

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

APPELLATE CASE NO. 2014-001694

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Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

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Opinion No. 2016-UP-436

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PETITION FOR REHEARING

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On October 19, 2016, this Court affirmed Appellant's conviction in an unpublished *per curiam* opinion without the benefit of oral argument.<sup>1</sup> State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Oct. 19, 2016). Pursuant to Rule 221, SCACR, Appellant respectfully requests this Court rehear the three issues presented. This Court's opinion overlooked and/or misapprehended multiple significant points of fact and law. Additionally, as will be discussed in greater detail, this Court's conclusion concerning the mistrial issue creates an unsurmountable burden for all appellants by

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<sup>1</sup> Appellant's case was scheduled for oral argument on September 6, 2016, at 10 a.m. On August 31, 2016, this Court cancelled the scheduled argument.

making the review of trial judge's decisions when presented with mistrial motions virtually unreviewable on appeal. Concerning the second issue, this Court ruled on the content of closing arguments without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016. Finally as to the third issue, Appellant respectfully requests greater explanation as to this Court's reasoning in addition to his request for rehearing regarding the facts and law overlooked and/or misapprehended.

### **Motion for Mistrial**

On appeal, Appellant challenged the trial judge's failure to declare a mistrial where the alleged victim engaged in multiple emotional outbursts disrupting the attorneys and the trial because the outbursts improperly influenced the jury to decide the case, which was already emotionally charged, based on emotion instead of the evidence presented in violation of Appellant's state and federal constitutional rights to a fair and impartial trial. This Court's opinion only cited to the standard of review – abuse of discretion – in such cases, and offered no analysis on the subject.

Appellant concedes that the standard of review on appeal when the challenge is to the trial judge's failure to grant a mistrial is "abuse of discretion." However, this standard of review does not mean "no review." This Court's opinion on this issue eliminates appellate review of the decisions of trial judge's on mistrial motions. Although this Court acknowledged that "[t]he decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge" and that reversal was required when the trial judge abused his discretion or when manifest prejudice resulted, this Court failed to consider whether the judge abused his discretion or if manifest prejudice resulted from the repeated outbursts. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Instead, this Court's sole focus was on the trial judge's presence at

the trial as providing an opportunity for a better perspective than a cold record. If this view prevails, then all appellate issues for which the standard of review is an abuse of discretion must result in no review at all on appeal as the trial judge is always in a position to have a better opportunity for observing the actual trial than a cold record offers.

“The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution.” State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). “[T]he very heart of a ‘fair trial’ embodies a disciplined courtroom wherein an accused’s fate is determined solely through the exercise of calm and informed judgment.” Id. at 303, 295 S.E.2d at 631.

The South Carolina Supreme Court held a mistrial was in order where “spectators filled the courtroom seats to capacity and even stood against the walls,” there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with “‘obvious disgust,’” and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. The Court held it was error for the trial judge to deny the motion for a mistrial “without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice.” Id. at 302, 295 S.E.2d at 630. Further, the Court held the judge’s reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, the Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal,

trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. The Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, the Court held the trial judge should have set aside the verdict. Id.

The trial judge erred in failing to order a mistrial based on Minor’s repeated and extreme emotional outbursts. Although the trial judge was aware of Minor’s disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor’s behavior. Minor’s sobbing began during defense counsel’s opening statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor’s improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor’s conduct, the judge never told the jury not to consider her conduct in their deliberations.

The jury heard from a self-described “wound up” solicitor in closing that Minor’s “raw emotion” was proof that she was telling the truth. According to the solicitor, Minor’s performance was so real and “compelling” that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is not supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor’s

testimony was compelling as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer’s report that each child had provided a “compelling” disclosure of abuse could only be interpreted to mean the forensic interview believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor’s continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor’s conduct was extreme, even theatrical, as acknowledged by the prosecutor’s remark regarding the Academy Awards. Minor’s conduct deprived Appellant of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial. Appellant respectfully requests this Court rehear the matter where the opinion issued bars appellate review of all mistrial motions and all other legal errors where the standard of review is an abuse of discretion. Further, Appellant respectfully requests this Court rehear the matter in light of the overwhelming evidence that the judge abused his discretion in denying the motion and that the ends of justice required a mistrial due to Minor’s repeated emotional and distracting outbursts.

### **Content of Closing Argument**

Prior to closing arguments, defense counsel moved to require the prosecutors to open in full and use their final argument for rebuttal only. R. 284, line 21 – R. 285, line 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367. The judge denied this request and permitted the state to give two closing arguments – one prior to defense counsel and one after. Appellant challenged this ruling on appeal. In affirming Appellant’s conviction, this Court cited State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) for the proposition that

the prosecutor “is entitled to open the closing arguments to the jury unless the defendant has offered no evidence” and that the prosecutor may make an opening argument to the jury on issues of fact. This Court failed to consider the impact upon such a holding on the due process rights of a criminal defendant. Further, the Court rendered its decision without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016.

Closing argument is “an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound.” Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(J. Douglas dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

[t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party’s claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply my respond in full but may not introduce any new matter.

Rule 43(j), SCRCP.

