

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
General Sessions Court
Clifton B. Newman, Jr., Circuit Court Judge

Case No. 2014-GS-31-00050
Appellate Case No. 2015-000175

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S.C. SUPREME COURT

The State,

Respondent,

v.

Dennis E. Hoover,

Petitioner.

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's admission of a report of a medical examination, and testimony concerning the contents of that report, under the business records exception to the rule against hearsay?
2. Did the Court of Appeals err in affirming the trial court's ruling that allowed the alleged victim, Justin Boyce, to testify concerning petitioner's feelings toward his brother, Marshall Boyce?
3. Did the Court of Appeals err in affirming the trial court's rulings that allowed inflammatory comments and questions by the solicitor during his cross-examination of petitioner?
4. Did the Court of Appeals err in failing to address the cumulative prejudice from the trial court's errors and in failing to find petitioner was denied a fair trial?

ARGUMENT IN REPLY

Petitioner has summarized the evidence in his petition for writ of certiorari. In that summary, he has pointed out the weakness of the state's case and the absolute failure of the investigating law enforcement officials to gather critical evidence and interview critical witnesses, which would have corroborated petitioner's account of the altercation that led to his indictment and exonerated him with respect to the crime charged. In its return, the state makes blanket assertions as to the facts that are simply not supported by the evidence. For example, the state asserts, ". . . and a white pickup truck driven by Petitioner entered the parking lot." *See* Return, p. 2. There is nothing in the record to substantiate this assertion. No witness testified that petitioner drove a white pickup truck to the store, and in fact petitioner testified he drove his green pickup truck. The video in evidence does not show petitioner driving a white pickup truck. While it depicts a white truck, nothing on the video links petitioner to that truck. The state's theory of the case is largely premised on the timeline surrounding the appearance of the white truck in the video. In claiming petitioner drove that truck, however, the state is expressing only its

theory, not facts that were introduced into evidence. This Court should view the state's factual recitals with caution and should not accept the representations made by the state in its return without verifying those representations against the evidence actually in the record.

Petitioner adheres to the arguments made in his petition for writ of certiorari, which are not repeated here. He submits this reply to address certain assertions made by the state in its return. For the reasons stated in the petition and in this reply, this Court should grant a writ of certiorari and reverse his conviction.

I. The Court of Appeals erred in affirming the trial court's admission of a report of a medical examination, and testimony concerning the contents of that report, under the business records exception to the rule against hearsay.

Petitioner challenges the admission of certain hearsay evidence under the business records exception to the rule against hearsay, Rule 803(6) of the South Carolina Rules of Evidence. The state contends the claim of error is not preserved. The claim is preserved and should be addressed.

Trial counsel specifically raised a hearsay objection and the state argued the medical examination report was admissible under the business records exception. R. pp. 328-29. Trial counsel responded that the proper manner of getting the information into evidence was through the medical personnel who conducted the examination. R. p. 329. This objection was adequate to preserve the argument that the subjective opinion of the person who conducted the examination could not come in under the business records exception.

A party is not required to cite the evidence rule or use special words in making an objection, where the context reveals the basis for the objection. *See State v. Foster*, 354

S.C. 614, 620 n.4, 582 S.E.2d 426, 429 n.4 (2003) (objection to admission of prior consistent statement because it “would add to [the witness’s] credibility” was sufficient to preserve issue of admissibility under Rule 801(d)(1)(B), because the danger of erroneously admitting such a statement under that rule is its bolstering effect); Rule 103(a)(1), SCRE (requiring an evidentiary objection to state the specific ground of objection, “if the specific ground was not apparent from the context”). In this case, the argument that the source of the evidence should be the medical personnel was sufficient to preserve the argument that the subjective opinions of the person who conducted the examination should not be introduced through this document under the business records exception.

