

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ANTWON FULLER,

APPELLANT

APPELLATE CASE NO. 2016-000672

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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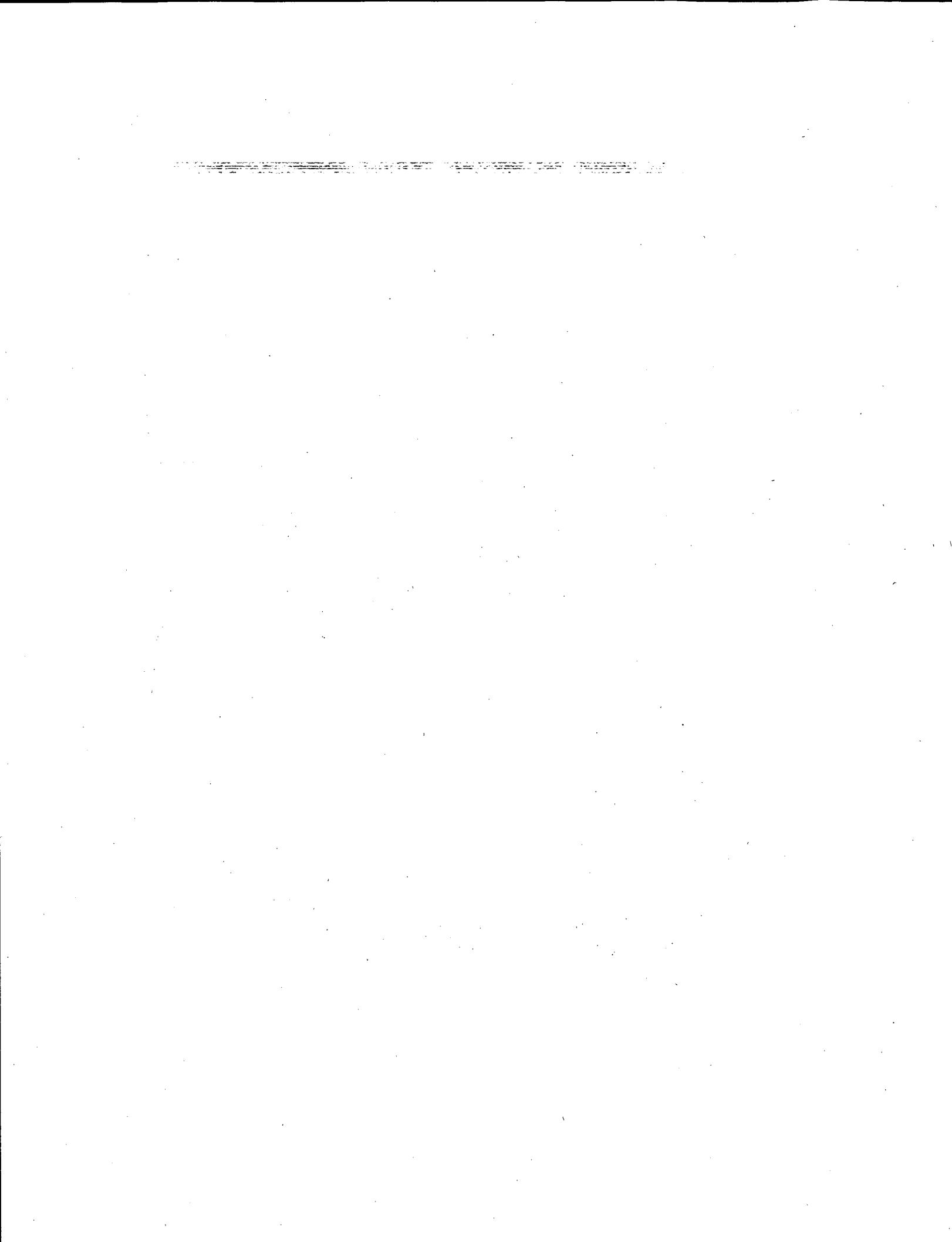
STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in preventing appellant from cross-examining the alleged victim about her two prior DUI convictions when this evidence would have shown her bias and motive to lie about the assault to escape prosecution for a car crash while she was intoxicated?

2.

Whether the trial judge erred in placing appellant on the sex offender registry for kidnapping after the jury acquitted him of criminal sexual conduct and assault and battery?



