

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Florence County
D. Craig Brown, Circuit Court Judge

Opinion No. 5209 (S.C. Ct. App. filed March 19, 2014)
Appellate Case No. 2014-001127

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

TYRONE WHATLEY,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A Florence County Grand Jury indicted Petitioner for one count of first-degree burglary, two counts of armed robbery, and one count of conspiracy. On August 4, 2010, the State served Petitioner with notice to seek a sentence of life without parole. On February 2, 2011, Petitioner proceeded to trial before a jury. Scott P. Floyd represented Petitioner, and Fitzlee McEachin represented the State. The jury found Petitioner guilty on all counts, and the Honorable D. Craig Brown sentenced him to life in prison for burglary and both counts of armed robbery and five years' imprisonment for conspiracy.

On February 9, 2011, Petitioner filed a Notice of Appeal. On January 31, 2012, Petitioner's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), raising the following issue: "Did the trial court erred in refusing to permit [Petitioner] to question [Jessica] Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the [S]tate dismissed two counts of armed robbery after she cooperated with law enforcement?" On September 7, 2012, Petitioner's counsel provided to the Court of Appeals State v. Gracely, 399 S.C. 363, 731 S.E. 2d 880 (2012). On December 20, 2012, the Court denied Petitioner's counsel's petition to be relieved and directed the parties to brief the following issue: Did the circuit court improperly limit the scope of Petitioner's cross-examination of the State's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against Petitioner?

On March 19, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. See State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014). Petitioner's request for rehearing was denied on April 25, 2014. A Petition for Writ of Certiorari to the Court of Appeals was submitted on June 3, 2014, and this Return follows.

ARGUMENT

The Court of Appeals properly determined Petitioner suffered no prejudice as a result of the trial court's improper limitation on the scope of Petitioner's cross-examination of State's witness Jessica Ussery regarding the mandatory minimum sentences she avoided by testifying against Petitioner.

Relevant Facts

On July 21, 2009, Brandon Cross and Ciera Davis were asleep in their motel room when Davis heard a knock on the door. (R. 59, lines 1-11; R. 76, lines 6-25; R. 77, lines 1-25; R. 78, lines 1-11.) She looked through the peephole and saw a woman. (R. 78, lines 12-20.) As she opened the door, two men burst through. (R. 78, lines 21-25; R. 79, lines 1-2.) One man was carrying a gun and both demanded money. (R. 63, lines 12-18; R. 65, lines 20-21; R. 79, lines 11-25; R. 80, lines 1-5.) Cross was able to get out of the motel room, and he ran downstairs and asked a man in an Explorer to call the police. (R. 66, lines 14-25; R. 67, lines 4-9.) Cross saw the men come down with bags and a gun and jump into a small, burgundy, two-door car and drive away. (R. 67, lines 16-25; R. 68, lines 1-10.)

As Sergeant John F. McLaurin of the Florence County Sheriff's Office was responding to the 911 call, he saw the burgundy car pull out right in front of him. (R. 92, lines 4-24.) He activated his blue lights and initiated a traffic stop. (R. 93, lines 2-4.) After initially failing to stop, Jessica Ussery, the driver, eventually stopped and Petitioner and John Barfield ran from the stopped car. (R. 93, lines 5-22; R. 94, lines 1-7; R. 97, lines 21-25; R. 97, lines 1-5.) Ussery was arrested at the scene, and Barfield and Petitioner were eventually arrested. (R. 123, lines 14-18; R. 142, lines 8-10; R. 171, lines 2-9; R. 172, lines 22-23; R. 174, lines 8-25.) Petitioner was charged with and ultimately

indicted on two counts of armed robbery, one count of first-degree burglary, and one count of conspiracy. (R. 253.)