The state contends the information contained in the examination report was objective, observable information, not subjective opinion. As more fully addressed in the petition for writ of certiorari, the questions required the observation of symptoms or signs of specific medical conditions and the examiner was a medical professional capable of rendering an opinion as to the presence of such signs or symptoms. The opinion of the medical professional as to the absence of such signs or symptoms was a subjective opinion and not admissible under Rule 803(6).

II. The Court of Appeals erred in affirming the trial court’s ruling that allowed the alleged victim, Justin Boyce, to testify concerning petitioner’s feelings toward his brother, Marshall Boyce.

Petitioner challenges the admission of testimony of Justin Boyce concerning the feelings of petitioner toward Boyce’s brother, Marshall, based on the witness’s lack of personal knowledge. The state contends the testimony was within the witness’s personal knowledge. To the contrary, the state fails to show, as it did at trial, the *basis* for the

claim that the witness had personal knowledge of the matter about which he was being questioned. The context of the questions and answers that led to the ultimate testimony, however, clearly establishes that the basis of any so-called knowledge of the witness was what his brother had told him. The court erred in admitting his testimony and the Court of Appeals erred in affirming, where the state never established that the testimony had a proper foundation – a non-hearsay basis for the witness’s so-called knowledge of the information about which he testified.

The state claims the defense opened the door to this testimony with its cross-examination of the witness concerning an altercation between the Boyces and petitioner in June 2011. The state claims the challenged testimony was admissible because the state was seeking to provide the explanation for that altercation. This argument is unfounded. The defense’s earlier questions concerning the altercation between the Boyces and petitioner in June 2011 did not open the door to the questions concerning petitioner’s feelings about Marshall Boyce’s involvement with petitioner’s brother. The testimony concerning petitioner’s feelings did not explain or rebut the earlier testimony about the altercation.

Moreover, the door opening doctrine does not obviate the clear requirement of the rules of evidence that a witness’s testimony must be based on his *personal* knowledge and that a proper foundation must be laid to demonstrate that the matter is within his *personal* knowledge. *See* Rule 602, SCRE. Here, contrary to the state’s argument, it is not enough to ask “if” the witness “knows” the information about which he is testifying. Rather, the rules require another step – that the witness state “how” he “knows” the information. Trial counsel clearly objected on grounds of hearsay and foundation. The

witness's answers clearly demonstrated the matter about which he was testifying was not within his *personal* knowledge but the product of what his brother had told him.

III. The Court of Appeals erred in affirming the trial court's rulings that allowed inflammatory comments and questions by the solicitor during his cross-examination of petitioner.

Petitioner challenges the solicitor's improper questions and comments interjected during his cross-examination of petitioner, questions and comments that impugned petitioner's character in multiple ways. The state does not attempt to defend the offending questions and comments as appropriate, and they clearly are not. They are inappropriate, inflammatory, and absolutely indefensible, and they resulted in prejudice to petitioner that could not be cured by any curative charge. Rather than defending the comments on the merits, the state continues to assert, as it did in the Court of Appeals, that the claim of error is not preserved. The petition for writ of certiorari sets forth in detail the nature of the objections interposed by the defense and the rulings by the trial court. Those objections were sufficient to preserve this claim of error.

With respect to the state's contention that trial counsel got the relief he requested, the Court should nonetheless address the merits of petitioner's argument that the solicitor's improper cross-examination resulted in such unfair prejudice that a new trial is warranted. *See* Rule 403, SCRE. The solicitor crossed the line of appropriate conduct and injected improper considerations for the purpose of prejudicing petitioner and inducing a guilty verdict as a product of that prejudice. His comments were not in keeping with his role as a minister of justice. A minister of justice cannot strike foul blows in seeking to obtain a conviction at all costs. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001); *State*

v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000); *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). In this case, the Court should address the merits of this argument and find the prosecutor's comments and questions deprived petitioner of a trial that was fundamentally fair as required by due process. *See* U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