STATEMENT OF THE CASE

On September 8, 2014, an Aiken County grand jury indicted appellant Michael Fuller for first-degree criminal sexual conduct, first-degree assault and battery, kidnapping, unlawful carrying of a pistol, possession of a stolen pistol, and possession of a weapon during commission of a violent crime. R. 828 – 835. On February 16, 2016, appellant was tried before the Honorable G. Thomas Cooper, Jr., and a jury. R. 1. Margaret F. Bodman and Carter Potts represented the State. R. 1. Wallis A. Alves and C. David Hayes represented appellant. R. 1.

The jury **acquitted** appellant on the CSC and assault and battery charges. R. 789, ll. 15 – 20. The jury convicted appellant on the kidnapping and gun charges. R. 789, l. 12 – 790, l. 5. Judge Cooper sentenced appellant to a total of forty-one (41) years' imprisonment: consecutive terms of thirty years' imprisonment for kidnapping, five years' imprisonment for possession of a weapon during a violent crime, five years' imprisonment for possession of a stolen pistol, and one year's imprisonment for unlawful carrying of a pistol. R. 810, l. 2 – 811, l. 22. Judge Cooper also ordered appellant to register as a sex offender. R. 810, ll. 23 – 24. This appeal follows.

ARGUMENT

1.

The trial judge erred in preventing appellant from cross-examining the alleged victim about her two prior DUI convictions when this evidence would have shown her bias and motive to lie about the assault to escape prosecution for a car crash while she was intoxicated.

Introduction

The bookend facts of Katie Schlinger's encounter with Michael Fuller in the wee hours of December 20, 2013, were not in dispute. At approximately 4:00 AM, Katie Schlinger ("Schlinger") voluntarily gave appellant Michael Fuller ("Fuller") a ride in her car from her hotel. R. 247, l. 17 – 248, l. 13. Schlinger then wrecked her car near the Aiken hospital. R. 255, ll. 6 – 15. What was very much in dispute was what happened in between the hotel and the wreck. This case turned on Schlinger's credibility.

Schlinger was an admitted alcoholic who sometimes blacked out when she drank. R. 334, ll. 12 – 16. R. 286, ll. 1 – 3. She was intoxicated at the time of the wreck with a blood alcohol level of at least .098. R. 634, ll. 13 – 20. R. 822. She also had marijuana and illegally obtained Adderall in her system. R. 635, l. 5 – 636, l. 12. R. 280, l. 19 – 281, l. 8. Fuller was found unconscious in the demolished car and the police had to shine lights and scream at him to awaken him. R. 63, l. 4 – 64, l. 23. Fuller told the police that he fell asleep while Schlinger was giving him a ride home and he awoke surrounded by the police after the wreck. R. 820-821. Schlinger claimed that Fuller pulled a gun on her, hit her with the gun and forcefully tried to rape her, and she wrecked the car on purpose to escape. R. 250, l. 9 – 255, l. 21. The jury acquitted Fuller of rape and assault and battery, but convicted him of kidnapping and weapons charges. R.

789, ll. 15 – 20. But for a crucial error made by the trial court, the result would have been different.

Relevant Facts

Schlinger was twenty-eight years old at the time of trial. R. 233, ll. 3 – 4. She was from Florida. R. 233, ll. 5 – 6. She worked as a bartender. R. 235, ll. 8 – 12. Schlinger traveled from Florida to Aiken because her brother was scheduled for open-heart surgery in the Aiken hospital. R. 236, ll. 5 – 11. She and her family stayed at a hotel near the hospital. R. 236, l. 4 – 239, l. 22.

Schlinger's much-older boyfriend (53 years old) came to Aiken. R. 239, l. 23 – 240, l. 10. R. 288, ll. 10 – 14. Schlinger described their relationship as "Not great." R. 240, ll. 11 – 13. Schlinger's brother's surgery went well and the family went to the hotel bar at approximately 10:00 PM to celebrate. R. 240, l. 20 – 241, l. 8. Schlinger had taken Adderall she illegally got from her sister throughout the day to help her stay awake. R. 242, ll. 5 – 22. R. 280, l. 19 – 281, l. 8. When asked by the solicitor how long they stayed at the bar, Schlinger said, "We closed it down." R. 243, ll. 10 – 14. Schlinger admitted drinking only "two glasses of wine and a Fireball shot" while they closed down the bar. R. 243, ll. 15 – 17.

