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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARTIN DIXON,

APPELLANT

APPELLATE CASE NO. 2023-000597

FINAL BRIEF OF APPELLANT

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1. Does a trial judge that actively advocates and pressures a co-defendant to testify and waive their right to remain silent assume the role of advocate for the prosecution in violation of the due process rights of an accused requiring the grant of a mistrial and recusal?

2. Was appellant's trial before a judge who admitted he would discriminate in sentencing based upon the difference in gender between appellant and co-defendant a violation of appellant's due process right to a fair trial?

STATEMENT OF THE CASE

Appellant Martin Dixon was indicted for kidnapping, attempted murder, and arson by a Richland County grand jury on July 15, 2020. R. *. The arson indictment was not called to trial due to a defect in its language. R. 7, l. 1 – 8, l. 15. Appellant was tried before the Honorable Clifton B. Newman (hereinafter the court) and a jury on April 3 – 6, 2023. At trial, appellant was represented by Aimee Zmroczek. Dale Scott and John Whitmire represented the state.

On April 6, 2023, the jury convicted appellant of kidnapping and attempted murder. Judge Newman sentenced appellant to twenty-three years on each charge, concurrent with credit for time served. R. 735, ll. 1 – 7.

This appeal follows.

STATEMENT OF FACTS

On the morning of August 7, 2019, Freddie Free was working at Elmwood Cemetery when he encountered a car blocking access to a portion of the cemetery. R. 55, l. 22 – 56, l. 15. Free observed a burnt area on the side of the vehicle and saw the vehicle move as if someone was inside the trunk and reported the vehicle to 9-1-1. R. 58, l. 2 – 59, l. 25. Officer Joseph Dwyer with the City of Columbia Police Department responded to the call. R. 67, l. 2 – 68, l. 21. Dwyer noticed evidence of burnt material around the fuel inlet as well as in the passenger compartment. R. 69, l. 2 – 70, l. 10. Dwyer was unable to open the trunk but observed a person inside the trunk by pulling down the rear seats. R. 73, ll. 9 – 21. Emergency services responded and gained access to the trunk. R. 75, ll. 2 – 9. Antrone Dubose was found inside the trunk of the vehicle. R. 92, ll. 4 – 15. How Dubose ended up in the trunk of the car was the central question presented at trial. Dubose asserted he was forced into the trunk by two of his companions, Michelle Jones and appellant. R. 113, l. 24 – 115, l. 9; 120, l. 6 – 121, 23; 135, l. 8 – 136, l. 9.

At the time of trial, Jones was facing the same criminal charges as appellant, but her case had not yet been called to trial. The solicitor told the court they intended to call Jones to testify as a witness in appellant's case, and if she "didn't play along" they would set her trial immediately. R. 42, l. 23 – 43, l. 6. Jones was represented by Robert Forney. R. 42, ll. 2 – 10. Forney told the court that his client was mentally ill, had a low IQ, and would struggle with the court's competency questions in connection with her right to refuse to testify. R. 231, ll. 7 – 19. The court informed Forney that he "knew how to handle" Jones. R. 231, ll. 20 – 24.

The court then actively pressured Jones to waive her Fifth Amendment assertion and testify on behalf of the state against appellant, as discussed *infra*. Part of this effort included statements telling Jones that the court did not believe she was actively involved in the crime and that the court would not sentence a woman the same as it would a man. R. 246, ll. 3 – 5. After the court's heavy-handed efforts to assist the state in pressuring Jones to testify and the court's statements of bias, appellant's trial counsel moved for either a mistrial or for recusal. R. 360, l. 7 – 361, l. 19; 379, ll. 10 - 21. The trial court denied both motions. R. 378, ll. 4 – 12; 380, ll. 7 – 22.

Dubose related the attack took place earlier in the morning hours of August 7, 2019, or late in the evening hours of August 6, 2019, and started behind an abandoned building in Columbia when he was hit in the head with a crowbar and forced into the trunk of the car. R. 113, l. 24 – 115, l. 9; 120, l. 6 – 121, l. 23; 135, l. 8 – 136, l. 9. While Dubose told police appellant was his attacker, he also claimed his attacker as missing a finger on his hand.[1] R. 277, l. 11 – 278, l. 19. Though Dubose claimed to have been beaten and struck in the head with a crowbar, he was treated only for a minor laceration near his eye. R. 296, ll. 6 - 21.

Dubose identified himself as disabled. R. 100, l. 13 – 101, l. 22. Dubose was acquainted with appellant, including periods rooming together across several years. R. 104, l. 13 – 105, l. 20. Appellant and Dubose were friends, and Dubose provided transportation while they lived together. R. 173, l. 24 – 174, l. 20; 538, ll. 3 - 13. Dubose indicated friction arose with the arrival of Michelle Jones and problems over money. R. 108, l. 6 – 110, l. 23.

