THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Court of Appeals Case No. 2015-001199

The State, ... Respondent

v.

Preston Shands, Jr., ... Appellant.

Final Reply Brief of Appellant

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ARGUMENT IN REPLY

Question I

Did the trial court judge err by not applying the third step of *Batson's* comparative juror analysis when the Solicitor struck three men based on their prior criminal convictions but sat a similarly situated female who also had a criminal conviction?

The State acknowledges that the prosecutor used criminal history to strike male jurors while also seating a female juror with a criminal conviction and additional female jurors with contacts with law enforcement. Respondent's Brief, p. 12-13. In his initial brief, at pp.8-9, Mr. Shands argued "the State negated the reason by seating similarly-situated [female] jurors." *State v. Stewart*, 413 S.C. 308, 317, 775 S.E.2d 416, 421 (Ct. App. 2015). *Stewart*, of course, involved a prosecutor using criminal history for striking jurors based on race and controls here. Since Mr. Shands filed his initial brief, our Supreme Court, on May 19, 2016, denied the State's petition for a writ of certiorari to review this Court's holding in *Stewart*.

This Court should order a new trial.

Questions II

Did the trial court judge err by not quashing the indictment because the grand jury presentment process in Laurens County, including in Mr. Shands' case, violates state law and Equal Protection?

The State's contends, "Shands presented no evidence to prove that Martin or Lynch did not testify before the grand jury." Respondent's Brief, p. 15. Counsel, however, presented evidence that the ordinary procedure followed in Laurens County is for someone other than the person listed on the witness on the indictment to testify in front of the grand jury. Counsel further inquired of the Solicitor whether Martin or

Lynch testified in front of the grand jury, but the Solicitor could not answer the questions because records are not kept. R. 26-28. This procedure is contrary to law that requires the witnesses testifying before the grand jury to be listed on the indictment. S.C. Code §14-7-1550. This Court should not allow the State to benefit from creating a procedure that makes it impossible for an accused to learn the identity of the witnesses testifying before the grand jury. Our Supreme Court had to ban the practice of solicitors testifying as the sole witness before the grand jury before solicitors would discontinue the practice. *State v. Anderson*, 312 S.C. 185, 187, 439 S.E.2d 835 (1993).

This Court should order a new trial.

Questions III

Did the trial judge err by allowing the Solicitor to impeach Mr. Shands by asking him if he had been previously convicted of a violent felony, suggesting to the jurors that Mr. Shands is a violent person, when he was on trial for multiple violent felony charges?

Although recognizing the authority of *Green v. State*, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000) and *State v. Colf,* 337 S.C. 622, 525 S.E.2d 246 (2000), the State brief does not accurately apply the five factors set forth in those cases. All of the *Colf* factors militate in favor of excluding reference to Shands' prior conviction for a "violent felony." First, other that an vague discussion about "generalized impact on credibility," Respondent's Brief, p. 30, the State never identifies the impeachment value of the 40 year old conviction. Second, the conviction is remote, and Shands has not been in similar trouble while confined or after being released into the community. Third, the prejudice from the similarity of the crime was enhanced when the trial judge allowed the State to portray Shands as a violent felon without any mention of the remoteness of the

conviction. Fourth, the defendant's credibility was important to his defense. Fifth, credibility was the central issue in the case.

The State's argument that "Shands put his character into evidence and opened the door to his prior conviction is without merit. Respondent's Brief, pp. 33-34. Although Shands did present evidence that he had never acted in this manner around his wife and the children, this evidence was admissible under Rule 404(a)(2), SCRE. If the prosecution had evidence to rebut these character traits, its presentation would be limited to evidence of the "pertinent trait of character." The State did not present contrary evidence because none existed. This fact further highlights the prejudice to Shands.

Contrary to the State' argument, at pp. 35-36 of its brief, the error was not harmless because Mr. Shands' credibility was essential to his defense. Our appellate courts consistently find error prejudicial when the defendant's credibility is at issue. *E.g.* *State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (error in qualifying witness as an expert not harmless when the "case turned solely on the credibility of the minor and of Appellant"); *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (Solicitor's improper vouching from State's witness, Ethridge, was prejudicial "because Gilchrist essentially presented a 'mere presence' defense, believing Ethridge was the only way the jury could convict Gilchrist."); and *State v. Bryant,* 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) ("[T]e improper questioning pitted the officer's testimony against Bryant. Credibility was a critical issue in this case as Bryant and the officer were the only two witnesses present during the entire incident. We find that Bryant was unfairly prejudiced by the improper cross-examination.").

This Court should order a new trial.

Question IV

Did the trial judge err by not instructing the jurors about the law of involuntary intoxication when Mr. Shands' testimony supported providing the instruction?

