

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

J. Derham Cole, Circuit Court Judge

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JUN 09 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CAROLYN POE,

APPELLANT

APPELLATE CASE NO. 2013-000356

FINAL BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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STATEMENT OF ISSUE ON APPEAL

Whether reversible error occurred when the Solicitor during cross-examination of Appellant asked her to explain why the security guard and police officer called by the State would lie falsely about the alleged crime.

STATEMENT OF THE CASE

On January 14, 2013, the Aiken County Grand Jury indicted Appellant Carolyn Poe on one count of shoplifting. R. 115 – R. 118. On February 12, 2013, Appellant proceeded to trial before the Honorable J. Derham Cole and a jury. Jeffrey A. Slocum and Kevin N. Molony represented the State, and Michael D. Routzong represented Appellant. R. 1. At the end of the trial, the jury found appellant guilty as charged. R. 106, ll. 6-8. The trial judge sentenced her to ten years incarceration suspended upon the service of three years imprisonment and three years of probation. R. 112, ll. 6-15.

ARGUMENT

THE SOLICITOR WAS NOT PERMITTED TO ASK APPELLANT TO EXPLAIN TO THE JURY WHY THE STATE'S WITNESSES WOULD LIE AND FALSELY TESTIFY AGAINST HER, AND DOING SO CONSTITUTED REVERSIBLE ERROR.

FACTS

At trial, the State presented evidence that on May 23, 2012, Appellant opened, concealed, and carried DVDs out of a Wal-Mart store in North Augusta. R. 10, l. 1—R. 33, l. 9. The State's only direct evidence of the incident was testimony from the store's undercover agent, Timothy Lawrence, who stated that he saw Appellant take a number of DVDs from the electronics department to another department, where she opened the packaging and hid the disks on her person. He claimed she then checked out a few other items in her cart and exited the store without paying for the disks. R. 10, ln. 1—R. 14, ln. 14. The State presented to the jury security video of Appellant in the store placing unopened DVDs in her buggy and later checking out at a cashier stand without the DVDs, but it had no video of Appellant actually opening and concealing the DVDs on her person. R. 33, l. 11—R. 34, ln. 12. The State also called Corporal Joshua Priester with the North Augusta Department of Public Safety, who testified that he responded to a call from the store during the incident. Upon arriving, he stopped Appellant leaving the scene in her truck, in which he observed the same eight DVDs that the store reported missing. R. 36, l. 19—R. 42, ln. 2.

Appellant testified in her own defense, explaining that although she did pick out some DVDs from the store that day, she later decided she did not want them and put them away on a shelf before she left. R. 49, l. 20—R. 59, l. 12. Appellant also explained that she always kept a number of DVDs in the truck for her kids to watch on a portable DVD player.

R. 57, ln. 7—R. 58, ln. 10. On cross-examination, the solicitor asked Appellant what motives Timothy Lawrence and Officer Priester would have to untruthfully contradict her account:

Q: Mrs. Poe, do you know of any reason why Mr. Lawrence would want to frame you for eight DVDs?

MR. ROUTZONG: Objection, Your Honor. How could she possibly know why Mr. Lawrence would be interested in lying in this case?

THE COURT: Overruled.

THE WITNESS: I don't know why he want to frame me, but I know he did sit here and lie.

Q: Okay. And why would . . . Officer Priester make up a store that he—

MR. ROUTZONG: Objection, Your Honor. He is pitting the witnesses.

THE COURT: Well, he is just asking if they would have a reason to. He's asking her if she knows of any reason that they might have. That's an appropriate question. Overruled.

Q: Any reason why Officer Priester would say that he saw . . . eight DVDs matching the ones stolen from Walmart in the back of your truck? . . .

A: I don't know why he would say that. I guess he is trying to make a name for himself.

R. 71, ln. 16—R. 72, ln. 12.

DISCUSSION

The solicitor was not permitted to ask Appellant to explain to the jury why the State's witnesses would lie falsely testify against her, and doing so constituted reversible error. “It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness. This error is reversible if the accused is

unfairly prejudiced thereby.” *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (quoting *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988)). In *Bryant*, the solicitor improperly pitted witnesses by asking the defendant why the officer who made a failed attempt to stop the defendant with blue lights was giving differing testimony about the incident:

[Solicitor]: You were perfectly sober and you didn't see that police car parked in the Jamestown Baptist Church parking lot and you had to go right by it?

[Bryant]: There wasn't no policeman in the Jamestown parking lot.

[Solicitor]: He couldn't be telling the truth about that, could he?

[Bryant]: Who?

[Solicitor]: The police officer. Where do you think it came from?

[Bryant]: He must be lying because I didn't see no police car at no Jamestown Church. If he want to stop-

Id. at 219-20, 447 S.E.2d at 854. The pitting was prejudicial because “[c]redibility was a critical issue in this case as Bryant and the officer were the only two witnesses present during the entire incident.” *Id.* at 221, 447 S.E.2d at 855.

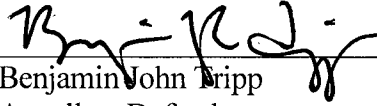
Here, the State called Lawrence to testify that he saw Appellant covertly take the DVDs from the store without paying. The State also called Corporal Priester to testify that he observed in Appellant’s truck the same eight DVDs that the store reported missing. During her direct examination, Appellant explained that although she did pick out some DVDs from the store that day, she later decided she did not want them and put them away on a shelf. On cross-examination, just like in *Bryant*, the solicitor manifestly pitted

Appellant against Lawrence and Corporal Priester by calling out the conflicting accounts and asking Appellant to explain the discrepancy. Also like in *Bryant*, the pitting was prejudicial because, as Appellant and Priester were the only two witnesses present during the incident, credibility was a critical issue. Indeed, the prejudice here was greater than in *Bryant* insofar as the solicitor impliedly asserted that Appellant was claiming the witnesses intentionally gave false accounts in order to frame her. The questioning was doubtless a measured attempt to negatively portray Appellant as dissident and unscrupulous, and the trial court should have therefore excluded the testimony.

CONCLUSION

For the foregoing reasons, Appellant Carolyn Poe respectfully requests that this court reverse her conviction and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender


ATTORNEY FOR APPELLANT

This 9th day of June, 2014.

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."

June 9, 2014



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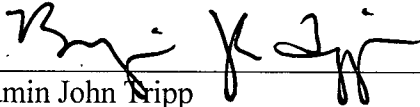
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CERTIFICATE OF SERVICE

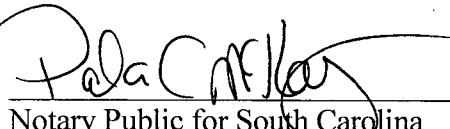
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of June, 2014.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of June, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.