At trial, the State called Ussery to the stand. (R. 109, line 10.) She testified she drove her boyfriend, Barfield, to a trailer park to pick up Barfield's friend, Rom, also known as Jamal Bryant, who Ussery identified as Petitioner. (R. 114, lines 4-25; R. 115, lines 1-16; R. 116, lines 9-25; R. 117, lines 1-2; R. 125, lines 12-17.) Ussery testified that when they picked Petitioner up, he had a shotgun with him, which he put in the trunk of Ussery's car. (R. 115, lines 17-24; R. 117, lines 4-9.) She testified Barfield told her he needed to stop at the Days Inn to pick up some money from someone who owed him. (R. 118, lines 1-6.) She recounted that when they arrived at the motel room, Barfield told her to knock on the door and then Barfield pushed his way into the room and Petitioner followed him. (R. 119, lines 13-17; R. 120, lines 14-24.) She explained that after they arrived at the motel, Barfield had the gun. (R. 119, lines 4-18.) Ussery testified that both Barfield and Petitioner were carrying bags, pocketbooks, and clothes when they came out of the motel room. (R. 121, line 25; R. 122, lines 1-2.) She drove them away from the motel and saw blue lights behind her. (R. 121 line 13-R. 122, line 20.) She turned into the Merita Bread parking lot and both men jumped out of the car, ran, and told her not to say anything. (R. 121, line 11-2, lines 20-25.)

On cross-examination, Petitioner asked Ussery about her original charges, and she explained she was charged with two counts of armed robbery with a deadly weapon, failure to stop for a blue light, and falsification of information to the police. (R. 129, lines 22-25; R. 130, lines 1-11.) Ussery further testified her two armed robbery charges were dropped to accessory before the fact and after the fact. (R. 130, lines 12-20.) Petitioner did not ask Ussery what the principal crime was for which she was charged

with accessory before and after the fact. (R. 130, lines 12-21.) Petitioner later asked Ussery if she knew what her exposure was on her pending accessory charges, and she answered that she did not know.¹ (R. 141, lines 22-25; R. 142, line 1.) The State objected to Petitioner questioning Ussery regarding the amount of time she faced on those charges, and the trial court sustained the objection. (R. 142, lines 3-6.) Petitioner then asked Ussery if she was aware of what kind of time she faced on the armed robbery charges. (R. 142, lines 8-12.) She testified, "No, sir; not of the full extent, no, sir. It carries a long sentence." (R. 142, lines 13-14.) Petitioner then asked, "So nobody's ever told you what arm[ed] robbery carries?" (R. 142, lines 18-19.) Ussery answered, "I'm not aware of or how long the year term is." (R. 142, line 20.) The State made no objection to this line of questioning. Petitioner then questioned Ussery about whether she had received a plea bargain in exchange for her testimony and she testified she was not aware of any plea bargain or deal for her testimony. (R. 142, lines 21-25; R. 143, lines 1-6.)

The State then called Barfield. (R. 143, lines 18-19.) Barfield testified that he and Petitioner talked about committing a robbery and that Petitioner brought a gun with him when Barfield and Ussery picked him up. (R. 148, lines 1-4, 24-25; R. 149, lines 1-24.) He testified he put the gun in his pants when he got out of the car at the motel room. (R. 151, lines 1-24.) He testified he and Petitioner entered the motel room and asked the victims, "Where is the dope and the money?" (R. 151, lines 19-24; R. 152, lines 7-25.) Barfield testified that when they left the motel in Ussery's car, law enforcement got

¹ When Appellant brought up Ussery's accessory charges a second time, he still did not ask her what the principal crime was for which she was charged with accessory before and after the fact. (R. 141, lines 13-21.)

behind them. (R. 155, lines 2-9.) When they reached a Merita Bread store, he and Petitioner jumped out of the car and ran. (R. 155, lines 12-21.)

On cross-examination, Petitioner asked Barfield about his original charges and what charges had been disposed of. (R. 158, lines 20-25; R. 159, lines 1-17.) Barfield explained he was originally charged with conspiracy, weapon possession, burglary first, and two counts of armed robbery. (R. 158, lines 20-24.) He further testified that all of those charges were dismissed and he pled guilty to two counts of attempted armed robbery, receiving a seven-year sentence. (R. 158, line 25; R. 159, lines 1-17.) Petitioner then asked Barfield, "Did you know what you were facing for arm[ed] robbery?" (R. 159, line 18.) At that point, the State objected to his questioning him regarding the amount of time he was subjected to, and the trial court sustained the objection after an off-the-record bench conference. (R. 159, lines 19-25; R. 160, lines 1-2.) Petitioner continued with his cross-examination by asking Barfield if he was aware he could receive substantially more time for the armed robbery and burglary charges that were dismissed than what he received for attempted armed robbery, and Barfield testified that he was aware. (R. 160, lines 6-16.)