The State acknowledges Shands' testimony about his involuntary intoxication but argues he is not entitled to a jury instruction in the issue. The State, however, overlooks the standard of review. In determining whether the evidence requires a charge of [a lesser included offense], the Court views the facts in a light most favorable to the defendant." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is ***any*** evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) (emphasis added) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. *See also State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) (reversible error not to charge involuntary manslaughter).

This Court should order a new trial.

Question V

Did the trial judge, after sustaining Mr. Shands objection to the Solicitor's improper closing argument, err by not striking that argument from the record and instructing the jurors to disregard it?

The State argues that the prosecutor's closing argument was not objectionable, and the trial judge did not sustain Shands' objection. These arguments are without merit. First, the prosecutor's statement, "[T]his is a jealous, controlling husband who was not

going to let *his property* leave that house," is highly inflammatory and not based on evidence. The trial judge very clearly admonished the prosecutor to confine her arguments to the evidence.

The State also argues this issue is not preserved for appeal because Shands did not explain in his opening brief why the argument was objectionable. Shands was not required to offer such an explanation because his objection was sustained and the issue for appeal is the prejudice resulting form the denial of a curative instruction.

This Court should order a new trial.

Question VI

Did the trial judge err by charging the jurors they could infer malice from the use of a deadly weapon when that instruction is contrary to *State v. Belcher* and was an impermissible comment on the facts of the case?

The State's argues that there was no evidence to mitigate the crime of attempted murder to a lesser offense because the assault was committed during the commission of a kidnapping. The State relies on the felony murder rule in homicide cases. *See e.g.* Respondent's Brief, p. 46. This argument overlooks the fact that attempted murder is a specific intent crime under S.C. Code Ann. § 16-3-29. And compare *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) (specific intent to commit murder is an element of attempted murder) with *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996) (held that conviction for assault and battery with intent to kill does not require showing of specific intent to kill).

Under the facts of this case, reasonable jurors could conclude there was not a specific intent to kill even if they concluded the assault was committed with malice. *See State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997) (absence of malice was not element

of common law offense of assault and battery of high and aggravated nature, so it was error to equate that offense to voluntary manslaughter). *And see* S.C. Code Ann. § 16-3-600(C)(1) (allowing for conviction for first-degree assault and battery when the injury "occurred during the commission of a robbery, burglary, kidnapping, or theft").

As discussed in the opening brief, at p. 28, *Belcher* left undecided whether this instruction constitutes a charge on the facts of the case. Telling jurors that an inference of malice arises from the use of a deadly weapon cannot be reconciled with our Supreme Court's admonition in *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) that trial judges not give specific examples of provocation when instructing jurors about voluntary manslaughter.

This Court should order a new trial.

Question VII

Did the trial judge err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the arguments made by the State in its rebuttal closing argument?

The State remains entrenched in the common law rule that allows prosecutors to "sandbag" when a defendant presents evidence. The State, no doubt, is empowered by the General assembly rejecting proposed Rule 21, SCRCrimP. Although the General Assembly rejected Proposed Rule 21, the South Carolina Supreme Court seems inclined to change the rule though the common law. *See* Oral Argument in *State v. Stephanie Greene*, Appellate Case No. 2014-000764 (found at

http://media.sccourts.org/videos/2014-000764.mp4 (last viewed June 19, 2016)). *See also United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014) (held that prosecutor's improper comment during rebuttal warranted reversal of conviction). The oral argument in *Maloney* is enlightening and can be viewed at https://www.youtube.com/watch?v=HgafGnA4Eow&feature=youtu.be last viewed June 23, 2016).

The State argues Shands cannot claim surprise because of the prosecutor's argument in opposition to his directed verdict motion on the kidnapping charge. Respondent's Brief, pp. 51-52. But, there was guarantee the prosecutor would make those same arguments during her closing argument. The jurors had not heard such an argument from the prosecutor. It is fundamentally unfair to require the defense to predict the prosecutor's closing argument. What if counsel predicts inaccurately? It is equally unfair not to allow one party to respond the other party's best argument.

This Court should order a new trial.

Question VIII

Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

In support of its argument that our state's kidnapping statue is not unconstitutionally vague and overbroad, the State relies on our Supreme Court's logic in *State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980): "The terms of this statute are clear and unambiguous. It proscribes the forceful seizure, confinement or carrying away of another person against his will without authority of law." If the kidnapping statute is construed in this manner, then the State's proof failed.

This Court should reverse the conviction for kidnapping.

CONCLUSION

For the reasons set forth in his opening brief and this reply brief, this Court should reverse Mr. Shands' convictions and sentences and order a new trial.

Respectfully Submitted,

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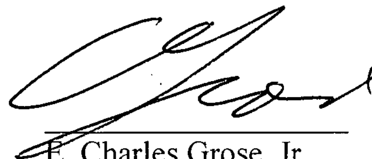
Rule 211, SCACR Certification

I certify that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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