STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY WILLIAM COLE,

APPELLANT

APPELLATE CASE NO 2016-001451

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Davis v. Alaska, 415 U.S. 308 (1974) 6

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 6

State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991) 8

State v. China, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993) 4

State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006) 9

State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004) 6, 7

State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994). 6, 7, 8

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 6

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) 6, 7, 8

State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) 6, 8, 9

Rules

Rule 608, SCRE 6

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in precluding Appellant from cross-examining the State's informant about his history of mental illness and accompanying prescriptions, where the informant admitted to having mental disorders during redirect examination and those mental disorders were present at the time of the alleged drug transaction?

STATEMENT OF THE CASE

A Cherokee County Grand Jury indicted Appellant at the January 29, 2015 term of General Sessions for distribution of Oxycodone. R.__. His case was called to trial on June 18, 2016 before the Honorable J. Derham Cole, and a jury. Assistant Solicitor Kimberly Leskanic appeared on behalf of the State, and N. Douglas Brannon represented Appellant. Tr. 1.

At the conclusion of the trial, the jury found Appellant guilty as indicted. Tr. 199, ll. 7 – 9. Judge Cole sentenced Appellant to fifteen years' imprisonment suspended upon the service of five years. Tr. 202, ll. 11 - 20.

This appeal follows.

ARGUMENT

The trial judge erred in precluding Appellant from recross-examining the State's informant about his history of mental illness and accompanying prescriptions, where the informant admitted to having mental disorders during redirect examination and those mental disorders were present at the time of the alleged drug transaction.

During the first day of Appellant's two-day trial, the State called Anthony Elliott to the stand in order to testify about the alleged drug transaction which gave rise to Appellant's arrest. Tr. 42 l. 13 – Tr. 50 l. 6. Elliott claimed that he was motivated to work with the Cherokee County sheriff "to see about cleaning Cherokee County up." Tr. 43, ll. 5 – 11. He further claimed that he wanted to "[g]et rid of some of the drugs." Tr. 43, ll. 10 – 11. He was paid sixty dollars for his services, which allegedly included purchasing drugs from a man who he identified as Appellant. Tr. 60, l. 25 – Tr. 61 l. 1.

Elliott testified in his own defense regarding prior charges, including petit larceny, accessory after the fact to a felony, and a hit-and-run accident involving death. Tr. 61, ll. 6 – 20. He was using drugs at the time of some of those incidents. Tr. 73, ll. 19 – 25. When asked on redirect examination what changed in his life to make him stop using drugs, Elliott stated: "I got - - I used drugs to kill the pain that I had. **I didn't know I had mental disorders**." Tr. 74 ll. 1 – 4. (emphasis added). He further admitted to being mentally disabled. Tr. 74, l. 6.

Following the Assistant Solicitor's redirect examination, counsel for Appellant proffered testimony from Elliott regarding his disabilities. Appellant elicited the following diagnoses:

PTSD, bipolar disorder (type one and type two)[1], agoraphobia, general anxiety disorder, and obsessive compulsive disorder. Tr. 78, ll. 13 – 15. These illnesses were treated with a host of medications: Mobic, Resperdal, Effexor, Levothroxine, Remeron, and Xanax. Tr. 79, ll. 2 – 8. Elliott revealed that at the time of Appellant's trial, he was not receiving a disability benefit each month, although he was appealing that decision. Tr. 78, ll. 5 – 12.

Elliott did not advise law enforcement of his "mental health issues" before signing a contract or agreeing to work for them. Tr. 79, ll. 13 – 18. He indicated that at the time of the controlled buy he was taking thyroid medication, Xanax, Remeron, and Effexor. Tr. 83, l. 18 – Tr. 83, l. 19. According to Elliott, Remeron helped him fall asleep and Effexor was a mood stabilizer. Tr. 83, ll. 12 – 20; Tr. 85, l. 13 – Tr. 87, l. 24; Tr. 95, l. 19 – Tr. 96, l. 23.

At the conclusion of the proffered testimony, Appellant sought to replicate Elliott's remarks regarding mental illnesses and accompanying prescriptions before the jury. Tr. 80, l. 9 – Tr. 87, l. 19. The trial judge ruled that the testimony was irrelevant, and even it if it was relevant, it was "more prejudicial than probative." Tr. 84, ll. 12 – 21.

