

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenwood County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2021-000941

THE STATE,

Respondent,

vs.

COREY JERMAINE BROWN,

Petitioner.

STATE'S PETITION FOR REHEARING

On September 29, 2023, this Court issued a published opinion in which it reversed the decision of the Court of Appeals and remanded for a new trial in Petitioner Corey Jermaine Brown's case involving charges of armed robbery, kidnapping, and conspiracy. State v. Brown, Op. No. 28179 (S.C. Sup. Ct. filed Sept. 29, 2023). In finding a new trial was warranted, this Court concluded: (1) the State was required to and should have disclosed the plea agreement it reached with Brown's co-defendant Shadarron Evans even though Evans subsequently breached that agreement, which resulted in it ceasing to exist before Brown's trial got underway; and (2) the non-disclosed evidence regarding the breached plea agreement was material because it could have been used to impeach Evans, Evans was a key witness for the State, and there was no physical evidence connecting Brown to the charged offenses. Pursuant to Rule 221(a) of the

South Carolina Appellate Court Rules, the State respectfully petitions for rehearing because it believes this Court misapprehended and overlooked two significant points in its analysis.

First, in finding the State was required to disclose the breach plea agreement due to the nature of that agreement, this Court repeatedly indicated Evans's original plea agreement with the State was made "in exchange for Evans's testimony." Respectfully though, the information contained in the record from the circuit court proceedings in Brown's case contradicts this Court's finding in that regard.

Looking to what occurred during the circuit court proceedings, the solicitor testified Evans's original plea agreement had "nothing to do with testimony" and, instead, was simply one pursuant to which Evans was "gonna plead guilty" in exchange for a favorable negotiated sentence. (R. pp. 493-493; p. 501). Additionally, after Evans reneged on that deal that was purely designed to resolve his charges, the solicitor explained Evans was the one who brought up his willingness to testify, which was *not* a component of the by-then-breached original plea agreement, and the State responded to that assertion by making clear there was no offer on the table if he testified and there would be no telling what would happen as a result. (R. pp. 493-494). Beyond that, the solicitor testified the negotiations that occurred after Brown's trial were what led to the agreement with Evans that was ultimately successfully reached. (R. p. 493-494).

Critically, the true nature of Evans's original breached plea agreement, which had *nothing* to do with an agreement to testify based on the testimony presented, undercuts this Court's conclusion Evans knew "the State was willing to offer him more if his testimony was satisfactory." What Evans truly knew was, after substantial back-and-forth negotiations, the State was willing to allow him to plead guilty in exchange for him receiving an agreed-upon thirteen-year term of imprisonment and the State receiving the benefit of his charges being

resolved. But, after agreeing to that offer from the State, Evans backed out. At that point, Evans attempted to improve his position by offering to testify for the prosecution, and the State—which had just been burned by Evans’s decision to back out of the agreed-upon deal—responded to that offer by making clear to Evans he was taking his chances and not being offered anything in return. Notably, no testimony was presented suggesting the solicitor even promised to *consider* extending or recommending leniency if Evans did, in fact, end up testifying in Brown’s trial.

As a result of that, Evans—like most if not all defendants who decide to cooperate with the State—*hoped* he would wind up in a better position than he was in before he potentially angered the solicitor by backing out of an already-agreed upon deal but had no guarantees, promises, or offers that he truly would wind up in such an improved position. Cf. State v. Cain, 297 S.C. 497, 503, 377 S.E.2d 556, 559 (1988) (“The record here contains only a passing reference to a pre-trial statement by the solicitor that he would assist, if possible, in keeping Threatte from being incarcerated in the same institution as appellant. There is no evidence giving rise to an inference that an undisclosed immunity grant or plea bargain existed, or that Threatte perjured himself in testifying he had been promised nothing. The five (5) day period between appellant's sentencing and Threatte's plea hearing afforded ample opportunity for the solicitor and Threatte's counsel to negotiate the plea agreement.”). Therefore, Evans’s trial testimony indicating he had not been promised anything “to testify” during Brown’s trial was indeed truthful and accurate, and the breached original plea agreement had little to no impeachment value in regard to Evans’s trial testimony since that agreement had not been connected to Evans testifying and was no longer in existence due to Evans’s decision to back out of it. Accordingly, the specific circumstances involved in Brown’s case respectfully did not and do not support a conclusion the State violated Brown’s constitutional rights by failing to disclose the breached

plea agreement with Evans. See Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003) (explaining “[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony” and further instructing “[t]he fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony”); cf. Collier v. Davis, 301 F.3d 843, 849 (7th Cir. 2002) (“After a thorough review of the record, we are convinced that Merrill’s evidence does not show a Brady violation or evidence of an understanding as interpreted in Giglio. Merrill’s general and hopeful expectation of leniency is not enough to create an agreement or an understanding.”). This Court should grant rehearing.

Second, in finding the State’s non-disclosure of the breached plea agreement was material and warranted the grant of a new trial, this Court heavily focused on the importance of Evans’s testimony and the absence of physical evidence connecting Brown to the incident. Respectfully though, a more complete analysis of what occurred during Brown’s trial demonstrates there was no reasonable likelihood the non-disclosed evidence could have affected the judgment of the jury under the specific circumstances involved.