Schlinger and her boyfriend went back to their room and got into a fight. R. 244, ll. 7 – 9. Schlinger's boyfriend was jealous of Schlinger's stepfather. R. 244, ll. 10 – 22. Surveillance video from the hotel was admitted into evidence and showed the couple's fight. (State's Exhibit 31). Schlinger can be seen standing in the doorway of their room. (State's Exhibit 31). The boyfriend is not visible. (State's Exhibit 31). The boyfriend violently jerks Schlinger into the room with such force that she loses her shoe. (State's Exhibit 31). Schlinger leaves the room with her shoe in her hand and is visibly upset. (State's Exhibit 31). Schlinger storms out of camera range with her boyfriend apparently calling after her (the video does not contain audio).

(State's Exhibit 31). Schlinger returns to the room and the fight continues with Schlinger standing in the hall and the boyfriend standing just inside the door. (State's Exhibit 31).

Schlinger again walks off camera and her boyfriend follows. (State's Exhibit 31). The boyfriend returns, enters the room, and then leaves with a bag. (State's Exhibit 31). He returns, takes a room key in Schlinger's direction, then walks off camera, but the shadow of his car can be seen pulling away from the hotel. (State's Exhibit 31). The video shows the time as 2:47 AM when the boyfriend leaves the hotel. (State's Exhibit 31).

As Schlinger explained during her testimony, she went to her car and called a friend because she was upset about the fight. R. 245, ll. 12 – 22. The boyfriend came to the car and yelled at her that if she did not return to the room, he was going to leave. R. 245, ll. 12 – 22. She told him to go. R. 245, ll. 12 – 22. Schlinger said, "And so he packed up his stuff and he left in the middle of the night." R. 245, ll. 12 – 22. She saw him leave. R. 245, ll. 23 – 24.

Schlinger decided to drive to a store to buy cigarettes and wine and, as she described it, "just cheer in my beer." R. 246, ll. 13 – 25. The State admitted a video from a convenience store that showed Schlinger buy a four-pack of wine coolers and cigarettes, which she appears to buy in separate transactions. (State's Ex. 30). Schlinger has trouble making one of the transactions and turns and makes what looks like an apology to the person waiting behind her. (State's Ex. 30). Schlinger leaves the store at 3:45 AM. (State's Ex. 30).

Schlinger went back to the hotel, but stayed in her car because she could not smoke cigarettes in the room. R. 246, ll. 21 – 25. She denied opening the wine. R. 247, ll. 15 – 16. Fuller approached her and asked her for a cigarette, which she gave him. R. 247, ll. 17 – 20. Schlinger said nothing about Fuller frightened her and they had a pleasant conversation. R. 247, l. 17 – 248, l. 13. Schlinger claimed Fuller asked her for a ride to the hospital to visit his uncle,

and she agreed, even though it was 4:00 AM. R. 247, l. 17 – 248, l. 13. She testified that it did not cross her mind that the hospital did not have visiting hours at 4:00 AM. R. 247, l. 17 – 248, l. 13.

The police took Fuller into custody after he regained consciousness from the wreck and he gave two statements that were admitted into evidence. R. 64, l. 1 – 67, l. 8. R. 812 – 818; R. 819 – 827; State's Ex. 1-3; State's Ex. 29. The interviews were recorded and transcribed and this brief will, for convenience, refer to the transcriptions. In Fuller's first interview in the back of the police car after just regaining consciousness, he initially displayed confusion about what happened and whose car was involved in the wreck. R. 812 – 814. Fuller then tells the police that he asked Schlinger for a ride to his grandmother's house on Hampton Avenue. R. 815. He told them Schlinger was driving and he needed a ride because his friend Dominique had left him at the hotel. R. 815 – 818.

When the police interviewed Fuller at the station, he admitted smoking marijuana, that Schlinger told him about her older boyfriend, agreed to give him a ride to Hampton Avenue, and that he passed out on the way. R. 819 – 821. When he woke up, "all of a sudden the police was right there." R. 821. Fuller told the police that Schlinger was drunk. R. 822. He expressed disbelief when the police told him he was being charged with kidnapping and told the police to investigate Schlinger's intoxication level. R. 823 – 825.

