

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to Laurens County

MAY 14 2014

D. Garrison Hill, Circuit Court Judge **S.C. Supreme Court**

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court when it prohibited appellant from introducing evidence of third party guilt that the victim's son was the perpetrator when the victim did not report the crime; there was an incident two months earlier between the victim and her son documented by a 911 call; the victim told the burglar that her son was not allowed to go into her purse; the victim admitted that she had suspected her son of taking money from her; and appellant presented an alibi witness.

2. Whether the Court of Appeals erred in affirming the trial court when it prohibited appellant from cross examining the victim on the 911 call she made regarding her son two months prior to this incident when the state opened the door on direct testimony, because the victim testified that she recognized Officer Galarza because he came out and talked to her when the episode occurred with her son, William Sizemore.

STATEMENT

The Laurens County Grand Jury indicted Kevin Shane Epting on the charge of burglary first degree (Indictment # 09-GS-30-0190) and assault and battery of a high and aggravated nature (ABHAN). On November 10, 12, 13, 2009, Epting proceeded to trial before the Honorable D. Garrison Hill and a jury. He was represented by Claude H. Howe, III, and H. Katherine Anderson. The state was represented by Ronald N. Fleming. The jury returned verdicts of guilty as indicted. Judge Hill sentenced Epting to twenty years on the burglary first and ten years on the ABHAN to run concurrently. Epting's attorney filed a notice of appeal. The Court of Appeals affirmed the convictions and sentences on March 7, 2012. State v. Epting, Op. No. 2012-UP-152 (Ct. App. filed March 7, 2012). App. 1 -2. Appellate counsel for Epting filed a petition for rehearing which the Court of Appeals denied on May 25, 2012. App. 19. This Court granted the petition for a writ of certiorari on April 16, 2014. This brief of petitioner follows.

STATEMENT OF FACTS

Around 1:30 a.m. in the early morning of November 11, 2008, Marilyn Hopkins awoke when she heard someone in her home. She assumed she had locked her front door so she did not check it after going to bed. R. 27, ll. 14 – 25; R. 28, ll. 1 – 25; R. 33, ll. 1 – 25. She went into the dining area and allegedly saw Kevin Epting going into her purse. She said to him: “My son is off limits to my wallet, and you will not go into my billfold.” R. 37, ll.1 – 25.

Ms. Hopkins knew Kevin because his mother lived across the street from her and Kevin stayed there with her sometimes. R. 31, ll. 4 – 18. Kevin and his mother had helped her in the past. R. 36, ll. 14 – 22. Kevin had been to her house and eaten dinner with her and her son, Billy. R. 34, ll. 1 – 25.

The burglar then hit her in the eyes and kicked her leaving bruises, and then he left without the purse. R. 35, ll. 1 – 25; R. 36, ll. 1 – 13. She did not call the police. She said she called her sister at 1:40 a.m. R. 36, ll. 2 – 4. Her sister did not call the police until November 12, 2008, almost thirty- eight hours after the incident. R. 40, ll.17 – 25.; R. 93, ll. 15 – 25; R. 94, ll. 1 – 25; R. 95, ll. 1 – 14.

Her sister, Judy Prather, testified that she called Ms. Hopkins to check on her on November 12. Ms. Hopkins sounded very upset so Ms. Prather went over to see her. When she saw her sister’s black eyes and bruises, Ms. Prather told her sister that the person who did this cannot get away with it. Ms. Prather then called the police. Ms. Prather denied that Ms. Hopkins had called her at 1:40 a.m. after the incident. R. 77, ll. 1 – 21; R. 80, ll. 1 – 25; R. 81, ll. 1 – 25.; R. 82, ll. 1 – 25; R. 83, ll. 1 – 24.; R. 84, ll. 7 – 25; R. 85, ll. 1 – 10.

ARGUMENT

The Court of Appeals erred in affirming the trial court when it prohibited appellant from introducing evidence of third party guilt that the victim's son was the perpetrator when the victim did not report the crime; there was an incident two months earlier between the victim and her son documented by a 911 call; the victim told the burglar that her son was not allowed to go into her purse; the victim admitted that she had suspected her son of taking money from her; and appellant presented an alibi witness.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

In a pretrial motion, the solicitor moved for the court to exclude a 911 call made in September 2008 by the victim, Ms. Hopkins, to report that her son was “acting up” which the defense had indicated they wanted to introduce. The state argued that it was not relevant. R. 4, ll. 8 – 25; R. 5, ll. 1 – 25; R. 6, ll. 1 – 25.

