

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

J. Derham Cole, Circuit Court Judge

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JAN 14 2015

SC Court of Appeals

Opinion No. 2014-UP-447 (S.C. Ct. App. filed 12/10/2014)

13-GS-02-000063

THE STATE,

RESPONDENT,

V.

CAROLYN POE,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 17, 2014.

QUESTION PRESENTED

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

STATEMENT OF THE CASE

On January 14, 2013, the Aiken County Grand Jury indicted Petitioner Carolyn Poe on one count of shoplifting. R. 115 – R. 118. On February 12, 2013, Petitioner 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 Petitioner. R. 1.

At trial, the State presented evidence that on May 23, 2012, Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner leaving the scene in her truck, in which he observed DVDs matching those that the store reported missing. R. 36, l. 19—R. 42, ln. 2.

Petitioner 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. Petitioner 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 Petitioner 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.

At the end of the trial, the jury found Petitioner 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.

Petitioner timely appealed to the South Carolina Court of Appeals, arguing that the cross-examination of Petitioner constituted pitting and resulted in reversible error. Final Brief of Appellant. On December 10, 2014, the Court of Appeals issued an unpublished opinion affirming

the conviction. App. 1-2. Petitioner filed a petition for rehearing on December 11, 2014. App. 3-5. The Court of Appeals denied the petition on December 17, 2014. App. 6.

ARGUMENT

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

The solicitor was not permitted to ask Petitioner 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." *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.

Pitting constitutes reversible error if unfair prejudice results. *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998). The prejudicial character of pitting must be determined

from its relationship to the entire case. *State v. Pradubsri*, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct. App. 2013). Unfair prejudice results when the credibility of a pitted witness is a critical issue in the case. *Sapps*, 295 S.C. at 486, 369 S.E.2d at 146; *Bryant*, 316 S.C. at 221, 447 S.E.2d at 855 (1994).

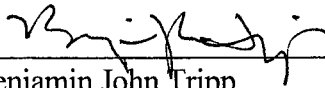
Here, the State called Lawrence to testify that he saw Petitioner covertly take the DVDs from the store without paying. The State also called Corporal Priester to testify that he observed in Petitioner's truck the same DVDs that the store reported missing. During her direct examination, Petitioner explained 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 pitted Petitioner against Lawrence and Corporal Priester by calling out the conflicting accounts and asking Petitioner to explain the discrepancy.

Additionally, the pitting was prejudicial because Petitioner's credibility was a critical issue. Like in *Bryant*, Petitioner and Priester were the only two witnesses present during the actual alleged incident. Petitioner's credibility was therefore material to one-half of the State's evidence in the case. The other half of the evidence was circumstantial. Furthermore, the wording of the solicitor's pitting of Petitioner added a second layer of prejudice because the solicitor impliedly asserted that Petitioner was claiming the witnesses intentionally gave false accounts in order to frame her. The wording constituted a measured attempt to negatively portray Petitioner to the jury as dissident and unscrupulous. Accordingly, unfair prejudice resulted from the pitting, and the trial judge's committed reversible error in overruling Petitioner's objections.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant her petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of January, 2015

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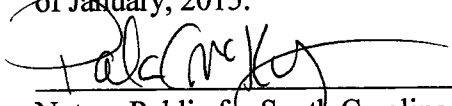
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, 1015 Sumter Street, Columbia, SC 29201, this 14th day of January, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of January, 2015.



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