Disingenuously, the state continues to claim, as it did in the Court of Appeals, that the colloquy about gay people could not have influenced the verdict because there was no evidence the altercation stemmed from dislike of or discomfort with homosexuals or that Boyce was a homosexual. To the contrary, this fact demonstrates the compelling nature of petitioner's prejudice argument. The entire line of questioning was irrelevant and had no probative value whatsoever. Any discussion of feelings about gay people was totally extraneous. However, the prejudicial effect was substantial. *See* Rule 403, SCRE. The questioning allowed the jury's verdict to be influenced by the jurors' own passions and prejudices toward people who are intolerant of others. A genuine likelihood exists that such passions and prejudices influenced the jury in its assessment of petitioner and led to a conviction due to the jurors' perceptions of him as a person, not based on his actual guilt of the crime charged. Under the circumstances, his conviction should be reversed and the case remanded for a new trial.

IV. The Court of Appeals erred in failing to address the cumulative prejudice from the trial court's errors and in failing to find petitioner was denied a fair trial.

Petitioner raised a claim of cumulative error, which the state contends is not preserved for review. The state relies on the Court of Appeals' decision in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct.App. 2013), to assert the argument is not preserved because the cumulative error doctrine was not raised to and ruled upon by the

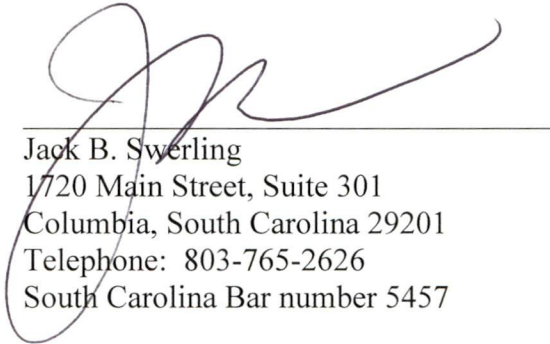
lower court. The South Carolina Supreme Court has not set forth what, if anything, is required to preserve a claim of cumulative prejudice resulting from claims of error that were adequately preserved in their own right by objections made during a criminal trial. The Supreme Court has not adopted the rationale expressed in *Beekman* with respect to claims of cumulative error in a criminal trial. *Beekman* relied upon a **dissenting** opinion of a Court of Appeals judge in a case in which both the Court of Appeals majority and the Supreme Court found reversible error. *See Beekman*, 405 S.C. at 236, 746 S.E.2d at 490, *citing State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct.App. 2006) (Goolsby, J., dissenting), *majority aff'd as modified*, 382 S.C. 205, 675 S.E.2d 740 (2009). *Beekman* also relied upon a Court of Appeals decision addressing a claim that the cumulative effect of improper jury charges warranted a new trial in a **civil** case. *See Beekman*, 405 S.C. at 236-237, 746 S.E.2d at 490, *citing Wells v. Halyard*, 341 S.C. 234, 240, 533 S.E.2d 341, 344 (Ct.App. 2000).

The arguments of Questions I, II, and III were properly preserved with contemporaneous objections. Nothing more was required to enable the appellate court to assess the cumulative prejudicial effect of two or more errors. If the trial court's multiple errors are deemed harmless standing alone, this Court should review the prejudice resulting from those errors in combination and find that the cumulative prejudice affected the outcome and denied petitioner a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. The Court should reverse petitioner's conviction based on the multiple trial errors and the substantial prejudice that resulted from the combination of those errors.

CONCLUSION

For the reasons stated in the petition for writ of certiorari and in this reply to the state's return, this Court should grant a writ of certiorari, reverse the rulings of the Court of Appeals and the circuit court, and grant Petitioner a new trial.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I have served the reply to the return to the petition for writ of certiorari upon respondent, by mail to its counsel of record, Assistant Attorney General William M. Blich, Jr., Post Office Box 11549, Columbia, South Carolina 29211, on November 13, 2017.



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