Next, the State called Investigator Alvin Powell of the Florence County Sheriff's Office. (R. 166, lines 6-7; R. 167, lines 2-3.) He testified he interviewed Ussery and Barfield, and Barfield gave him Petitioner's name and address. (R. 173, lines 13-25; R. 174, line 1.) Barfield confirmed Petitioner's identity through a photo identification. (R. 174, lines 1-10.) Investigator Powell testified he was the one who arrested Petitioner and collected evidence in the case. (R. 174, lines 11-25.)

After Investigator Powell's testimony, the trial judge met with the attorneys in chambers. (R. 184, lines 6-9.) The trial judge then announced on the record that he had

determined, based on State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007), that Petitioner should have been able to ask about the amount of time Barfield faced. (R. 184, lines 10-23.) Specifically, the trial judge found questioning of that nature could go to the bias or prejudice of the witness, and he decided to allow Petitioner to question Barfield regarding the amount of time he was facing. (R. 184, lines 23-25; R. 185, lines 1-5.) The trial judge specifically stated, "And if he knows the answer, he can answer it. If he doesn't know, he doesn't know." (R. 185, lines 1-5.) After the trial court explained to the jury that he had changed his ruling, the following exchange took place:

Q: Mr. Barfield, earlier when we discussed the fact that you were charged with two counts of arm[ed] robbery - - -

A: Yes, sir.

Q: - - - did you understand that you were facing from minimum ten to maximum 30 years on those two counts?

A: At the time of the robbery, no. After I spoke to my lawyer, yes.

Q: And you were also charge[d] with one count of burglary first; is that correct?

A: Yes, sir.

Q: And did you understand that you were facing a minimum of 15 years to life on that charge?

A: Yes, sir.

(R. 189, lines 16-25; R. 190, lines 1-25; R. 191, lines 1-5.)

Ultimately, the jury found Petitioner guilty on all counts, and Petitioner was sentenced to life for burglary and both counts of armed robbery and five years' imprisonment for conspiracy. (R. 249, lines 17-25; R. 250, lines 1-5.)

Discussion

Petitioner argued to the Court of Appeals that the trial court erred in limiting the scope of his cross-examination of Jessica Ussery regarding the mandatory minimum sentences she avoided by testifying against Petitioner. Specifically, he argued that when the trial judge recognized his error in limiting Petitioner's cross-examination of Barfield regarding the amount of time Barfield faced for his original armed robbery charges and allowed Petitioner to question him again, the trial judge should also have done the same with Ussery. The Court of Appeals agreed with Petitioner that the trial court erred in preventing Petitioner from cross-examining Ussery concerning the mandatory minimum sentence she faced for the reduced charges pending against her at the time of Petitioner's trial. However, the Court found that because Petitioner had ample opportunity to demonstrate Ussery's bias, he suffered no prejudice. Thus, the Court affirmed the trial court's decision.

When cross-examining a witness in regard to the potential for bias, considerable latitude must be allowed. Gillian, 360 S.C. at 450, 602 S.E.2d at 71. Any fact may be elicited which tends to show interest, bias, or partiality of the witness. State v. Brewington, 297 S.C. 97, 101, 226 S.E.2d 249, 250 (1976). Limitations placed on a defendant's ability to cross-examine a witness constitute a Confrontation Clause violation when the defendant is prohibited from engaging in "**otherwise appropriate cross-examination**" designed to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (emphasis added). "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's

opportunity for effective cross-examination at trial.” Gillian, 360 S.C. at 450, 602 S.E.2d at 71.

However, although a defendant is entitled to an opportunity for meaningful cross-examination, the scope of that cross-examination still rests in the trial judge’s sound discretion. State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008). A defendant’s right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias “based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness’s safety, or interrogation that is repetitive or only marginally relevant.” State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 814 (Ct. App. 1996). The limitation of cross-examination constitutes reversible error only if the defendant establishes **unfair prejudice** resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (emphasis added).

In State v. Gracely, the appellant argued “the trial court erred in refusing to allow defense counsel to cross-examine the State’s witnesses regarding the mandatory minimum sentences they avoided by testifying against [him].” 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012). Gracely discussed State v. Brown, in which a witness testified in exchange for a lesser sentence and “was permitted to *avoid* a mandatory prison term of more than three times the duration she would face on her plea to conspiracy” Id. at 373, 731 S.E.2d at 885 (quoting Brown, 303 S.C. at 171-72, 399 S.E.2d at 594). This Court found this was “critical evidence of potential bias that appellant should have been permitted to present to the jury.” Id. This Court in Gracely clarified Brown by stating,

“The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” Id. at 374-75, 731 S.E.2d at 886.