Defense counsel argued that appellant should be allowed to introduce evidence of third party guilt and that the 911 call was connected to that. R. 7, ll. 1 – 25. Defense counsel said they wanted to present facts that would show that the victim's son, Billy Sizemore, was likely the intruder and which facts would meet the standard for third party guilt in South Carolina. R. 10, ll. 20 – 25.

Counsel outlined the law and facts supporting third party guilt. R. 11, ll. 1 – 25; R. 9, ll. 1 – 25; R. 10, ll. 1 – 25; R. 11, ll. 10. In September 2008, just two months before the burglary incident, the victim called 911, and reported that her son was “showing out” and had knocked a hole in the

wall. He left but she wanted a policeman to come out and retrieve her house key from her son who had gone next door. R. 5, ll. 1 – 12; R. 7, ll. 1 – 25.¹

Other facts were the victim's statement that her son was not allowed near her wallet. Two of the son's co-workers were willing to testify that the son, Billy, hated his mother and talked of wanting her dead. R. 10, ll.1 – 25.

Defense counsel argued that the victim's statement that her wallet was off limits to her son and the 911 call and the co-workers' testimony presented more than mere suspicion and a reasonable inference that the son was the intruder. Defense counsel argued that under Holmes v. South Carolina, 547 U.S. 319 (2006), admissibility turned not on the strength of the state's case, but if there were a reasonable inference that someone other than the accused was the intruder. In this case, that Mr. Sizemore was the intruder. R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 25; R. 14, ll. 1 – 25; R. 15, ll. 1 – 25; R. 16, ll. 1 – 25.

The judge ruled that based on State v. Gregory, 198 S.C. 98. 16 S.E.2d 532 (1941), there had to be “ a proof of connection with the crime and the train of facts or circumstances tending to clearly point out the other person is the guilty party.” R. 17, ll. 2 – 10.

The judge ruled there was no real connection between the son and this crime except the victim's statement to the intruder that her “son was off limits to her wallet and you will not go in my billfold.” He said that giving the most favorable interpretation to the defense of that statement, then it could be her son who was the intruder. However, he said it was not enough to show that the son was the guilty party. R. 16, ll. 24 – 25; R. 17, ll. 1 – 25; R. 18, ll. 1 – 21.

¹ Ms. Hopkins told police in the burglary incident that she did not know how the intruder got into her house. R. 37, ll. 18-21.

During the trial, Ms. Hopkins admitted on cross-examination that she had suspected her son, Billy, of taking money from her wallet before but she then thought maybe someone else did it. She also admitted that her son was off limits to her wallet. Her son knew that she kept her money in her purse in the china cabinet. R. 52, ll. 11 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 25.

Ms. Hopkins testified that on the morning of November 11 after the incident, she called Joyce Epting, Kevin's mother, to come to her house to be with her because she "thought the world of her." She admitted that she did not tell Ms. Epting that Kevin had come into her house and attacked her. R. 70, ll. 14 – 25; R. 71, ll. 1 – 15.

Joyce Epting testified for the defense that Ms. Hopkins called her on the morning of November 11 to come over as she had something to show her. When Ms. Epting arrived, Ms. Hopkins had two black eyes and told her that the chemotherapy treatments did that to her. She had been having treatments for cancer. R. 114, 1 – 25; R. 115, ll. 1 – 5; R. 29, ll. 1 – 24.

Sharon Corley, who was the girlfriend of Kevin during this incident, testified for the defense that Kevin spent the night of the alleged incident with her. On Sunday, November 9, 2008, they attended her stepfather's funeral. Then Kevin spent the night on Monday, November 10, and the alleged incident happened that night during the early morning hours of November 11. R. 118, ll. 1 – 25; R. 119, ll. 1 – 25; R. 120, ll. 1 – 25; R. 121, ll. 1 – 25; R. 122, ll. 1 – 25.

Ms. Corley testified that she was a paralegal and worked for an attorney. She also taught English at a reform school for boys under DJJ. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25. She had tried to give a statement to the police to let them know that Kevin could not have done this, but the police were not interested in talking to her. R. 123 – 127. She said she was "outraged at this injustice." R. 128, ll. 1 – 23.

Kevin testified in his defense. He denied committing this crime. R. 101, ll. 1 – 25; R. 102, ll. 1 – 25. He explained his whereabouts during this time and that he spent the night with Sharon on the night the incident occurred. R. 103 – 113.

The judge allowed defense counsel to proffer the above discussed evidence of third party guilt, which he had presented in his pretrial motion, at the close of the state's case. R. 98 – 100.