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[1] Dubose denied saying his attacker was missing a finger but was contradicted by the testimony of the investigating officer and his recorded interview. R. 134, ll. 13 -20.

It was uncontested that appellant and Jones spent several days with Dubose before the alleged assault. Appellant rented a motel room close to Lexington Hospital, and the group stayed there from August 1 – 5, 2019. R. 262, ll. 13 – 25. Both Jones and appellant had identifying paperwork in the vehicle when it was found, including papers from Lexington Hospital dated August 5, 2019. R. 279, l. 19 – 281, l. 10. Dubose claimed the friction within the group peaked with appellant striking him with a crowbar and ordering him to get into the trunk of the car. R. 114, 4 – 118, l. 8. Dubose indicated Jones assisted in this assault by kicking and pushing him to force him into the trunk of the car. R. 150, ll. 14 – 18; 182, ll. 3 - 25. After the car arrived at the cemetery, Dubose claimed to have heard discussions between appellant and Jones about driving the car into the river or setting it on fire while Dubose was trapped in the trunk to kill him. R. 125, l. 14 – 126, l. 13.

The story of the group interactions diverged significantly on August 5, 2019. On that date, Dubose abruptly left both Jones and appellant stranded in the Lexington Hospital area. R. 525, l. 20 – 526, l. 11. Since Dubose had driven off without explanation, appellant called a friend from North Carolina named "T" Ordum who drove to the area and picked up appellant and Jones on August 5, 2019. Ordum allowed them to stay with him in Hickory, North Carolina. R. 526, ll. 12 – 24; 548, l. 14 – 549, l. 21. Appellant would remain in North Carolina from August 5, 2019, until his arrest in North Carolina in October. R. 526, ll. 3 - 22. As the crime occurred late in the evening on August 6, 2019, or early morning hours August 7, 2019, appellant's presence in North Carolina beginning on August 5 was an alibi. R. 55, l. 22 – 56, l. 15. As there was no forensic testing of any of the evidence available (no fingerprint or DNA evidence was introduced during trial), appellant's guilt depended on which version of events the jury found credible between the conflicting accounts of Dubose and appellant. R. 38, ll. 17 – 25.

Jones was the wildcard in the equation. Dubose had a bad history with Jones before she became connected with appellant. R. 137, ll. 2 – 16. Jones' presence angered Dubose and caused arguments over her access to his car and the plans Dubose had made with appellant. R. 140, ll. 1 – 25; 159, ll. 4 – 17. Following her arrest, Jones gave incriminating statements about both appellant and her own involvement in the Dubose assault. R. 410, l. 21 – 411, l. 17. Jones suffered from significant mental health problems including bi-polar disorder and schizophrenia.[2] R. 394, l. 21 – 395, l. 22.

Following the pressure from the court, Jones ultimately took the stand and provided incriminating testimony placing the blame for the assault on appellant. R. 399, l. 15 – 401, l. 25.

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[2]At one point in her testimony, Jones related that appellant was a member of the Illuminati (a secret society of alleged vast power and reach), that Dubose had killed people in Charleston, and that Dubose had a gun and was planning on killing both appellant and Jones. R. 426, l. 10 – 427, l. 20; 439, ll. 13 – 23; 447, ll. 1 – 22. She rambled about former President Donald Trump and government agencies when explaining why she can be seen talking to herself on her recorded interview. R. 451, ll. 14 -25.

STANDARD OF REVIEW

It is "well settled [that] judges should recuse themselves where questions of impartiality or impropriety are raised." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). Judicial Canon 3 indicates a judge should "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3(E), Rule 501, SCACR.[3] A party seeking disqualification must show some evidence of bias or prejudice. *See* Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). "In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice." Ellis v. Procter & Gamble Distrib. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

In light of the nature of the question, this Court should review the record *de novo*. *See* Patel v. Patel, 359 S.C. 515, 525, 599 S.E.2d 114, 119 (2004) ("Assuming without deciding that there is merit in Husband's policy arguments supporting the federal rule and *de novo* standard of review."). "[T]he fair meaning of any remark must be interpreted in the light of the context in which it is uttered in determining whether the remarks show personal bias or prejudice on the part of the judge sufficient to require that he be disqualified." Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981).

