THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MARCO SANDERS,

APPELLANT

APPELLATE CASE NO. 2014-001201

Appeal from Marion County

Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2016-UP-315

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Marco S. Sanders petitions the Court for rehearing. Counsel respectfully submits that in finding that the bias argument is unpreserved the Court overlooked the fact that trial counsel's challenge to the witness' credibility encompassed an assertion of bias and motive to misrepresent on the part of the witness. The trial judge understood that trial counsel wanted to question the witness about being fired from the sheriff's department for "issues with controlled substances." The trial judge specifically cited Rule 608 when he ruled that trial counsel could not cross examine the witness about the reason for his termination from the

sheriff's department. Counsel respectfully requests that this Court reconsider, find that the issue is preserved for appellate review and find that the trial judge's refusal to allow cross examination of the witness about the fact that he was fired from the sheriff's department for issues with controlled substances constitutes reversible error requiring a new trial.

On July 4, 2012, Samuel Rowell was fatally shot in his home. Witnesses testified that Rowell operated a club out of his home for birthday parties and other events. (R. p. 135, line 24 – p. 136, lines 1-12). Inside the home were pool tables, rest rooms, and a bar area. (R. p. 234, lines 10 – 18). On the evening of July 4, 2012, Eddie Godbold, Rowell's neighbor, went to Rowell's house to borrow a deep fryer. (R. p. 130, line 2 – p. 131, lines 1-15). Godbold did not remember the club having a function on the day of the shooting. (R. p. 142, lines. 14 – 21). Godbold testified that he knocked on both the front and back doors and did not get an answer but as he walked by a side door he heard Rowell say, "They're trying to rob me." (R. p. 131, lines 10-18). At that point Godbold heard gunshots so he ran and hid. (R. p. 131, line 18 – p. 132, lines 1-20). Godbold eventually used another neighbor's phone to call 911 and then waited for the police to arrive. (R. pp. 132-134).

Godbold testified that at the time of the shooting he saw a white Escalade parked near Lafayette Reed's house. (R. p. 143, line 7 – p. 144, lines 1-25). Reed is a distant cousin of Rowell and lived close to Rowell. Reed, testified that on the evening of the shooting he was almost run off the road by a large light colored SUV. (R. pp. 344 – 245). Detective James Lee with the Marion County Sheriff's Department testified that the co-defendant and appellant's nephew, Tyrell Woods' girlfriend owned a white Expedition. (R. p. 414, lines 7-25).

Levern "JJ" Nichols, an employee of the Marion County Sheriff's Department, placed Appellant and the co-defendant in a white SUV the day before the shooting. Nichols told Detective Lee that he saw the co-defendant and Appellant in a white SUV the day before Rowell was shot.

(R. p. 379, lines 1-25; R. p. 385, lines 9-12). Nichols testified at trial that he saw the co-defendant and Appellant in a white SUV the day before Rowell was shot. (R. pp. 390-393). At the time of trial, however, Nichols was no longer employed with the Sheriff's Department. (R. p. 378, lines 11-13).

Counsel for Petitioner asked Nichols, outside of the presence of the jury, why he was no longer with the Marion County Sheriff's Department. (R. p. 385, lines 9-15). Nichols answered, "I was fired for issues with controlled substances." (R. p. 385, line 16). The judge did not allow Petitioner to question Nichols in front of the jury about being fired for issues with controlled substances. (R. p. 405, line 15 – p. 406, lines 1-21). The judge stated, "Therefore, pursuant to what I've said on 608 – Rule 608, as well as Rule 609, and pursuant to my reading of State v. Aleksey, again, 343 S.C. 20, 538 S.E.2d 248, my ruling remains the same, but your objection is so noted – is so noted for the record. All right." (R. p. 406, lines 17-21). Counsel for Petitioner noted, "Your Honor, just in case I didn't make it clear for my – my objection was twofold. One on the identification, but also on credibility." (R. p. 406, lines 22-24). The trial judge then ruled again that he was allowing the in court identification and was limiting the cross examination of the witness. (R. p. 406, line 25 – p. 407, lines 1-9). The trial judge erred in limiting the cross examination of Nichols.

Petitioner should have been allowed to cross examine Nichols about his termination from the Marion County Sheriff's Department due to issues with controlled substances because this evidence constitutes evidence of bias and motive to misrepresent. SCRE Rule 608(c) provides that, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." In State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001), this Court wrote:

> Under Rule 608(c), "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." This subsection of Rule 608 preserves South Carolina precedent holding that generally, "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) (citing 98 C.J.S. Witnesses § 460).

During cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914 (2000).

In State v. McEachern, 399 S.C. 125, 140-141, 731 S.E.2d 604, 612 (Ct.App. 2012) the South Carolina Court of Appeals wrote:

> "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct.App.2004) (quoting U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984)).

At the time Nichols told Detective Lee that he saw Appellant and the co-defendant in a white SUV the day before the shooting, he was still working with the Marion County Sheriff's Department and knew that investigators were looking for a white SUV. (R. p. 378, line 14 – p. 379, lines 1-4). The fact that Nichols was later fired from the Marion County Sheriff's Department for issues with controlled substances shows that at the time Nichols made the statement implicating Petitioner, he needed to try and stay in the good graces of the investigators. The questioning about the termination provides a motive to misrepresent.

The trial judge's reliance on State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000) is misplaced because the dismissed narcotics indictments against the witness in Aleksey did not involve an act of dishonesty or untruthfulness pursuant to **Rule 608(b).** The trial judge in

the present case should have permitted the cross examination pursuant to **Rule 608(c).** The Court in Aleksey found the dismissed indictments were not evidence of bias, prejudice or any motive to misrepresent under **Rule 608(c)**. In the present case the fact that Nichols was later fired demonstrates that he had bias and a motive to misrepresent and falsely implicate Petitioner in order to try and keep his job.

The present case is also distinguished from State v. Burgess, 408 S.C. 421, 442, 759 S.E.2d 407, 418 (2014), because the motive to misrepresent in the present case goes directly against Petitioner rather than the general disciplinary issues in Burgess that were not against Burgess and happened after his arrest.

The error in limiting the cross examination of Nichols was not harmless. Nichols' testimony was the only evidence placing Appellant in the white SUV. A white SUV was seen leaving Rowell's home after the shooting. The trial judge's error in limiting the cross examination of Nichols requires reversal.

In affirming the conviction this Court wrote:

> We find Sanders's bias argument is unpreserved. See State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, and with sufficient specificity to inform the [trial] court . . . of the point being urged by the objector." (citations omitted)). At trial, Sanders argued his cross-examination was proper because it challenged the employee's in-court identification and the employee's credibility. However, the record does not indicate Sanders ever argued to the trial court the cross-examination was proper to show bias against him. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve [the issue], but it must be clear that the argument has been presented on that ground."); id. ("A party may not argue one ground at trial and an alternate ground on appeal.").

State v. Sanders, Op. No. 2016-UP-315 (Filed June 22, 2016). While Petitioner did not specifically use the words "bias" and "motive to misrepresent" counsel for Petitioner argued credibility of the witness stating, "Your Honor, just in case I didn't make it clear for my – my objection was twofold. One on the identification, but also on credibility." (R. p. 406, lines 22-24). The judge then ruled, "I did not believe – believe that any – or the in-court identification was in any way suggestive in nature. He testified and laid the foundation as to how he knew your client, as well as Mr. Woods, and,.therefore, I allowed the identification, as well as limiting your scope of cross examination of this witness. But your objections are so noted for the record." (R. p. 407, lines 3-9). Earlier the trial judge specifically cited Rule 608. (R. p. 406, lines 17-21).

Trial counsel's challenge to the witness' credibility encompassed an assertion of bias and motive to misrepresent on the part of the witness. The trial judge understood that trial counsel wanted to question the witness about being fired from the sheriff's department for "issues with controlled substances." Rule 608, SCRE, is titled "Evidence of Character, Conduct and Bias of Witness." Black's Law Dictionary defines credibility as, "The quality that makes something (as a witness or some evidence) worthy of belief." In the present case counsel for Petitioner challenged Nichols' credibility. Nichols was not worthy of belief because at the time he made the inculpatory statement linking Petitioner to the white SUV, he had bias and a motive to misrepresent and falsely implicate Petitioner in order to try and keep his job. The challenge to Nichols' credibility encompassed bias and motive to misrepresent.

In State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010), the South Carolina Supreme Court wrote, " Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. State v. Dunbar, 356

S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)." Petitioner fairly raised the issue in regard to seeking to cross examine Nichols about being fired from the Sheriff's Department for "issues with controlled substances" in order to show lack of credibility due to bias and motive to misrepresent. The trial judge understood the argument and ruled on the issue. The issue is preserved for appellate review. Petitioner respectfully seeks rehearing and a finding that the trial judge's refusal to allow cross examination of the witness about the fact that he was fired from the sheriff's department for issues with controlled substances constitutes reversible error requiring a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 7th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marco Siara Sanders, #243091, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 7th day of July, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this
7th day of July, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.