STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2016-001451

The State, Respondent,

vs.

Jeffrey William Cole, Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. The trial court properly limited Appellant's trial counsel from delving into unrelated, irrelevant, and likely confusing cross-examination regarding the informant's mental disorders and medication.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly limited Appellant's trial counsel from delving into unrelated, irrelevant, and likely confusing cross-examination regarding the informant's mental disorders and medication.

The trial court properly limited cross-examination of the State's witness who conducted a controlled buy from Appellant. Appellant sought to delve into the witness's diagnosed mental disorders and medications he took without establishing a proper basis for their relevancy. The trial court properly prohibited Appellant from conducting a fishing expedition into the private mental health of the witness and exposing the jury to confusing, irrelevant, and unduly prejudicial testimony.

Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). In order to state a violation of the confrontation clause, a criminal defendant must show he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004). This Court in Gillian stated:

> The Confrontation Clause does not, however, prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain **wide latitude** insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, **harassment, prejudice, confusion of the issues,** witness' safety, or interrogation that is repetitive or only marginally relevant.

Gillian, 360 S.C. at 451, 602 S.E.2d at 71 (emphasis added)(citing Van Arsdall, 475 U.S. 673). "It is well settled that the scope of cross-examination is within the trial judge's discretion, and this Court will not interfere absent a showing of prejudice by the complaining party." State v. Sherard, 303 S.C. 172, 174, 399 S.E.2d 595, 596 (1991).

Further, pursuant to Rule 401, SCRE: "'Relevant evidence' means 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." Additionally: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. **Evidence which is not relevant is not admissible.**" Rule 402, SCRE (emphasis added). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In the instant case, Elliott testified regarding the drug transaction he conducted with Appellant, in which he exchanged money for oxycodone under a controlled buy. Elliott had prior offenses, which were discussed in front of the jury, and indicated he used drugs at the time of those offenses. On redirect examination, the State asked Elliott what changed to make him stop using drugs, and he responded: "I got -- I used drugs to kill the pain that I had. I didn't know I had mental disorders." He indicated he saw a psychiatrist and goes to the doctor every month for treatment. (T.74; R.___).

Appellant sought to cross-examine Elliott about his mental disorders. Appellant was allowed to proffer questions regarding any diagnosis of mental disorders and any medications for those disorders. The proffer included responses for both at the time of the controlled buy as well as at the time of trial. The proffer established the drugs taken at the time of the controlled buy were a mood stabilizer and one he took to assist him in going to sleep. (T.83-87; 95-96; R.___). At no point during the proffer did Appellant establish the drugs resulted in the inability of Elliott to tell the truth, remember the details of the controlled buy, or properly perceive the reality of the events at the time of the controlled buy.

The trial court prevented a discussion regarding the various diagnosis and medications. He found it was not relevant and it was unduly prejudicial. (T.84; R.___). The court then allowed the parties to research the drugs involved overnight and to provide additional argument. The following day, after more argument regarding whether Elliott was competent to testify, the trial court specifically ruled: "Well, I have observed the witness testify and I have heard him testify and there is no indication to me that he's not competent to testify in the trial of this case." (T.108; R.___). The court continued:

> And so there is no indication whatsoever that I have seen or that I have been made aware of that would indicate that anything

> that Mr. Elliott was taking, if at all at that time, would affect his ability to recall to testify and be able to testify accurately about the events in question.
>
> . . . .
>
> I don't find that his competency in this case to be an issue and I don't find that his testimony regarding the prescriptive drugs that he was provided would affect his ability to also testify competently or be able to recall the events occurring in November of 2014.

(T.108-109; R.___). The court concluded the discussion by finding:

> 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 . . .unless you tell me that you have someone, that could testify that his condition would be something that would affect his ability to be able to testify accurately or recall and make him incompetent and that sort of thing.
>
> . . . .
>
> [U]nless you have got some medical testimony that tells us that that affects his competency or affects his ability in some way to be able to accurately recall an event, **it's not relevant** to anything and **it's just a source of confusion and misdirection** insofar as the jury is concerned and it doesn't help in any way to decide any fact that they have to decide.