Because the State had an out-of-town witness who was unable to attend the second day of trial, the trial judge tabled the issue until the next day. Tr. 87 – 88; Tr. 104 – 113. On the morning of the second day of trial, counsel for Appellant revealed the intended purpose of the mood stabilizing medication Remeron: to treat bipolar disorder. Tr. 104, ll. 5 – 9. Based upon that revelation, and coupled with arguments arising out of <u>State v. China</u>, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993)—lack of capacity may be evidenced by general demeanor of the witness, the age of the witness, or the presentation to the court of the witness' psychological profile through expert testimony—Counsel Brannon sought a continuance in order to obtain

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[1] The two types of bipolar disorder, when combined, are called unipolar. Elliott testified that he had been bipolar since he was eight years old. Tr. 78 ll. 18 – 20; Tr. 79, ll. 10 – 12.

Elliott's medical records and contact the medical professionals who diagnosed him. Tr. 105, ll. 7 – 20.

The trial judge concluded that there was no indication that any of the medications would have affected Elliott's ability to recall the events surrounding the controlled buy. Tr. 108, ll. 12 – 23. Further, the court ruled:

> The fact that he has a mental condition is apparently not something that affects his ability to testify. It doesn't affect his competence. It doesn't affect his recall ability, or anything else, that I have been made aware of. And so simply providing the jury with information about a mental condition doesn't help them in any way... So I say that simply because of the fact that you have a bipolar condition does not necessarily mean that you are not competent and cannot testify accurately.

Tr. 109, ll. 17 – 23; Tr. 110, ll. 15 – 17.

After the State rested, Appellant moved for a directed verdict due to the fact that the controlled buy was not depicted on the video which was recorded by the undercover informant. Tr. 169, ll. 4 – 9. The trial judge denied the motion. Tr. 169, l. 17. The jury found Appellant guilty on the charge of distribution of Oxycodone. Tr. 119, ll. 7 – 9.

Discussion

Appellant should have been allowed to recross-examine Elliott in front of the jury in order to indicate the witness's bias and lack of credibility. Elliott admitted that he was not receiving a monthly disability benefit check, and he may have been in need of money in order to fund the numerous prescriptions which accompanied his illnesses. As such, he may have been willing to deviate from the truth in order to obtain his sixty dollars.

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). 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 Elliott. 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).

Appellant's questions to Elliott concerning the diagnoses of mental illnesses and the accompanying prescription drugs with which he treated them were proper questions. Had he disclosed the disorders to law enforcement, there was a chance he would not have been selected as an informant. Therefore, his failure to divulge the diagnoses entails a degree of dishonesty. Elliott testified that Effexor was a mood stabilizer, and Counsel further articulated that it is therefore a mind-altering substance. Tr. 83, ll. 12 – 21. The trial judge's refusal to permit Appellant to ask Elliott about medications taken during the time leading up to the controlled buy was clear error because the questions probed Elliott's credibility, reliability, and bias, the primary tools of cross-examination.

The next inquiry is whether the error was harmless beyond a reasonable doubt. Gillian, 360 S.C. at 454, 602 S.E.2d at 73; Mizzell, 349 S.C. at 333, 563 S.E.2d at 318; Graham, 314 S.C. at 385, 444 S.E.2d at 527. Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684see also Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19

The South Carolina Supreme Court held a violation of the Confrontation Clause was not harmless even where the facts did not fall squarely within the Van Arsdall factors. Graham, 314 S.C. at 385, 444 S.E.2d at 527-528. The witness, Simmons, first invoked his Fifth Amendment right not to incriminate himself where there was still a pending murder indictment against him despite his guilty plea to accessory to murder after the fact. Id. at 386, 444 S.E.2d at 528. The prosecutor claimed the plea agreement was valid only if the state called Simmons and Simmons testified truthfully, which the state defined as consistent with a prior statement that he was drunk and had no knowledge of the surrounding events. Id. at 386-387, 444 S.E.2d at 528. The prosecutor acknowledged he could not prevent Simmons from testifying, but continued to threaten further prosecution unless Simmons testified truthfully, as defined by the prosecutor. Id. Predictably, Simmons testified he was drunk and had no knowledge of the murder. Id. Graham then proffered the testimony of another witness who stated that Simmons informed the witness that he would have no further problems with the victim and that Simmons had killed the victim. Id. The Court stated that the prosecutor's attempted manipulation of Simmons' testimony and the witness'

proffered testimony raised the question of the extent of Simmons' involvement in the murder. Id. The Court held the jury was entitled to know Simmons' sentence of only eight years as murder was a serious crime for which Graham, who was sixteen, received a life sentence and Simmons avoided the heavy penalty "for what may have been his silence." Id.

