THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,Appellant

MOTION FOR REHEARING

The Court issued its opinion on January 17, 2018, and affirmed the lower court decision in the Opinion 2018-UP-031. The Appellant, by and through his undersigned attorneys, made a Motion of Extension of Time to File the Motion for a Rehearing which was granted and extended the time period until February 16, 2018. The Appellant hereby makes the following Motion for Rehearing in accord with Appellate Rule 221 and respectfully represents unto this Honorable Court as follows:

1. The Court incorrectly ruled that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

Woodberry's testimony was improper character witness ultimately about both the Defendant and Colon. It was introduced for the purpose of bolstering the testimony of Colon. A review of the

testimony shows that Woodberry was asked about the shooting in New York and contained an improper opinion that the result was Colon was passive, had schizophrenia and had the mind of a 13-year old. [R pp 300 L23- 302 L 20]. The State then further had Woodberry testify that Colon and Macon had begun hanging around about two months before the robbery and that the Appellant would "take Jason off too". [R p 303 L 4-22]. Therefore the implication of the testimony was that Colon had the mind of a 13-year old, was easily lead and suffered from schizophrenia. That painted a picture of Colon as a person unable to make decisions for himself. That was coupled with the assertion that Macon had begun taking Colon off three months before the trial. This is a classic case of bolstering as Woodberry was allowed to give his improper and unfounded opinion in order to take the assessment of Colon as a witness out of the province of the jury. *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (S.C. App., 2013). The testimony was a back door attack on Macon in order to make Colon to be a more sympathetic witness who was under the control of Macon. While Woodberry never testified directly that he believed Colon, the clear and only implication was that Colon was a simple minded, mentally ill person, who was lead astray by Macon. The instant case should be controlled by *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (S.C. App., 2012), as Woodberry's testimony "included comments on the credibility of the victim's account of the [bank robbery], the trial court erred in admitting it." Id at 397 SC at 465, 725 SE2d at 142. The entirety of Woodberry's testimony was a comment on the credibility of Colon. The State admitted the purpose of the testimony was to show how Macon used Colon. [R 294 l 18-22]. The Appellant objected to all of this testimony on the grounds that it was improper character evidence. [R pp 291 L 25 - 296 L 11].

2. <u>The hearsay was not harmless and Macon was prejudiced</u>.

The Opinion of the Court finds that the testimony of Woodberry was hearsay, but limits the application of hearsay argument to the testimony regarding how Colon was shot. It is the argument of the Appellant that all Woodberry's testimony regarding any kind of medical condition, such as schizophrenia is hearsay and the allowance of that testimony was in fact prejudicial. The Appellant made this argument at trial. [R pp 292 L 8 - 299 L 12]. As argued in the Appellant's briefs the testimony regarding a lobotomy and schizophrenia resulting from the gunshot wound was improper hearsay which was admitted to bolster the testimony of Colon and to show that Macon controlled Colon. The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. The evidence was prejudicial as it was the lynchpin to the entire case of the State as it was used to show that Macon "controlled" Colon, a young man who had a lobotomy, was schizophrenic and had a lobotomy. The only reasonable conclusion after this testimony was that the Appellant controlled Colon and therefore was guilty.

3. <u>The argument that Woodberry's testimony was outside the scope of a lay witness was preserved and the testimony as a medical opinion, not an impression drawn from observed facts</u>.

First, the Appellant discussed the Motion in Limine concerning Mr. Woodbery's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The

Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13-year old, but could not testify that he was easily led.

The testimony of Woodberry was that Colon got a lobotomy from the gunshot and was left as a schizophrenic person with the mind of at 13-year old. The testimony was based on what the doctors had told Woodberry. [R. P 302 L 2-20]. When giving his testimony, he based all his opinions on what the doctor had told him. [R p 302 L 4-10, L 11-20]. Thus all of the testimony was based on the information he received from the doctors, not his observations.

CONCLUSION

The evidence given by Woodberry was improper character evidence given to bolster the testimony of Colon. Woodberry, via hearsay, vouched for Colon and his testimony. The trial court allowing improper testimony by Woodberry was not insignificant and was prejudicial as it was the foundation for the entire point of Woodberry's testimony. There was nothing to Woodberry's testimony other than this improper evidence. Finally, the Appellant asserts both that the argument that Woodberry's testimony was improper was both preserved and it was improper expert witness evidence based on hearsay. As such it is substantial. The Appellant is entitled to a new trial in this case as the errors prevented him receiving a fair trial.

This the 16th day of February, 2018, at Orangeburg, South Carolina.

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CERTIFICATE OF SERVICE

On the 16th day of February, 2018, the undersigned served a copy of the Motion for a Rehearing on counsel for the Respondent by placing a copy in the United States Mail, postage fully paid, to the following address:

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Glenn Walters, Sr.
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February 16, 2018

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State v Arthur William Macon, Appellate Case No. 2014-002126

Dear Ms Kitchings:

Enclosed you will please find the Motion for a Rehearing in this case. We also enclose the $25.00 filing fee. Please call me at 803-413-5676 with any questions. By copy of this letter we are serving the attorney for The State.

With kind regards, I am

Yours very truly,

R. Bentz Kirby

cc: J. Benjamin Alpin

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