RECEIVED
Jun 06 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant, Charles Barham, respectfully petitions for rehearing of his appeal, decided May 22, 2024, in Unpublished Opinion No. 2024-UP-182. In support of his petition, Appellant states as follows:

Appellant raised three issues on appeal – two claims of error with respect to admission of evidence and a third claim of cumulative prejudice resulting from those errors.

Appellant asks the Court to rehear Issue 2 – whether the trial court erred in admitting rebuttal testimony of Floyd Owen concerning Appellant's alleged participation in a burglary that had occurred in 2007, a crime unrelated to the 2015 alleged crimes for

S.E.2d at 398-99. The reference in *Stroman* was also made in the context of the Court's prior statement of the controlling principle of law with respect to opening the door: "'Where one party ***introduces evidence*** as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.'" *See Stroman*, 281 S.C. at 513, 316 S.E.2d at 399 (citations omitted) (emphasis added). In the context of these prior statements of the facts and applicable law, the *Stroman* Court's reference to counsel's initiating the questioning must be read in the context of ***initiating questioning that resulted in introduction of evidence*** on the subject. In the present case, the question was asked, but it did not elicit the expected response. Because the defense did not by its question ***introduce evidence*** that Owen previously implicated Appellant in another crime, it did not open the door to recalling Owen to give the details of Appellant's alleged involvement in the earlier crime. Simply put, where no ***evidence*** to that effect was elicited, there was no ***evidence*** to rebut through Owen's recall testimony.

Even if *Stroman* can be argued to have once stood for the proposition that a question by counsel, standing alone, without eliciting the particular evidence, can open the door to rebuttal evidence, the Court overlooked the more recent holdings of our Supreme Court that call into question the validity of such a proposition.

Our Supreme Court recognizes that statements by counsel are not evidence. *See Landry v. Landry*, 430 S.C. 153, 163, 843 S.E.2d 491, 496 (2020); *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Our Supreme Court also recognizes that argument of counsel is not evidence. *See In re Gonzalez*, 409 S.C. 621, 636 n. 3, 763 S.E.2d 210, 218 n.3 (2014); *Morris*, 367 S.C. at 64, 624 S.E.2d at 653. And, most

importantly in the context of the instant case, our Supreme Court recognizes that counsel's questions are not evidence; rather, only the answers elicited by counsel's questions are evidence. *See State v. Washington*, 431 S.C. 394, 408, 848 S.E.2d 779, 786 (2020).

In *Washington*, our Supreme Court recognized the distinction between questions asked by counsel and the answers the questions elicit in its determination whether there was evidence in the record to support a particular jury charge. There, the defense attempted repeatedly, without success, to elicit testimony that an individual other than the defendant was the person who shot the victim. *See Washington*, 431 S.C. at 408, 848 S.E.2d at 786. That individual, Kinloch, repeatedly denied the assertions to that effect contained in counsel's questions. *Id.* The state sought and the trial court granted a jury instruction on accomplice liability, based on the defense's questions that suggested someone other than defendant was the shooter. The Supreme Court found the accomplice liability charge was not properly given, because the record contained no evidence that someone else may have been the shooter. *Id.*, 431 S.C. at 407-10, 848 S.E.2d at 786-87.

Significantly, the Supreme Court rejected the contention that the ***questions*** directed to Kinloch in his cross-examination by defense counsel provided an evidentiary foundation for the accomplice liability charge. The Court stated:

> While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter.

Id., 431 S.C. at 408, 848 S.E.2d at 786. Similarly, in this case, defense counsel asked the investigating officer if Owen previously named Appellant in connection with a charge he

faced, but that question did not elicit an answer confirming that he had. The questions by counsel were not evidence, and those questions did not elicit the evidence they sought. Because no actual evidence was introduced to the effect that Owen previously implicated Appellant in a crime with which Owen was charged, the door was not opened to allow otherwise inadmissible testimony to be admitted in response. The Court should rehear this issue and find counsel's questioning of the officer did not open the door to Owen's recall testimony.