In a 1911 case, the Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state’s argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense’s closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to require the partying having the opening in the argument

to disclose fully the law.<sup>2</sup> Thereafter, the Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury on issues of fact. Id. Citing Lee, id., the Rodgers Court held “the solicitor is not required to make an opinion argument to the jury on issues of fact” “but may do so in his discretion.” Rodgers, 269 S.C. at 25, 235 S.E.2d at 809. Thereafter, the custom in South Carolina – with no foundation in any rule of law – permitted the prosecutor to deliver two closing arguments with the content of those arguments virtually unlimited.

The trial judge’s refusal to require the state to open fully denied Appellant’s right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. There is simply no good reason – other than custom – to adhere to the current status quo. The prosecution should have been made to open fully as to the law and the facts with the Appellant having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Appellant in a rebuttal. Permitting the order of arguments in this fashion would have ensured the Appellant’s rights to a fair trial and due process of law were not at odds with his right to present a full and complete defense. The current system forces defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

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<sup>2</sup> Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

Appellant respectfully requests this Court rehear this issue to consider the dearth of case law and rules supporting the current practice and to allow the Supreme Court to provide guidance as anticipated from its decision in Beaty.

### **Illicit Photographs & A Motive to Lie**

On appeal, Appellant challenged the trial judge's refusal to permit him to question his accuser concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Appellant. In ruling on this issue, this Court noted the standard of review, prior cases limited a defendant's right to present a defense, Rule 401, SCRE, Rule 403, SCRE, and prior cases limiting a defendant's rights under the Confrontation Clause. However, this Court's opinion offers little to explain the reasoning by the affirmance on this issue. Appellant respectfully requests greater explanation of the decision in addition to his request for this Court to rehear the matter based on significant points overlooked and/or misapprehended.

Everyone agreed that Terrance C. was Minor's ex-boyfriend. Everyone also agreed there were three photographs of Terrance's genitalia on Minor's phone. The photographs appeared on Minor's phone on August 14 and August 15 of 2010. Minor made her allegations of sexual assaults against Appellant on August 25, 2010. Appellant and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Appellant wanted to question Minor regarding the contents of those photographs.

The judge found the content of the photographs was not relevant. He ruled that Appellant could "ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Appellant] disapproved of if he did," but he refused to allow Appellant to "tell the jury that they are actually Terrance's private areas." His ruling would permit Appellant to argue motive

because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, lines 7-25. In short, the judge found that Minor's improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, line 23 – R. 42, line 4.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility.” 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). “[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment.” State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits “[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's

sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656.” S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Appellant was not offering evidence of specific instances of Minor’s sexual conduct, opinion evidence of Minor’s sexual conduct, or reputation evidence of Minor’s sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor’s sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Appellant was offering three sexually explicit photographs on the twelve-year old’s phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor’s credibility?

Deciding an issue similar to the one presented in the instant matter, the Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence “need not be sufficient in itself to establish the whole or any definite portion of a party’s contention.” Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge refused. On appeal, the Supreme Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money. Id.

Additionally, the Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. Id. at 200, 387 S.E.2d at 90. Finley's defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. "The unique facts of this controversy, coupled with [Finley]'s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." Id. The Court found the evidence was "essential to a full and fair determination of [Finley]'s guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party." Id. (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal sexual conduct cases. In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Id. at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." Id. This Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." Id. at 220, 530 S.E.2d at 412. This Court ruled that the Rape Shield Statute "is not a blanket exclusion of evidence concerning alternative sources of a child victim's sexual knowledge." Id. at 219, 530 S.E.2d at 411. Thus, relevant

evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor's knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and Appellant had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outraged and punished her, as all parents would. The content showed just how serious Minor's misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance's naked body with a fully erect penis on twelve-year old Minor's phone were a far cry from simply "inappropriate" photographs. The actual content of the photographs demonstrated Minor's knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor's credibility and to learn that Minor had a very big incentive to fabricate the allegations against Appellant.

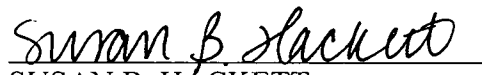
Appellant respectfully requests this Court rehear this matter to provide greater explanation of this Court's reasoning. Additionally, Appellant respectfully requests this Court rehear this matter to consider the significant facts and case law overlooked and/or misapprehended in arriving at the conclusion that the trial judge's failure to permit the jury to learn of the contents of the photographs

– that Minor had three photographs showing her boyfriend’s genitalia on her phone – violated Appellant’s constitutional rights.

**Conclusion**

Appellant respectfully requests this Court rehear this matter for the significant points overlooked and/or misapprehended in rendering its *per curiam* unpublished opinion on October 19, 2016.

Respectfully Submitted,

  
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SUSAN B. HACKETT  
Appellate Defender

This 3<sup>rd</sup> day of November, 2016.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

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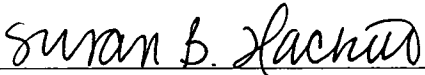
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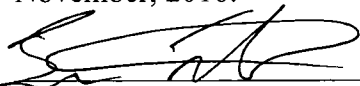
APPELLANT

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 V. Henry Gunter, Jr., Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Denver Tate, #236480, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3<sup>rd</sup> day of November, 2016.

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day of  
November, 2016.

  
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Notary Public for South Carolina  
My Commission Expires: October 30, 2022.