

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. D. Garrison Hill, Circuit Court Judge
Appellate Case Tracking Number 2012-21234

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S.C. Supreme Court

The State,

Respondent,

v.

Kevin Shane Epting,

Petitioner.

Opinion No. 2012-UP-152 (S.C. Ct. App. filed March 7, 2012)

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON CERTIORARI..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT 4

 I. The trial court properly refused to allow Petitioner to explore third party guilt because the evidence presented was mere conjecture and was not inconsistent with defendant’s guilt so as to be admissible. 4

 II. The trial court properly limited Petitioner’s cross-examination of the victim because the State did not open the door to testimony related to the prior 911 call involving the victim’s son. Further, any error was entirely harmless because the testimony would have been entirely irrelevant and confusing to the jury. 8

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986).....	4
<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006)	4, 5
<u>State v. Beam</u> , 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999)	8
<u>State v. Burgess</u> , 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).....	5, 6
<u>State v. Gay</u> , 343 S.C. 543, 541 S.E.2d 541 (2001).....	5
<u>State v. Gregory</u> , 198 S.C. 98, 16 S.E.2d 532 (1941).....	4, 5, 6, 7
<u>State v. Page</u> , 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008).....	8
<u>State v. Stroman</u> , 281 S.C. 508, 316 S.E.2d 395 (1984).....	8
<u>Taylor v. State</u> , 312 S.C. 179, 439 S.E.2d 820 (1993).....	10
<u>U.S. v. Scheffer</u> , 523 U.S. 303(1998).....	4

Other Authorites

Rule 401, SCRE.....	10
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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly refused to allow Petitioner to explore third party guilt because the evidence presented was mere conjecture and was not inconsistent with defendant's guilt so as to be admissible.

- II. The trial court properly limited Petitioner's cross-examination of the victim because the State did not open the door to testimony related to the prior 911 call involving the victim's son. Further, any error was entirely harmless because the testimony would have been entirely irrelevant and confusing to the jury.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted on charges of burglary first degree and assault and battery of a high and aggravated nature. On November 10-13, 2009, Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury found him guilty as indicted and Judge Hill sentenced Petitioner to twenty years on burglary and ten years on ABHAN, concurrent.

The Court of Appeals affirmed the conviction and sentence. State v. Epting, Op. No. 2012-UP-152 (S.C. Ct. App. filed March 7, 2012). Petitioner served and filed a Petition for Rehearing on March 21, 2012, and at the request of the Court, the State filed a Return on April 3, 2012. The Court of Appeals denied the Petition for Rehearing by Order filed May 25, 2012. Petitioner served and filed his Petition for Writ of Certiorari on July 25, 2012. The State filed its Return on September 24, 2012. This Court granted the Petition for Writ of Certiorari and Petitioner filed his Brief of Petitioner on May 14, 2014. This Brief of Respondent follows.

Factual Background

On November 11, 2008, the victim awoke to the sound of someone in her home. She went to the kitchen and found Petitioner at the china hutch going through her pocketbook. (T.90-91; 94; R. 33-34; 37). The victim recognized the burglar as Petitioner because he had been to her home before with her son. (T.91-92; R.34-35).

The victim confronted Petitioner and told him: "My son is off limits to my wallet and you will not go in my billfold." (T.94; R.37). Petitioner stated walking toward the victim and began hitting and kicking her. (T.91; R.34). Petitioner left without taking the

purse or any money. (T.93; R.36). The victim had two black eyes, a knot on her head, bruises on her side. The victim admitted not calling the police right away because she was frightened. She later called her sister, who subsequently called the police. (T.93; 123; 129; 137-138; R.36; 66; 72; 80-81).

Deputy Galarza responded to the sister's call. (T.147-149; R.87-89). He took the statement of the victim, whom he described as upset, nervous, and scared. (T.150-151; R.90-91). She described Petitioner and later identified him as the burglar and the one who assaulted her from a photo shown by Deputy Galarza. (T.157; Supplemental R. 1).