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[3]Federal judges are likewise bound by similar language through statute. "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C.A. § 455 (West 2023)

ARGUMENT

1. A trial judge who advocates and pressures a co-defendant to testify assumes the role of advocate for the prosecution in violation of the due process rights of an accused requiring the grant of a mistrial and recusal

A. A judge must remain neutral and not act as an advocate for either party.

"A criminal defendant has a due process right to have his case heard by a fair and impartial judge." State v. Langford, 400 S.C. 421, 437, 735 S.E.2d 471, 479 (2012). "It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties." State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999).

"A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial." State v. Kennedy, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (finding trial judge's improper remark about the accused telling lies in the presence of the jury mandated reversal); *see also* State v. Campbell, 297 S.C. 24, 26, 374 S.E.2d 668, 668–69 (1988) (holding the basis for judges not commenting on the facts is "founded upon the concept of our system of justice that every person charged with a crime has the right to a fair and impartial trial and that such a trial may only be achieved with the neutrality of the trial judge."); State v. Ates, 297 S.C. 316, 317–18, 377 S.E.2d 98, 99 (1989) (holding a trial judge "must refrain from all comment which tends to indicate his opinion on the weight or sufficiency of evidence, the credibility of witnesses, the guilt of the accused, or the facts in controversy."); Barnes v. Jones Chevrolet Co., 292 S.C. 607, 610, 358 S.E.2d 156, 158 (Ct. App. 1987) (holding "that in the management and control of a trial, the trial judge should avoid intemperate language, both in what he says and how he says it; constant vigilance in avoiding the appearance of partiality, anger, and impatience is required of trial judges who should be conscious at all times that the high office of a

judge of the Court of Common Pleas requires a temperament consonant with the high calling of the judiciary.").

There is substantial danger when the trial court steps away from its role as a neutral and becomes actively involved in the adversarial process even when the conduct takes place outside the presence of the jury. This danger can be seen in judicial involvement in plea negotiations. *See* United States v. Kyle, 734 F.3d 956, 965–66 (9th Cir. 2013) (*quoting* United States v. Kraus, 137 F.3d 447 (7th Cir. 1998)) (Noting that judicial remarks directed to future or ongoing plea negotiations which "suggest what will satisfy the court" transform the court "from an impartial arbiter to a participant in the plea negotiations."). A trial judge that takes an active, adversarial role in convincing a co-defendant to waive their right to remain silent and testify against an accused has transformed the court from an impartial arbiter to an active and adversarial party in the criminal prosecution. *See* United States v. Kyle, 734 F.3d 956, 965–66 (9th Cir. 2013).

It is also improper for a trial judge to assume the role of advocate on behalf of the prosecution, impacting both the due process rights of the accused and the public's perception of the court as neutral. *See* Archer v. State, 383 Md. 329, 347, 859 A.2d 210, 221 (2004) ("The trial judge departed from a neutral judicial role and acted as an advocate in expressing an opinion to [witness] about how he could testify."); People v. Blalock, 239 Ill. App. 3d 830, 836, 607 N.E.2d 645, 649 (1993) (finding it was "inappropriate for the trial judge repeatedly to inform the witness of [the right to remain silent] and editorialize that testifying would be foolish").

Our Supreme Court has also cautioned trial courts to avoid providing their personal opinions about the wisdom of waiving important rights. *See* State v. Gunter, 286 S.C. 556, 559, 335 S.E.2d 542, 543 (1985) ("Before a defendant testifies, the trial judge may establish that he understands his Fifth Amendment privilege by fully advising him of his right to testify or not to

testify. *This inquiry must be limited in scope, and it is impermissible for the judge to express his opinion, although the opinion may be based upon his experience and best judgment.*") (emphasis added). The inherent danger of the improper influence of trial judge's personal opinion on waiving fundamental rights typically warrants reversal even absent a showing of prejudice. *See* Butler v. State, 302 S.C. 466, 467, 397 S.E.2d 87, 87 (1990); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986). For example, in Pierce, this Court reversed where the trial judge told a capital defendant that while the jury could not hold it against him if he did not testify: "I am going to charge [the jury] that the law does not permit them to hold it against you, but they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but have it in their mind and wonder why he did not tell us his side of it." Id., 289 S.C. at 434, 346 S.E.2d at 710. This Court held these comments by the trial judge were "erroneous, improper and contrary to South Carolina law," and reversed and remanded for a new trial. Id.

In the present case, the trial court's actions, outlined *infra*, assumed the role of advocate for Jones to waive her privilege against self-incrimination over the objection of Jones' counsel in violation of Gunter and Pierce, and that advocacy impacted the right of the appellant to be tried before a neutral judge rather than an advocate for his prosecution.

B. The court stepped outside of its role as neutral and actively pressured and advocated for co-defendant Jones to waive her right to remain silent and testify against appellant.