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008), the South Carolina Supreme Court found that trial counsel was ineffective for failing to establish Miller's defense of third party guilt. The Supreme Court determined that trial counsel was ineffective for failing to cross-examine a witness regarding similar robberies allegedly committed by a third party because Miller's sole defense was mistaken identity and third-party guilt. A specific third party was named.

In Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013), the Supreme Court ruled that trial counsel was ineffective because there was an actual conflict of interest due to trial attorney's dual representation of the defendant and his girlfriend which prevented trial counsel from pursuing a third-party guilt theory against the girlfriend even after the trial judge permitted trial counsel to pursue the third-party guilt theory. Jordan was charged with possession with intent to distribute and trafficking methamphetamine. In 2003, a confidential informant informed law enforcement that Jordan's girlfriend, Summers, was manufacturing methamphetamine. At trial, evidence so strong was introduced pointing to Summers' involvement with the methamphetamine production that the trial judge invited trial counsel to present evidence as to Summers' third-party guilt although Summers was not charged.

In Holmes v. South Carolina, 547 U.S. 319 (2006), the United States Supreme Court held that a criminal defendant's federal constitutional rights were violated by an evidence rule under which the defendant may not introduce evidence of third party guilt if the prosecution has

introduced forensic evidence that, if believed, strongly supported a guilty verdict. The South Carolina Supreme Court had held in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004), that where there was strong evidence of a defendant's guilt, especially strong forensic evidence, the proffered evidence of third party guilt did not raise a reasonable inference of appellant's own innocence.

In Kevin Epting's case, there was no forensic evidence thereby allowing a reasonable inference to his innocence. The police did not check for fingerprints, and there was no sign of forced entry. R. 89, ll. 22 – 25; R. 90, ll. 1 – 8; R. 96, ll. 1 – 25; R. 97, ll 1 – 10.

The United States Supreme Court also wrote in Holmes v. S.C., Id. that the state had violated a criminal defendant's right to have a meaningful opportunity to present a complete defense. The Court in Holmes, *supra*, wrote that the rule in State v. Gregory, *supra*, was of the type that allowed judges to exclude evidence that was repetitive or marginally relevant. The Court stated that applying this rule to third party guilt cases, the evidence may be excluded where it did not sufficiently connect the other person to the crime. The Court wrote that the point was that by evaluating the strength of only one party's evidence, no logical conclusion could be reached regarding the strength of contrary evidence offered by the other to cast doubt.

In State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2008), the Court of Appeals wrote that the rule for admitting third party guilt in South Carolina was found in State v. Gregory, 198 S.C. 98, 16 S.E. 2d 532 (1941). The rule is:

Evidence offered by an accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. at 104-105, 16 S.E.2d at 534-535.

The rule in Gregory did not require that a specific third person be named. The rule concerns “facts that are inconsistent with the defendant’s guilt.”

There was a sufficient connection between Billy Sizemore, the victim’s son, and the crime to meet the standard of South Carolina law as cited in State v. Gregory, *supra*. The victim’s statement when she saw the intruder, that her son was off limits to her wallet, would be reasonable and logical only if she were talking to her son. The victim did not report the incident and it was only reported thirty-eight hours later after her sister saw her and said the person could not get away with this crime. Her sister called 911.

Kevin had a credible alibi witness in his then girlfriend, Sharon Corley. There was no sign of forced entry and no forensic evidence.

There was a recent history of violence on the part of the son as documented by the 911 call, and evidence that his mother suspected him of taking money from her in the past. Ms. Hopkins had a motive to protect her son from going to prison and to save her the embarrassment that her own son would harm her.

During deliberations, the jury sent the judge a request to get a copy of the police report and witness statement. The note said that the jury vote was seven guilty and five not guilty. The judge stated that he had specifically told the jury not to tell him how they stood. He told the attorneys that he would have to tell the jury the record was closed. R. 129, ll. 5 – 25.

The Court of Appeals held that evidence offered by a defendant as to the commission of the crime by another person must be limited to facts inconsistent with the defendant’s guilt, and the evidence must raise a reasonable inference as to the accused’s innocence; and the application of the

limits on third-party guilt evidence should not rely on the strength of the prosecution's evidence against the defendant, but rather on the strength of the evidence proffered by the defendant.