In Mizzell, the Court held the trial court's error in limiting cross-examination of a witness concerning potential sentencing was not harmless because the witness provided the only evidence of the defendants' participation in the crime. 349 S.C. at 334, 563 S.E.2d at 319. Although some of the testimony from the witness was cumulative, the witness provided the only evidence that the defendants were at the crime scene as there was no physical evidence implicating the defendants. Id

Also, in State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) the South Carolina Supreme Court held a trial court's limitation on the defendant's cross examination of a state's witness was not harmless error. The witness testified that in return for her testimony she was allowed to plead guilty to one count of conspiracy for which she could receive a maximum of seven and one-half years. Id. However, the defendant was prevented from asking the witness the punishment for trafficking cocaine, the original charge for the witness. Id. The Court noted that the witness faced a mandatory sentence of at least twenty-five years without parole for the trafficking cocaine charge. Id. The Court held the fact that the mandatory minimum was more than three times the duration she would face on her plea to conspiracy was critical evidence of potential bias. Id. Additionally, the witness's testimony was critical to the prosecution's case because she provided the only evidence of the defendant's knowing involvement in the drug deal. Id. at 171-172, 399 S.E.2d at 594.

On the other hand, in Sims, the Court held the error was harmless because the prosecution's case against the defendant was strong where the defendant's fingerprints were found at the scene,

the victim's mother testified the defendant was angry with the victim, and the defendant confessed to two officers. 348 S.C. at 26, 558 S.E.2d at 523. Similarly, this Court held the error was harmless where the testimony provided by the two witnesses whose cross-examination was limited improperly was not the only evidence of the defendant's involvement in the murder. State v. Curry, 370 S.C. 674, 681, 636 S.E.2d 649, 652-653 (Ct. App. 2006). One of the victims unequivocally identified the defendant as the shooter, and a co-conspirator testified regarding the defendant's discussion about the murder weapon; thus, this Court concluded, the testimony of the two witnesses was cumulative to that given by others. Id. at 681-682, 636 S.E.2d at 653

The state's case against Appellant was weak. No physical or forensic evidence linked Appellant to the robbery. Law enforcement officers admitted that they did not maintain a line of sight on Appellant. No items from the controlled buy were found with Appellant. The only evidence against Appellant was the testimony of Elliott and the grainy video which he recorded. Therefore, Elliott's credibility was paramount as his testimony was the almost entire prosecution case against Appellant.

Due to the trial court's erroneous limitation on Appellant's cross-examination of Elliott, it is difficult to analyze the nature of his credibility. Although Elliott stated he was diagnosed with mental health disorders when he was eight years old, he never disclosed this information to law enforcement. His multiple diagnoses may have prevented him from serving as an informant and thereby receiving his sixty dollar payment. Appellant should have been able to recross Elliott on the mental health diagnoses and accompanying prescriptions of mind-altering medications.

CONCLUSION

Appellant's convictions should be reversed and this case remanded to the Cherokee County Court of General Sessions for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

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V.

JEFFREY WILLIAM COLE,

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

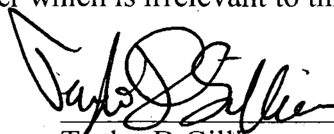
Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Trial transcript p. 1-7;
(3) Tr. p. 21 – 29;
(4) Tr. p. 42 – 169;
(5) Tr. p. 175 – 176;
(6) Tr. p. 198 - 203
(7) State's Exhibit #1 - Video

[***Signature Page Follows***]

I certify that this designation contains no matter which is irrelevant to this appeal.

May 05, 2017



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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 05, 2017.

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