When informed that co-defendant Jones would assert her Fifth Amendment right to remain silent if called as a witness, the court stepped outside the role of neutral and pressured Jones to waive her rights and testify against appellant. At the time of appellant's trial, Jones was facing the same charges but had not yet been called to trial. The solicitor indicated the state intended to call

Jones to testify against appellant, and if she "didn't play along" they would set her trial immediately. R. 42, l. 23 – 43, l. 6. Jones was represented by Robert Forney. R. 42, ll. 2 – 10.

Forney informed the court of his concerns over Jones' competency and that she would be asserting her right to remain silent. R. 231, ll. 16 – 19. The court then proceeded to engage in a lengthy exercise to convince Jones to change her mind and help the prosecution.

Initially, the court questioned Rivers about her background and family, finding some interest in her relation to Nelson Rivers.[4] R. 234, l. 1 – 236, l. 18. The court then asked the direct question required:

> THE COURT: And the solicitor wanted me to ask you whether or not you plan to testify in this case.
>
> MS. JONES: I plead the Fifth. No answer.
>
> THE COURT: "I plead the Fifth. No answer." How did you figure that out?
>
> MS. JONES: Because that's what God want me to do.
>
> THE COURT: That's what? That's what what?
>
> MS. JONES: That's what God want me to do.
>
> THE COURT: That's what God wants you to do? I see.

R. 236, l. 25 – 237, l. 12.

The court then inquired into the details of Jones' medication and mental health history. R. 238, l. 5 – 24. After a discussion on Jones' competency evaluation and the proper role of the court and the lawyers involved, the court indicated he believed Jones's mental health had improved based upon his conversation with her to that point. R. 241, ll. 2 – 16. Forney explained his concerns

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[4]The court used Nelson Rivers, a minister at Royal Baptist Church in Charleston, as another source of potential advice to convince Jones to testify. "So I might call Nelson and say, 'Nelson, what do you want me to do with your people?'" R. 247, ll. 6 – 19.

about the length of time since Jones' evaluation and her low intelligence and difficulty understanding legal concepts. R. 241, ll. 17 – 25.

In response to whether a plea offer for testimony had been arranged, the solicitor indicated:

> *It was always sort of my understanding that she would be testifying as a state's witness and then -- I don't know.* This was scheduled February 20 for trial, and maybe a week or two beforehand Mr. Forney indicated that she would be pleading the Fifth under his advisement. Now I just want to make sure everybody is of the same understanding that I will be moving to put her on the trial docket as soon as possible.

R. 243, ll. 2 – 10 (emphasis added).

The court warned both appellant and Jones of the danger inherent in a jury trial and the danger of a long prison sentence. R. 243, l. 25 – 244, l. 12. The court then involved Jones' aunt, Beverly Rivers, in the discussion:

> THE COURT: I'm talking to Ms. Beverly Rivers more than anyone else in here today because, yeah, you can just say, "I want a jury trial. I'm pleading the Fifth. I'm not going to say anything." And when you have a jury trial, you don't have to testify. *You can take the Fifth, and Mr. Scott* [the solicitor], *he doesn't -- I mean, he -- he would love to -- obviously he picked out the guy he thinks is most guilty and put him on trial.* And you can want a trial but, you know, you – *you might want to consider trying to figure out how to get out of this jam that you're in.*

R. 244, l. 20 – 245, l. 6 (emphasis added).

The court then told Jones that she was likely not really responsible for anything despite the fact that DuBose had already testified to the jury that Jones both kicked and punched him. R. 182, ll. 3 - 23.

> I don't know what her degree of culpability is. It's hard for me to believe that she would've -- she would've beaten the man in the head

> and forced him in the trunk and all that stuff. Sounds like she was just the third wheel here.[5]

R. 245, ll. 7 – 12.

The court then focused on the dangers of Jones going to trial and not working out a deal, even implying there would not be a prison sentence for her if she cooperated, and encouraged Jones' relatives to apply additional pressure.

> THE COURT: Well, you can have all these trials, and people can end up in prison for a long period of time, *or you can figure out a way that you can try to get out of this. And, of course, I'm not -- you know, I'll put a guy in prison a lot faster than I'll put a woman in prison, especially a woman that has three children.* And I'm not saying whatever should be an end result. But it's so easy to say, "Well, I'm going to take the Fifth. I'm not going to cooperate. I want me a jury trial. I'm thinking this is just going to go away." And then you have a jury trial. If you get found guilty, then you have some serious problems.
>
> Ms. Beverly Rivers, and if she's got problems, you've got problems. And so you-all need to think hard.