The police never investigated Schlinger's intoxication as a possible cause of the wreck. R. 507, ll. 12 – 23. Instead, they accepted Schlinger's version of events that happened after Fuller entered the car. On direct-examination, Schlinger said that she turned on University Parkway and arrived at the first entrance to the hospital, but Fuller told her to keep driving. R. 250, ll. 9 – 19. She began to turn at the second entrance to the hospital, but Fuller again told her

to keep going. R. 250, ll. 9 – 19. She claimed she realized that no other entrance to the hospital existed and when she turned to tell Fuller this, he put a pistol to her cheek. R. 250, ll. 9 – 19.

Fuller hit her in the back of the head with his gun and told her to keep driving. R. 250, l. 20 – 251, l. 3. She began to cry and Fuller again hit her in the head with his gun and threatened to kill her. R. 251, ll. 4 – 6. Schlinger said she then “slowly reached down for the door handle and I pushed on the gas as hard as I could and I flung myself out of the car. And when I stopped rolling I took off running and I don’t know how but somehow he got the car into park and he tackled me.” R. 251, ll. 7 – 11. After Fuller tackled her, they fought and Fuller eventually sat on top of her and hit her again in the head with the gun. R. 252, l. 24 – 253, l. 19. Fuller pulled down his pants, put his penis in her mouth, and commanded her to perform oral sex. R. 252, l. 24 – 253, l. 19. R. 259, ll. 15 – 20.

He began unbuttoning her pants and Schlinger offered him money if he would take her to an ATM. R. 252, l. 24 – 253, l. 19. They got back into the car and Fuller told her to drive. R. 252, l. 24 – 253, l. 19. Schlinger said as she began driving, she realized that she again needed to escape, put the car in reverse, and wrecked the car. R. 253, l. 14 – 256, l. 20. She flagged down a motorist who took her to the hospital where she was treated for extensive injuries sustained in the wreck, including a fractured vertebrae in her neck. R. 256, l. 21 – 260, l. 25.

Schlinger’s coat that she wore when she flung herself out of the car and rolled on the paved street was admitted into evidence. R. 358, ll. 19 – 24. During her closing argument, defense counsel held up the jacket for the jury and asked, “Is this a pea coat that somebody was rushed, that somebody was, jumped out of a car in? Rolled out of a car in? Rolled down asphalt? Was attacked and thrown to the ground? Was fighting for her life? Does that pea coat show any signs of any of that? It does not.” R. 685, ll. 20 – 25. The defense called witnesses

from the hospital who testified that Schlinger's claims about being sexually assaulted did not appear in the notes even though this would have been a standard inquiry given her description of the attack. R. 543, ll. 2 – 4. R. 545, l. 8 – 546, l. 8. R. 589, ll. 1 – 3. The jury acquitted Fuller of rape and assault and battery. R. 789, ll. 15 – 20.

The police only found one of the four wine coolers at the site of the wreck. R. 512, ll. 1 – 24. They did not find the carton containing the wine coolers. R. 512, ll. 1 – 24. Schlinger claimed she did not know what happened to the wine. R. 291, ll. 14 – 18. The emergency room doctor testified that he noted Schlinger was intoxicated and that she admitted that she drank alcohol. R. 588, ll. 9 – 25. Schlinger's blood was drawn at 8:43 AM. Her blood alcohol level four hours after the wreck was 0.065. R. 572, l. 24 – 812, l. 5. The defense called a forensic toxicologist who performed a retrograde analysis on the blood alcohol level in Schlinger's blood at the time of the accident. R. 630, l. 6 – 634, l. 20. He determined that the "lowest possible blood-alcohol level that I calculated was a .098, I believe." R. 634, ll. 13 – 20.

Schlinger admitted on cross-examination that she had depression and PTSD and took prescription medications for these conditions at the time of the wreck. R. 333, l. 12 – 334, l. 6. She admitted she was an alcoholic. R. 334, ll. 7 – 24. R. 312, ll. 5 – 8. She claimed, however, that she only had three drinks the night of the wreck. R. 312, ll. 1 – 4.

Defense counsel then asked Schlinger if she had "two DUIs on your record" and the State objected. R. 312, ll. 9 – 12. The colloquy was as follows:

Q. And, in fact, you have two DUIs on your record, don't you?

MS. BODMAN: Objection.

THE WITNESS: I do not.

MS. ALVES: Judge, it goes to bias and a motive to lie.

THE WITNESS: I do not. I have one DUI from 2010.

MS. BODMAN: Your Honor.

THE COURT: What's the objection?

MS. BODMAN: Inadmissible. Irrelevant. Improper.