(T.109-110)(emphasis added).

In State v. Turner, the defendant sought to question a victim regarding her diagnosis of schizophrenia and the medicine, Prozac and Risperdal, taken for that condition. State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 698 (2007). The South Carolina Supreme Court found:

> Because the victim was taking her medication at the time of the robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus

> between the medications the victim was taking and any alleged misidentification of appellant.

Id. at 131, 644 S.E.2d at 698. This is the same rationale employed by the trial court in limiting Appellant's cross-examination. As in Turner, the medical diagnosis and medications are irrelevant because there has been absolutely no showing that they relate to Appellant's ability to tell the truth or recall the events accurately.

The issue of limiting cross-examination regarding a person's mental health was discussed in great detail by the Fourth Circuit in United States v. Lopez, 611 F.2d 44 (4th Cir. 1979), in which the court limited the defendant's ability to discuss a witness's psychological history as disclosed in a psychiatric examination. Turner's holding has great support in the Fourth Circuit as the Court explained:

> One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interests of justice. This is so because cross-examination of an adverse witness on matters of such personal privacy, **if of minimal probative value, is manifestly unfair and unnecessarily demeaning of the witness**. Moreover, such cross-examination will generally introduce into the case a collateral issue, leading to a large amount of testimony substantially extraneous to the essential facts and issues of the controversy being tried. Because of the **obvious unfairness** of such a cross-examination and its **needless waste of judicial time**, it has been posited in an authoritative text that, "Courts should have the power to protect witnesses against cross-examination that does little to impair credibility but that may damage their reputation, invade their privacy, and assault their personality."

Id. at 45 (emphasis added) (quoting Wright & Graham, 22 Federal Practice and Procedure, §5215, p. 280). The Court continued:

> The rationale for such a restriction [of cross-examination into collateral matters such as using a witness' psychiatric experiences by way of an attack on the witness' credibility], as applied in the psychiatric area, is that many psychiatric problems or fixations which a witness may have had are without any relevancy to the

> witness' credibility, concerned as it is with whether the witness' mental impairment is related to "his capacity to observe the event at the time of its occurrence, to communicate his observations accurately and truthfully at trial, or to maintain a clear recollection in the meantime." It follows that the witness' mental impairment, to constitute a proper subject for cross-examination, must have been "at a time probatively related to the time period about which he was attempting to testify," must go to the witness' qualification to testify and ability to recall, and must not "introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the Government to introduce testimony explaining the matter."

Id. at 45-46 (internal citations and footnotes omitted).

As the Court of Appeals of Utah has stated: "Merely asserting that the witness suffers from a mental disorder does not meet this requirement of showing the disorder directly affects the witness's ability to perceive, recall, and relate events." State v. Stewart, 925 P.2d 598, 600 (Utah Ct. App. 1996). The Utah Court also found: "Our decision echoes other courts that have also found a witness's mental health history is irrelevant when the party seeking to admit it fails to show that it actually affects the witness's credibility." See, e.g., United States v. Butt, 955 F.2d 77, 82 (1st Cir.1992) (affirming trial court's decision to exclude evidence suggesting witness was mentally unstable because there had been no formal psychiatric diagnosis of mental illness that would prevent witness "from perceiving matters truthfully and testifying about them"); United States v. Friedman, 854 F.2d 535, 571 (2d Cir.1988) (affirming trial court's decision to quash motion to admit psychotherapist's notes because "nothing in [them] casts any doubt upon [the witness's] ability to understand and relate the truth"), *cert. denied*, 490 U.S. 1004, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989); Stewart v. State, 398 So.2d 369, 375 (Ala. Crim. App.) ("[T]he credibility of a witness may be attacked by showing mental incapacity, but only if the incapacity exists at the time the witness testifies, or existed at the time of his observation of the incident about which he testifies."), *writ denied*, 398 So.2d 376 (Ala. 1981); Bakken v. State,