R. 245, l. 24 – 246, l. 15 (emphasis added). The court told Jones that testifying in appellant's case would not make an impact but would "make a whole lot of difference in your case, because it sounds like you're in a lot of trouble too." R. 248, ll. 2 – 5.

After Jones' counsel indicated there had been no plea offer from the solicitor's office, the court stepped in again to advocate for Jones to waive her rights and testify.

> THE COURT: Yeah. You know, whatever y'all want to do. But this is a case from 2019. We've got a jury out, and we've got all these people here from Charleston. And if you all want to figure out what to do -- Mr. Scott [solicitor] can't handle two cases simultaneously. I mean, it seems as if y'all would have been thinking on this already.

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[5]This lack of individual culpability ultimately mirrored the version of events Jones relayed to the jury, blaming appellant for the criminal actions and indicating she was forced to participate. R. 411, ll. 11 – 17.

> You know what I mean, Ms. Rivers -- Ms. Jones, you know what I mean, right?
>
> A lot of people who -- everyone loves to say, well, this person's incompetent. They don't have good sense. You know, all of us have in a lot of ways the same amount of sense. You know, we all have positives and negatives.
>
> And just like Mr. -- Mr. Victim there, Mr. Dubose, he has good sense, but you've got to pull it out of him.
>
> Then Mr. Defendant here, Mr. Dixon, claimed he didn't understand anything. He's got good sense. *So, y'all better figure these cases out because Mr. Scott will go one after the other. He'll call these cases, and either you're guilty or not guilty. But if you're guilty, you know, then the judge is ready to throw the hammer or do whatever. But you're facing a lot of time.*

R. 248, l. 9 – 249, l. 8 (emphasis added).

The court then called on DuBose to present additional testimony regarding the culpability of Jones even though he had already been called as a witness and testified under oath.

> THE COURT: You help her [speaking to Beverly Rivers]. You help her figure out the right thing to do in consultation with your lawyer. But when all is said and done, the lawyer will go home tonight.
>
> MS. RIVERS: Yes, sir.
>
> THE COURT: And your client may or may not go home tonight, or whatever the case is heard. So we're going to press on with this trial, and you all figure out what you're going to do or want to do. Because you know what the accusation is. *And then, Mr. Guy back here, Dubose -- Mr. Dubose, did she hit you? Stand up and talk.*
>
> MR. FORNEY: Your Honor, I object to this.
>
> THE COURT: *I'm talking to Mr. Dubose, not to you. Did she hit you, Mr. Dubose?*
>
> MR. DUBOSE: Yeah. She kicked me in the trunk.
>
> THE COURT: Sir?
>
> MR. DUBOSE: Yeah.

MR. SCOTT: He said she kicked him into the trunk.

R. 249, l. 15 – 250, l. 11 (emphasis added)

In response to Forney's objection, the court questioned his professionalism and advice in front of Jones:

> That's what I'm saying. You know, *you come in with all the lawyering and end up lawyering so much that your client is in prison, and you're back home.* You need to make some wise decisions in dealing with representing these people. It's not about the technicalities of this and the technicalities of that. *It's about the future of these people who are being placed on trial and who sometimes end up getting the short end of the stick because of this over lawyering.* That's the way I see it.

R. 250, l. 23 – 251, l. 8 (emphasis added).

When Forney told the court the solicitor had made no offers, the court indicated that "the whole notion that the solicitor has to go around begging people to cooperate -- sometimes the lawyer needs to be begging the solicitor to let them cooperate for the benefit of their own client." R. 251, ll. 21 – 25. The court then referenced another client of appellant's own counsel (Aimee Zmroczek) who was cooperating with the state in connection with the various Murdaugh trials and that it was "good lawyering" for appellant's counsel to seek to cut a deal with the solicitor. R. 252, l. 2 – 14. Once again applying pressure to Jones' family, the court told Beverly Rivers:

> THE COURT: I'm just speaking a word to the wise, particularly Ms. Beverly. You're in charge of this lady, right?
>
> MS. RIVERS: Yes, sir.
>
> THE COURT: All right. That's why I'm saying I'm talking to you more than anyone else and your husband and everybody else, because you have to make family decisions on these things. And Mr. Forney has come and gone out and comein and gone out, and now it's your turn to go out and deal with your client and figure out what, if anything, y'all can do with this case because I won't be the judge, chances are. I'm just here on this case with Mr. Dixon at this time. And it doesn't matter to me whether this lady testifies or not. It doesn't matter to me whether she has a jury trial or not. But my interest is that these *people who are*

> *being accused and who come in with lawyers who try to do lawyer-y things so much so in a lot of instances that their clients get the short end of the stick.* And I don't want this lady here, Ms. Jones, to get the short end of this stick unless she deserves to get it. And that's all I'm going to say. How about that, Ms. Beverly? How about that?
>
> MS. RIVERS: Yes, sir. I agree with you.
>
> THE COURT: You know what I'm talking about.

