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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Kieth Kelly, Circuit Court Judge

Appellate Case No. 2024-000439

The State, ...Respondent

v.

Cody Hudson, ...Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Question I

The trial court erred as a matter of law by allowing law enforcement, in violation of his due process rights, to shackle Cody Hudson during the reading of the verdict and polling of the jurors.

The State argues, "The trial court acted within its discretion in allowing [Mr. Hudson] to be shackled during the reading of the verdict" but contradicts this position by acknowledging the trial judge merely "determin[ed] it was customary" to shackle an accused during the reading of the jury verdict and polling the jurors in Spartanburg County. Brief of Respondent, p. 7. *And see* Tr. 675-76 (trial judge questing law enforcement about the local practice). Following the customary practice of law enforcement is not a judicial exercise of discretion. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes,* 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App.1997).[1] Acquiescing to the local customary practice is a far cry from the individualized security determination required on a case-by-case basis. *Deck v. Missouri*, 544 U.S. 622 (2005); *State v. Heyward*, 441 S.C. 484, 895 S.E.2d 658 (2023); *Reese v. State*, 441 S.C. 392, 894 S.E.2d 295 (Ct. App. 2023).

The State relies on *State v. Tucker*, 320 S.C. 206, 464 S.E.2d 105 (1995), which affirmed shackling of the accused during a capital trial. Brief of Respondent, p. 7. Tucker, however, had "two previous convictions for escape, and at least one for attempted escape," and "fled the State and resisted arrest assaulting the officers in Maggie Valley," North

[1] In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

Carolina. *Tucker*, 320 S.C. at 209, 464 S.E.2d at 107. In contract to this case, Tucker's "shackles were not visible to the jury." *Id. Tucker*, accordingly, supports Mr. Hudson's position.

The State advances two arguments regarding prejudice to Mr. Hudson. First, the State argues Mr. Hudson "was only shackled for the reading of the verdict and polling of jurors, limiting the risk of any prejudice."[2] Brief of Respondent, p. 8. Arguing limited prejudice is an acknowledgement of actual prejudice. This case was tried in the old Spartanburg County Courthouse. Mr. Hudson consistently described the layout of the courtroom and the opportunities of all jurors to see the shackles. Tr. 6-7; R. *; Brief of Respondent, p. 6. The State does not dispute the jurors' opportunities to see Mr. Hudson shackled. Brief of Respondent, pp. 7-9.

Second, the State argues the error was harmless, claiming the prosecution "presented overwhelming evidence of Appellant's guilt" because the child "testified in detail about the assaults," the child "was in possession of a photograph of Appellant's penis, and DNA evidence found on Appellant's sperm on a washcloth in [the child's] closet." Brief of Respondent, pp. 8-9. This Court must reject this argument for two reasons. First, the State asks this Court to apply a reduced standard for harmless error. Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). The State never acknowledges this standard. Second, Mr. Hudson testified at trial, denied the allegations, and offered plausible non-guilt explications about the DNA

[2] The State does not argue the general prohibition against shackling an accused does not apply during the reading of the verdict and polling the jurors. *People v. Sanders*, 39 N.Y.3d 216, 207 N.E.3d 423 (2023).

evidence photograph alleged to be his penis. Here, there was no medical evidence of sexual abuse and neither the DNA evidence nor the photograph corroborated a sexual assault. *Compare State v. Kromah*, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse."). *See also State v. Chavis*, 412 S.C. 101, 105, 771 S.E.2d 336, 338 (2015) (medical "exam also revealed Victim had chlamydia," and "the State presented medical records that Appellant was taking medicine commonly used to treat chlamydia at this time."); *State v. Berry,* 332 S.C. 214, 221, 503 S.E.2d 770, 774 (Ct. App. 1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the [inadmissible evidence], the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.").

This Court should hold the trial court erred by allowing law enforcement to shackle Mr. Hudson during the reading of the verdict and polling of the jurors. This Court, additionally, should hold the State failed to demonstrate the error was harmless and order a new trial.

Question II

The trial court erred as a matter of law by not removing Juror No. 81 after he failed to disclose to the Court that he knows Sara Jumper and is friends with her on Facebook.

Cody Hudson filed and served his Initial Brief of Appellant on July 19, 2024, citing to *State v. Rowell*, No. 2022-000571, 2024 WL 3435567, at *1 (S.C. July 17, 2024). The State filed its Initial Brief of Respondent on December 18, 2024. During the interim between the two initial briefs, on September 18, 2024, the Supreme Court of South Carolina reissued its opinion in *State v. Rowell*, 444 S.C. 109, 906 S.E.2d 554 (2024), but the opinion remains essentially the same.