The Court of Appeals misapprehended the issues. There was evidence inconsistent with Epting's guilt as he had an alibi from a reliable witness, Sharon Corley. The facts that the victim did not call the police, and did call Epting's mother to come over to assist her were inconsistent with Epting's guilt as it appeared the victim was trying to protect her son. The victim's credibility was at issue when she said she called her sister at 1:40 a.m. which the sister denied. Epting was prevented from presenting a complete defense.

It was thus prejudicial to exclude the evidence.

ARGUMENT

The Court of Appeals erred in affirming the trial court when it prohibited appellant from cross examining the victim on the 911 call she made regarding her son two months prior to this incident when the state opened the door on direct testimony, because the victim testified that she recognized Officer Galarza because he came out and talked to her when the episode occurred with her son, William Sizemore.

In a pretrial motion, defense counsel argued that regardless of the trial court's ruling on third party guilt, the evidence of the 911 call made by Ms. Hopkins in September 2008, just two months before this incident, was relevant because the victim did not know how the intruder got into her home. The officer who responded to the September 911 call had to go to the neighbor's house and retrieve Ms. Hopkins' house key from her son. R. 7, ll. 16 – 25. Ms. Hopkins had told the police in the burglary incident that she did not know how the intruder gained entry to her home. R. 7, ll. 18 – 21.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

During cross-examination, when defense counsel asked Ms. Hopkins about that incident, the solicitor objected based on the judge's ruling that evidence of third party guilt was not allowed. The court held an *in camera* hearing. Defense counsel argued that the solicitor had opened the door and he should be allowed to cross examine the witness. The judge allowed defense counsel to proffer

the testimony. Counsel questioned Ms. Hopkins where she admitted that Billy had put a hole in the wall. She called the law to get her key returned. R.56 – 60.

Defense counsel argued that he understood the court's ruling on third party guilt but that he was not introducing evidence. He wanted to be allowed to fully cross examine because a factual issue for the jury as to how the intruder may have gained entry. The judge ruled it was not proper questioning. R. 60., ll. 7 – 25; R. 61, ll. 1 – 25; R. 62, ll. 1 – 25; R. 63, ll. 1 – 25; R. 64, ll. 1 – 25.

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004).

The South Carolina Constitution provides:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or both.

S.C. Const. Art. 1, Sec. 14.

The right to confront and cross-examine witnesses and to call witnesses in one's own behalf are essential to due process. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The right of cross-examination is implicit in the constitutional right of confrontation. Id. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination. State v. Gillian, *supra*. The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination. State v. Gillian, *supra*.

In State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), the Court of Appeals wrote:

The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial.

Citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987).

It is the opportunity for cross-examination that is constitutionally protected. State v. Hill, *supra*, citing State v. Stokes, 381 S.C. 390, 400-01, 673 S.E.2d 434, 439 (2009). As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a "meaningful" cross-examination. Id.

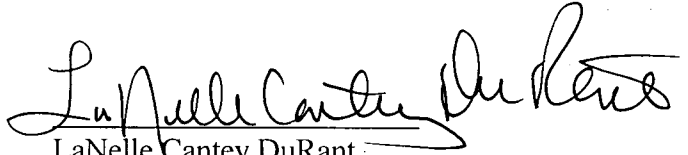
The Court of Appeals held that the admission of evidence was addressed to the sound discretion of the trial judge; and a violation of a defendant's Sixth Amendment right to confront a witness was not per se reversible error, and this court must determine if the error was harmless beyond a reasonable doubt.

The Court misapprehended Issue Two as well. The trial judge abused his discretion by violating Epting's Sixth Amendment right to confront the witness against him, the victim, by not allowing Epting to ask her about the 911 call she made when the episode occurred with her son. If the jury had known of this incident, there was a reasonable probability that it would have affected the outcome of the trial. There was a connection between the 911 call and this incident as the 911 call indicated a poor relationship between the son and mother which could give him motive to commit the crime. The fact that he took a key to her house indicated he wanted entry. The 911 call and third party guilt issues were related. Defense counsel should have been allowed to question Ms. Hopkins on the prior incident with her son.

CONCLUSION

Based on the above, Petitioner's convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of May, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

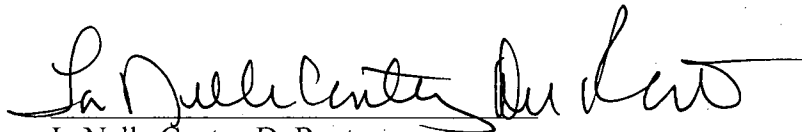
V.

KEVIN SHANE EPTING,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kevin Shane Epting #245196, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of May, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of May, 2014.

Kevin Epting (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.