R. 252, l. 14 – 253, l. 16.[6]

The court then inquired when Jones could be set for trial, with the solicitor indicating they could try her the next day. R. 254, ll. 7 – 22. When Forney provided information to help with scheduling Jones' trial, the court questioned his veracity.[7]

C. Appellant's motion for mistrial and recusal.

Based upon the court's unusual pressure on Jones, the court's statements regarding the culpability between Jones and appellant, and the court's statements of bias based upon the sex of the two co-defendants, appellant's counsel moved for a mistrial and recusal. R. 360, l. 22 – 361, l. 15. In making the motion, counsel for appellant cited Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981) requiring judicial disqualification upon a showing of personal bias or prejudice on the part of the judge. Appellant's counsel provided the court with a transcript from its earlier interaction with Jones, and the court reviewed this transcript during the motion hearing. R. 364, l. 7 365, l. 12. Counsel for appellant argued a mistrial was appropriate "where argument by the trial judge indicates a lack of neutrality and cannot be cured by instruction." R. 362, ll. 12 – 14. After

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6 With this interaction with Jones' family, the court effectively was provided legal advice to Jones in contravention to that of her attorney and interjecting family members to serve as additional leverage supporting the court's legal advice to Jones.

7 The court indicated disbelief at Forney's trial schedule, indicating "And I'm going to -- I'm going to monitor -- have my clerk monitor the schedule and see how many of those trials you actually did during, based on what you've just told me, you have scheduled." R. 255, ll. 1 – 5.

discussing the interactions with Jones, counsel for appellant noted the "problematic statements with regard to the neutrality and an opinion on the facts." R. 366, ll. 6 – 8.

The solicitor believed the court's pressure on Jones was entirely proper:

> MR. SCOTT: I always found it to be very unbiased, very neutral, Your Honor. I think what you did yesterday was 100 percent appropriate. Everything you said was 100 percent accurate. I hope she testifies; they hope she doesn't. We'll see what happens.

R. 377, l. 23 – 378, l. 3.

The court denied the motion for recusal and mistrial. R. 378, ll. 4 – 12. In making the ruling, the trial court noted the improper impact his actions may have had on appellant: "I can understand that a defendant who may not fully comprehend everything may -- may have a feeling one way or the other." R. 378, ll. 5 – 7.

D. The court should have granted a mistrial and recused himself after stepping outside the role of neutral and advocating on behalf of the state for a witness to waive their rights and provide incriminating testimony against appellant.

As noted, in South Carolina it is improper for the trial court to provide his opinion on the wisdom of waiving important rights like taking the stand and waiving the Fifth Amendment. *See* State v. Gunter, 286 S.C. 556, 560, 335 S.E.2d 542, 544 (1985) (holding "the comments of the trial judge constitute reversible error because he exceeded the scope of his authority to instruct the appellant as to his Fifth Amendment rights" by expressing his opinion on the wisdom of that decision). Here, the trial judge did not simply inquire of Jones about her decision to invoke the Fifth Amendment, he actively lobbied and pressured Jones to waive such right and testify as outlined *supra*.

In a similar case involving driving a reluctant witness onto the stand, the Court of Appeals of Maryland noted that the "trial judge departed from a neutral judicial role and acted as an

advocate in expressing an opinion to [witness] about how he could testify." Archer v. State, 383 Md. 329, 347, 859 A.2d 210, 221 (2004). It is important to note that the witness in Archer no longer had a Fifth Amendment right to refuse to testify, while in the present case Jones still had such a right the court encouraged her to waive over her own counsel's advice.

"When the court intervenes in this process [resolving conflicts in testimony], it may unduly influence the witness to shape his testimony to what the witness believes the court expects." Com. v. Laws, 474 Pa. 318, 326, 378 A.2d 812, 816 (1977). Here, the trial judge told Jones it could not believe she played any role in the crime, despite the earlier testimony of Dubose about Jones kicking and forcing him into the trunk, and implied Jones was merely present during the actions. R. 245, ll. 7 – 12. Ultimately, Jones' testimony adopted this merely present view of the interaction with Dubose by making herself a mere spectator to the alleged events. R. 411, ll. 11 – 17.