MS. ALVES: Judge, this goes to, towards—directly toward bias and her motive to tell a lie on this evening.

THE COURT: I'll sustain the objection. Strike it from the record.

R. 312, ll. 9 – 25. Defense counsel then asked Schlinger if she knew it was illegal to drive drunk and she admitted this obvious fact. R. 313, ll. 2 – 4. Defense counsel asked Schlinger to admit that if she was under the influence she could have been arrested and Schlinger replied, "I was not intoxicated." R. 313, ll. 5 – 10. Defense counsel pressed the question and the solicitor again objected based on "speculation" and the court sustained the objections. R. 313, ll. 14 – 23. Judge Cooper then excused the jury to hear defense counsel's argument on the line of questioning. R. 313, l. 24 – 314, l. 10.

During the in-camera hearing, the State tried to prevent appellant from cross-examining Schlinger about the illegal Adderall, marijuana, and alcohol in her bloodstream. R. 317, l. 12 – 318, l. 23. Defense counsel argued:

Judge, under Rule 608 I think that that rule gives me the right to—even though this would not be subject to cross-examination if she were on the witness stand because it does not carry more than a year and, but this is within the past 10 years, I think it is relevant to this case because asking her about those prior DUIs and she says one, but, Judge, her driving record and her rap sheet say two convictions for DUI. And, in fact she had only just gotten—according to her driving record from the Florida DMV, she had only just gotten her license back on, about two weeks prior to this.

THE WITNESS: That's—

THE COURT: Just wait a minute.

MS. ALVES: So, Judge, I just would argue that it is relevant that I get out the information that she does have two prior DUIs. That's a strong motive to tell a lie about somebody raping you instead of having to potentially—

THE COURT: I don't see that. I don't see that.

MS. ALVES: I'm sorry?

THE COURT: I don't see any connection between having two DUIs and a motive for lying about being raped. I just don't.

MS. ALVES: Judge—

THE COURT: I don't see it.

MS. ALVES: Yes, sir.

THE COURT: I'll sustain the State's objection on that. Are you ready for the jury?

R. 331, l. 5 – 332, l. 11 (emphasis added).

Discussion

The court's ruling prevented defense counsel from cross-examining Schlinger and showing the jury that Schlinger had a motive to lie about Fuller to evade the substantial penalties that can result from a third DUI conviction. In South Carolina, a DUI second carries a maximum sentence of three years. S.C. Code Ann. § 56-5-2930(A)(2). A DUI third carries a maximum sentence of five years and a potential mandatory minimum of six months' imprisonment. S.C. Code Ann. § 56-5-2930(A)(3). Because this case hinged on Schlinger's credibility, appellant was entitled to cross-examine Schlinger on this substantial motive to lie about whether her intoxication caused the wreck.

Defense counsel properly cited Rule 608 as authority to cross-examine Schlinger on her motive to fabricate the assault to escape a third DUI conviction. Rule 608, SCRE. Rule 608(c) states that "Bias, prejudice or **any motive to misrepresent** may be shown to impeach the witness

either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE (emphasis added). Defense counsel specifically argued that she was offering Schlinger’s prior convictions to show she had “a strong motive to tell a lie,” but the trial judge ruled there was no connection. R. 331, l. 20 – 332, l. 11.

South Carolina’s rule allowing impeachment for bias and motive to lie is broadly interpreted. “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” State v. McEachern, 399 S.C. 125, 140-41, 731 S.E.2d 604, 612 (Ct. App. 2012) (internal quotations omitted). “[G]enerally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.” Id. (internal quotations omitted). Attorneys are routinely allowed to cross-examine the State’s witnesses about their pending charges to show they have a motive to lie. See State v. Sims, 348 S.C. 16, 23-24, 558 S.E.2d 518, 522-23 (2002).

The witness’s motive to lie in a case like Sims is to curry favor with the prosecutor in hopes of reduced time for pending charges. This motive is much less than Schlinger’s motive, which was to entirely escape prosecution. From Schlinger’s perspective at the time of the accident, she was facing at least a third DUI and jail time. Fuller was unconscious. Schlinger was badly injured in the crash and, for all Schlinger knew, Fuller was also seriously injured or even dead. At the time she blamed Fuller for rape and kidnapping, Schlinger had great motive to lie.