ARGUMENT

- I. **The trial court properly refused to allow Petitioner to explore third party guilt because the evidence presented was mere conjecture and was not inconsistent with defendant's guilt so as to be admissible.**

The trial court correctly refused to allow Petitioner to explore third party guilt involving the victim's son. Petitioner maintains the court erred in prohibiting him from introducing evidence of third party guilt. He maintained he should be allowed to admit a 911 call made by the victim involving her son as well as testimony that the son had a grudge against his mom. The evidence would not have raised an inference of Petitioner's innocence and was mere conjecture at best regarding the guilt of the victim's son. Accordingly, the trial court properly excluded the evidence.

The United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986). However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308 (1998).

In Holmes, the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, this Court explained:

[E]vidence offered by accused as to the commission of the 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 bare suspicion upon another, or to raise a

conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. **Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.**

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted) (emphasis added).

The Court of Appeals addressed the standard to apply in State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010). The Court specifically acknowledged the United States Supreme Court in Holmes rejected the analysis of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and instead, “specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence.” Burgess, 391 S.C. at 23, 703 S.E.2d at 516-517 (citing Holmes, 547 U.S. at 328). In Burgess, the defendant sought to admit testimony the murder victims received threats related to their drug debts in the months leading up to their murder. The Court of Appeals affirmed the trial court’s refusal to admit the testimony because it was remote and was not inconsistent with Burgess’ guilt. Burgess, 391 S.C. at 22-23, 703 S.E.2d at 515-516.

In the instant case, the State moved prior to trial to exclude a 911 call from September 2008, approximately two months before the burglary involved in this case, involving the victim’s son. The victim called 911 and indicated her son was acting up and had knocked a hole in the wall of her home. (T.34-35; R.4-5). The victim called 911 in order for an officer to retrieve the son’s house key so he could not return.

The trial court properly utilized and applied the Gregory standard in determining whether to allow the call and events surrounding the call as evidence of third party guilt. After quoting much of the above language from Gregory, the trial court found the 911 call and events disconnected to the crime. The 911 call was two months prior to the burglary and did not involve the theft of money, but instead involved the son damaging her property. (T.47-48; R.17-18). The two events are not related, and the evidence of the 911 tape was irrelevant and would merely serve to confuse the jury as found by the trial court. (T.121; R.64). The threats about drug debts received in Burgess contain a much more direct connection to the underlying murders than a 911 call regarding property destruction has to a subsequent burglary.

Additionally, Petitioner argues the victim's statement to the burglar implicated the son. The victim reported she told the burglar: "My son is off limits to my wallet and you will not go in my billfold." (T.94; R.37).¹ The trial court properly found the evidence, even given "the interpretation most favorable to the Defense," would not show a reasonable inference of the son's guilt or Petitioner's innocence. (T.47-48; R.17-18). The statement made to the burglar certainly did not implicate the son. The only rational inference, given the language used in the statement, is the victim was talking to someone other than her son. The statement does not provide a basis for allowing in the 911 call or surrounding events as third party guilt evidence.

Petitioner further attempts to tie his "alibi" to the need to provide evidence of third party guilt. The fact he presented alibi testimony to the jury, which was clearly rejected, does not entitle him to present evidence that amounts to no more than mere speculation regarding the guilt of a third party. There is no evidence in the record the son

¹ It should be noted the statement was testified to in front of the jury. (R.37).

was near the location or was seeking money from the victim. Instead, the only evidence was he had his key to the house taken back because he caused property damage to the house. This testimony provides no basis for finding the son guilty of burglary and is certainly not inconsistent with Petitioner's guilt.

None of the evidence implicates the son or demonstrates Petitioner's innocence. Petitioner failed to produce any evidence even placing the son near the area of the victim's home on the night in question. As the Supreme Court stated in Gregory: "An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." Id. at 105, 16 S.E.2d 532, 535. The evidence of a completely unrelated incident involving the destruction of property by the son would be the epitome of "conjecture or surmise" if allowed into evidence to stand as a basis for third party guilt related to a burglary and assault of the victim. As a result, the trial court properly excluded the evidence of third party guilt, and the Court of Appeals properly affirmed that decision.