The Court declined to address Appellant's argument that the admission of Owen's testimony contravened the principle of the door-opening doctrine that requires a proportional response that is not unduly prejudicial. The Court misapprehended that this argument was not preserved. The requirement of a proportional response that is not unduly prejudicial is an aspect of the door-opening doctrine, as set out in the case law cited both in Appellant's briefs and in the Court's opinion. Appellant argued the response in this case grossly exceeded a proportional response and was unduly prejudicial. Contrary to the Court's holding, Appellant's argument as to this issue is preserved. During the argument of the issue at trial, when the prosecution stated its purpose for seeking to recall Owen, the defense offered to stipulate to the facts the state sought to elicit, thereby setting out and even agreeing to what would be a proportional response. The proportionality argument is properly before the Court, and the Court should address this part of the issue on the merits. For the reasons spelled out in the opening and reply briefs of Appellant, incorporated herein by reference, the rebuttal testimony was grossly disproportionate to the invited response, was unduly prejudicial, and its admission was reversible error.

In finding the prejudice argument was not preserved, the Court also overlooked that the defense objected to admission of this evidence on the basis of Rule 403 of the South Carolina Rules of Evidence. Moreover, the defense again invoked Rule 403 in its new trial motion based on the admission of this evidence. Appellant's prejudice argument is preserved, and the Court should grant rehearing and address the merits of the argument. Based on the argument in Appellant's opening and reply briefs, the prejudice resulting from Owen's recall testimony far outweighed its probative value, precluding its admission.

The Court's decision also overlooked and failed to address another component of the door-opening doctrine argued by Appellant. Owen's recall testimony contravened our Supreme Court's admonition that "we will not condone 'a thinly-veiled attempt to show propensity by way of the open-door doctrine.'" *See State v. Simmons*, 430 S.C. 1, 15, 841 S.E.2d 845, 852 (2020), *quoting State v. Heyward*, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019); *see also State v. Williams*, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020). The Court should rehear this issue and address Appellant's argument that the testimony elicited by the state through Owen was just such an attempt and not proper in this case.

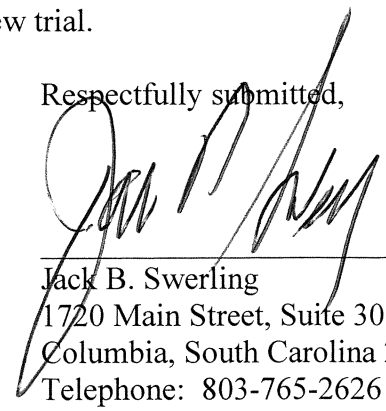
The Court also overlooked and failed to address the constitutional ramifications of the admission of this testimony. The court's admission of this evidence compelled the defendant to give up his constitutional right to remain silent, resulted in improper burden-shifting, and denied him his due process right to a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 12. Because of the testimony of Owen with respect to the specifics of Appellant's alleged involvement in the remote and unrelated burglary, it became imperative that Appellant take the stand in order to refute those allegations. Had

the testimony not been admitted, Appellant would have invoked his right to remain silent and not taken the stand, due to the inadequacy of the state's evidence to link Appellant to the charged crimes, except for testimony from witnesses with demonstrated bias and a personal stake in implicating Appellant. Admission of Owen's testimony about the unrelated burglary forced Appellant to give up his right to remain silent and take the stand to refute Owen's recall testimony, increasing the prejudicial effect of the erroneously admitted recall testimony. The Court should rehear its decision and address the merits of Appellant's constitutional claims.

The Court found Issue 1 was not preserved and declined to address it on the merits. If the Court grants rehearing with respect to Issue 2, Appellant asks the Court to also grant rehearing on Issue 1 and decide it on the merits, because it is an issue that is likely to arise again in a retrial. If the Court rehears both Issues 1 and 2 and finds error on those issues but insufficient prejudice to warrant reversal, it should also revisit the cumulative prejudice argument of Issue 3. Accordingly, Appellant respectfully moves for rehearing of all three issues raised in this appeal.

For all the reasons outlined above, and based on the authorities cited in the Final Brief and Final Reply Brief of Appellant, the Court should rehear its decision, reverse the lower court's rulings, and remand for a new trial.

Respectfully submitted,



Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626
South Carolina Bar number 5457

Katherine Carruth Goode
P.O. Box 61123
Columbia, South Carolina 29206
Telephone: 803-799-4440
South Carolina Bar number 8951

Attorneys for Appellant

RECEIVED
Jun 06 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2024, addressed to the attorney of record as follows:

J. Anthony Mabry
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

June 6, 2024

Kellie S. Reaves
Paralegal to Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626