Unfortunately, the trial judge kept the jury from hearing about Schlinger’s prior DUI convictions. Knowing about her prior convictions would have further damaged her credibility in

a case where it was already shaky. It also would have shown the jury that Schlinger had the ability to fabricate this story because of her past experience in the judicial system. The jury certainly disbelieved Schlinger's story about the rape and the assault because of its acquittal of Fuller on these charges. Had Fuller been able to fully cross-examine Schlinger and show the extent of her motive to lie, the result of this trial would have been different.

The trial judge erred in placing appellant on the sex offender registry for kidnapping after the jury acquitted him of criminal sexual conduct and assault and battery.

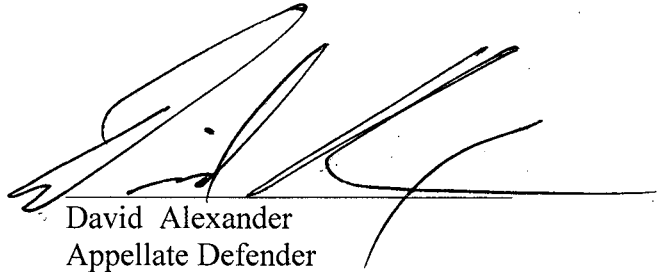
The jury acquitted Fuller of CSC and assault and battery, nevertheless, the trial judge ordered appellant placed on the sex offender registry. R. 807, l. 17 – 810, l. 24. Appellant objected to his placement on the registry because of the jury’s acquittal. R. 798, l. 18 – 799, l. 25. R. 805, ll. 9 – 11. The statute governing sex offender registration requires placement when a person is convicted of kidnapping “except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense.” S.C. Code Ann. § 23-3-430(C)(15). The trial court erred in refusing to accept the jury’s acquittal of Fuller as the requisite “finding” that exempted Fuller from registration.

In Lozada v. SLED, 395 S.C. 509, 719 S.E.2d 258 (2011), the Court held that Lozada’s Pennsylvania conviction for unlawful restraint qualified as a kidnapping conviction requiring registration in South Carolina. The Court noted that Lozada failed to present any evidence that his conviction did not have a sexual element and further noted that Lozada also pled guilty to indecent assault arising from the same incident. Id. at n.3. Lozada was a *declaratory judgment action* and Lozada admitted the sexual element of his crime. Id. Here, Fuller was found not guilty of the sexual allegations made against him by the fact-finder—the jury—in his *criminal trial*. See also Thompson v. State, 415 S.C. 560, 785 S.E.2d 189 (2016). In Thompson, the Court stated it is encouraged for the sentencing court to make its finding about the character of the kidnapping offense rather than leaving it to a later declaratory judgment action and the defendant must be given a full opportunity to be heard. Id. Fuller could have no better opportunity to be heard than the jury’s rejection of the State’s evidence of sex crimes.

Fuller's acquittal of the sexual crimes prevents his registration as a sex offender and would, in effect, punish him for a crime of which he was acquitted, which violates his right to a trial by jury. See U.S. Const. amend. VI. S.C. Const. art. I, § 14. Fuller's case is similar to Edwards v. SLED, 395 S.C. 571, 720 S.E.2d 462 (2011) where after Edwards received a pardon for his "peeping tom" convictions, the Court held he was relieved of the registration requirement. A pardon is the equivalent of an acquittal. Indeed, the registration statute explicitly states that where a person receives a pardon based on a not guilty verdict, registration is not required. S.C. Code Ann. § 23-3-430(F)(2). Fuller received a not guilty verdict on the sex crimes **from a jury**, not a pardon from a government agency like in Edwards. This Court should reverse this portion of appellant's sentence even if it does not reverse appellant's kidnapping conviction.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and cursive.

David Alexander
Appellate Defender

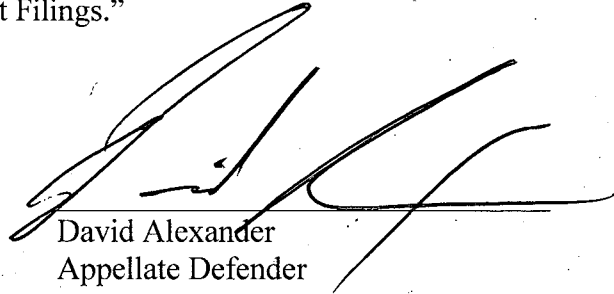
ATTORNEY FOR APPELLANT

This 31st day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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