II. The trial court properly limited Petitioner's cross-examination of the victim because the State did not open the door to testimony related to the prior 911 call involving the victim's son. Further, any error was entirely harmless because the testimony would have been entirely irrelevant and confusing to the jury.

Petitioner maintains the trial court improperly limited Petitioner's cross-examination of the victim. He contends the State opened the door for testimony regarding the underlying facts of the victim's 911 call to police several months prior to the burglary. The State did not open the door, the trial court properly refused to admit Petitioner's attempt to get in through a backdoor the testimony regarding third party guilt, any error in refusing to admit the testimony was entirely harmless as it was irrelevant and insufficient to establish third party guilt so Petitioner could not have been prejudiced by its exclusion.

A determination of whether the State opened the door was within the discretion of the trial court and can only be reversed on an abuse of that discretion. See State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). Further, ordinarily, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it if the testimony would otherwise confuse the jury. State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (citing State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)).

In this particular case, the State asked the victim if she recognized the Deputy with whom she spoke after the police were called about the burglary. The victim responded by stating: "He's the one I called when the episode occurred with my son, William Earl Sizemore." The State then redirected the victim by stating: "Okay. Did

you talk to him the day after Kevin Epting broke into your house?” The victim answered: “Not to my knowledge. I called him on behalf - - because my son had come in. He was watching TV. I was watching TV. And he went into the bedroom. He was sleeping in and - -” The State again interrupted her answer so she could not go into the episode related to the 911 call. (T.98; R.41).

The victim began an explanation the officer had previously been called, but the State interrupted as soon as possible to prevent any improper disclosure of the facts of the 911 call. As a result, the State did not open the door to any further details of the 911 call being admitted into evidence. No further explanation was necessary to prohibit the jury from being confused or to allow the jury to fully understand the circumstances of this case. It is clear from the victim’s testimony she is talking about an incident unrelated to the current case and the jury would not have been confused as to whether the testimony related to Petitioner or some other incident.

Additionally, any inquiry into the events would have served merely to confuse the jury as the two incidents are clearly unrelated, and the limitation properly prohibited Petitioner from admitting evidence of third party guilt through the back door that he could not get in through the proper means. The purpose of allowing a party to provide evidence or testimony in response to the other party’s opening the door to that testimony is to reduce confusion, not create it. In this case, the trial court specifically found admitting any further testimony regarding the door slamming incident with the victim’s son “confuses the issues and could be misleading to the jury.” (R.64). The Court did not abuse his discretion in prohibiting Petitioner from exploring this area when the State did not open the door to the full incident, the victim’s testimony that supposedly opened the

door did not need clarification and would not have confused the jury, and any further discussion or attempt to cast the third party blame would only serve to confuse or mislead the jury.

Further, as the Court of Appeals properly found, any error was entirely harmless. Even if the State opened the door, the testimony regarding the 911 call was irrelevant and not properly admissible. See Rules 401 and 402; SCRE. Petitioner proffered the testimony he sought to obtain from the victim. The testimony produced the fact the victim's son had slammed open a door knocking a hole in the wall; the victim called the police to retrieve her key from her son; and the deputy retrieved the key and returned it to the victim. (T.114-117; R.57-60). None of these facts are remotely relevant or connected to the burglary for which Petitioner was convicted. As a result, the exclusion of the testimony and limitation on cross-examination could not reasonably have affected the outcome of trial. Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

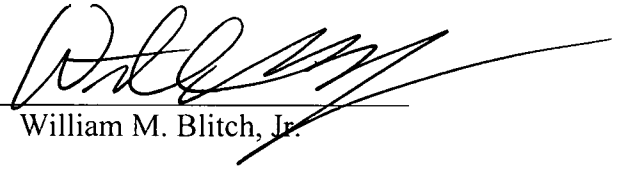
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion and Petitioner's convictions and sentences should be affirmed.

Respectfully submitted,

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June 13, 2014

STATE OF SOUTH CAROLINA

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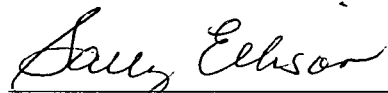
Petitioner.

PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 13th day of June, 2014.



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