STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from Lee County
Court of General Sessions
Clifton B. Newman, Jr., Circuit Court Judge

Appellate Case No. 2015-000175

The State,

Respondent,

v.

Dennis E. Hoover,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, appellant, Dennis E. Hoover, respectfully requests rehearing of his appeal, decided June 7, 2017 (Unpublished Opinion No. 2017-UP-236), based on principles of law and evidence overlooked or misapprehended by the Court of Appeals, as follows:

I. Admission of Medical Report and Related Testimony.

Appellant challenged the admission of hearsay evidence from a report of a medical examination and testimony about the contents of that report, as inadmissible under the business records exception to the rule against hearsay, Rule 803(6), SCRE.

The Court's decision overlooked the portion of Rule 803(6) that provides subjective opinions and judgments contained in such records are not admissible. The Court misapprehended the nature of the information contained in the medical report as not containing subjective opinions and judgments. *Cf. In re Care and Treatment of Harvey*, 355 S.C. 53, 62, 584 S.E.2d 893, 897 (2003) (log of treatment center for juveniles with sexually aggressive behaviors was not admissible under business records exception because it contained subjective opinions and judgments about the progress of the committed patient's treatment and behaviors); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) (appraiser's report of the value of a home was inadmissible under Rule 803(6) because it contained the appraiser's subjective opinion as to that value); *see also South Carolina Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 147 n.11, 705 S.E.2d 425, 430 n.11 (2011) (incident report containing officer's observations was inadmissible under the exclusion for subjective opinions and judgments contained in both Rule 803(6) and Rule 803(8), SCRE). The medical report contained information supplied by the medical professional who examined appellant when he was taken into custody. The observations of the medical professional in answer to questions concerning what symptoms appellant displayed were based on that professional's subjective medical judgment concerning his symptoms. The Court should rehear the issue of the error in admitting this report and the testimony concerning the contents of the report, evaluate the prejudicial effect of this evidence, and reverse.

II. Admission of Testimony Without Foundation Based on Personal Knowledge.

Appellant challenged the admission of testimony of the alleged victim, Justin Boyce, concerning appellant's feelings toward his brother, Marshall Boyce, because the

testimony was hearsay and not based on a proper foundation, Justin Boyce's own personal knowledge. *See* Rules 602, 802, SCRE; *State v. Frazier*, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004); *South Carolina Dep't of Soc. Servs. v. Jennifer M.*, 404 S.C. 269, 287 n.12, 744 S.E.2d 591, 600 n.12 (Ct. App. 2013); *Watson v. Sellers*, 299 S.C. 426, 432, 385 S.E.2d 369, 372 (Ct. App. 1989); *Ellison v. Pope*, 290 S.C. 100, 103, 348 S.E.2d 367, 369 (Ct. App. 1986). The defense objected on both hearsay and foundation grounds, but the trial court allowed the testimony without requiring the proper foundation. The Court of Appeals's decision overlooked the absence of any evidence to establish that the matter about which Justin Boyce was testifying was based on his own personal knowledge, rather than what his brother, Marshall, had told him.

After the witness had twice indicated his knowledge was based on what his brother told him, and after the defense had stated the hearsay and foundation bases for its objections, the following exchange occurred:

Q All right. You know if that upset Dennis Hoover?

MR JONES: Objection, Your Honor.

MR. GENTRY: If he knows.

THE COURT: Overrule the objection.

MR. GENTRY: Do you know ---

THE COURT: You've asked the question. He can answer the question.

BY MR. GENTRY:

Q Okay, go ahead (sic) answer, if you know.

A Yes, sir, it upset him.

Tr. p. 247, line 14 – p. 249, line 5. This colloquy establishes that the basis for the witness's knowledge, other than what he had been told, was never established. The trial court overruled the objection without requiring the prosecutor to lay a foundation, and the witness was allowed to provide the substantive testimony without establishing a proper foundation – the witness's personal knowledge. The Court of Appeals misapprehended that the witness's testimony did not establish he had personal knowledge. His testimony was inadmissible hearsay under Rules 801 and 802, SCRE, and was not within any exception to the rule against hearsay.

The Court further misapprehended the substantial and harmful nature of the error. Only two people knew what transpired in the convenience store bathroom where the altercation took place. Each claimed the other instigated the attack. Investigators failed to gather and preserve evidence that could have corroborated appellant's account. The state's theory was that appellant harbored ill will toward the Boyces and that the confrontation was instigated by appellant as the result of that ill will. Justin Boyce's inadmissible hearsay testimony concerning appellant's feelings was substantially prejudicial, since there was no evidence to corroborate either appellant's account or Boyce's account of how the altercation came about. The Court should rehear this issue, find both error and prejudice, and reverse.

III. Inflammatory Questions and Comments of Prosecutor.

Appellant challenged the inappropriate and improper questions and comments made about his character during his cross-examination by the prosecutor. The Court did not address this claim of error and its resulting prejudice, citing the principle that there is no issue to decide where the appellant received the relief requested and the principle that

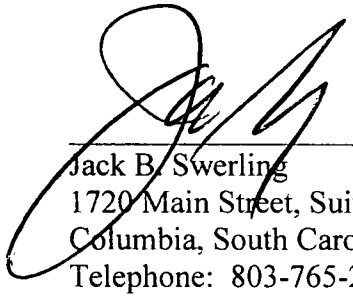
an issue cannot be raised for the first time on appeal. The Court of Appeals overlooked the reasons this claim of error was preserved, as set out in detail in the Final Reply Brief of Appellant, incorporated herein by reference. The basis for the defense's objections was apparent from the context. *See* Rule 103(a)(1), SCRE. To the extent the Court of Appeals's ruling is based on the lower court's striking of an offending question, that action struck only the question, not the answer it elicited. The line of questioning was completely inappropriate and the answer highly prejudicial. The Court should rehear this issue, find it properly preserved, and find prejudicial error requiring reversal.

IV. Cumulative Prejudice.

If the Court rehears the appeal and finds errors, it should also rehear the issue of the cumulative prejudice resulting from the erroneous evidentiary rulings and the prosecutor's improper questions and comments, the cumulative effect of which was to deny appellant his due process right to a fair trial. The state's case was weak, involving the conflicting testimony of the alleged victim and the accused, with no corroborative evidence of either account. In the first two claims of error, the jurors heard extraneous matters that were not properly admitted into evidence. Those matters were prejudicial because of their tendency to support the state's theory of the case. In the third claim of error, the jury heard inflammatory comments by the prosecutor about the accused and answers elicited as the result of improper questions, and the comments, questions, and answers could have inflamed the prejudices of the jurors and influenced their verdict based on improper considerations. Although objections to some of the comments were sustained, the jury heard them nonetheless. The jury heard so many improper and

extraneous matters that the likelihood of unfair prejudice is great. If the court rehears this appeal and finds errors, it should also rehear the issue of cumulative error.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing, by mail, postage prepaid, to counsel for respondent, Assistant Attorney General William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on June 22, 2017.

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June 22, 2017

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Dennis E. Hoover
Appellate Case No.: 2015-000175

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving William M. Blitch, Jr., Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosure

cc: William M. Blitch, Jr., Assistant Attorney General
Katherine Carruth Goode, Esquire
Dennis E. Hoover, #00362818
Audrey Hoover