489 P.2d 120, 124 (Alaska 1971) (explaining excluded evidence of witness's alleged psychiatric problems would have been admissible if it was shown problem rendered witness's observation and memory of event unreliable); Stanford v. Commonwealth, 793 S.W.2d 112, 116 (Ky. 1990) ("[P]rior mental treatment of a witness is not relevant as to credibility unless it can be demonstrated that there was a mental deficiency at the time of the testimony or at the time of the matter about which the testimony was given."); Commonwealth v. Perreault, 435 N.E.2d 635, 638 (Ma. 1982) (" '[T]here must be some indication that the impairment or addiction involved is relevant to the issue of credibility before evidence of such can be used to impeach.' " (citation omitted)); State v. Gum, 309 S.E.2d 32, 43 (W.Va. 1983) (holding that evidence of witness's acquittal by reason of mental illness was properly excluded partly because no showing was made that mental disorder affected witness's credibility).

Accordingly, this Court should find Appellant has failed to demonstrate the relevance of the mental disorders and medication he sought to discuss in cross-examination of the State's witness. He presented no evidence either played any role in the witness's ability to perceive the events as the occurred, recall the events as the occurred, or testify truthfully about the events. As a result, the trial court properly found any examination into the mental disorders and medications was unduly prejudicial, irrelevant, and properly excluded.

"A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error if the error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (citation omitted). Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

> 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 684. "In determining whether and error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319. "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Gillian, 360 S.C. 433, 455, 602 S.E.2d 62, 73 (Ct. App. 2004). Error is considered harmless where it could not reasonably have affected the outcome of the trial. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." Id. (citations omitted).

In the instant case, Elliott admitted he was paid $60 to participate in the controlled buy and only got paid after he made a buy. (T.63-64; R.___). Appellant also established the reason Elliott knew where to go to get the pills was because he had previously purchased for his own use. (T.69; R.___). Elliott's credibility was thoroughly impeached with his prior convictions, as well as his prior drug use during the time of his prior convictions. (T.69-70; 73-74 R.___). Additionally, the fact Elliott suffered from mental disorders and went to a psychiatrist and doctor monthly for treatment was before the jury. (T.74; R.___). Accordingly, Elliott's credibility was impeached and the jury knew all it needed to know to judge his credibility without knowing the specifics behind his mental disorders and medications. See e.g., State v. Cooper, 312 S.C. 90, 92, 439 S.E.2d 276, 277 (1994) (holding any error in excluding evidence of witness' prior bad acts harmless, where witness was thoroughly impeached by admission of numerous previous

convictions and acknowledgment his testimony was given for favorable treatment on pending charges), *overruled in part on other grounds* by Franklin v. Catoe, 346 S.C. 563, 575, 552 S.E.2d 718, 725 (2001); State v. Brayboy, 401 S.C. 207, 215, 736 S.E.2d 679, 683 (Ct. App. 2012) (finding any limitation on cross-examination harmless when the witness was already thoroughly impeached); State v. Tillman, 304 S.C. 512, 520, 405 S.E.2d 607, 612 (Ct. App. 1991) (finding, where witness was thoroughly impeached by admission of numerous prior convictions and his acknowledgment that he was testifying under an agreement to receive favorable treatment on some outstanding charges, any error in excluding evidence of a particular crime he might have committed was harmless).

This Court should affirm Appellant's conviction and sentence because the trial court did not err in limiting Appellant's cross-examination into the irrelevant and unduly prejudicial area of the State's witness's mental health and, even if limited in error, any error would be entirely harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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August 15, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2016-001451

The State, Respondent,

vs.

Jeffrey William Cole, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2017.

Anne Mueller

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August 15, 2017

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RE: State v. Jeffrey William Cole
Appellate Case Tracking No. 2016-001451

Dear Mr. Gilliam:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services