the Wrobleski Court noted "two basic principles" as being fixed in the law: (1) that the scope of witness cross-examination is in the trial judge's discretion; and (2) litigants must be allowed wide discretion in cross-examination as to bias and interest. Id. 353 Md. At 525, 727 A.2d at 938. I other words, a party should be able to expose potential "personal interest the witness may have in arriving at the stated opinion" by cross-examining an expert as to his earnings from the specific case in which he is testifying, as well as from "forensic activities generally." Id. However, the Wrobleski Court cautioned that it is "not the *proper* function, of

such cross-examination to embarrass witnesses or to invade unnecessarily their legitimate privacy, and thus to discourage them from testifying and thereby make it more difficult for parties to obtain needed expert testimony." Id. 353 Md. At 526, 727 A.2d at 938 (emphasis in original).

In the case at bar, the State's cross-examination of Robinson crossed-over into an improper function of cross-examination that was irrelevant as to any personal interest or bias Robinson could have harbored by providing his opinion at Appellant's trial. Robinson had already answered the State's questioning regarding his fee for services rendered in Appellant's case to testify ($1500), his fee schedule ($250/hour for material review and consultation), and even travel expenses ($125/hour). R. 258, ln. 8—R. 259, ln. 14. Yet the State sought more: it demanded to know how much Robinson made per year from both his "testimony and [his] work." R. 259, ll. 18. After the trial court overruled Appellant's objection to this line of questioning, the State's next question made clear the intent of its inquiry pertained to Robinson's entire annual income encompassing all of his "work"—weather in-court or out: "*Is that what you report to the I.R.S.*?" R. 259, ll. 22-23.

Under such circumstances, the trial court permitted the State to use cross-examination "to embarrass witnesses or to invade unnecessarily their legitimate privacy." Wrobleski, 353 Md. At 526, 727 A.2d at 938. Further, such questioning confuses the issue before the jury of Robinson's actual interest in the case with his overall work in and out of court through the course of a year. Ward, 288 S.C. 603, 344 S.E.2d 166. Robinson's $300,000 annual reported income to the I.R.S. for all work performed by him in his business as a whole[4] was far beyond the scope of relevance

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4 On redirect examination, Robinson testified that other sources compromising his annual income other than testimony, including but not limited to seminars, television shows, and an "H.B.O. Special." Tr. 261, ln. 15—Tr. 262, ln. 3.

to any personal interest or bias Robinson could possibly have had by providing limited services in Appellant's case—especially when compared to the paltry sum charged in Appellant's case—because it would not tend to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. Rule 401, SCRE. As such, it was inadmissible, and the trial court erred in denying Appellant's objection. See Rule 402, SCRE; see also Ward, 288 S.C. 603, 344 S.E.2d 166; Wrobleski, 353 Md. At 526, 727 A.2d at 938.

Appellant was likewise prejudiced by the trial court's erroneous ruling. The State relied upon arguing that Appellant's version of events was inconsistent with the location of other physical evidence. Specifically, the State argued Appellant could not have been by the hot water heater when the Glock 19 was fired because the shell casings were on the ground by the back sliding glass door. Tr. 278, ln. 8—Tr. 279, ln. 18. Robinson's testimony regarding how the shell casings from the firearm could indeed have been ejected from the gun, bounced off the nearby hard surface, and ended up by the doorway directly conflicted with the State's theory and supported Appellant's. Tr. 244, ln. 19—Tr. 246, ln. 25; Tr. 249, ln. 18—Tr. 250, ln. 1. By permitting the State to impeach Robinson through implying he was simply giving an opinion for money improperly discredited Robinson's testimony, and by extension Appellant's defense. As such, Appellant's defense was weakened by the State wrongly impugning Robinson's credibility. Accordingly, Appellant was prejudiced by the trial court's erroneous ruling.

CONCLUSION

For the foregoing reasons, Appellant Corey Mark Porter respectfully requests reversal of his convictions and sentence, and remand for new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of May, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COREY MARK PORTER,

APPELLANT

APPELLATE CASE NO. 2023-000059

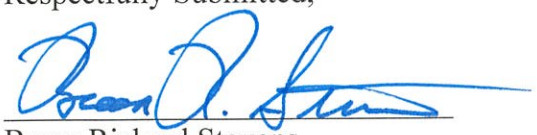
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Corey Mark Porter states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on Jan. 9-11, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Corey Mark Porter.

Respectfully Submitted,



Breen Richard Stevens
Appellate Defender

This 18th day of May, 2023.

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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APPELLANT

APPELLATE CASE NO. 2023-000059

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments:
(2) Sentence sheets;
(3) Trial Transcript dated January 9-11, 2023, pp. 1-350.

I certify that this designation contains no matter which is irrelevant to this appeal.

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 18th day of May, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Corey Mark Porter, #389936, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 18th day of May, 2023.

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT