

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

RECEIVED

Steven H. John, Circuit Court Judge

OCT 18 2017

Appellate Case No. 2015-000184

SC Court of Appeals

The State, Respondent,

v.

Derek Vander Collier, Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant Derek Vander Collier respectfully petitions this Court for a rehearing in the above-captioned matter after a published opinion, dated October 4, 2017, affirmed his conviction for second-degree burglary. In support of this petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

Limitations on Closing Argument

The Court first found no reversible error in Appellant’s argument that the trial court’s ruling that restricted Appellant from attacking Justin Kirman’s credibility was not an “invited response” to statements made by the State at trial. Although the Court properly noted that there is “no binding authority prohibiting the use of the [invited response] doctrine to justify an allegedly improper closing remark by a criminal defendant,” the Court overlooked and misapprehended the substance of Appellant’s claim of error. Specifically, the Court held that “the remarks in the State’s closing

argument that prompted the defense to assert Kirkman had an improper motive to fabricate his testimony did not constitute bolstering.” (Op. at 8). To the contrary, the State repeatedly argued that Kirkman “has no motivation to lie,” despite his probationary status from his prior crimes. (*See, e.g.*, R. p. 298, lines 7–8). This constituted bolstering and vouching of Kirkman’s credibility, and, in the context of this trial, strayed outside of the parameters of what the judge permitted counsel to argue. Thus, Appellant had an *obligation* to rebut the State’s argument by arguing that Kirkman did, indeed, have a motivation to lie. That is the alleged error in this case—that the State was permitted to vouch for Kirkman’s credibility but Appellant was not able to argue the inverse.

Moreover, the Court improperly held that Appellant had the burden to make a contemporaneous objection to the State’s remarks about Kirkman’s credibility. The Court overlooked and misapprehended the fact that Appellant is not directly attacking the bolstering and/or vouching, instead, Appellant is claiming that his remarks on credibility were an invited response. South Carolina courts have never required an objection to the improper testimony at issue in order to find that an invited response was warranted.

Finally, the Court overlooked and misapprehended the prejudicial impact of the trial court’s rulings, holding that “the trial court gave the defense adequate leeway to attack Kirkman’s credibility in its closing argument” and that Appellant “has not provided sufficient evidence to prove he was prejudiced by the trial court’s ruling.” (Op. at 8–9). Kirkman was the State’s key witness and the *only eyewitness*. Depriving Appellant of the right to argue Kirkman’s motivation to lie after the State repeatedly bolstered and vouched for his credibility strikes at the very heart of the Due Process rights due to Appellant. Respectfully, this Court should grant rehearing and reverse the trial court.

Admission of Interviews

The Court found no abuse of discretion in the admission of Appellant's first and third interviews at trial.¹ As to the first interview, the Court held that Appellant "did not appear to be under the influence of any drugs and refused [the detective's] offer to postpone the first interview. (Op. at 9). Moreover, the Court found that Appellant "appears relaxed and forthcoming with details" and "detected no signs of overreaching on the part of law enforcement in eliciting information from [Appellant]." (*Id.*). Therefore, under the abuse of discretion standard of review, the Court affirmed the trial court's ruling. (*Id.*).

The Court overlooked and misapprehended the uncontroverted evidence that Appellant smoked crack cocaine approximately forty-five minutes prior to his first interview. Crack cocaine is "a highly addictive and powerful stimulant derived from powdered cocaine." *Arrington v. Astrue*, No. 09-cv-870 A(F), 2011 WL 3844172, at *5 n.7 (W.D.N.Y. Aug. 8, 2011). The addictive nature of crack cocaine is widely known, and is often noted in judicial opinions.² *See id.* The Court overlooked the effect that the need for an additional "hit" of the drug would have on whether Appellant's statement was given voluntarily, or whether it was given out of a desire and hope to be released so that Appellant could satisfy the need to redoes. Indeed, the addictive nature of drugs such as crack cocaine is not subject to reasonable dispute, and Detective Truex admitted at the hearing that intoxication on crack cocaine "can impair your decisions." (R. p. 22, lines 15–17). In

¹ The State acknowledged that it did not intend to introduce Appellant's second statement at trial. (R. p. 41, lines 2–4).

² It is proper for the Court to take judicial notice of these facts. *See* Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding.").

light of this, the Court overlooked the significant effect that intoxication had on Appellant's ability to freely, voluntarily, and intelligently give a statement against his own interests.

As to Appellant's third statement, the Court held that "[b]ecause we find his first interview was voluntary, we find the trial court did not abuse its discretion in finding the statements in the third interview were also voluntary." (Op. at 9–10). "The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996). Here, if the Court grants rehearing and holds that the first statement was involuntary, Appellant contends that the third statement would also be inadmissible due to the failure of the State to show that the third statement "was obtained from a lawful source independent of the illegal conduct." *Id.*

Finally, the Court held that the third interview was admissible despite Appellant's "argument that his cooperation with law enforcement and admissions during the third interview were a desperate attempt to appease the police in order to avoid incarceration." (Op. at 10). Detective Carol Allen, who conducted Appellant's second and third interview, acknowledged that "[Appellant's] understanding was that he was implicating himself in order to either help [Drug Enforcement Unit] or help [her] office in the prosecution of other people." (R. p. 51, lines 16–19). Additionally, Detective Allen told Appellant that she would "put in a good word for [him]." (R. p. 53, lines 6–8). However, Detective Allen did not attend Appellant's bond hearing to testify on his behalf, nor did she provide any assistance to Appellant during the prosecution. (*See* R. p. 53, lines 10–13). Instead, Detective Allen merely made promises in order to induce Appellant to give inculpatory statements against his own interest. It is axiomatic that a "confession may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, *however slight*, [or] by the

exertion of improper influence.” *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1976)). Indeed, the Supreme Court has suppressed statements when an officer in an apparent position of authority makes a promise to induce a statement. See *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). Here, the Court misapprehended the relevant law on inducements and overlooked the fact that Appellant’s third statement was made as a direct result of Detective Allen’s promise to help Appellant during his case. Thus, the Court should have suppressed the third statement.

In-Court Identification

Finally, the Court affirmed the admission of the in-court identification of Appellant. As the Court’s opinion notes, the State initially informed the trial court that no *Neil v. Biggers* hearing would be necessary since the solicitor would not be asking for an in-court identification. (Op. at 4). However, after Kirkman—the State’s only eyewitness—took the stand, the solicitor asked “Do you recognize the individual you saw in the courtroom, that day - - that day in the courtroom?” (R. p. 77, lines 24–25). The trial court then declared a mistrial and held a *Neil v. Biggers* hearing prior to the next trial. Following the testimony at the hearing, Appellant made a motion for the photographic lineup to be excluded and a motion to suppress any in-court identification. (R. p. 125, lines 8–18). The trial court ruled that it would allow the in-court identification. (R. p. 132, lines 1–10).

The Court held that “[a]lthough Kirkman’s hesitation was probative of the reliability of his out-of-court identification, it does not necessarily follow that the lineup was tainted by suggestive police tactics.” (Op. at 11). However, under the two-pronged analysis of the admissibility of an in-court identification, the Court overlooked and misapprehended the unduly suggestive nature of the identification and the reliability of the identification. Specifically, Kirkman *admitted* that the identification was unduly suggestive, by acknowledging that he “was worried that [he] was associating

and since the gentleman in the photo had a hoodie on, that [he] was just associating those two together.” (R. p. 115, lines 8–15). In many cases, courts are left to speculate whether a lineup is suggestive based on the characteristics in the photographs, but here was have an *admission* by the person viewing the lineup that the similarity in clothing *did* affect his decision. That is sufficient to satisfy the first element of the two-pronged analysis, and the Court’s failure to give weight to the *admitted* suggestiveness of the identification is fatal to the admissibility inquiry.

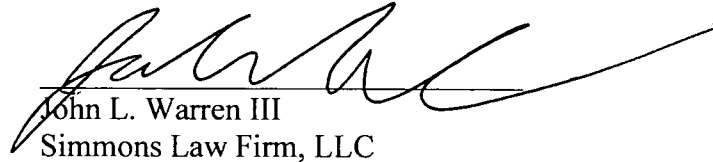
As to the second prong, the Court overlooked and misapprehended the complete lack of indicia of reliability to the identification. Kirkman was not able to state with one-hundred percent certainty that Appellant was the suspect, which is likely due to the fact that Kirkman was located thirty to thirty-five feet from the suspect at the crime scene, had only fifteen to twenty seconds to observe the suspect, and the lineup occurred a month after the crime. (R. p. 101, lines 10–18). Specifically, the Court noted that “[t]here was no evidence of any distractions that would have compromised Kirkman’s degree of attention.” (Op. at 11). That is simply not true, as the distance, length of time, and Kirkman’s uncertainty strongly demonstrate the lack of reliability in the identification.

Additionally, the Court overlooked and misapprehended the importance of Kirkman being in the courtroom during the *Jackson v. Denno* hearing. While the Court is correct that Appellant’s counsel did not object to Kirkman’s presence in the courtroom, that fact is still probative of the reliability of the identification. The Court should grant rehearing and reverse the affirmance of the admission of the in-court identification.

Conclusion

Appellant Derek Vander Collier respectfully requests that this Court issue an order granting a rehearing.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'John L. Warren III', written over a horizontal line.

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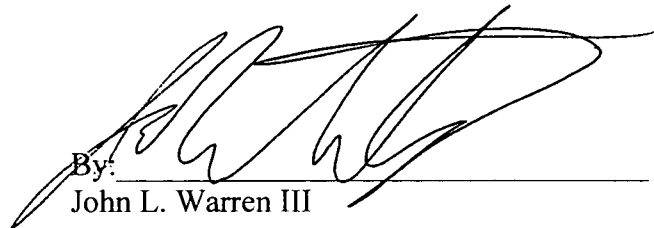
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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the State of South Carolina with a copy of the *Petition for Rehearing* by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 18th day of October, 2017, addressed as follows:

William F. Schumacher, IV
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By: 
John L. Warren III