Demonstrating that fact, Evans—even without the presentation of any testimony indicating the State had been willing to agree to a negotiated thirteen-year sentence if Evans entered a guilty plea with no condition of testifying involved—was *thoroughly* impeached with what was presented during Brown’s trial. Specifically, through his own testimony Evans, who took the witness stand while shackled and dressed in a jail inmate jumpsuit, personally established: (1) he had previously been convicted of selling marijuana and committing robbery in

the past;¹ ² (2) he was a self-admitted liar and had initially lied during the very investigation that led to his and Brown's charges;³ (3) he was presently charged with the unmistakably highly-serious offenses of armed robbery and kidnapping;⁴ (4) he was facing "a lot of time in prison" if convicted of those charges; (5) he had spoken with the solicitor prior to testifying; and (6) he had earlier spoken with a detective investigating the incident in which there had been discussions about having his charges reduced if he told the truth. (R. pp. 203-204; pp. 234-235; pp. 248-249). Beyond that, the jury was made fully aware the State had an intent to engage in negotiations and enter into some sort of deal with Evans after Brown's trial as the solicitor directly informed the jurors during his closing argument he was "the one who wa[s] going to offer [Evans and another cooperating witness] something." (R. p. 417). And, if the significance of that remark may have somehow been missed by the jurors when it was uttered, defense

¹ Through her closing argument, defense counsel expressly attacked Evans's credibility and the sufficiency of his testimony based on his prior convictions. (R. p. 434). In fact, defense counsel went so far as to state Evans's and his cooperating accomplice's testimony was not sufficient to satisfy the requirements of our justice system due to the fact it was not corroborated. (R. p. 435; p. 442; p. 448). Obviously, that particular contention was inaccurate and inconsistent with established law. See State v. Rayfield, 369 S.C. 106, 120, 631 S.E.2d 244, 251 (2006) (Pleicones, J., concurring in part and dissenting in part) ("No witness's testimony need be corroborated."), abrogated by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016); see also United States v. Levi, 405 F.2d 380, 382 (4th Cir. 1968) ("That guilt or innocence may sometimes turn upon the credibility of one witness has been always of concern to society because of the possibility of error or false swearing. Yet it is well established at common law . . . that ordinarily the testimony of one eyewitness is sufficient for the purpose of identification of the perpetrator of a crime." (footnotes omitted)).

² Notably, during his testimony about his prior convictions, Evans admitted he had previously been charged—as he was at the time of Brown's trial—with both armed robbery and kidnapping but had been able to avoid being convicted of those charges by entering a guilty plea to the lesser offense of robbery. (R. pp. 234-235).

³ Defense counsel also called the jurors' attention to Evans's shifting accounts through her closing argument. (R. p. 435).

⁴ In her closing, defense counsel noted Evans was charged with the same offenses as Brown and suggested he was "looking to get out of it" by testifying. (R. p. 445).

counsel made sure they did not miss its significance by pointing out the solicitor had stated he *was* going to make—as opposed to was going to decide *if* he would make—a deal with Evans. (R. p. 446).

Critically, in light of the substantial impeachment of Evans that did occur during Brown’s trial coupled with the fact the jurors could have been under no illusion Evans might receive some benefit for his assistance with the prosecution, the non-disclosed evidence concerning the original plea agreement Evans breached was not something that could have created a reasonable probability the jury would have decided Brown’s case differently or that could have undermined confidence in the outcome of the proceedings, which was particularly true since that original agreement had *nothing* to do with Evans testifying against any of his co-defendants. See Duncan v. State, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984) (finding a failure by the solicitor to disclose impeachment evidence was not material and did not require reversal when the witness had nonetheless been impeached through prior convictions); see also Deck v. Missouri, 544 U.S. 622, 635 (2005) (explaining visible shackles are “inherently prejudicial”); State v. Kuchera, 969 A.2d 1052, 1060 (N.J. 2009) (recognizing the appearance of any witness—whether for the prosecution or the defense—in restraints undermines the credibility of that witness’s testimony); cf. State v. Gunn, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993) (“The exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness’s credibility. In light of the abundance of other evidence detailing Roxanne’s unabashed disrespect for the law, appellants cannot establish that the trial court’s ruling denied them a fair trial.” (citations omitted)); State v. Kirkpatrick, 320 S.C. 38, 48, 462 S.E.2d 884, 891 (Ct. App. 1995) (“The evidence supports the conclusion there was no undisclosed plea agreement. Further, defense counsel thoroughly cross-examined Darlene Higgins about the representations made to her by the

prosecution and had the opportunity to expose any bias she might have in giving her testimony.”). Accordingly, when the proper analysis of *all* the pertinent information is considered in Brown’s case, the specific circumstances involved do not support a conclusion the non-disclosed evidence was material. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) (“Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”); see also United States v. Jackson, 345 F.3d 59, 74 (2d Cir. 2003) (explaining a new trial is generally not warranted “when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable” (citation and internal quotations omitted)). This Court should grant rehearing.

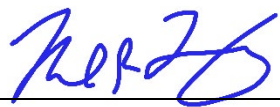
Conclusion

For all the foregoing reasons coupled with the reasons articulated in the State’s brief and during oral argument before this Court, the State respectfully asks this Court to reconsider the matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion affirming the decision of the Court of Appeals.

Respectfully submitted,

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