

 ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

TYRONE WHATLEY,

APPELLANT

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Appeal from Florence County

D. Craig Brown, Circuit Court Judge

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Opinion No. 5209

Appellate Case No. 2011-185486

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PETITION FOR REHEARING

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**SC Court of Appeals**

On March 19, 2014, this Court affirmed Petitioner's convictions for first-degree burglary, two counts of armed robbery, and conspiracy and life sentence in a published opinion. State v. Whatley, Op. No. 5209 (S.C. Ct. App. filed Mar. 19, 2014). This Court found the trial court erred in preventing Appellant from cross-examining a cooperating co-defendant concerning the mandatory minimum sentence she faced for reduced charges pending at the time of Appellant's trial, but found Appellant suffered no prejudice because he had ample opportunity to demonstrate the cooperating co-defendant's bias. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court

rehear the matter limited to whether Appellant suffered prejudice based upon the following points overlooked or misapprehended by the Court.

Without question, Ussery faced mandatory minimum sentence, which she avoided by testifying against Appellant. The South Carolina Supreme Court held that such a fact was “critical information that a defendant must be allowed to present to the jury.” State v. Gracely, 399 S.C. 363, 374-375, 731 S.E.2d 880, 886 (2012). Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution’s case.

Van Arsdall, 475 U.S. at 684; see also Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19. Although this Court applied the Van Arsdall factors to the instant matter, Appellant respectfully disagrees with this Court’s application and assessment of those factors.

This Court’s determination that the limitation placed upon Appellant’s cross-examination of Ussery did not prevent a full picture of her possible bias overlooked or misapprehended the facts as presented by the prosecution, the limited evidence against Appellant, and the governing legal principles. As this Court acknowledged, the only witnesses who placed Appellant at the crime scene were cooperating co-defendants, one of whom was Ussery. Therefore, the testimony of Ussery was vital to the prosecution. However, this Court determined Appellant suffered no harm due to the trial judge’s erroneous limitation on cross-examination because Barfield, the other cooperating witness, provided the same material facts as Ussery. Thus, this Court determined it was

cumulative to Barfield's testimony, and as a result, Appellant was not harmed by the limitation to explore Ussery's bias. This was error.

In Gracely, 399 S.C. at 376-377, 731 S.E.2d at 887, the Court found the Confrontation Clause violation was not harmless even where the evidence presented was cumulative regarding Gracely's involvement in drug trafficking. The Court explained that the testimony "only corroborated other testimony," and the prosecution presented no physical evidence connecting Gracely to the charged offenses. This "enhanced the importance of that testimony, and the necessity that [Gracely] be permitted to demonstrate any bias on the part of the State's witnesses." Id. at 376, 731 S.E.2d at 887. The Gracely Court also expressed that the background of the witnesses "should have cautioned the trial court against limiting [Gracely]'s cross examination." Id. at 377, 731 S.E.2d at 887. The witnesses in Gracely had significant involvement in criminal activity and cooperated only after arrest and the prospect of long prison terms. "In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless." Id.

The prosecution presented Ussery as an unbiased witness who had been taken advantage of by her boyfriend, Barfield. She had been bullied and pressured by her boyfriend to participate in the robberies. She was simply the getaway driver with little to no responsibility for the crimes. As such, her testimony was more than simply cumulative to Barfield's testimony. Further, as this Court acknowledged, the state's case against Appellant was weak. No physical or forensic evidence linked Appellant to the robbery. The victims were unable to identify Appellant. The officer who chased the individuals from the car was unable to identify Appellant. No items from the robbery were found with Appellant. The only evidence against Appellant was the testimony of Ussery and Barfield. Ussery testified that the third individual involved was named Jamal Bryant and used the

nickname Rom. Barfield testified the third individual went by the name of Rom. The state introduced no evidence, except the in-court identifications made by Ussery and Barfield, that “Rom” and Appellant were one in the same. Therefore, the credibility of Ussery and Barfield was paramount as their testimony was the entire prosecution case against Appellant. Ussery’s credibility was suspect, just as the cooperating co-defendants’ in Gracely exhibited highly suspect credibility. Ussery had been charged and only decided to cooperate with police after she had been sitting in jail for a substantial amount of time and faced several substantial terms of imprisonment.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

This 3rd day of April, 2014.

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CERTIFICATE OF SERVICE

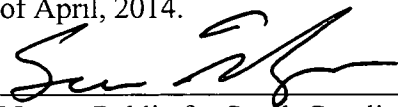
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tyrone Whatley, #208735, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3<sup>rd</sup> day of April, 2014.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day  
of April, 2014.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.