The purpose of Rule 608(c), SCRE, is that a defendant be allowed to explore any “bias, prejudice, or other motive to misrepresent” such that the jury gets a clear picture of a witness with which to judge her credibility. Cross-examination is the tool used to highlight any biases that may exist. Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Petitioner to inquire into whether Ussery believed she would get to plead to reduced charges in exchange for testifying. Ussery testified her armed robbery charges had been dropped to accessory charges but that she had not yet been given any deals or plea bargains. Just as this Court pointed out in State v. Mizzell, 349 S.C. 326, 329, 563 S.E.2d 315, 316 (2002), this particular testimony was highly probative of bias because the jury could have inferred that Ussery would be more likely “to engage in biased testimony in order to obtain a future recommendation for leniency.” Mizzell at 332-33, 563 S.E.2d at 318.

Even though the Court of Appeals found the trial court erred in excluding evidence of potential sentences for Ussery’s pending charges, it properly found Petitioner suffered no prejudice. “A violation of the defendant’s Sixth Amendment right to confront the witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt.” Mizzell at 333, 563 S.E.2d at 318 (quoting State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). In Mizzell, this Court found the harmless error analysis depends on the particular facts of each case and upon the following factors: “the importance of the witness’s 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." Mizzell at 333, 563 S.E.2d at 318-19 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Here, the Court of Appeals found the improper limitation the trial court imposed upon Petitioner's cross-examination of Ussery did not "prevent[] a full picture of [her] possible bias." State v. Whatley, 407 S.C. 460, 468, 756 S.E.2d 393, 397 (Ct. App. 2014) (quoting Gracely, 399 S.C. at 377, 731 S.E.2d at 887). In addressing the first three Van Arsdall factors, the Court found that although Ussery's testimony was important to the State's case, it was cumulative to, and corroborated by, Barfield's testimony. The Court noted Barfield's testimony established the same material facts as Ussery's and Ussery's testimony did not contradict Barfield's on any essential point. Both Ussery and Barfield recounted the same events in their testimony: (1) they picked up Petitioner and drove him to the motel, (2) Petitioner supplied the gun while Barfield carried it, and (3) both men left Ussery to fend for herself after the police stopped her vehicle. Importantly, the Court noted that without Ussery's testimony, evidence of the above events was presented through Barfield.

In examining the fourth Van Arsdall factor, the extent of cross-examination, the Court of Appeals found no prejudice. Specifically, it noted that "[a]side from sustaining the State's objection to Whatley's question concerning the sentences Ussery faced for her accessory charges, the trial court did not restrict Petitioner's cross-examination of Ussery in any way." Whatley, 407 S.C. at 470, 756 S.E.2d at 398. Accordingly, the Court of Appeals correctly determined Petitioner suffered no unfair prejudice as a result of the limitation placed on his cross-examination of Ussery. See State v. Brown, 303 S.C. 169,

171, 399 S.E.2d 593, 594 (1991) (finding limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation).

Respectfully, the State submits Petitioner's assertion in his petition that the Court acknowledged the State's case was weak misconstrues the Court's opinion. Admittedly, in the Court's examination of the fifth factor, overall strength of the State's case, it found no physical evidence tied Petitioner to the robbery and neither the victims nor the officer could identify him. However, the Court noted the evidence presented identifying Petitioner as one of the robbers came from both Ussery and Barfield. This observation supports the Court's earlier determination that Ussery's testimony was cumulative to, and corroborated by, Barfield's testimony. Additionally, the Court emphasized that Petitioner "availed himself of extensive opportunities to delve into Ussery's bias and poor credibility, capitalizing on her inconsistent statements to the police." Whatley, 407 S.C. at 470, 756 S.E.2d at 398. Finally, the Court considered in its analysis of potential prejudice that although Ussery avoided a mandatory minimum sentence of ten years for armed robbery, she still faced the same sentence for a reduced charge of accessory before the fact.

Thus, the Court of Appeals properly affirmed the trial court's decision based on lack of prejudice.

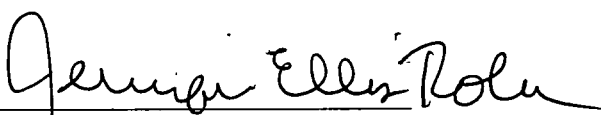
CONCLUSION

Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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July 1, 2014

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Susan B. Hackett, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 1st day of July, 2014.



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