The crux of the State's argument is the trial court convened a hearing and determined the juror was not biased. Brief of Respondent, pp. 11-12. After *Rowell*, the test is simple:

> Where a party claims a juror has withheld material information in response to a *voir dire* question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias. This will typically turn on the nature of the information withheld, rather than the nature of the juror's state of mind in not disclosing it. The nature of the fox's disguise matters little to the chicken.

444 S.C. at 115, 906 S.E.2d at 557. *Rowell* further held:

> [W]hen a juror untruthfully answers or fails to answer a material *voir dire* question, the juror's bias may not be presumed, and a new trial may be ordered only when prejudice is proven by showing the concealed information reveals a potential for bias *and* would have made an objectively material difference in the moving party's use of a peremptory strike or resulted in a successful challenge for cause.

Id., 444 S.C. at 115-16, 906 S.E.2d at 557.

As set forth in the Brief of Appellant, at pp. 10-11, Mr. Hudson maintains knowledge that a material witness for the prosecution, who he contend at trial supplied the

motive for the child to fabricate false allegations, sufficiently revealed a potential for bias Even without benefit of the *Rowell* test, Mr. Hudson informed the trial court, based the information ultimately disclosed, he would have "struck" the juror. Tr. 572-73. This Court should reverse the trial court and order a new trial.

Question III[3]

The trial court erred as a matter of law by not quashing the indictments for second-degree criminal sexual conduct with a minor as multiplicitious.

Cody Hudson argues the two indictments for second-degree criminal sexual conduct with a minor are multiplicitious. Brief of Appellant, pp. 11-15. The State argues this practice is consistent with our state's caselaw, citing *State v. Tumbleston*, 376 S.C. 90, 645 S.E.2d 849 (Ct. App. 2007) and *State v. Smith,* 276 S.C. 484, 280 S.E.2d 56 (1981). As set for in the Brief of Appellant, at pp. 12-13, other cases suggest a different result, to wit: *State v. Pee Dee News Co*., 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985); *State v. Sheppard*, 248 S.C. 464, 150 S.E.2d 916 (1966). *See also State v. Greene,* 423 S.C. 263, 814 S.E.2d 496 (2018) (to avoid double jeopardy, one homicide is limited to one homicide punishment per defendant).

Accordingly, it might be necessary to overrule *Tumbleston* and *Smith.* The Court of Appeals "lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court." *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *affirmed as modified by State v. Cheeks,* 408

[3] The State seemingly addressed Questions III and IV in one argument. Initial Brief of Respondent, pp. 12-14. During this combined argument, the brief states, "Appellant testified in detail about this assault and significantly stated that Appellant penetrated her vagina with his penis." *Id*., p. 14. Mr. Hudson testified at trial and denied these allegations and believes the first of three uses of the term "Appellant" in this sentence is a scrivener's error and, therefore, declines to address this statement any further.

S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9. This Court, therefore, should consider transferring this appeal to the Supreme Court pursuant to Rule 204(b), SCACR.

Question IV

Alternately, this Court should reverse the trial court and remand this case for the trial judge to reconsider the sentences for the two counts of second-degree criminal sexual conduct with a minor because the trial court impermissibly imposed consecutive sentences, exceeding the maximin penalty allowed by law, on these two indictments that are multiplicitious.

The State seemingly addressed Questions III and IV in one argument by reframing the questions presented:

> The [trial] court properly did not quash the indictments for second degree criminal sexual conduct with a minor. Additionally, the crimes are separately punishable and not impermissibly consecutive.

Brief of Respondent, pp. 12-14. The State cites no authority in support of the second sentence of this issue statement, and this Court should deem Mr. Hudson's position unopposed and any position by the State to the contrary abandoned. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.").

Regardless of whether the State abandoned this issue, the outcome of Question IV is contingent on the outcome of Question III. As discussed in Question III, this Court should consider transferring this appeal to the Supreme Court pursuant to Rule 204(b), SCACR.

(conclusion and signature on next page)

CONCLUSION

For the reasons stated in the Brief of Appellant and this pleading, this Court should reverse the trial court and order a new trial. Alternatively, this Court should remand for the trial court to reconsider the sentence on the two counts of second-degree criminal sexual conduct with a minor.

Respectfully Submitted,

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Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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