"A court abandons its neutral role and commits fundamental error by *sua sponte* prompting the prosecution to present evidence or take certain actions that allow the State to prove its case when it otherwise may not have done so." Baugh v. State, 253 So. 3d 761, 763 (Fla. Dist. Ct. App. 2018). Here, the court actively drove Jones to waive her Fifth Amendment right and testify against appellant. Courts have long noted the danger to due process when a trial judge drives a witness from the stand or into invoking Fifth Amendment rights. *See* Webb v. Texas, 409 U.S. 95, 98 (1972) ("[W]e conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."). Appellant's due process rights to a fair trial before a neutral judge are likewise impermissibly impacted by a trial court acting as advocate and prosecutor to drive a witness to waive important rights and take the stand.

Here, respectfully, a reasonable person would be in little doubt that the court was attempting to aid the prosecution based upon the court's extensive efforts to drive Jones to take the stand and testify against appellant. It is "well settled [that] judges should recuse themselves where questions of impartiality or impropriety are raised." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). Judicial Canon 3 requires a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3(E), Rule 501, SCACR. The court improperly stepped into the role of advocate and should have declared a mistrial and recused himself from further proceedings. This Court should reverse the denial of the mistrial motion, reverse appellant's conviction, and remand this case for further proceedings before a different trial judge.

2. A trial before a judge who admitted he would discriminate in sentencing based upon a difference in gender between appellant and co-defendant was a violation of appellant's due process right to a fair trial.

In the presence of appellant, while pressuring co-defendant Jones to waive her right to remain silent and take the stand, the court stated: "I'll put a guy in prison a lot faster than I'll put a woman in prison, especially a woman that has three children." R. 246, ll. 3 - 5. As noted *supra*, "every person charged with a crime has an absolute right to a fair and impartial trial." Kennedy, 272 S.C. at 234, 250 S.E.2d at 339. An accused "has a due process right to have his case heard by a fair and impartial judge." Langford, 400 S.C. at 437, 735 S.E.2d at 479. Being tried and sentenced by a judge that has an admitted bias in favor of a co-defendant charged with the same offenses based solely upon gender is a violation of that right requiring reversal.

"[T]he fair meaning of any remark must be interpreted in the light of the context in which it is uttered in determining whether the remarks show personal bias or prejudice on the part of the judge sufficient to require that he be disqualified." Shaw v. State, 276 S.C. 190, 192–93, 277 S.E.2d 140, 141 (1981). Shaw is particularly instructive here, as our Supreme Court noted the offending comments indicating bias or prejudice were made in a "off-hand and joking manner." Id. at 192, 277 S.E.2d at 141. Ultimately, our Supreme Court held that "the only reasonable view of the facts alleged [improper judicial comments indicating a bias against Shaw] are that they indicate an attempt at levity to ease the tensions created by the magnitude of the case concerning Mr. Shaw, rather than any actual personal bias on the part of the judge." Id. at 193, 277 S.E.2d at 141.

In contrast, the court here was obviously in earnest when he told Jones "I'll put a guy in prison a lot faster than I'll put a woman in prison, especially a woman that has three children." R. 246, ll. 3 - 5. The court acknowledged his heated tone during the Jones testimony:

> MS. ZMROCZEK: *She wasn't going to testify and then she goes in front of the Court where there's a pretty heated exchange where the Court's saying how much time she can get and she better think about it and yelling at her lawyer.* And I've got to figure out how to -- because I'm certainly not trying to -- you know, I can't drag you into the case, but I've got to figure out the way to protect my client's rights and still –
>
> THE COURT: *Now, I didn't yell at her lawyer now.* You know, I'm behind this glass enclosure. I have to speak so you can hear me.
>
> MS. ZMROCZEK: Certainly. *The tone of the delivery was certainly out of frustration. And I think you even said that you just frustrated that -- that they clog up the system.*
>
> THE COURT: *Understood. Mr. Forney is a -- is a seasoned public defender. He's -- he knows how to handle himself. He's fine.*
>
> MS. ZMROCZEK: He absolutely does. I'm not worried about him. *I'm just worried about the effect that it may or may not have on my client.* I just need to research that.
>
> THE COURT: I understand. But she still have to -- just like he tried to object to me talking to the victim, he's not in this case. So you likewise, you don't represent him. So -- I mean her.
>
> MS. ZMROCZEK: I definitely don't represent –
>
> THE COURT: You do your research and we'll see where it goes.
>
> MS. ZMROCZEK: I will, Your Honor.
>
> THE COURT: *There's a lot of frustration particularly on a case like this where all of these people, each one of them have their own individual problems and issues.* And you know, who may not well understand what's going on here.

R. 341, l. 24 – 343, l. 12 (emphasis added).

The context of the remarks came as the trial court emphasized his opinion, despite the contrary testimony of Dubose, that it was hard for the court to believe that Jones "would've beaten the man in the head and forced him in the trunk and all that stuff. Sounds like she was just the third wheel here." R. 245, ll. 8 – 11. The prejudicial remarks were not made in jest or in a light-hearted moment as in Shaw.

