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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2012-213631

Edward B. Cottingham, Circuit Court Judge

Case No. 2012-GS-26-00859

State of South Carolina, ... Respondent,

v.

Rickey Mazique, ... Appellant.

REPLY OF APPELLANT

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STATEMENT OF ISSUES ON REPLY

1. CAN THE CONVICTION BE AFFIRMED WHERE THE DEFENDANT'S CORE RIGHT TO EFFECTIVE CROSS-EXAMINATION WAS DENIED?

2. IS THE ISSUE AS TO CROSS-EXAMINATION AS TO BIAS OF WITNESS SUFFICIENTLY PRESERVED FOR APPELLATE REVIEW? (RESPONDENT'S VII).

ARGUMENT IN REPLY

I. THE DENIAL OF EFFECTIVE CROSS-EXAMINATION OF STATE WITNESSES WAS NOT HARMLESS.

As more fully set forth in the Appellant's Brief, Mazique was simply not afforded the opportunity to effectively cross-examine the state's witnesses. One of the most effective means by which Mazique could have cross-examined the State's witnesses would have been by use of their prior sworn testimony from the preliminary hearing. Mazique requested a copy of the transcript from the preliminary hearing but was denied. Mazique was entitled to a copy of the transcript. *See* Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial). While the State has argued that there is no showing of its importance without the introduction or proffer of the transcript, it was impossible for Mazique to proffer that which he had been improperly denied. The Court therefore erred in refusing to order that the transcript be provided to Mazique for use at the trial.

The Court further impeded Mazique's effectiveness by repeatedly cutting off Mazique's attempts at cross-examination of the State's witnesses. The Court limited cross to such an extent that Mazique was forced to call the officers as his own witnesses in attempt to continue their cross-examination. This examination was equally limited. As a result, Mazique was denied the effective cross-examination that is guaranteed by the Sixth Amendment. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him" *U.S. Const. amend. VI.* This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the

witnesses against him. Pointer v. Texas, 380 U.S. 400, 403-04, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Contrary to the State's argument, the continued limitation of Mazique's ability to be effective in his cross-examination implicates a core procedural right, and regardless of how the State characterizes the evidence against Mazique, the denial of cross-examination as to bias can not be considered harmless:

> Considering the importance and deeply-rooted history of the constitutional right to confrontation, its violation is much more substantive than the type of technical or nominal error that originally motivated the harmless error standard. The Supreme Court has described the right to cross-examination as "the constitutionally prescribed method of assessing re-liability." Crawford v. Washington, 541 U.S. 36, 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." Id. While the instant case does not involve the Sixth Amendment, the Supreme Court's reasoning in Crawford illustrates the idea that stripping a defendant of the confrontation right may create significant harms that are invisible after the fact. Even if a defendant may seem obviously guilty, we must test that impression through the mechanism of a jury trial. In the same way, cross-examination is the mechanism favored in our system to test the government's assertion that evidence is reliable.

United States v. Ferguson, 752 F.3d 613 (4th Cir. 5-21-2014).

The denial of Mazique's attempts to exercise effective cross-examination violate his rights as guaranteed under the Confrontation Clause.

II. CROSS-EXAMINATION AS TO BIAS IS SUFFICIENTLY PRESERVED FOR APPELLATE REVIEW.

Under the Confrontation Clause, a defendant has the right to cross-examine witnesses who are cooperating with the Government about potential sources of bias. United States v. Cropp, 127 F.3d 354, 358 (4th Cir.1997). "Included in the Confrontation Clause protection is the right to cross examine any State's witness as to possible sentences faced when there exists a

substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." State v. Gillian, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct.App.2004) (*internal quotation marks and alterations omitted*). Mazique was therefore entitled to inquire as to whether the witness had outstanding charges against her as it is a potential source of bias. *See* State v. Mizzell, 349 S.C. 326 (2002). The record sufficiently shows that Mazique was attempting to question the witness as to potential bias. The inquiry was therefore proper. As a result, it was error for the Court to deny Mazique's cross as to potential bias.

Because the witness that Mazique was attempting to question was essential to the state's case, the denial of cross-examination as to bias can not be harmless. *See* State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991):

> The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias. State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983); State v. Collins, 235 S.C. 65, 110 S.E.2d 270 (1959). The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced. *Cf.* State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983).

State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

In Brown, no evidence was presented to the jury regarding the sentence the witness avoided in pleading guilty and testifying for the State. There the Court held that the trial judge abused his discretion in limiting cross-examination. As in Brown, Mazique was prejudiced by the denial of cross-examination as to the potential for bias of a key state witness.

CONCLUSION

Based on the foregoing, the conviction and sentence of the Appellant should be reversed.

Respectfully submitted,

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February 2, 2015.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Reply of the Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 2nd day of February, 2015, addressed as follows:

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Respectfully submitted,

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