

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Honorable D. Craig Brown, Circuit Court Judge

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SEP 19 2016

Opinion No. 2016-UP-315 (S.C. Ct. App. Filed June 22, 2016) S.C. SUPREME COURT

2013-GS-33-00256

THE STATE,

RESPONDENT,

V.

MARCO SANDERS,

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 8/18/2016.

QUESTION PRESENTED

Did the Court of Appeals err in finding unpreserved the issue of whether the trial judge erred in refusing to allow cross examination of a witness about the fact that he was fired from the Marion County Sheriff's Department for issues with controlled substances, when the witness placed Petitioner and the co-defendant in a vehicle matching the description of the vehicle seen leaving the crime scene?

STATEMENT OF THE CASE

In May of 2013, the Marion County Grand Jury indicted Sanders, in a six count indictment, for murder, attempted robbery, burglary first degree, attempted murder, possession of a firearm during the commission of a violent crime and conspiracy, indictment #2013-GS-33-256. Count six of the indictment, the conspiracy indictment, was directly presented to the grand jury. On May 19, 2014, Sanders and his co-defendant and nephew, Tyrell Woods proceeded to jury trial before the Honorable D. Craig Brown. Ralph Wilson Senior represented Sanders. Scott Floyd and Vick Meetze represented Woods. E. L. Clements, III and Dudley Saleeby prosecuted the case. The jury returned with verdicts of guilty. Judge Brown sentenced both Sanders and Woods to life imprisonment for murder and burglary first degree, thirty (30) years for armed robbery and attempted murder, five years for conspiracy and the firearm charge. The sentences were ordered to be served consecutively. A timely notice of intent to appeal was served on May 29, 2014, and the direct appeal perfected. On June 22, 2016, the Court of Appeals affirmed the convictions and sentence. A timely petition for rehearing was filed and denied on August 18, 2016. This petition for writ of certiorari follows.

STATEMENT OF FACTS

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 when he went to Rowell’s home that evening he did not see any other cars, other than Rowell’s truck. (R. p. 142, line 6 – p. 143, lines 1-6).

Godbold testified that he did see a white Escalade parked in a driveway close to Rowell’s home. (R. p. 143, line 7 – p. 144, lines 1-25). Another neighbor and distant cousin of Rowell, Lafayette 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 Petitioner’s nephew, Tyrell Woods’ girlfriend owned a white Expedition. (R. p. 414, lines 7-25). During the investigation of the case, Levern Nichols, JJ, was an employee of the Marion County Sheriff’s Department and told Detective Lee that he saw the co-defendant and Petitioner 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 Petitioner in a white SUV the day before Rowell was shot. (R. pp. 390-393). At the time of trial Nichols was no longer employed with the Sheriff's Department. (R. p. 378, lines 11-13).

Detectives with the Marion County Sheriff's Department, with the help of SLED, were eventually able to view video surveillance from Rowell's home. Detective Neil Rouse with the Marion County Sheriff's Department viewed the video and identified Petitioner. (R. p. 516, lines 2-25). Petitioner's fingerprints were found on cigar boxes that had been stuffed in a pillow case in Rowell's home. (R. p. 563, line 8 – p. 564, line 1).

ARGUMENT

The Court of Appeals erred in finding unpreserved the issue of whether the trial judge erred in refusing to allow cross examination of a witness about the fact that he was fired from the Marion County Sheriff's Department for issues with controlled substances, when the witness placed Petitioner and the co-defendant in a vehicle matching the description of the vehicle seen leaving the crime scene.

Counsel for Petitioner asked JJ, Levern 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:

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 Petitioner 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 termination is evidence of any motive to misrepresent.

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 is 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 Petitioner 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 the Court of Appeals 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.

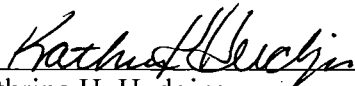
In State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010), the South Carolina Supreme Court wrote, "Error preservation rules do not require a party to use the exact

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. 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.

CONCLUSION

Based on the argument above, this court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County
Honorable D. Craig Brown, Circuit Court Judge

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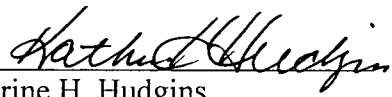
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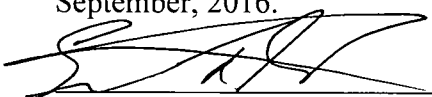
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Kaycie S. Timmons, Esquire, at the 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 19th day of September, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of
September, 2016.


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