A trial court judge that explicitly tells an accused he is going to face a longer sentence based solely upon his gender has admitted a bias based upon gender and violated the due process rights of the accused.

> The trial judge must act with absolute impartiality in the performance of judicial duties. Canon 3 of Rule 501, SCACR. Reference by a trial judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice to the defendant.

State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (dealing with comments about counsel being young and a "pretty girl" and a "nice girl" undermined counsel's credibility before the jury and prejudiced the defendant); *see also* State v. Kennedy, 272 S.C. 231, 234, 250 S.E.2d 338, 339-40 (1978) ("The trial judge's action in this case [calling accused testimony lies] is totally incompatible with the right of the accused to a fair trial. His remark is so totally irreconcilable with the proper image of a neutral trial judge that we are compelled to condemn it in the strongest terms.").

While no South Carolina authority has been located directly addressing this issue, other courts have addressed a trial judge's comments indicating a bias based upon gender as a violation of due process and equal protection. The Fourth Circuit reviewed a sentence disparity after the trial judge stated on the record:

> Well, these modern philosophies that have come forward lately about women's liberation is such that I reckon legally I can't make a distinction between your sentence and your co-defendants, but I'm

> old-fashioned enough I just don't believe in punishing women who participate in a crime with the men on the same basis as a man. Ordinarily I think the man takes the lead and persuades the female, the woman.

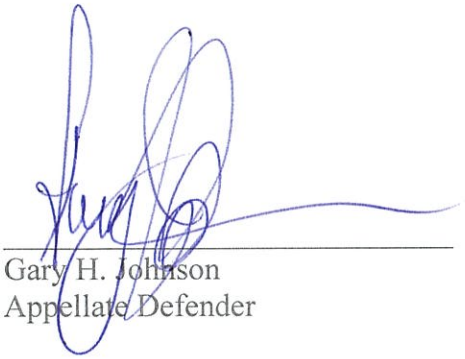
United States v. Maples, 501 F.2d 985, 986 (4th Cir. 1974). In overturning the sentence, the Fourth Circuit noted that "absent any proof that rehabilitation or deterrence are more easily accomplished in the case of females rather than males, we deem the factor of sex an impermissible one to justify a disparity in sentences." Id., 501 F.2d at 987.

The court's statements were also a violation of the Judicial Canon's requiring that a "judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, *by words or conduct manifest bias or prejudice*, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so." Canon 3(B)(5) of Rule 501, SCRAP (emphasis added).

Appellant's due process rights were violated by being tried by a judge who admitted bias and prejudice based on gender. This improper judicial bias, while expressed outside the presence of the jury, falls within the conduct prohibited in Pace and dictates a new trial before a neutral judge.

CONCLUSION

By reasons of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Richland County Court of General Sessions for a new trial before a different trial judge.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2024.

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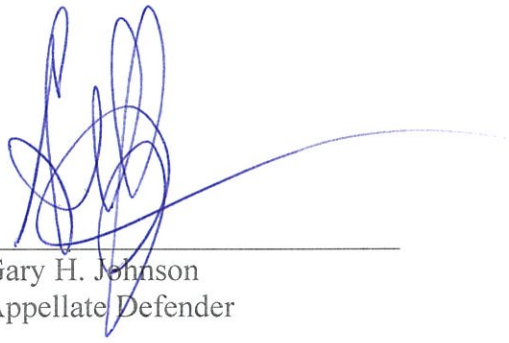
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

October 21, 2024.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

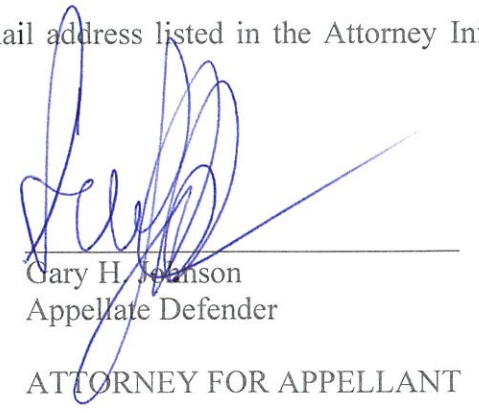
MARTIN DIXON,

APPELLANT

APPELLATE CASE NO. 2023-000597

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 21st day of October, 2024.



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ATTORNEY FOR APPELLANT

Leverett, Scott

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Der Ms. Shupe,

Attached please find a copy of the Final Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Gary Johnson
Appellate Defense